



KMK Legal Update Seminar

Wednesday, December 14, 2016

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Table of Contents

Tab 1	Professionalism and Leadership, Or Everything I Ever Needed to Know, I Learned From My Grandmother <ul style="list-style-type: none">▪ Justice Michelle M. Keller, Kentucky Supreme Court
Tab 2	The Competitive World of Economic Development Incentives: Growing Jobs, Attracting Talent and Winning Your Business <ul style="list-style-type: none">▪ James J. (Jim) McGraw, Jr., Business Representation & Transactions Partner, KMK Law▪ Johnna Reeder, President & CEO, REDI Cincinnati▪ Geoffrey G. (Geoff) Leder, Real Estate Partner, KMK Law▪ P. Andrew Spoor, Real Estate Attorney, KMK Law▪ Thomas G. Seward, Jr., Director of Corporate Location Strategy, KMK Consulting Company LLC
Tab 3	Corporate Law Update <ul style="list-style-type: none">▪ Edward E. (Ed) Steiner, Business Representation & Transactions Partner, KMK Law▪ Robert C. (Rob) Lesan, III, Business Representation & Transactions Partner, KMK Law▪ Shannon D. Lawson, Business Representation & Transactions Associate, KMK Law
Tab 4	What Takes So Long <ul style="list-style-type: none">▪ Justice Donald C. Wintersheimer, Kentucky Supreme Court (Retired)
Tab 5	10 Cases Every In-house Counsel Should Know <ul style="list-style-type: none">▪ Joseph M. (Joe) Callow, Jr. Litigation Partner, KMK Law▪ Bethany P. Recht, Litigation Partner, KMK Law
Tab 6	Brain Disorders and the Impaired Attorney: Problems and Solutions <ul style="list-style-type: none">▪ Patrick J. Garry, Associate Director, Ohio Lawyers Assistance Program
Tab 7	KMK Law Speaker Contact Information

Additional Resources Available Online

Additional resources are available to event attendees on our event website:
<http://www.kmklaw.com/news-events-301.html>

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Introduction



James C. (Jim) Kennedy
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Professionalism and Leadership, Or Everything I Ever Needed to Know, I Learned From My Grandmother



Justice Michelle M. Keller
Kentucky Supreme Court

**PROFESSIONALISM AND LEADERSHIP
OR
EVERYTHING I EVER NEEDED TO KNOW
I LEARNED FROM MY GRANDMOTHER**

I. PROFESSIONALISM

A. Manners Always Matter

1. Inside and outside the courtroom

KBA Code of Professional Courtesy (Sept. 1, 1993):

Attorneys are required to strive to make the system of justice work fairly and efficiently. In carrying out that responsibility, attorneys are expected to comply with the letter and spirit of the applicable Code of Professional Responsibility adopted by the Supreme Court of Kentucky.

The following Code of Professional Courtesy is intended as a guideline for lawyers in their dealings with their clients, opposing parties and their counsel, the courts and the general public. This Code is not intended as a disciplinary code nor is it to be construed as a legal standard of care in providing professional services. Rather, it has an aspirational purpose and is intended to serve as the Kentucky Bar Association's statement of principles and goals for professionalism among lawyers.

1. A lawyer should avoid taking action adverse to the interests of a litigant known to be represented without timely notice to opposing counsel unless ex parte proceedings are allowed.
2. A lawyer should promptly return telephone calls and correspondence from other lawyers.
3. A lawyer should respect opposing counsel's schedule by seeking agreement on deposition dates and court appearances (other than routine motions) rather than merely serving notice.
4. A lawyer should avoid making ill-considered accusations of unethical conduct toward an opponent.
5. A lawyer should not engage in intentionally discourteous behavior.
6. A lawyer should not intentionally embarrass another attorney and should avoid personal criticism of other counsel.
7. A lawyer should not seek sanctions against or disqualification of another attorney unless necessary for the protection of a client and fully justified by the circumstances, not for the mere purpose of obtaining tactical advantage.
8. A lawyer should strive to maintain a courteous tone in correspondence, pleadings and

other written communications.

9. A lawyer should not intentionally mislead or deceive an adversary and should honor promises or commitments made.

10. A lawyer should recognize that the conflicts within a legal matter are professional and not personal, and should endeavor to maintain a friendly and professional relationship with other attorneys in the matter. In other words, "leave the matter in the courtroom."

11. A lawyer should express professional courtesy to the court and has the right to expect professional courtesy from the court.

SCR 3.130 Impartiality and decorum of the tribunal (OH ST RPC Rule 3.5)

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person as to the merits of the cause except as permitted by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law, local rule, or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

SCR 3.130 Candor toward the tribunal (OH ST RPC Rule 3.3)

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal published legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer

comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

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

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

SCR 3.130 Fairness to opposing party and counsel (OH ST RPC Rule 3.4)

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) knowingly falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or deliberately fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;

(f) present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in any civil or criminal matter; or

(g) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or agent who supervises, directs or regularly consults with the client concerning the matter or has authority to obligate the client with respect to the matter; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

SCR 3.130 Truthfulness in statements to others (OH ST RPC Rule 4.1)

In the course of representing a client, a lawyer:

(a) shall not knowingly make a false statement of material fact or law to a third person; and

(b) if a false statement of material fact or law has been made, shall take reasonable remedial measures to avoid assisting a fraudulent or criminal act by a client including, if necessary, disclosure of a material fact, unless prohibited by Rule 1.6.

SCR 3.130 Respect for rights of third persons (OH ST RPC Rule 4.4)

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall:

(1) refrain from reading the document;

(2) promptly notify the sender; and

(3) abide by the instructions of the sender regarding its disposition.

SCR 3.130 Dealing with unrepresented person (OH ST RPC Rule 4.3)

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

SCR 3.130 Communication (OH ST RPC Rule 1.4)

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

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

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

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

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

2. When it really matters

3. As we progress through our careers

B. One's Professionalism is not Defined by Job Title or Rank

SCR 3.130 Responsibilities of partners, managers and supervisory lawyers (OH ST RPC Rule 5.1)

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

SCR 3.130 Responsibilities of a subordinate lawyer (OH ST RPC Rule 5.2)

- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

SCR 3.130 Responsibilities regarding nonlawyer assistants (OH ST RPC Rule 5.3)

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer only if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

SCR 3.130 Professional independence of a lawyer (OH ST RPC Rule 5.4)

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
 - (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
 - (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

SCR 3.130 Reporting professional misconduct (OH ST RPC Rule 8.3)

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Association's Bar Counsel.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall report such violation to the Judicial Conduct Commission.

(c) A lawyer is not required to report information that is protected by Rule 1.6 or by other law. Further, a lawyer or a judge does not have a duty to report or disclose information that is received in the course of participating in the Kentucky Lawyer Assistance Program or Ethics Hotline.

(d) A lawyer acting in good faith in the discharge of the lawyer's professional responsibilities required by paragraphs (a) and (b) or when making a voluntary report of other misconduct shall be immune from any action, civil or criminal, and any disciplinary proceeding before the Bar as a result of said report, except for conduct prohibited by Rule 3.4(f).

(e) As provided in SCR 3.435, a lawyer who is disciplined as a result of a lawyer disciplinary action brought before any authority other than the Association shall report that fact to Bar Counsel.

(f) As provided in SCR 3.166(2), a lawyer prosecuting a case against any member of the Association to a plea of guilty, conviction by judge or jury or entry of judgment, should immediately notify Bar Counsel of such event.

SCR 3.130 Misconduct (OH ST RPC Rule 8.4)

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law.

C. How Might Recent Federal Court 1st Amendment Decisions Impact Our Regulation of Attorney Behavior in This Area?

Keeping in mind two things: (1) restriction on attorney speech may be granted more latitude because attorneys “agree” to certain restrictions when they apply for and receive a license to practice law; and (2) freedom of political speech is highly protected. I think the way the federal district court for the Eastern District of Kentucky and the 6th Circuit Court of Appeals have treated restraints on judicial candidates’ speech is worth consideration. I also think that it is worth considering an opinion from the 6th Circuit that dealt specifically with attorney political speech. The judicial candidate case(s) are first and are related.

Winter v. Wolnitzek, 56 F.Supp. 884 (E.D. Ky. 2014)

In pertinent part, a candidate for circuit court judge filed suit in federal court challenging the constitutionality of two of Kentucky’s judicial Canons. The candidate had mailed flyers identifying himself as a Republican candidate and his opponent as a Democratic candidate. The candidate received a letter from the Judicial Conduct Commission notifying him that it had received a complaint regarding the flyers, and the candidate filed suit. A candidate for district court judge joined the suit alleging that he wanted to send out similar flyers but feared he might be sanctioned if he did so.

Issue: Whether two Canons of the Judicial Code of Conduct violated the First Amendment.

The Kentucky Constitution provides that judicial races are to be “non-partisan.”

Cannon 5(a)(1)(a) provides that a candidate for election to judicial office shall not: campaign as a member of a political organization.

Cannon 5(B)(1)(c) provides that a judicial candidate shall not “knowingly, or with reckless disregard for the truth misrepresent any candidate’s identity, qualifications, present position” or “make any other false or misleading statements.”

The U.S. District Court held that these Cannons are void as vague because a candidate could not tell what speech might be banned and overbroad because they banned speech that is acceptable.

In pertinent part, the Court agreed that a candidate who stated that he was “the Republican or Democratic candidate” might be misleading the public into thinking that he/she had been nominated by a political party. However, the Court held that “suppressing” that misleading speech was not the answer. The answer to misleading speech is “more speech.”

Winter v. Wolnitzek, 834 F.3d 681, 693 (6th Cir. 2016)

The Court of Appeals addressed the preceding issues and, in pertinent part, an issue involving a judicial candidate who had been appointed to her seat and who put out campaign literature encouraging the public to “re-elect” her.

Issue 1) Did judge who had been appointed to the bench violate the Judicial Cannon about making false statements by saying “re-elect” in campaign materials?

The 6th Circuit found that Cannon 5(b)(1)(c) was constitutional; however, it also found that the “re-elect” statement by the judicial candidate did not violate the Cannon. It was not “materially false [or] calculated to mislead and deceive the voters.” The Court noted that:

‘[R]e-elect’ *could* mean what the [Ky. Sup. Ct.] thought it meant: elect someone to the same position to which she was previously elected. And that was not true for [this judge]. The Governor had appointed her to the position; she had not been elected to it. But the term fairly could also mean ‘to elect for another term in office,’ precisely what [this judge] was seeking. *Webster’s Third New International Dictionary* 1907. Applied to a statement such as ‘re-elect,’ readily capable of a true interpretation here, the ban outstrips the Commonwealth’s interest in ensuring candidates don’t tell knowing lies and thus fails to give candidates the ‘breathing space’ necessary to free debate. *Brown v. Hartlage*, 456 U.S. 45, 60–61, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982); *see Weaver*, 309 F.3d at 1319–20.

For attorney ethics purposes, how far do we take the “fairly could mean” language and how far into the dictionary definitions do we have to delve? Note that the only definition in Webster’s New Twentieth Century Unabridged Dictionary Second Edition is “to elect again.” As is the only definition in the Cambridge English on-line dictionary. Does an ethical rule fall by the wayside because differing dictionaries give differing definitions?

SCR 3.130(4.1)(a) states that a lawyer “shall not knowingly make a false statement of material fact or law to a third person.” (Ohio’s equivalent is OH ST RPC Rule 4.1.) If we cannot determine what is a “misleading” statement, can we determine what is a “false” statement? If prohibiting misleading statements chills protected speech, does not prohibiting false statements, whatever they are, chill protected speech as well?

Issue 2: The Court of Appeals also addressed whether a candidate for circuit or district court judge, who distributed flyers identifying himself as “a Republican” and his opponents as “Democrats,” violated the Judicial Canons with regard to misleading the electorate?

The Court of Appeals noted that the district court had asked the Supreme Court of Kentucky to certify the law, which it did, saying that a candidate identifying him/herself as “the Republican candidate,” “the Conservative Republican candidate,” and his/her opponent as “the Democratic candidate,” or “the Liberal Democrat candidate” would be violating the Canons. Such statements lead voters to believe explicitly or implicitly that the candidate was a nominee of a party.

Like the district court, the Court of Appeals had a problem with the “implicitly” part of the Supreme Court’s decision, finding that it was unconstitutionally vague. The Court noted that some might infer such statements to be endorsements but others might infer them to say that no other Republicans or Democrats were running in the race. Because there were different plausible interpretations, a candidate would not know when he or she was violating the Canon.

For attorney ethics purposes, how far do we take this “plausible interpretation” language?

SCR 3.130(3.4)(b) states in pertinent part that a lawyer shall not knowingly counsel or assist a witness to testify falsely. (The Ohio equivalent is OH ST RPC Rule 3.4.) What does that mean to an ordinary person and is it open to a number of equally plausible interpretations?

In the movie *Anatomy of a Murder*, Jimmy Stewart is interviewing his client, who is charged with murdering his wife’s alleged paramour. Knowing that temporary insanity may be the only viable defense, Stewart tells his client what temporary insanity is, then asks his client what happened. When the client strays from what would be a “good” story, Stewart stops him and reminds him of the elements of temporary insanity. This goes on for a few minutes until the “light bulb” goes off and the client “massages” his story to fit the definition of temporary insanity. Would this run afoul of SCR 3.130(3.4)(b)? Could a reasonable person believe that the attorney was only explaining the law to a client who was a little slow rather than coaching the

client to change his story to fit the defense? The latter is, after all, a plausible interpretation. Does that render the rule unconstitutionally vague?

Berry v. Schmitt, 688 F.3d 290 (6th Cir. 2012)

Berry, an attorney, wanted to attend a Kentucky Legislative Ethics Commission hearing that had been called to investigate charges that the then President of the Kentucky Senate had violated fund raising rules. The Commission held a closed hearing, excluding Berry from the proceedings, but permitting the President of the Senate to attend. Berry wrote a letter to the Commission which he also distributed to members of the public and the media. The letter said:

The inquiry was conducted entirely behind closed doors with the exception of Senator Williams who was allowed to be present throughout the preliminary inquiry. The exclusion of the public and the media was enough to arouse suspicion, but the exclusion of the complainant (except for a brief appearance as a witness) coupled with the inclusion of the alleged violator throughout the proceeding gave cause for some to speculate that the deck was stacked and the Senator would be exonerated. I was not, and am not, willing to go that far, but I do believe that your Order ... that exonerated him, was contrary to the undisputed evidence that was presented.

A complaint was filed with the KBA and the Inquiry Commission issued a letter to Berry indicating that he had violated SCR 3.130(8.2)(a), which provides that a lawyer shall not make a statement concerning the qualifications of a judge, adjudicatory officer, or public legal officer that he knows to be false or that he makes with reckless disregard for the truth. The letter also advised Berry to “conform [his] conduct to the requirements of the Rules of Professional Conduct.”

Two years later, Berry filed suit in federal district court alleging that he wanted to again criticize the Commission and to re-circulate his letter. He also alleged that, because of the letter from the Inquiry Commission, he feared being sanctioned if he did so.

After addressing standing and jurisdiction at length, the 6th Circuit determined that SCR 3.130(8.2)(a) was unconstitutional as applied to Berry. The Court held that “an attorney’s ‘statements impugning the integrity of a judge may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment unless they ‘imply a false assertion of fact.’” The Court then looked to the Restatement (Second) of Torts for guidance in interpreting the preceding. In doing so, the Court held that a statement of opinion based on implied or undisclosed facts may be subject to sanctions while an opinion based on disclosed facts would not. By way of example:

If A says to B, “I think C must be an alcoholic.” That is an opinion that has no disclosed factual basis and could be subject to sanctions.

On the other hand, if A says to B, “C moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a portable radio listening to a news

broadcast, and with a drink in his hand. I think he must be an alcoholic.” The opinion that C is an alcoholic is supported by the facts that formed the basis for the opinion and is not subject to sanctions.

Applying the preceding to Berry, the Court concluded that his letter contained an opinion – some might speculate that “the deck was stacked” – however, the bases for that opinion were also stated – the hearing was conducted behind closed doors, the accused was the only outsider in attendance, and the public and media were excluded. Thus, SCR 3.130(8.2)(a) was unconstitutional as applied to Berry.

Question – In *Kentucky Bar Ass’n v. Waller*, 929 S.W.2d 181, 181 (Ky. 1996), an attorney referred to a judge, who had recused, as “that lying incompetent asshole.” If the attorney had said, “Judge _____ lied when he said that _____, and he has been reversed by the Court of Appeals and Supreme Court more than any other judge in Kentucky, and he has an anus.” It contains the facts upon which the opinion was based so, would the attorney’s opinion that the judge was a lying incompetent asshole be actionable?

Before answering, note that the 9th Circuit found that an attorney’s statement to the press that the judge “has a penchant for sanctioning Jewish lawyers: me, David Kenner and Hugh Manes. I find this to be evidence of anti-[S]emitism” was not actionable because the attorneys were all Jewish and had all been sanctioned. *Standing Comm. v. Yagman*, 55 F.3d 1430, 1437 (9th Cir.1995).

II. LEADERSHIP

"It's a terrible thing to look over your shoulder when you are trying to lead and find no one there."

----Franklin D. Roosevelt

III. THE HALLMARKS OF LEADERSHIP

- A. Courage
- B. Vision
- C. Conviction

The Competitive World of Economic Development Incentives



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4

Overview/Objective

- Economic Development incentives are big business. Incentives are on the minds and lips of every elected official of every jurisdiction and play a major role in projects spanning from General Electric downtown to Medpace in Madisonville to the Blue Ash Airport Redevelopment to the Dennison Hotel.
- While all these may live or die with government support, hundreds more smaller projects, like a 25,000 square foot office lease, can benefit significantly from various incentives at the city, county and state levels.
- Most companies miss incentive opportunities and most companies miss fully utilizing incentives that have been awarded to them.

5

Overview/Objective

- The business is highly specialized, technical and often assumed to be straightforward – so mistakes are plentiful.
- Every community across the country has some type of public private partnership to help facilitate this process – such as REDI Cincinnati and TriEd in Northern Kentucky.
- In our panel discussion coming up we will ask our experts to reveal their inside baseball assessment of how well this economic development incentive world is truly impacting our clients and our great Cincinnati USA market.

6

Relevant Numbers

- 90% of businesses miss available incentives altogether in assembling their deals.
- 60% of businesses miss properly using and fully realizing what's awarded to them.
- In 2015, over \$6.6 billion of incentives were awarded across the country averaging \$27,443 per job accounting for 311,909 new jobs and \$79.8 billion in new investment. The average incentive was \$2.7 million per project.

7

Relevant Numbers

- In the second quarter of 2016, \$1.7 billion of incentives were authorized for an average of \$21,284 per job representing 50,300 new jobs and \$12.2 billion of capital investment at an average per deal of \$1.8 million. In this group, Kentucky had the third most deals at 49 with Ohio having 19 such deals and Indiana 14.
- In 2016, Ohio received a prestigious *Site Selection Magazine* Gold Shovel Award for its number of successful deals in 2015. The other states so honored were California, Tennessee, South Carolina, Nevada, and Utah.
- Number 1 – The GE Global Support Center downtown is the largest JCTC in Governor Kasich's tenure.

8



Do you know
REDI Cincinnati?

December 14, 2016

9



- Consistently recognized as a top economic development entity
- First point-of-contact for growing companies



10



Targeted cluster-based strategy

- BioHealth
- Food & Flavoring
- Information Technology
- Manufacturing
- Shared Services

11



- Resources
- Answers
- Incentives/grants/loans



12



13



THANK YOU

 /REDICINCINNATI
 @GROWCINCYUSA

14

Overview of Historic Tax Credits, New Markets Tax Credits



Geoffrey G. Leder, Esq.
Real Estate Partner
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15

NMTC Program Background

- Enacted by Congress as a part of the Community Renewal Tax Relief Act of 2000. One-year extensions ever since last December – received 5-year extension as part of PATH Act (through 2019). Administered by CDFI Fund of U.S. Treasury.
- CDFI Fund awarded \$7 billion in allocation authority last month to 120 “Community Development Entities.”
- Stimulates new private-sector investments in low-income communities.

16

Overview of Historic Tax Credits, New Markets Tax Credits: NMTC Program Background

- How does it stimulate? Offers a 39% credit over 7 years (5% first 3 yrs; 6% the last 4 yrs) for every “Qualified Equity Investment” in a “Qualified Active Low-Income Community Business.” Credit is used to offset investor’s tax liability.
- All NMTC funds must be invested for 7 years; if funds are returned early they must be reinvested within 12 months or risk full recapture of all tax credits claimed.
- Flexible program can be used for a broad range of eligible projects in low-income communities.
 - However, most credits have been used historically toward real-estate based projects
 - Recent focus on operating businesses due to tendency for significant job creation
 - Required commercial investment, not housing (mixed use is possible)
 - Cannot be used for golf courses, country clubs, tanning facilities, massage parlors, hot tub facilities, stores for the sale of liquor for off-site consumption, race tracks or other gambling.

17

NMTC Program Background

How does a project qualify for NMTCs?

- In most cases, geographic qualification based on census tract
- Qualifying census tracts have <80% of AMI and/or poverty rate >20%
- About 39% of all census tracts are eligible; about 36% of US population lives in eligible census tracts
- Most allocatees commit to serve areas of higher distress
 - Census tracts with <60% of AMI and/or poverty rate >30%
 - Census tracts with unemployment rate at least 1.5 times the national average

Does your project meet the basic NMTC qualifications criteria?

- Find out online, using your project address in the mapping tool at:
 - http://www.novoco.com/new_markets/resources/maps_data.php
 - <http://www.cohnreznick.com/NMTC-Mapping-Tool>
 - Or contact Geoff Leder (gleder@kmklaw.com; 513-562-1403) for assistance and/or guidance

Note: Mapping tool must be confirmed by the CDFI Fund Mapping System

18

Good Data on Community Impact Is Critical to Get Investors and CDEs Interested

Demonstrating “Community Impact”

- Jobs
 - Living wage jobs
 - Employee benefits
 - Job training
- Services to Low-Income Persons
 - Retail
 - Child care
 - Education
 - Fitness
 - Career training
 - Meals
 - Shelter

19

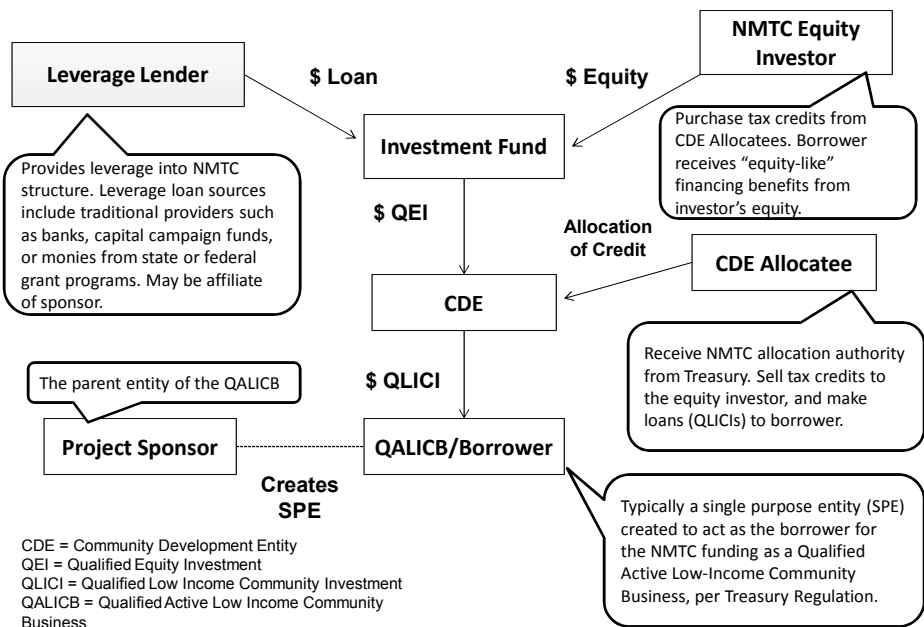
Good Data on Community Impact Is Critical to Get Investors and CDEs Interested

Demonstrating “Community Impact”

- Strong demonstrated support from elected officials, government agencies, community groups
- Letters of support from officials or evidence of financial support
- Any other types of meaningful positive impacts on Low-Income Persons
- Any Green or environmentally friendly aspects of the development

20

NMTC Players in Typical Structure



21

New Markets Tax Credits Calculating the Net Benefits of NMTCs

NMTC as % of NMTC Allocation	39%
Less: Time value of money discount	(3%)
Less: Tax credit investor profit	(3%)
Less: CDE fees	(9%)
Less: Transaction costs	(3%)
Less: Incremental administrative costs	(1%)
Pre-Tax Net Benefit of NMTCs (as % of NMTC Allocation)	<u>20%</u>

22

State of Ohio NMTC Program

- Through ODSA, ORC 5725.33 and OAC 122:22-1
- \$10 million of tax credit allocation authority to CDEs each year (typically 10 projects at \$1 million per project)
- Required piggy-back off federal program
- Capped at 1.0 MM in credits per project (~\$600K in additional equity)
- Special rule previously required operating business or owner-occupied real estate – requirement removed effective September 2016

23

Federal Historic Tax Credits

Basic eligibility requirements

Eligible Property

- Must be a “building,” which is defined as a structure enclosing a space within its walls and usually covered by a roof, the purpose of which is to provide shelter or housing, or to provide working, office, parking, display or sales space (bridges, ships, railroad cars are not eligible).
- Building must be depreciable (generally those used for commercial or residential rental purposes including hotels).

Types of Credit

- **10% Credit** available for older (pre-1936) non-historic, non-residential buildings
- **20% Credit** for historic buildings
- 5-year compliance period following “placement in service” (i.e., C of O)

24

Federal Historic Tax Credits

Qualification for “Historic” (i.e., 20%) Tax Credit

- 20% credit available for “certified historic structure”
- Listed in the National Register of Historic Places or
- Located in a registered historic district and certified as being of historic significance to the district
- For certified historic structures, the rehabilitation expenditures must satisfy the Secretary of the Interiors’ Standards for Rehabilitation
- These standards may increase the cost of the rehabilitation significantly

25

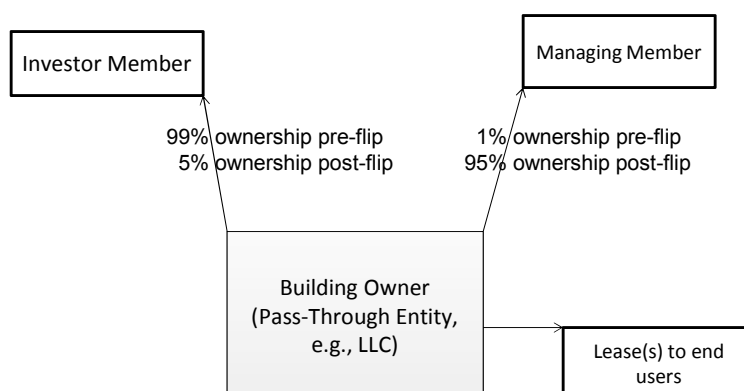
Federal Historic Tax Credits

Qualified Rehabilitation Expenditures (QREs)

- Generally include soft and hard costs, including interior improvements, with some exceptions
- Costs Excluded from QREs:
 - Land and building acquisition
 - Site work (demolition, fencing, parking lots, decks, landscaping, sidewalks, and outdoor lighting remote from building)
 - Enlargement that expands the total volume (i.e. rooftop additions, new basement, additions that go beyond the original footprint)
 - New building construction
 - Personal property (equipment, appliance, furniture, tacked carpeting, removable partitions, movable cabinets, and window coverings)

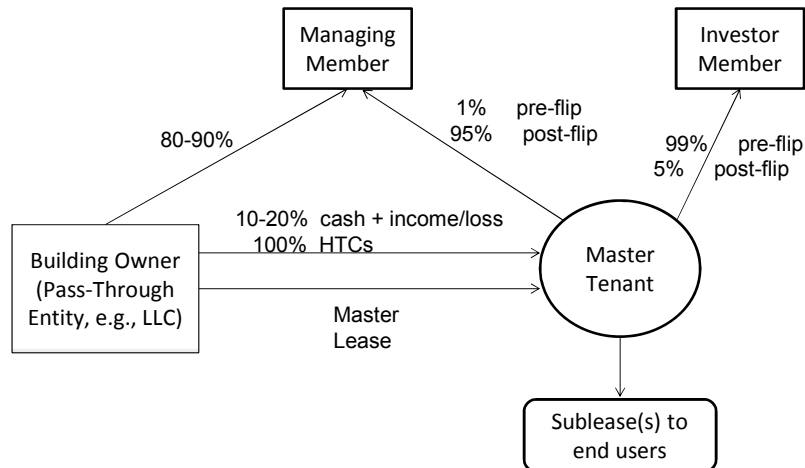
26

Federal Historic Tax Credits Single Entity Structure



27

Federal Historic Tax Credits Master Tenant Pass-Through Structure



28

Ohio Historic Tax Credit Program

- Administered through Ohio Development Services Agency, ORC 149.311 and OAC 122:19-1
- Similar to “certified historic structure” requirements in the 20% credit federal program (i.e., no qualification simply because the building is old)
- 25% credit (instead of 20%); capped at \$5MM per project (unless “catalytic” – significant economic development up to \$25MM)
- Works with ownership or master tenant structure

Ohio Historic Tax Credit Program

- Highly competitive program; applications due bi-annually in March and September (complicated scoring; political process)
- Investor receives a tax certificate – may use against state tax liability or receive a refund for up to \$3MM in one year
- Typical 18 month deadline to close on financing and commence construction; approval also will set maximum tax credits available (often less than QREs otherwise would dictate)

Most Common Property Tax Incentives



P. Andrew Spoor
Real Estate, Of Counsel
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Real Property Taxes

- Tax Increment Financing (TIF) Incentives
 - Municipal (5709.40(B), 40(C), and 41)
 - Township (5709.73(B), 73(C))
 - County (5709.78(A), 78(B))
 - Project Based vs. District vs. Private
- Community Reinvestment Area (3735.67)
- Enterprise Zone (5709.61)

32

Development Entities

- Port Authorities (Sales Tax Exemption)
- Special Improvement Districts (1710)
- New Community Authorities (349)
- Community Improvement Corporations (1724)

- Development entities tend to be particularly useful in Townships because they allow Townships to use incentives not otherwise available to them.

33

Special Considerations

- School Districts must be compensated for the loss in tax revenue caused by most real property tax exemptions. Full compensation is not required if the School District consents to the incentive, but in such cases a special contract is required setting forth the terms of such compensation.
- All of the foregoing incentive programs require legislative action from at least one governmental entity. As such, it is critical to discern which program best facilitates a project early on so as to allow for the time necessary to go through such legislative action (usually no less than 30 days, and up to 120 days).

34

Kentucky

- Tax Increment Financing (KRS) 154.30
 - Different from Ohio. Less focused on real property taxation and more on income taxation.
- Industrial Revenue Bonds (KRS 103)

35

Overview of State Programs



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Director Corporate Location Strategy
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36

Identifying an Opportunity

Is your company adding 25 or more employees over the next 3 years?

Is your company making an acquisition or part of a merger?

Is your company making a significant investment?

Is your company making any real estate decisions, i.e. relocating, considering renewing its lease, moving jurisdictions?

37

The Programs

Ohio Development Services Agency

- Job Creation Tax Credit
- Data Center Tax Abatement
- R&D Investment Loan Fund
- Innovation Ohio Loan Fund
- 166 Direct Loan
- Ohio Enterprise Bond Fund
- Roadwork Development (629)

JobsOhio

- Economic Development Grant
- Workforce Training Grant
- Growth Fund Loan
- R&D Grant
- Revitalization Loan
- Revitalization Grant
- Revitalization - Phase II

Program Highlights

Over the past 2-3 years JobsOhio and the State have created and updated some of their incentive programs; here are the highlights:

- **Job Creation Tax Credit:** Statutory update changing the credit from a percentage of Ohio income tax withholdings to a percentage of Ohio payroll
- **JobsOhio Revitalization Program:** New program focused on helping revitalize sites in preparation for end-users that support future job creation
- **JobsOhio Research and Development Grant:** New program to support the development and commercialization of emerging technologies and products

Summary/Takeaways

- There is serious money at stake to enhance your expansion, your move or your reorganization – sometimes huge money
- The number one mistake is getting this issue into a company's growth or restructuring strategy too late
- The second biggest mistake is forgetting the impact of confidentiality
- The Company is always the buyer
- REDI Cincinnati is of major value to you and to our region
- Compliance downstream is essential
- Mutual trust is critical to maximizing success

40

Questions?

Please contact us with any questions concerning Economic Development Incentives.

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41

Corporate Law Update



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42

Successor Liability in Ohio



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43

Various Tests

1. Contractual Liability
2. Products Liability
3. Employment Liability
4. Workers' Compensation
5. Unemployment Tax

44

Contractual Liability

- General rule: buyer of assets does not assume the debts of the seller
- Traditional exceptions
 - The buyer expressly or implicitly agrees to assume liability
 - **The transaction amounts to a de facto consolidation or merger**
 - **The buyer corporation is merely a continuation of the seller corporation**
 - The transaction is entered into fraudulently for the purpose of escaping liability
- *Welco Indus. Inc. v. Applies Cos.*, 67 Ohio St. 3d 344 (Ohio 1993).

45

Products Liability

- *Flaugherty v. Cone Automatic Machine Co.*, 30 Ohio St. 3d (1987)
- “Mere continuation” – traditional v. expanded
- *Welco* => traditional mere continuation for contract claims; but no clear answer on tort claims

46

Employment Liability

- *Cobb v. Contract Transport, Inc.* 452 F. 3d 543, 511 (6th Cir. 2006) (noting that labor cases “apply an equitable, policy driven approach to successor liability that has very little connection to the concept of successor liability in corporate law.”)
- Federal successor liability rule considers:
 - The defendant’s interest
 - The plaintiff’s interest
 - Federal policy embodied in the relevant statutes in light of the particular facts of the case and the particular duties at issue.

47

Workers' Compensation

- Statutory Framework
 - Ohio Rev. Code §4123.32
 - Ohio Adm. Code §4123-17-02
 - BWC makes the determination; subject to an abuse of discretion standard
- “For workers’ compensation purposes, a ‘successor in interest’ is simply a transferee of a business in whole or in part.” State ex. rel. *RFFG, LLC v. Ohio Bureau of Workers’ Comp.*, 2013-Ohio-241 (Ohio Ct. App.).

48

Unemployment Tax

- Statutory Scheme
 - Ohio Rev. Code §4141.24(6)(1)
- *Senco Brands, Inc. v. Ohio Dept of Job & Family Servs.*, 2016-Ohio-41769 (Ohio Ct. App.)
 - Under R.C. 4141.24(6)(1), the transfer to the purchaser of the seller’s unemployment experience arises primarily out of substantially common ownership, management or control and not the purchase of assets.
 - “Unemployment experience” is not an “interest” in property subject to the order of bankruptcy court.
 - “Management” includes day-to-day management, not just executives.

49

Practice Tips

- Perform thorough due diligence (especially with regard to employment and workers' compensation issues).
- Include clear language in the purchase agreement disclaiming liability, and make sure boilerplate requires modifications in writing.
- Require predecessor entity to remain in existence for some period post-closing.
- Negotiate appropriate indemnity, escrow and holdback provisions.
- Carefully review all government forms and filings.

50

Anti-assignment Clauses in the Context of Merger Transactions



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51

Standard Anti-Assignment Clause

“Neither party may assign any of its rights hereunder without the prior written consent of the other party, which consent shall not be unreasonably withheld, conditioned or delayed. Any purported assignment in violation of this Section shall be null and void.”

52

Types of Merger Transactions

- **Forward Merger:** The target company merges with and into the buyer with the buyer as the surviving entity.
- **Forward Triangular Merger:** The target company merges with and into the buyer's merger subsidiary, with the buyer's merger subsidiary as the surviving entity.
- **Reverse Triangular Merger:** The buyer's subsidiary merges with and into the target company with the target company as the surviving entity, which is wholly owned by the buyer.

53

***Cincom Systems, Inc. v. Novelis Corp.*, 581 F.3d 431 (6th Cir. 2009)**

- Federal law governs questions with respect to the assignability of patents and copyright licenses.
- A transfer occurs any time an entity other than the one to which the license was granted gains possession of the license.
- There is no difference between a transfer by operation of law and a transfer effected by the parties.

54

***Inhalation Plastics, Inc. v. Medex Cardio-Pulmonary, Inc.*, 638 Fed. Appx. 489 (6th Cir. 2016)**

- When a merger becomes effective, the surviving entity “possesses all assets and property of every description, and every interest in the assets and property...” R.C. 1701.82(A)(3).
- “An anti-assignment clause has no effect in the context of a merger, because all obligations and rights are automatically conferred upon the new entity and no assignment is necessary.”
- “Ohio merger law is clear that the transfer of rights pursuant to a merger is not an assignment.”

55

What does this mean?

- Cincom: In the context of intellectual property, a patent or copyright license is not assignable, absent an express provision to the contrary.
- Inhalation Plastics: Mergers do not violate anti-assignment provisions because an assignment does not occur as a matter of law.

56

What should you do?

- Evaluate the assignment provision in each agreement
 - Intellectual property
 - Future plans (*i.e.*, M&A transactions)
- Insert or remove anti-assignment triggers
 - Merger
 - Operation of law
 - Change of control
 - Reorganization

57

Select 2016 Developments in Ohio Business Entity Law



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58

The *Crosby v. Beam* Doctrine Remains Viable in Ohio

- Judge-made law
- Shareholders as fiduciaries (compare Kentucky – *Griffin v. Jones* (W.D.KY 2016) (Kentucky has not adopted *Crosby v. Beam*))
- Controlling shareholders (not just majority shareholders) have heightened fiduciary duties to minority shareholders

59

Select Cases

- *Kirila v. Kirila Contractors, Inc.* (Ct. App. Trumbull County 2016)
- *Lugenbeal v. Stupak* (Ct. App. Hamilton County 2016)
- Other cases

60

Senate Bill 181 (Effective July 2, 2016)

- Officers and Fiduciaries: New Ohio Revised Code 1701.641
- Fiduciary Rules and Freedom of Contract in Ohio LLCs

61

Text of Ohio Revised Code 1701.641

- (A) Unless the articles, the regulations, or a written agreement with an officer establishes additional fiduciary duties, the only fiduciary duties of an officer are the duties to the corporation set forth in division (B) of this section.
- (B) An officer shall perform the officer's duties to the corporation in good faith, in a manner the officer reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances. In performing an officer's duties, an officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, that are prepared or presented by any of the following:
- (1) One or more directors, officers, or employees of the corporation who the officer reasonably believes are reliable and competent in the matters prepared or presented;
 - (2) Counsel, public accountants, or other persons as to matters that the officer reasonably believes are within the person's professional or expert competence.
- (C) For purposes of this section, both of the following apply:
- (1) In any action brought against an officer, the officer shall not be found to have violated the officer's duties under division (B) of this section unless it is proved by clear and convincing evidence that the officer has not acted in good faith, in a manner the officer reasonably believes to be in or not opposed to the best interests of the corporation, or with the care that an ordinarily prudent person in a like position would use under similar circumstances.
 - (2) An officer shall not be considered to be acting in good faith if the officer has knowledge concerning the matter in question that would cause reliance on information, opinions, reports, or statements that are prepared or presented by any of the persons described in division (B)(1) or (2) of this section to be unwarranted.
- (D) An officer shall be liable in damages for a violation of the officer's duties under division (B) of this section only if it is proved by clear and convincing evidence in a court of competent jurisdiction that the officer's action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation. This division does not apply if, and only to the extent that, at the time of an officer's act or omission that is the subject of the complaint, either of the following is true:
- (1) The articles or the regulations of the corporation state by specific reference to division (D) of this section that the provisions of this division do not apply to the corporation.
 - (2) A written agreement between the officer and the corporation states by specific reference to division (D) of this section that the provisions of this division do not apply to the officer.
- (E) Nothing in this section affects the duties of an officer who acts in any capacity other than the officer's capacity as an officer. Nothing in this section affects any contractual obligations of an officer to the corporation.

62

The Importance of 1701.641

- Defining and limiting officer fiduciary duties (similarly to Ohio Directors) (Default Rule)
- Extending Ohio's Enhance "Business Judgment Rule" protections to corporate officers (*Contra* Lyman Johnson, "Corporate Officers and the Business Judgment Rule" (2005))
- Impact on D&O coverage/indemnification provisions in articles/regulations

63

OSBA Corporation Law Committee Comment

New Section 1701.641 sets out a default, statutory standard for the fiduciary duties that officers owe to the corporation. As stated, these are the only fiduciary duties owed by an officer, unless the corporation acts specifically in a written contract, or in its articles or regulations to create additional fiduciary duties. Ohio statutes already define the exclusive fiduciary duties for directors of a corporation in Section 1701.59, for partners in a partnership under Section 1776.44 and for the members and managers of a limited liability company under Sections 1705.281 through 1705.29. This new section states the default duties that apply to corporate officers.

Officers are typically employees and are agents of the corporation. As such, an officer will have other obligations that may be set out in a contract, job description, or more broadly such as an obligation to comply with a corporate code of conduct or other corporate policies. This new section of the statute relates only to fiduciary duties.

The statutory fiduciary duties of officers set out in division (B) are essentially the same as the fiduciary duties owed by directors to the corporation under Section 1701.59. The statutory duties cannot be reduced or eliminated, nor can the standard of proof be raised. The corporation can increase the duties or can lessen the burden of proof required to impose liability for damages. Changes that are permitted can be accomplished by a contract with an officer, or in the articles or regulations. Permitting variation by contract leaves intact the broad power of the directors of the corporation under Section 1701.64 to establish the obligations of the corporation's officers. A contract that varies the statutory default rule must be in writing.

The other provisions are also similar to the provisions that apply to a corporate director as the courts have generally applied the same rules to officers and directors. Division (E) is explicit that new Section 1701.641 would not alter an officer's liability under contract.

64

Text of Ohio Revised Code 1701.081: Does this “Delaware-ize Ohio LLC Law?”

1705.081 Effect of operating agreement.

- (A) Except as otherwise provided in divisions (B) and (C) of this section, an operating agreement governs relations among members and between members, any managers, and the limited liability company. A limited liability company is bound by the operating agreement of its member or members whether or not the limited liability company executes the operating agreement. To the extent the operating agreement does not otherwise provide, this chapter governs relations among the members and between the members, any managers, and the limited liability company.
- (B) Except as otherwise provided in division (C) of this section, the operating agreement may not do any of the following:
- (1) Vary the rights and duties under section 1705.04 of the Revised Code;
 - (2) Unreasonably restrict the right of access to books and records under section 1705.22 of the Revised Code;
 - (3) Eliminate the duty of loyalty under division (C) of section 1705.161 of the Revised Code or division (B) of section 1705.281 of the Revised Code, but the operating agreement may identify activities that do not violate the duty of loyalty, and all of the members or a number or percentage of members specified in the operating agreement may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;
 - (4) Eliminate the duty of care under division (C) of section 1705.161 of the Revised Code or division (C) of section 1705.281 of the Revised Code;
 - (5) Eliminate the obligation of good faith and fair dealing under division (D) of section 1705.281 of the Revised Code, but the operating agreement may prescribe the standards by which the performance of the obligation is to be measured;

65

Text of Ohio Revised Code 1701.081: Does this “Delaware-ize Ohio LLC Law? (cont.)

- (6) Eliminate the duties of a manager under division (B) of section 1705.29 of the Revised Code, but the articles or the operating agreement may provide that a manager who is a member of the limited liability company or who is serving as the representative of a member owes to the limited liability company and the other members only the duties that would be owed by the member or may prescribe in writing the standards by which performance is to be measured or identify activities that do not violate the manager’s duties;
- (7) Eliminate the duties of an officer under sections 1705.292 or 1705.293 of the Revised Code, but the articles or the operating agreement may provide that an officer who is a member of the limited liability company or who is serving as the representative of a member owes to the limited liability company and the other members only the duties that would be owed by the member or may prescribe in writing the standards by which performance is to be measured or specify activities that do not violate the officer’s duties;
- (8) Vary the requirement to wind up the limited liability company’s business in cases specified in division (A) or (B) of section 1705.47 of the Revised Code;
- (9) Restrict the rights of third parties under this chapter.
- (C) A written agreement, including a written operating agreement, that modifies, waives or eliminates the duty of loyalty, the duty of care or both for one or more members, managers or officers shall be given effect.
- (D) It is the policy of this chapter, subject to the limitations of division (B) and divisions (C) of this section, to give maximum effect to the principle of freedom of contract and to the enforceability of operating agreements. Except as stated in divisions (B) and division (C) of this section, the default rules relating to the rights and obligations between and among members, managers and officers of a limited liability company set out in sections 1705.01 through 1705.52 and section 1705.61 may be modified by the operating agreement or by the articles of organization.

66

Modify, Wave or Eliminate Fiduciary Duties

- The statutory obligation of “good faith and fair dealing” under Ohio Revised Code 1705.281(D) vs. Delaware’s implied contractual covenant of good faith by fair dealing
- Ohio Revised Code 1701.081(D)’s meaning: Fiduciary Rules and Freedom of Contract in Ohio LLCs

67

Questions?

Please contact us with any questions concerning the Corporate Law Update.

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What Takes So Long



Justice Donald C. Wintersheimer
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10 Cases Every In-house Counsel Should Know



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70

1. *Spokeo v. Robins*, 136 S. Ct. 1540 (May 16, 2016).

- Standing!
- Follow up to *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013).
- A Plaintiff must have: (1) suffered an injury in fact, (2) that is traceable to the challenged conduct of a defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo*, 136 S. Ct. at 1547.
- “To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.” *Id.* at 1548.

71

1. *Spokeo v. Robins*, 136 S. Ct. 1540 (May 16, 2016).

- *Galaria v. Nationwide Mut. Ins.*, 2016 U.S. App. LEXIS 16840 (6th Cir. Sept. 12, 2016).
 - 2012 hack of Nationwide (1.1 million customers and potential customers).
 - Nationwide offered free credit monitoring and identity theft protection and suggested fraud alerts and credit freezes.
 - District court dismissed complaint; Sixth Circuit reversed.

72

1. *Spokeo v. Robins*, 136 S. Ct. 1540 (May 16, 2016).

- “Plaintiffs’ allegations of a substantial risks of harm, coupled with reasonable incurred mitigation costs, are sufficient to establish a cognizable Article III injury at the pleading stage.” *Galaria*, 2016 U.S. App. LEXIS, at *9.
- “Although hackers are the direct cause of Plaintiffs’ injuries, the hackers were able to access Plaintiffs’ data only because Nationwide allegedly failed to secure the sensitive personal information entrusted to its custody.” *Id.* at *15.
- Following *Lewert v. P.F. Chang’s China Bistro, Inc.*, 819 F.3d 963 (7th Cir. April 14, 2016) and *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688 (7th Cir. 2015).

73

1. *Spokeo v. Robins*, 136 S. Ct. 1540 (May 16, 2016).

- *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925 (8th Cir. Sept. 8, 2016) (Plaintiffs lack standing to pursue for storage of information; no injury in fact).
- *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511 (D.C. Cir. July 26, 2016) (Plaintiffs lacked Article III standing to pursue claims for collecting ZIP Codes at point of sale).
- *Attias v. CareFirst, Inc.*, 2016 U.S. Dist. LEXIS 105480 (D.D.C. Aug. 10, 2016) (Plaintiff's claims dismissed for lack of Article III standing; "Where a violation of a statute may result in no harm, that mere violation is insufficient to confer standing.").
- *Smith v. Ohio State Univ.*, U.S. Dist. LEXIS 74612 (S.D. Ohio June 8, 2016) (alleged procedural violations of FCRA did not create concrete injury to establish standing).

74

2. *Cole v. City of Memphis*, 2016 U.S. App. LEXIS 18564 (6th Cir. Oct. 17, 2016).

- (b)(3) and (b)(2) class actions and ascertainability.
- *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d. Cir. 2013) (heightened ascertainability standard in 23(b)(3) class actions).
- *Mullins v. Direct Digital LLC.*, 795 F.3d 654 (7th Cir. 2015) (rejecting *Carrera*).
- *Rikos v. Proctor & Gamble, Co.*, 799 F.3d 497 (6th Cir. 2015); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532 (6th Cir. 2012).

75

2. *Cole v. City of Memphis*, 2016 U.S. App. LEXIS 18564 (6th Cir. Oct. 17, 2016).

“In the Rule 23(b)(3) context, ascertainability aids the inherent efficiencies of the class device by ensuring administrative feasibility, and as we read our own precedent and the precedent of other courts, ascertainability is a requirement tied almost exclusively to practical need to notify absent class members and to allow those members a chance to opt-out and avoid the potential collateral estoppel effects of a final judgment. But the requirements that the class be defined in a manner that allows ready identification of class members serve several important objectives that either do not exist or are not compelling in (b)(2) classes.”

Cole, 2016 U.S. App. LEXIS at *25.

76

3. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. (In re: Vitamin C Antitrust Litig.)*, 2016 U.S. App. LEXIS 17135 (2d Cir. Sept. 20, 2016).

- Sherman Act liability and international comity.
- Defendants were Hebei Welcome Pharmaceutical and North China Pharmaceutical Group Corporation.
- MTD denied; MSJ denied; jury verdict and judgment of \$147 million in damages and injunctive relief.
- Second Circuit reversed and concluded the district court should have granted the MTD.

77

3. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. (In re: Vitamin C Antitrust Litig.)*, 2016 U.S. App. LEXIS 17135 (2d Cir. Sept. 20, 2016).

- The Ministry of Commerce of the People's Republic of China filed an amicus brief in the district court.
 - Highest authority within the Chinese government to regulate foreign trade.
 - Chamber was a Ministry-supervised entity authorized by the Ministry to regulate vitamin C export prices and output levels.
 - The Ministry plan: maintain the order of market competition, promote industry self-discipline, and coordinate industry-wide negotiated prices.

78

3. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. (In re: Vitamin C Antitrust Litig.)*, 2016 U.S. App. LEXIS 17135 (2d Cir. Sept. 20, 2016).

- “Consistent with our holding in *Karaha Bodas* and the Supreme Court’s pronouncements in *Pink*, we reaffirm the principle that when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its law and regulations, which is reasonable under the circumstances, a U.S. court is bound to defer to those statements.” *Vitamin C*, 2016 U.S. App. LEXIS, at *31-32.
- “In short, by directing vitamin C manufacturers to coordinate export prices and quantities and adopting those standards into the regulatory regime, the Chinese Government required Defendants to violate the Sherman Act.” *Id.* at *35.

79

**4. *IBEW Local 98 Pension Fund v. Best Buy Co.*,
818 F.3d 775 (8th Cir. Apr. 12, 2016).**

- Securities class actions.
- *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (defendants may present evidence at class certification stage to rebut the *Basic* fraud on the market presumption).
- Interlocutory appeal of order granting class certification.
- Eighth Circuit reversed.

80

**4. *IBEW Local 98 Pension Fund v. Best Buy Co.*,
818 F.3d 775 (8th Cir. Apr. 12, 2016).**

- “We agree with the district court that, when plaintiffs presented a prima facie case that the *Basic* presumption applies to their claims, defendants had the burden to come forward with evidence showing a lack of price impact. But what the district court ignored, in our view, is that defendants did present evidence on this issue. . . .” *Best Buy*, 818 F.3d at 782.
- “Here, defendants rebutted the *Basic* presumption by submitting direct evidence (the opinions of both experts) that severed the link between the alleged conference call misrepresentations and the stock price at which plaintiffs purchased. As plaintiffs presented no evidence of price impact, they failed to satisfy the predominance requirement of Rule 23(b)(3) and district court abused its discretion by certifying the class.” *Id.* at 783.

81

4. *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775 (8th Cir. Apr. 12, 2016).

- *Tongue v. Sanofi*, 816 F.3d 199 (2d Cir. 2016) (affirming dismissal of Section 11 claims following *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015)).
- *Tyson Foods, Inc. v. Bouaphakeo*, 123 S. Ct. 1036 (Mar. 22, 2016) (parties may rely upon representative or sample evidence at class certifications stage).
- *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780 (6th Cir. May 19, 2016) (*American Pipe* tolling doctrine does not apply to statutes of repose under the '33 and '34 Acts; furthering circuit split).

82

5. *McMahon v. Yahoo! Inc.*, Case No. 5:16-cv-05466 (N.D. Cal. filed Sept. 24, 2016) and 47 others.

- *Yahoo says 500 million accounts stolen*, www.money.com, Sept. 23, 2016.
- *Why Yahoo is Under Fire About Cyber Hack Timeline*, www.fortune.com, Sept. 23, 2016.
- *Defending Against Hackers Took a Back Seat at Yahoo*, *Insiders Say*, www.nytimes.com, Sept. 29, 2016.
- *Verizon wants \$1B discount on Yahoo deal after reports of hacking*, www.nypost.com, Oct. 6, 2016; *Verizon Says Yahoo Hack Could Reopen \$4.8 Billion Deal Talks*, www.nytimes.com, Oct. 13, 2016.
- *In breach's wake, Yahoo user lawsuits begin to pile up*, www.usatoday.com, Sept. 26, 2016.

83

6. *Stryker Corp. v. National Union Fire Ins. Co.*, 2016 U.S. App. LEXIS 20653 (6th Cir. Nov. 18, 2016).

- Plaintiff not entitled to coverage under excess policy because claims were settled without insurer's written consent in violation of policy.
- Plaintiff purchased sub of Pfizer, Inc. that sold artificial knee joints; short shelf life and a number were sold past expiration date.
- Plaintiff subjected to product liability claims and obligated to cover Pfizer's losses.
- Very early on, Plaintiff unilaterally settled all product liability claims for \$7.6mm (commercial policy limit was \$15mm).
- Thereafter, separately adjudicated liability to Pfizer for \$17.7mm.

84

6. *Stryker Corp. v. National Union Fire Ins. Co.*, 2016 U.S. App. LEXIS 20653 (6th Cir. Nov. 18, 2016).

- General rule that "insurer may pay claims in any order it chooses." *Stryker Corp. v. XL Ins. Am.*, 735 F.3d 349, 357 (6th Cir. 2012).
- Primary covers Pfizer liability first and exhausts limits.
- Plaintiff seeks coverage from excess insurer for remaining \$7.6 paid to settle its direct product-liability claims.
- Denied. Claims did not constitute "ultimate net loss" because Plaintiff failed to obtain "written consent" at time settlements were made.

85

7. *Campbell-Edwald Co. v Gomez*, 136 S. Ct. 663 (Jan. 20, 2016).

- Decision rejects one of many important defenses commonly thought to be available to companies facing potentially massive litigation costs and resolves long-standing circuit split.
- Defendant cannot moot a putative class action by offering complete relief to the putative class representative.
- Unaccepted settlement offer equivalent to an unaccepted contract offer.

86

7. *Campbell-Edwald Co. v Gomez*, 136 S. Ct. 663 (Jan. 20, 2016).

- Decision followed by the Sixth Circuit in *Conway v. Portfolio Recovery Associates, LLC*, 2016 U.S. App. LEXIS 19373(6th Cir. October 27, 2016).
 - “The Supreme Court has now made clear that an unaccepted offer of settlement or judgment, like the one PRA made to Conway, generally does not moot a case, even if the offer would fully satisfy the plaintiff’s demands for relief.” *Id.* at *2.
- Supreme Court left the door cracked:
 - Can defendant moot a claim by making an actual payment of full relief?
 - Rule 68(d) cost shifting.

87

8. *Reiter v. Fairbank*, 2016 Del. Ch. LEXIS 158 (Del. Ch. Oct. 18, 2016)

- Good news for directors.
- Directors of Capital One Financial Corp. alleged to have breached fiduciary duties of oversight based on weak internal controls to stop money-laundering.
 - Check-cashing business considered “high risk products and services” for a “high risk customer base.”
- Chancery Court articulated standards for “bad faith” in order for directors to be held liable for failing to exercise oversight.
 - Must establish scienter: directors know that they are not discharging their fiduciary obligations.
 - A “sufficient connection between the corporate trauma and the board.”

88

8. *Reiter v. Fairbank*, 2016 Del. Ch. LEXIS 158 (Del. Ch. Oct. 18, 2016)

- Requires the proverbial red flag and conscious disregard of duty to address the misconduct.
- Court differentiated between a director’s duty to monitor business risk v. duty to monitor fraud and illegal activity.
- Good faith, not a good result, is what is required.
 - Reinforcing *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

89

**9. *O’Berry v. Turner*, 2016 U.S. Dist. LEXIS 55714
(M.D. Ga. Apr. 27, 2016) and the “Intent to deprive”
under revised FRCP 37(e).**

FRCP 37(e): Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.

90

**9. *O’Berry v. Turner*, 2016 U.S. Dist. LEXIS 55714
(M.D. Ga. Apr. 27, 2016) and the “Intent to
deprive” under revised FRCP 37(e).**

- *O’Berry* arose out of a car accident and involved failure to preserve driving log after receipt of spoliation letter from opposing counsel.
- Single employee maintained file and printed one hard copy in normal course after accident, which was misplaced.
- Court found that loss of the single copy of subsequently deleted ESI could “only” have resulted if defendants had “acted with the intent to deprive.”
 - Irresponsible to maintain only a single copy.
 - Company had no policy for preserving evidence for foreseeable litigation.
 - No one from **company or law firm** contacted employee about the documents.

91

9. *O’Berry v. Turner*, 2016 U.S. Dist. LEXIS 55714 (M.D. Ga. Apr. 27, 2016) and the “Intent to deprive” under revised FRCP 37(e).

- Mandatory instruction that the jury must presume that the missing ESI was unfavorable.
- Compare to *Nuvasive, Inc. v. Madsen Med., Inc.*, 2016 U.S. Dist. LEXIS 8997 (S.D. Cal. Jan. 26, 2016).
 - Permissive jury instruction imposed before amendments to the FRCP were in effect and then vacated for lack of evidence of intent to deprive.
 - Court noted that intent is difficult to prove and was relevant prior to amendment.
 - One factor considered by court was degree of fault by party who altered or destroyed evidence.

92

9. *O’Berry v. Turner*, 2016 U.S. Dist. LEXIS 55714 (M.D. Ga. Apr. 27, 2016) and the “Intent to deprive” under revised FRCP 37(e).

- *O’Berry* has been criticized for applying a gross negligence standard specifically rejected by other circuits.
- For preservation conduct that qualifies, the rule serves as a “safe harbor.”
- If you can show that “reasonable steps” are in place to preserve evidence, spoliation sanctions should not be considered.
- Parties must take appropriate actions to preserve, as opposed to achieving perfection. *See, e.g., Cooksey v. Digital*, 2016 U.S. Dist. LEXIS 53561 (S.D.N.Y. Sep. 20, 2016).

93

10. ???

94

Questions?

Please contact us with any questions concerning the
Litigation Update.

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95

Brain Disorders and the Impaired Attorney: Problems and Solutions



Patrick J. Garry
Associate Director, Ohio Lawyers Assistance Program

96

“Houston, we’ve had a problem.”

“Houston, we [still] have a problem.”

97

Prevalence of Substance Use and Other Mental Concerns Among American Attorneys

The American Bar Association Commission on Lawyer Assistance Program and Hazelden Betty Ford Foundation released their study in the *Journal of Addiction Medicine* in February, 2016, that, thus far, is the most comprehensive of its kind.

So, here are the new numbers...

98

... the old numbers were, well, old... from 1990. A few of the new numbers...

- Random sample of **12,825** licensed, employed attorneys completed surveys, assessing alcohol use, drug use, and symptoms of depression, anxiety, and stress.
- **20.6%** licensed, employed attorneys screen positive for hazardous, harmful, and potentially alcohol-dependent drinking.
- **28%** struggle with some level of depression.
- **19%** demonstrate symptoms of anxiety.

99

... of note:

- “Younger attorneys – those in their first 10 years of practice – exhibit the highest incidence of these problems.
- Men had a higher proportion of positive screens.
- **The most common barriers for attorneys seeking help were fears of others finding out and general concerns about confidentiality.**
- Attorneys, compared with other professionals, are leaders in alcohol use disorders and mental health disease.
- Attorney impairment poses a variety of risks: to individuals, to organization [firms], to communities, to government, to the economy, and to families.

100

... of further note:

Brain disorders – and accompanying disordered thoughts – occur without regard to age, race, sexual preference, economic standing, religious views, political affiliation, etc. You get the idea, right?

Genetic predisposition may play a role, but recent studies reveal that behavior has a significant impact upon gene expression.

101

**... no one wants a health problem...
especially a “mental health” problem...**

Stigma. Stigma. Stigma.

- A mark of disgrace associated with a particular circumstance, quality or person.
- “The stigma of mental disorder”
- Synonyms: shame, disgrace, dishonor, ignominy, opprobrium, humiliation, (bad) reputation

102

**... but these conditions are often chronic,
fatal, and progressive...**

... and, most importantly, treatable.

There is a solution.

103

... but, self-diagnosis is difficult

A few signs of disorders:

- Behavioral changes as simple as coming in late or leaving early.
- Decrease in production and quality of work product.
- Increased isolation. Few appearance at work-related functions.
- Discernible mood changes that may include irritability and apathy.
- When confronted, many plausible explanations, avoidance, and/or insistence that there is no problem.
- The odor of alcohol is “on or about” the person...at work.

104

“If you want something done right, do it yourself...right?”

...some exceptions, absent appropriate experience:

- Plumbing, electrical, HVAC.
- Automobile repair, including body work.
- Roofing, house painting, chimney work.
- Blacktopping, concrete work.
- Severe lacerations.
- Treating broken bones, including vertebrae.
- Heart disease.
- Mental health problems, including alcohol use disorders.

105

Solutions

- Personally, prepare like a champion: rest, nutrition, physical activity, hobby, nurture healthy relationships, serve others, etc.
- Personally, seek services, if possible. This is not probable.
- On behalf of others, take action...

106

Take Action

- Contact OLAP for any reason. The communications are confidential.
- Educate yourself by speaking to those with experience and knowledge.
- Open your mind to the possibility that an intervention of some sort may be necessary and life saving... and career saving.
- Gather the undisputed facts.
- Assess the risk to the organization. The risk to the individual is their life.
- Assess organization's willingness to exercise leverage.
- Confidentiality, dignity, respect, support, and empathy are required.

107

The Good News

Attorneys recover from brain disorders and impairments at a remarkable rate... once they begin the process.

The challenge remains: On a case-by-case basis, just how do we – collectively and individually – create an environment that allows an impaired person to begin the process?

Let's talk about that. Do not hesitate to call.

108

ohiolap.org

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109

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NMTC PROGRAM AWARD BOOK

CY 2015-2016

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THE NEW MARKETS TAX CREDIT PROGRAM

The New Markets Tax Credit Program (NMTC Program) helps economically distressed communities attract private investment capital. This federal tax credit helps to fill project financing gaps by enabling investors to make larger investments than would otherwise be possible. Communities benefit from the jobs associated with these investments, as well as greater access to public facilities, goods, and services such as manufacturing, food, retail, housing, health, technology, energy, education, and childcare.

“For the past 15 years, we have seen how the New Markets Tax Credit improves the quality of life and economic prospects for low-income Americans. The historic \$7 billion in tax credits awarded through the 2015-2016 round will support community projects and businesses nationwide.”

ANNIE DONOVAN
CDFI FUND DIRECTOR

Through the NMTC Program, the CDFI Fund allocates tax credit authority to Community Development Entities (CDEs) through a competitive application process. CDEs are financial intermediaries through which investment capital flows from an investor to a qualified business located in a low-income community. CDEs use their authority to offer tax credits to investors in exchange for equity in the CDE. With these capital investments, CDEs can make loans and investments to businesses operating in distressed areas that have better rates and terms and more flexible features than the market. The NMTC Program helps to offset the perceived or real risk of investing in distressed and low-income communities. In exchange for investing in CDEs, investors claim a tax credit worth 39 percent of their original CDE equity stake, which is claimed over a seven-year period. In addition to receiving a tax benefit, investors have the advantage of entering new, unsaturated markets before their competitors, thereby increasing their chances of success. The NMTC Program enables investors to gain recognition for supporting the revitalization of America’s communities.

NMTC PROGRAM HISTORY:

- In the 13 rounds to date, the CDFI Fund has made 1,032 allocation awards totaling \$50.5 billion in tax credit authority, including \$3 billion in Recovery Act awards and \$1 billion that was specifically set aside for recovery and redevelopment in the wake of Hurricane Katrina.
- \$42 billion in New Markets Tax Credits have been invested in low-income communities since the program’s inception through FY 2016.

IMPACT OF NMTC PROGRAM:

For every \$1 invested by the federal government, **the NMTC Program generates over \$8** of private investment.

Since its inception, **the NMTC Program has** supported the construction of 32 million square feet of manufacturing space, 75 million square feet of office space, and 57.5 million square feet of retail space.

The IRS’s NMTC Program regulations generally require that at least 85 percent of QEI proceeds be invested in Qualified Low-Income Community Investments (QLICs). All 120 of the 2015-2016 allocatees indicated that they would invest at least 95 percent of QEI dollars into QLICs. In real dollars, this means **at least \$889 million** above and beyond what is minimally required by the NMTC Program will be **invested in low-income communities**.

GEOGRAPHIC LOCATION OF ALLOCATEES

120

THE 120 ALLOCATEES ARE HEADQUARTERED IN 36 DIFFERENT STATES, THE DISTRICT OF COLUMBIA, AND PUERTO RICO.

53

53 OF THE ALLOCATEES (OR 44.2 PERCENT) WILL FOCUS INVESTMENT ACTIVITIES ON A NATIONAL SERVICE AREA;

23

23 OF THE ALLOCATEES (OR 19.2 PERCENT) WILL FOCUS ON A MULTI-STATE SERVICE AREA;

22

22 OF THE ALLOCATEES (OR 18.3 PERCENT) WILL FOCUS ACTIVITIES ON A STATEWIDE SERVICE AREA;

22

AND 22 OF THE ALLOCATEES (OR 18.3 PERCENT) WILL FOCUS ON LOCAL MARKETS (E.G., A CITYWIDE OR COUNTYWIDE AREA).

INVESTMENT ACTIVITIES

Approximately \$4.832 billion (70.7 percent) of NMTC investment proceeds will likely be used to finance and support loans to or investments in operating businesses in low-income communities.

Approximately \$2.007 billion (29.3 percent) of NMTC investment proceeds will likely be used to finance and support real estate projects in low-income communities.

URBAN VS. RURAL INVESTMENT AREA*

APPROXIMATELY
**\$4.157
BILLION**
WILL BE INVESTED
IN MAJOR URBAN
AREAS

APPROXIMATELY
**\$1.410
BILLION**
WILL BE INVESTED
IN MINOR URBAN
AREAS

APPROXIMATELY
**\$1.271
BILLION**
WILL BE INVESTED
IN RURAL AREAS

*Based on initial estimates of 2015-2016 allocatees

CDFIs vs. Non-CDFIs

34.2%

of the allocatees are certified Community Development Financial Institutions (CDFIs) or subsidiaries of certified CDFIs. They received allocations totaling \$2.410 billion.

LIST OF ALLOCATION
RECIPIENTS

Name of Allocatee	City	State	Service Area	Allocated Amount
Advantage Capital Community Develop-ment Fund, LLC	New Orleans	Louisiana	National	\$80,000,000
AMCREF Community Capital, LLC	New Orleans	Louisiana	National	\$80,000,000
Atlanta Emerging Markets, Inc.	Atlanta	Georgia	Local	\$50,000,000
Black Business Investment Fund of Central Florida, Inc.	Orlando	Florida	Statewide	\$20,000,000
Boston Community Capital Inc.	Boston	Massachusetts	National	\$55,000,000
Bremer CDE, LLC	St. Paul	Minnesota	Multi-State	\$40,000,000
Brownfield Revitalization, LLC	Raleigh	North Carolina	National	\$70,000,000
Building America CDE, Inc.	Washington	District of Columbia	National	\$45,000,000
CAHEC New Markets, LLC	Raleigh	North Carolina	Multi-State	\$45,000,000
California Statewide Communities Development Corporation	Walnut Creek	California	Statewide	\$70,000,000
Capital Impact Partners	Arlington	Virginia	National	\$70,000,000
Capital One Community Renewal Fund, LLC	New Orleans	Louisiana	National	\$90,000,000
CBKC CDC, L.L.C.	Kansas City	Missouri	Multi-State	\$80,000,000
CEI Capital Management LLC	Brunswick	Maine	National	\$80,000,000
Central States Development Partners, Inc.	Rock Island	Illinois	National	\$45,000,000
Chase New Markets Corporation	Chicago	Illinois	National	\$80,000,000
Chicago Development Fund	Chicago	Illinois	Local	\$75,000,000
Chicago Neighborhood Initiatives	Chicago	Illinois	Local	\$25,000,000

Name of Allocatee	City	State	Service Area	Allocated Amount
Cincinnati Development Fund, Inc.	Cincinnati	Ohio	Multi-State	\$65,000,000
Cinnaire New Markets LLC	Lansing	Michigan	Multi-State	\$75,000,000
City First New Markets Fund II, LLC	Washington	District of Columbia	Multi-State	\$75,000,000
Civic Builders, Inc.	New York	New York	National	\$40,000,000
Civic San Diego Economic Growth and Neighborhood Investment Fund	San Diego	California	Local	\$50,000,000
Clearinghouse Community Development Financial Institution	Lake Forest	California	Multi-State	\$65,000,000
Cleveland New Markets Investment Fund II LLC	Cleveland	Ohio	Local	\$60,000,000
Commonwealth Cornerstone Group	Harrisburg	Pennsylvania	Statewide	\$80,000,000
Community Development Finance Alliance	Salt Lake City	Utah	Statewide	\$35,000,000
Community Development Venture Capital Alliance	New York	New York	National	\$55,000,000
Community First Fund	Lancaster	Pennsylvania	Local	\$45,000,000
Community Hospitality Healthcare Services LLC	Placida	Florida	National	\$90,000,000
Community Impact Fund, LLC	Dover	Delaware	National	\$65,000,000
Community Loan Fund of New Jersey, Inc.	New Brunswick	New Jersey	Statewide	\$45,000,000
Consortium America, LLC	Washington	District of Columbia	National	\$50,000,000
Corporation for Supportive Housing	New York	New York	National	\$65,000,000
Dayton Region New Market Fund LLC	Dayton	Ohio	Local	\$40,000,000
DC Housing Enterprises	Washington	District of Columbia	Local	\$45,000,000
DV Community Investment, LLC	Phoenix	Arizona	National	\$80,000,000
Ecotrust CDE LLC	Portland	Oregon	National	\$75,000,000
Empire State New Market Corporation	New York	New York	Statewide	\$55,000,000
Empowerment Reinvestment Fund, LLC	New York	New York	National	\$55,000,000

Name of Allocatee	City	State	Service Area	Allocated Amount
Enhanced Community Development, LLC	New Orleans	Louisiana	National	\$90,000,000
ESIC New Markets Partners LP	Columbia	Maryland	National	\$80,000,000
Finance New Mexico, LLC	Santa Fe	New Mexico	Statewide	\$45,000,000
First-Ring Industrial Redevelopment Enterprise, Inc.	West Allis	Wisconsin	Local	\$45,000,000
FirstPathway Community Development, LLC	Chicago	Illinois	Multi-State	\$25,000,000
Florida Community Loan Fund, Inc.	Orlando	Florida	Statewide	\$65,000,000
Forward Community Investments, Inc.	Madison	Wisconsin	Statewide	\$35,000,000
French Lick Redevelopment CDE LLC	Paoli	Indiana	Statewide	\$45,000,000
Genesis LA CDE LLC	Los Angeles	California	Local	\$45,000,000
Greater Wisconsin Opportunities Fund, Inc.	Madison	Wisconsin	Statewide	\$75,000,000
Greenline Community Development Fund, LLC	Denver	Colorado	National	\$70,000,000
GS New Markets Fund, LLC	New York	New York	National	\$70,000,000
Habitat for Humanity NMTC, LLC	Atlanta	Georgia	National	\$55,000,000
Harbor Bankshares Corporation	Baltimore	Maryland	Multi-State	\$70,000,000
Heartland Renaissance Fund, LLC	Little Rock	Arkansas	Multi-State	\$65,000,000
Hope Enterprise Corporation	Jackson	Mississippi	Multi-State	\$50,000,000
IFF	Chicago	Illinois	Multi-State	\$80,000,000
Indianapolis Redevelopment CDE LLC	Indianapolis	Indiana	Local	\$55,000,000
Iowa Community Development LC	Johnston, IA	Iowa	Statewide	\$75,000,000
Kroger Community Development Entity, LLC	Cincinnati	Ohio	National	\$15,000,000
L.A. Charter School New Markets CDE, LLC	Los Angeles	California	Statewide	\$55,000,000
Las Vegas Community Investment Corporation	Las Vegas	Nevada	Multi-State	\$55,000,000

Name of Allocatee	City	State	Service Area	Allocated Amount
Local Initiatives Support Corporation	New York	New York	National	\$85,000,000
Los Angeles Development Fund	Los Angeles	California	Local	\$50,000,000
Low Income Investment Fund	San Francisco	California	National	\$85,000,000
M&I New Markets Fund, LLC	Chicago	Illinois	Multi-State	\$55,000,000
Mascoma Community Development, LLC	Lebanon	New Hampshire	National	\$50,000,000
MassDevelopment New Markets LLC	Boston	Massachusetts	Statewide	\$75,000,000
MBS Urban Initiatives CDE, LLC	St Louis	Missouri	National	\$75,000,000
MetaFund Corporation f.k.a. Oklahoma MetaFund CDC	Oklahoma City	Oklahoma	Multi-State	\$50,000,000
MHIC NE New Markets CDE II LLC	Boston	Massachusetts	Multi-State	\$70,000,000
Mid-City Community CDE, LLC	Bethesda	Maryland	National	\$45,000,000
Midwest Renewable Capital, LLC	Grimes	Iowa	National	\$80,000,000
Montana Community Development Corporation	Missoula	Montana	Multi-State	\$90,000,000
MS Gulf Coast Renaissance Corporation	Gulfport	Mississippi	Statewide	\$15,000,000
MuniStrategies, LLC	Jackson	Mississippi	Multi-State	\$70,000,000
National Community Fund I, LLC	Portland	Oregon	National	\$80,000,000
National Community Investment Fund	Chicago	Illinois	National	\$65,000,000
National New Markets Tax Credit Fund, Inc	Minneapolis	Minnesota	National	\$65,000,000
National Trust Community Investment Corporation	Washington	District of Columbia	National	\$65,000,000
New Markets Community Capital, LLC	Los Angeles	California	Statewide	\$55,000,000
Nonprofit Finance Fund	New York	New York	National	\$50,000,000
Northeast Ohio Development Fund, LLC	Cleveland	Ohio	Local	\$45,000,000
Northern CDE Corporation	Chicago	Illinois	National	\$60,000,000

Name of Allocatee	City	State	Service Area	Allocated Amount
NYC Neighborhood Capital Corporation	New York	New York	Local	\$55,000,000
NYCR-CDE,LLC	New York	New York	Local	\$45,000,000
Oakland Renaissance NMTC, Inc. A California Nonprofit Public Benefit Corporation	Oakland	California	Local	\$20,000,000
Ohio Community Development Finance Fund	Columbus	Ohio	Statewide	\$65,000,000
Opportunity Fund Northern California	San Jose	California	Statewide	\$55,000,000
Pacesetter CDE, Inc.	Fort Worth	Texas	National	\$35,000,000
Partners for the Common Good	Washington	District of Columbia	National	\$35,000,000
People Incorporated Financial Services	Abingdon	Virginia	Multi-State	\$65,000,000
PeopleFund NMTC LLC	Austin	Texas	Statewide	\$30,000,000
PIDC Community Capital	Philadelphia	Pennsylvania	Local	\$60,000,000
Pittsburgh Urban Initiatives LLC	Pittsburgh	Pennsylvania	Local	\$50,000,000
PNC Community Partners, Inc.	Pittsburgh	Pennsylvania	National	\$75,000,000
Popular Community Capital, LLC	San Juan	Puerto Rico	Multi-State	\$70,000,000
Primary Care Development Corporation	New York	New York	National	\$50,000,000
Punawai 'O Pu'uhonua, LLC	Honolulu	Hawaii	Statewide	\$55,000,000
Raza Development Fund, Inc.	Phoenix	Arizona	National	\$65,000,000
RBC Community Development, LLC	New Albany	Ohio	National	\$50,000,000
REI Development Corp.	Durant	Oklahoma	Statewide	\$65,000,000
River Gorge Capital, LLC	Chattanooga	Tennessee	National	\$45,000,000
San Francisco Community Investment Fund	San Francisco	California	Local	\$45,000,000
Southern Community Capital, LLC	Jackson	Mississippi	Multi-State	\$50,000,000

Name of Allocatee	City	State	Service Area	Allocated Amount
Southside Community Optimal Redevelopment Enterprise, LLC	Chicago	Illinois	Multi-State	\$65,000,000
St. Louis Development Corporation	St. Louis	Missouri	Local	\$75,000,000
Stonehenge Community Development, LLC	Baton Rouge	Louisiana	National	\$40,000,000
SunTrust Community Development Enterprises, LLC	Atlanta	Georgia	National	\$80,000,000
Telesis CDE Corporation	Washington	District of Columbia	National	\$35,000,000
Texas Mezzanine Fund, Inc.	Dallas	Texas	Statewide	\$75,000,000
The Business Valued Advisor Fund, LLC	Chicago	Illinois	National	\$45,000,000
The Housing Partnership Network, Inc.	Boston	Massachusetts	National	\$40,000,000
The Rose Urban Green Fund, LLC	Denver	Colorado	National	\$50,000,000
Travois New Markets, LLC	Kansas City	Missouri	National	\$50,000,000
United Bancorporation of Alabama, Inc	Atmore	Alabama	Multi-State	\$65,000,000
University Financial Corp.	Saint Paul	Minnesota	Local	\$70,000,000
Uptown Consortium, Inc.	Cincinnati	Ohio	Local	\$45,000,000
Urban Action Community Development LLC	Baltimore	Maryland	National	\$45,000,000
Urban Research Park CDE, LLC	Hunt Valley	Maryland	National	\$80,000,000



KEY HIGHLIGHTS:

APPLICANTS VS. ALLOCATEES

238 CDEs applied for allocations, requesting a total of approximately \$17.6 billion in allocations. The CDFI Fund made allocation awards totaling \$7 billion, or about 40 percent of the total amount requested by applicants, to 120 CDEs (or 50.4 percent of the total applicant pool).

MINORITY-OWNED OR CONTROLLED ENTITIES

17 of the allocatees (or 14.2 percent) are minority-owned or controlled entities. They received allocations totaling \$870 million.

ECONOMICALLY DISTRESSED COMMUNITIES

75% 119 of the 120 of the allocatees committed to providing at least 75 percent of their investments in areas characterized by: 1) multiple indicia of distress; 2) significantly greater indicia of distress than required by NMTC Program rules; or 3) high unemployment rates.

RURAL COMMUNITIES*

50% 14 allocatees met the criteria for "Rural CDE" designation. These 14 Rural CDEs received allocations totaling \$1.176 billion. 50 allocatees (or about 41.7 percent) will be required to deploy some or all of their investments in non-metropolitan counties; totaling approximately \$1.413 billion, or 20.7 percent of the QLICs to be made with this allocation round.

*For further information, see the 2015-2016 Notice of Allocation Authority.



ADDITIONAL RESOURCES

Learn more about the New Markets Tax
Credit Program: www.cdfifund.gov/nmtc

Explore where in the country New Markets
Tax Credit Program awardees are serving:
www.cdfifund.gov/statesserved

View previous award rounds of the CDFI Fund's
programs: www.cdfifund.gov/awards

Visit www.cdfifund.gov to learn about other
CDFI Fund programs and how to apply.