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2022 Legal Update Seminar

December 8, 2022 | 11:30 a.m. – 5:00 p.m. EDT

Nothing in this presentation is intended to be legal advice. Please consult with counsel of your choice with regards to any specific questions you may have. ©2022 Kaiting Muething & Klekamp, PLLC. All Rights Reserved.

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Welcome



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Opening Remarks



Seminar Materials

- CLE Information / Forms
- Copy of Slide Deck / Presentation Handouts
- Seminar Evaluation
- Agenda



Updates to Ohio Real Estate Tax Law, Underwriting Concerns, and Development Incentives



11:35 a.m. - 12:20 p.m.
CLE .75 hours, General



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Meet the Speakers



Objectives

- Review the recently enacted legislation that alters the rights for local school districts to contest property valuations for real property taxes
- Outline underwriting concerns in the post-COVID economy
- Provide updates on Ohio incentives and discuss best practices to obtain the maximum incentive package

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Ohio Real Estate Tax Law



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House Bill 126

- Effective July 21, 2022
- Changes the manner in which Boards of Education and other recipients of real property tax participate in the assessment process in Ohio

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Pre House Bill 126

- Boards of Education and other recipients of property tax in Ohio could contest any property tax assessment in their tax district for any reason and participate in proceedings initiated by property owners by filing a counter complaint.

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Pre House Bill 126 (cont.)

- A. \geq \$50,000 notice provision
- B. Sales taking place after January 1
 - 1. Assessment date could be used to reassess property
- C. Appeals of decisions of local Boards of Revision could be filed with the Ohio Board of Tax Appeals

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Post House Bill 126

- A. Sales taking place after January 1 cannot be used as a basis for a complaint until the following tax year
 - 1. Example-Sale 12/31/2021 could not serve as a basis for a complaint until the January 1, 2022 valuation date
 - 2. Real Estate taxes paid in arrears in Ohio-Tax Year 2021 real estate taxes paid in calendar year 2022 would not be affected by this sale
 - 3. March 31 filing deadline for assessment complaints; Now complaints cannot be filed until calendar year 2023 for tax year 2022 real estate taxes

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Post House Bill 126 (cont.)

B. Additional limitations on filing:

1. Sale price must exceed current assessment by \$500,000 and,
2. Sale price must exceed current assessment by 10%

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Post House Bill 126 (cont.)

C. Only property owners and tenants have appeal rights from decisions of the County Board of Revision

1. Boards of Education and any other counter complainant at the Board of Revision can participate as a party to an appeal filed by a property owner or tenant
2. Common Pleas Court option as an alternative to the Ohio Board of Tax Appeals
 - a) Question of alternative avenues of appeal

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Post House Bill 126 (cont.)

- D. Direct pay settlements prohibited
 - 1. April 2018 Ohio Attorney General opinion approved direct pay settlements
 - 2. County Auditors Association of Ohio supports prohibition of direct pay settlements

- E. Board of Revision to decide Board of Education complaints within one year or they must be dismissed

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What Will be the Impact of House Bill 126?

- A. Buyers will not get hit with tax increases for time periods when they do not own the property
- B. Fewer increase complaints
 - 1. Based on sales
 - 2. Based on perceived under assessment of the property
 - Mortgages
 - LLC transfers
- C. A greater effort to obtain information at the Board of Revision level
 - Subpoenas
 - Information requests
 - Appraisals

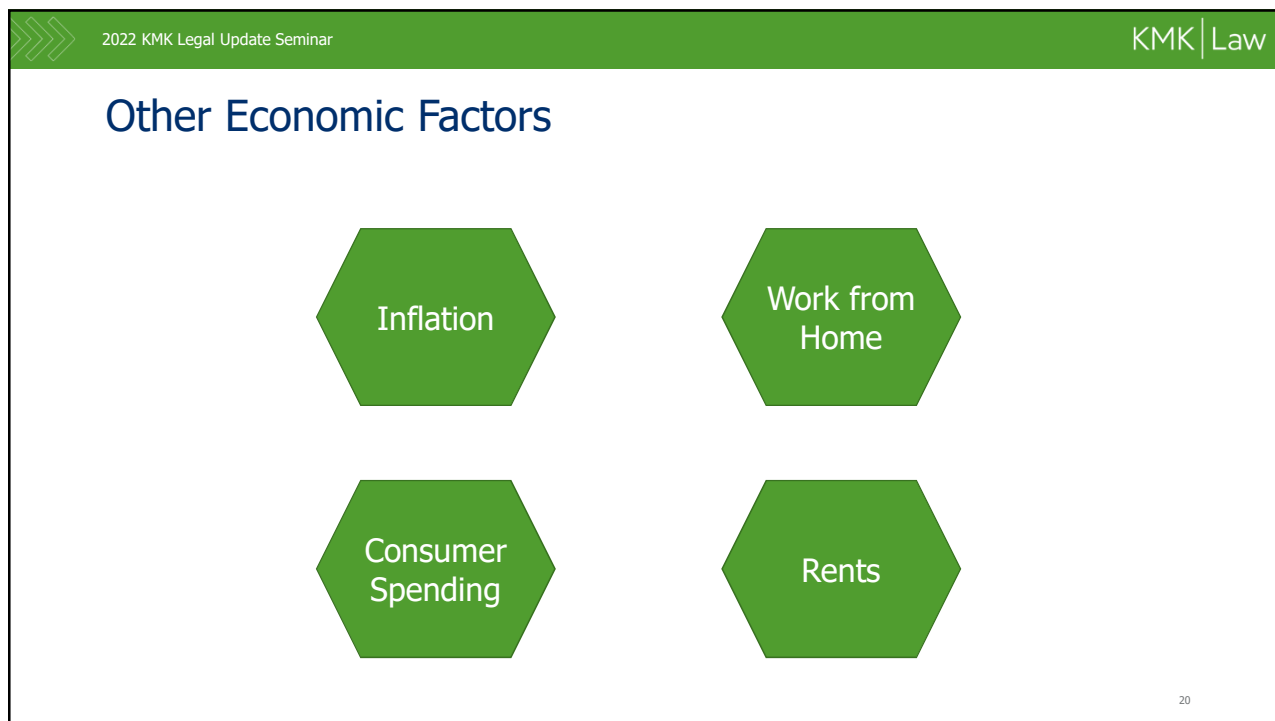
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Underwriting Concerns In the Current Lending Environment



Interest Rates

- Increasing interest rate environment
 - Fed Funds Rate – November 2022 – range of 3.75% to 4%
 - “Hard to see distress when interest rates are zero”
- LIBOR to SOFR
 - LIBOR phasing out in mid-2023
 - Transition to SOFR
 - Daily Simple SOFR Rate – November 29, 2022 – 3.81%
 - Initial borrower concerns largely alleviated



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What Does this Mean for Your Loan?

- Change in Interest Rate between Term Sheet and Closing
- Increasing Costs of Labor and Materials
- Vacancies and Trending Rents
- More Cash Equity or Loan Dollars
- Lower Investor Returns
- Alternative Funding Sources

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Ohio Incentives



Maximize Your Investment

Ohio Competes:

- Ohio's been named the **#6** Best State Business Climate by *Site Selection* Magazine 2022
- The Cincinnati Region tied for **No. 1** in *Site Selection* Magazine's analysis of Economic Development along the Ohio River corridor in 2022

Ohio Incentives:

| <u>Tax Credits:</u> | <u>Grants:</u> | <u>Financing:</u> |
|-------------------------|----------------------|-------------------|
| Job Creation Tax Credit | Fixed Asset Grant | Low Interest Loan |
| Property Tax Abatement | Infrastructure Grant | Public Financing |
| Sales Tax Abatement | Workforce Grant | Forgivable Loan |

Ohio is Competitive, But Financial Incentives Are Not Free

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Maximize Your Investment Cont'd

Competitive, But Not Free:

All programs offered by state and local entities require commitments from the developer / end user. States and jurisdictions provide financial incentives to compete for jobs, payroll and capital investment

Qualifications:

- Creating new jobs and payroll
- Retaining jobs (jobs at risk)
- New construction | physical expansion | renovation
- Revitalization
- Infrastructure improvements

Other Factors Considered:

- Quality jobs
- Competitiveness
- Targeted industries
- Location (Distressed Community)
- Company stability
- Previous assistance
- Developer experience
- Commitment term

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The Machine, The Model

How It Works – The Players:

- External facing and negotiating for state incentives are led by JobsOhio (private non-profit)
- JobsOhio contracts 6 private entities to serve as an extension at a regional level
- JobsOhio operates in partnership with state agencies (ODOD, ODOT, etc.)
- State, regional and local alignment/partnership
- Jurisdictions partner to secure payroll and investment opportunities

Investment Strategy:

- Each project evaluated based on it's own merits
- Take into account size/scope of project
- There is no formula for calculating/estimating expected value (Discretion)
- "But For" – Without incentives the project would not move forward
- Gap incentive support – Targeted state/local incentives
- ROI and break-even strategy



The Incentive Effect



Company: FIS Management Services

Industry: Financial Services

Project Type: Acquisition | Retention

Company Commitment:

- 0 jobs created
- 1,600 retained jobs
- \$196M retained payroll

Incentive Effect:

Total Incentives Secured:

- **140%** of total capital investment

Total Grants Secured:

- **70%** of total capital investment



Company: Paycor, Inc.

Industry: Information Technology

Project Type: Expansion

Company Commitment:

- 1,064 jobs created
- \$76.6M new payroll
- 731 retained jobs

Incentive Effect:

Total Incentives Secured:

- **160%** of total capital investment

Total Grants Secured:

- **10%** of total capital investment



Company: Mercy Health

Industry: Biohealth

Project Type: Expansion

Company Commitment:

- 500 jobs created
- \$50M new payroll
- 1,089 retained jobs

Incentive Effect:

Total Incentives Secured:

- **380%** of total capital investment

Total Grants Secured:

- **50%** of total capital investment

Reduce the cost of doing business.

The Incentive Effect



Company: FIS Management Services, LLC

Industry: Financial Services

Project Type: Acquisition | Retention

Project Scope:

- 0 jobs created
- 1,600 retained jobs

Project Description: FIS headquartered in Jacksonville, FL acquired Worldpay, one of the world's leading global eCommerce and payment technology companies.

Greater Cincinnati lost a Fortune 1,000 headquarters but there was a competitive opportunity to retain a significant presence of Worldpay employees (1,600).

In partnership with **KMKC** the company would end up receiving one of the largest deals in Ohio history to commit to and maintain a baseline presence in Cincinnati.

Exceptional Results:

Programs:

- JobsOhio Economic Development Grant
- Ohio Job Creation Tax Credit

Total Incentives Secured:

- 140% of total capital investment

Total Grants Secured:

- 70% of total capital investment

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Things To Consider

- Every program has unique rules, deadlines, qualifications, and paperwork that are always changing and require someone with specific expertise to manage
- **90%** of companies do not recognize when they are eligible for incentives
- Over **60%** of incentive dollars negotiated are never fully realized by the company
- Annual reporting requirements associated with incentives and public assistance can be cumbersome and last for decades

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Panel Conclusion

- Ohio House Bill 126 has dramatically shifted the tax appeal landscape in Ohio by imposing new limitations and prohibitions on a school board's right to file a tax complaint
- The commercial real estate lending market is facing real headwinds with increased interest rates and increased project costs. Developers and investors face increased challenges in underwriting new projects and investments
- Incentives are available at both the real estate tax and income tax level. Any developer or investor should review the menu of available incentives prior to each new project

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Professionalism in the Courtroom: A view from the Ohio Supreme Court

12:20 p.m. - 1:05 p.m.
CLE .75 hours, APC

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Justice R. Patrick DeWine
The Supreme Court of Ohio



Meet the Speaker

The Supreme Court of Ohio
Commission on Professionalism
Professional Ideals
For Ohio Lawyers and Judges

Attorneys and judges who adhere to and promote the best practices depicted in the Professionalism DOs & DON'Ts will elevate the level of professionalism in the practice of law.

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Do's and Don'ts

PROFESSIONALISM IN THE COURTROOM

To be truly professional when appearing in court, a lawyer must act in a proper manner. Such conduct goes beyond complying with the specific rules of procedure and of evidence promulgated by the Supreme Court of Ohio and with local rules issued by trial courts and individual judges. Proper conduct in the courtroom also includes adhering to common principles of civility and respect when dealing with the judge, court staff, and opposing counsel. The Supreme Court of Ohio Commission on Professionalism has prepared this list of "DOs and DON'Ts," to illustrate a number of principles so that lawyers appearing in Ohio courts will fully understand what is expected of them. In creating this list, the commission does not intend to regulate or to provide additional bases for discipline, but rather to help promote professionalism among Ohio's lawyers.

By following the principles of civility and respect, lawyers will enhance their professionalism, as well as the dignity of courtroom proceedings.

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DO be prepared for your participation in any court conference or proceeding.

DO wear appropriate courtroom attire when appearing in court. If you are a male attorney, always wear a tie.

DO advise your clients on how to dress appropriately for any scheduled court appearance.

DO be on time for all court conferences and proceedings. (The best practice is to arrive at least five minutes in advance of the scheduled time.)

If you are going to be late, do call the courtroom so those who are waiting are properly informed.

DO turn your cell phone and all other electronic devices off or to silent mode before entering a courtroom.

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DO be courteous when addressing the judge and opposing counsel, both in the courtroom and in chambers.

DO begin any argument on the record before the judge or jury, by saying, "May it please the court."

DO stand whenever you address the judge in the courtroom.

DO show all exhibits to opposing counsel before showing the exhibit to a witness.

DO ask the judge's permission before approaching a witness during trial or before publishing an exhibit to the jury during an examination.

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DO speak clearly and enunciate when addressing the judge or a witness.

DO agree to stipulate to facts that are not in dispute if they will not adversely affect your client.

DO respect the private nature of a sidebar conference; avoid making statements or arguments at a level that may be overheard by the jury.

DO inform the judge in advance of any delays in the scheduling of witnesses.

DO treat court personnel with the same respect you would show the judge.

DO be accurate when setting forth pertinent facts and pertinent rules of law.

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DO answer questions from the judge directly and forthrightly.

DO bring to the judge's attention any possible ethics issues as soon as you become aware of them.

DO verify immediately the availability of necessary participants and witnesses after a date for a hearing or trial has been set, so you can promptly notify the judge of any problems.

During final argument, do be circumspect when summarizing testimony that contains profane words.

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DON'T make ad hominem attacks on opposing counsel or be sarcastic in either your oral arguments or written briefs.

DON'T shout when making an objection in a court proceeding.

DON'T make any speaking objections in a jury case except for an explanatory single word or two (e.g., "hearsay," "leading," "no foundation"). **DO** request a side bar conference if you must expound on your objections.

DON'T interrupt opposing counsel or the judge, no matter how strongly you disagree with what is being said.

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DON'T argue with the judge or react negatively after the judge has ruled on an objection or other matter.

DON'T tell the judge that he or she has committed a reversible error.

DON'T tell the judge that another judge has ruled a different way without providing a copy of the other judge's written opinion.

DON'T display anger in the courtroom.

DON'T make facial objections during testimony or during arguments by opposing counsel.

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DON'T bring a beverage to the trial table unless it is in a non-descript glass or cup and only if you determined that the judge does not object to a beverage on the trial table.

DON'T lean or sit on the trial table, jury box, or any other furniture in the courtroom.

DON'T move freely around the courtroom once a proceeding is underway without obtaining permission from the judge.

DON'T celebrate or denounce a verdict as it is delivered, and also advise clients and interested spectators not to do so. **DO** behave civilly with opposing counsel when leaving the courtroom.

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Oral Argument

Your conversation with the Court



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Oral Argument Day

- Treat oral argument like a conversation
- The justices' questions are more important than your script
- Acknowledge weakness
- No attacks on opposing counsel
- It's all about preparation. Know your case—facts and law.

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PROFESSIONALISM

DOs and DON'Ts

LEGAL WRITING

A substantial part of the practice of most lawyers is conducted through the written word. Lawyers communicate with other attorneys, courts, and clients through writing. Writings introduce judges to the facts of a case, state the applicable law, and argue for a desired action or resolution to a legal dispute. The most effective legal writing is well-researched, clearly organized, logically sound, and professional in tone and appearance.

The Supreme Court of Ohio Commission on Professionalism has prepared this list of "DOs and DON'Ts" to guide lawyers in their professional writing. These points relate to many facets of attorney writing. In creating this list, the commission does not intend to regulate or to provide additional bases for discipline, but rather to help promote professionalism among Ohio's lawyers. The list provides general categories of "DOs and DON'Ts" containing specific recommendations on form and content for specific types of writing.

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DO MAINTAIN PROPER FOCUS

- DO** keep your purpose in mind while writing.
- DO** tailor your writing to your primary audience, but be aware that others may read what you have written.

DO PROVIDE A CONSISTENT, COHERENT ARGUMENT

- DO** research the applicable law thoroughly.
- DO** investigate the facts diligently.
- DO** plan and organize your writing.
- DO** make sure that any legal theory you present is consistent with applicable law.
- DO** use persuasive authority.
- DO** state clearly what you are requesting in motions and briefs.

DO PRESENT AN HONEST, ACCURATE POSITION

- DO** include all relevant facts.
- DO** cite the record accurately.
- DO** disclose relevant authority, including adverse controlling authority.
- DO** update all cited authorities and exclude any reversed or overruled case.

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DO ADOPT A CLEAR & PERSUASIVE STYLE

- DO put material facts in context.
- DO write in a professional and dignified manner.
- DO put citations at the end of a sentence.
- DO use pinpoint citations when they would be helpful.

DO PROVIDE APPROPRIATE SIGNPOSTS

- DO consider using headings and summaries.
- DO use transitions between sections that guide the reader from one argument to the next, especially in longer pieces of writing.

DO USE PRECISE ENGLISH GRAMMAR & CITATION FORM

- DO proofread for spelling and grammar.
- DO edit and redraft.
- DO cite cases and authorities accurately.
- DO use Ohio citation form (See Supreme Court of Ohio Writing Manual¹¹).
- DO adhere to the applicable court's technical requirements and rules for submitting documents, such as, for example, any restrictions on fonts, margins, and document length.

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The Brief

Writing your argument effectively

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Brief Writing: Know your audience

- Always start by thinking about whom you are writing for. Think of questions a layperson might have:
 - What would the first question be that my dad/mom would have if I was telling him/her about the case?
- Don't assume the justices know all.
- Justices are generalists; you know the case better than they do.
- Consider different nuances to your arguments for different justices.
 - For example, if you are writing to me, I'm very focused on the text. Other justices may be more interested in legislative history.

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Keep it simple, clear, and concise

- One sitting, two martini rule
- Short sentences
 - Use active verbs
 - Avoid redundancy and useless accuracy
 - Limit unnecessary adjectives and adverbs

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Keep it simple, clear, and concise

- Avoid acronyms, unless they are commonly known (e.g., NCAA)
- Use familiar terms for the parties. Stay away from “Plaintiff,” “Defendant,” “Appellant,” “Appellee,” “Relator,” and “Respondent”
- Instead of referring to a statute by numerals, label it with plain language to help your reader remember. For example, At the time, R.C. 2929.14—the statute that prescribes offenses for felonies (“the felony-sentencing statute”)—authorized a sentence between one and five years for third-degree felonies.

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Example

This medical claim brought by Plaintiff-Appellee John Doe alleges that a hypoxic-ischemic brain injury was sustained by his adult son Johnny Doe surrounding an elective airway intubation for mechanical ventilatory support. This was performed by anesthesiologist Defendant-Appellant Jane Smith, M.D., an anesthesiologist, at Defendant-Appellant Hospital ABC on January 1, 2001.

Useless accuracy

Passive voice

Passive voice

Redundancy

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Rewrite

John Doe alleges that his son Johnny sustained a permanent brain injury because anesthesiologist Dr. Jane Smith failed to properly perform intubation at Hospital ABC on January 1, 2001.

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Help the reader understand

Cite the internet if necessary:

- **Example:** A Texas appellate court cited *Wikipedia* in a 2009 decision, *In re K.E.L.*, No. 09-08-00014-CV, 2008 WL 5671873 (Tex. App. Feb. 26, 2009). Here's footnote 3:

“MySpace is a social networking website with an interactive, user-submitted network of friends, personal profiles, blogs, groups, photos, music, and videos for teenagers and adults internationally.” *Wikipedia, the Free Encyclopedia, MySpace*, at <http://en.wikipedia.org/wiki/MySpace> (last visited Feb. 3, 2009).

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Help the reader understand

Use visual aids:

One of the issues in this case was whether certain markings on the judgment-entry form used by the judge constitute part of the sentence and, thus, were required to be announced in open court in the defendant's presence. *State v. Sullivan*, 2015-Ohio-4845, ¶ 7 (1st Dist.).

HAMILTON COUNTY JUDICIAL CENTER
 JOURNAL ENTRY - COUNTY JUDICIAL CENTER
 LINK: ALLEN/LISA/C

CASE: /14/CRB/33774
 (check if applicable)
 MAGISTRATE'S DECISION

DEFENDANT: SULLIVAN/BRUCE
 CT.LNO: 2543712 TICKET:
 SEC. VIOL: 2919-27 ORCN

CHARGE: VIOLATING A PROTECTION ORDER
 ARREST DATE: 01/09/2015
 JMS NUMBER: 11/20/1990
 SEX: M D.O.B: 11/20/1990
 DEF. COUNSEL: RELEY/LATASHA
 PROS. WIT: RAY/PO

PLEA: NG FINDING: G V.J. CONVICTIONS WIN PREV. 6YRS.

TO THE HONORABLE JUDGE OF THE COURT, GREETING:
 Whereas, the above defendant was arrested and charged with the above section number. Whereas, the above defendant, having been read and convicted of said charge in person, as indicated below. Therefore, we recommend you to receive the following case your honorability. There is no other will have had fully received the terms of the sentence, or otherwise discharged by the course of law.

DAYS: 10 SUSP: 10 CREDIT TIME: _____ STAY: _____ FINES AND DAYS CONCURRENT FURNISH POINT
 FINE: 20 REMIT: _____ SUSP: _____ STAY: _____ CONFINEMENT NOT ELIGIBLE FOR 2 FOR 1
 NO EARLY RELEASE END OF FLEDGELINE

LOCAL COURTS ONLY: _____ RIME: _____ STAY: _____ ANY TREATMENT IF ELIGIBLE NOTIFICATION TO MHC
 COMMUNITY SERVICE IN LIEU OF FINES FURNISH TREATMENT FORWARD JUDICIAL INTERVENTION FOR WOMEN
 LANGUAGE INTERPRETER FEE: _____ OTHER: _____

COMMUNITY CONTROL: 1 PAYMENT: 6 RAY/THRE ✓

DRIVING COMMISSIONS: 1 DRIVING SUSPENSION: _____ DAYS/60 DAYS EFFECTIVE DATE: _____
 FRA COMPLIANCE: _____ FRAIGN COMPLIANCE: _____ VEH. BAN/RECALLATION: _____ DAYS FORFEITURE: YES NO
 & PLATES IMPONDED _____ CREDIT: _____ DAYS HELD _____

DEFENDANT IS GRANTED LIMITED DRIVING PRIVILEGES AS FOLLOWS AFTER MANDATORY SUSPENSION EFFECTIVE: _____
 OCCUPATIONAL
 VOCATIONAL
 BUSINESS
 COURT TREATMENT
 MEDICAL
 RESTRICTED LICENSE PLATES
 NON-PROBATION
 R.L. EXAMINATION

COMMUNITY CONTROL SANCTIONS:
no contact w/ PW

DATE: 2-12-15 JUDGE/MAGISTRATE: _____
 WARNING: A PARTY SHALL NOT ASK AN ERROR ON APPEAL THE COURT'S ADOPTION OF A MAGISTRATE'S FACTUAL FINDING OR LEGAL CONCLUSION UNLESS THE PARTY HAS TIMELY AND SPECIFICALLY OBJECTED THERETO AS REQUIRED BY RULE 19.
 CLERK OF COURTS
 DEPUTY CLERK

Other visual aids

- When comparing statutory provisions

| R.C. 4549.02(A)(1) | R.C. 4549.02(A)(2) |
|---|---|
| <p>*** The operator shall remain at the scene of the accident or collision <u>until the operator has given the operator's name and address</u> *** together with the registered number of that motor vehicle, to all of the following:</p> <p>(a) Any person injured in the accident or collision;</p> <p>(b) The operator, occupant, owner, or attendant of any motor vehicle damaged in the accident or collision;</p> <p>(c) The police officer at the scene of the accident or collision.</p> | <p>In the event an injured person is unable to comprehend and record the information required to be given under division (A)(1) of this section, the other operator involved in the accident or collision shall notify the nearest police authority concerning the location of the accident or collision, and the operator's name, address, and the registered number of the motor vehicle the operator was operating. The operator shall remain at the scene of the accident or collision until a police officer arrives ***.</p> |

Help the reader understand

Use heading wisely:

- Headings help the reader organize your narrative and understand your key points.
- There is little to be gained by: “Argument” or “Facts.” Instead, try: “Smith organizes conspiracy to limit price hikes.”
- Use to help the reader understand where you are headed.
- Try to keep parallel.

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Don't make it personal

- No attacks on opposing counsel.
- No attacks on the trial court.
 - If the trial court didn't do its job, explain how it reached the wrong result. But avoid attacks, we can read the record.
- Avoid using phrases like it “travesty of justice” or “an insult to intelligence.”
 - Very few arguments really merit being called “disingenuous” or “feckless.”
- Use exclamation points sparsely; don't be chicken little.
- Avoid naked appeals to sympathy.

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Tell the court why it should decide for you

- What is the rule you want the court to write? What impact will that rule have in other cases?
- What is the policy underlying the precedents you have cited?
- Why should the court rely on the cases in your brief?

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Writing the introduction

- Often the most difficult part to write.
- Strive to get the reader's attention in a way that makes him/her want to keep reading.
- At the same time, try to write something that flags immediately what this case is about and what the issue is that the court need decide.

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Include the standard of review

- Frame your argument in terms of the standard of review.
 - Weave the standard of review into your argument.
 - People tend to gloss over standalone sections.
 - Don't just serve up boilerplate paragraphs.

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Editing

“What I tell my law clerks is that we write these so that they are accessible to regular people. That doesn't mean that there's no law in it. But there are simple ways to put important things in language that's accessible. As I say to them, the beauty, the genius is not to write a 5 cent idea in a ten dollar sentence. It's to put a ten dollar idea in a 5 cent sentence.”

— Justice Clarence Thomas

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Editing



- Primary goal is getting rid of unnecessary things.
- Tightly written briefs keep the reader's attention focused; loosely written briefs cause the reader to skim.
- Try printing out a hard copy at least once.

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Questions?

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Contact me

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[@patdewine](https://twitter.com/patdewine)



[@JusticePatDeWine](https://www.facebook.com/JusticePatDeWine)

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Sports League Team, Venue, Event, and Player Sponsorship Agreements



1:15 p.m. - 1:45 p.m.
CLE .50 hours, General

 KMK | Law**Nicholas L. Simon**

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Associate

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Meet the Speakers



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Scope of Entitlements / Bundle of Rights

- Sports sponsorships are a “bundle of rights” owned by multiple parties
- Which party owns which rights depends on the sport, league, stadium and other factors
- First question - what type of sponsorship agreement do we have?
- What assets are we getting?
- And what assets are we not getting?
- Entitlements = Rights = Assets = Benefits

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Potential Contracting Parties

- **League or Conference**
 - NFL, NBA, MLB, MLS, NHL, NASCAR, NCAA, Big 10, etc.
- **Venue**
 - TQL Stadium, Mercedes-Benz Stadium, Madison Square Garden, etc.
- **Team**
 - Cincinnati Reds, University of Cincinnati (or Learfield / JMI), etc.
- **Event Organizer or Operator**
 - Cincinnati Music Fest or The Orange Bowl
- **Player** - Joe Burrow or Joey Votto
- **Other** – FIFA, UEFA, U.S. Soccer, USA Gymnastics, etc.

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League or Conference Assets

- League Designation / Use of League Marks
 - Microsoft: "Official Tablet & Laptop Sponsor of the NFL"
- Use of Team Marks collectively
- Exposure, activation, and hospitality at League/Conference Events, such as:
 - All-Star Games
 - Post-Season / Championship Game (maybe)
 - College Drafts

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League or Conference Assets (cont'd)

- League-Wide "Team" Sponsorship Assets
 - Depends on League
 - Jersey / Apparel Manufacturer (Nike / Adidas)
 - Sideline Rights (Gatorade, Microsoft Surface / Apple iPads)
 - Other – Court/Rink Placements, Home Plate Signage, LED Boards, etc.
 - All Games vs. National TV Games
- Some League sponsors will pre-negotiate Team sponsorship terms / offers to supplement League rights

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Venue Assets

- Most relevant for venues with multiple tenants or which host special events
 - Madison Square Garden, AT&T Stadium, or SoFi Stadium
 - 1995 litigation between Jerry Jones / Cowboys / Texas Stadium and NFL over "Texas Stadium" sponsorships that conflicted with exclusive NFL sponsorships
- Also relevant for Stadium financing purposes
- Stadium Designation / Use of Stadium Marks
 - Official Soft Drink of Allegiant Stadium

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Venue Assets (cont'd)

- Naming Rights
 - Entire Arena or Gate / Club
- "Permanent" Stadium Signage
 - Subject to major event and exclusivity exceptions
- Food and Beverage Rights (including pouring rights)
- Stadium Infrastructure – IT / 5G / DAS
- Ticketing (Ticketmaster, SeatGeek, etc.)
 - Can also be a Team asset
- Often linked to team sponsorship, but not always

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Team Assets

- Team Designation / Use of Team Marks
 - Often limited to a local marketing territory
- Branding on team apparel (jersey, helmet, practice gear, etc.)
- Signage at Team Home Games (scoreboard, LED, etc.)
- Media Assets (maybe)
 - Reds games on Bally Sports vs. FOX
 - Bengals Preseason vs. Regular Season / Playoffs
- Hospitality (tickets or VIP events)

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Team Assets (cont'd)

- Digital Assets
 - Website Exposure
 - Social Media
 - Email
- Activation at Team Home Games / Events
- Group Player Likeness
- Player / Coach / Mascot Appearances

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Event Organizer or Operator Assets

- Event Designation or Name / Use of Event Marks
 - Cincinnati Music Festival presented by P&G
 - Capital One Orange Bowl
 - Official Banking Partner of Maui Invitational
- Signage at Event
- Activation at Event
- Media assets (maybe)
- Hospitality

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Player Assets

- Player Name Image and Likeness
 - Distinct from Team / League IP
- Player Use of Product / Product Placement
 - Beware of League / Team rights
 - Arena Entrances
- Player Social Media
- Player Appearances
 - Media / Promotional
 - Meet and Greet / VIP Events

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Important Questions to Ask Up Front

- How does our sponsorship interact with other sponsors?
- How does our company plan to market the sponsorship?
 - Do we have sufficient assets?
 - Do we need assets or rights from another party?

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Commercial Category

- Important for two reasons:
 - What commercial category can the sponsor “activate” its rights
 - Scope of exclusivity (if any)
- Becoming increasingly complex as companies / categories blur lines:
 - Amazon – technology, e-commerce, consumer electronics, grocer, cloud computing, audio books, smart doorbells, media / entertainment, etc.
 - Apple – consumer electronics, watches, finance / fin tech, health, software, music, media/entertainment, etc.
 - Grocery – Kroger, Safeway, Wal-Mart, Target, Whole Foods (Amazon), CVS?, Hello Fresh?
 - Financial Services – See Empower Field Naming Rights definition (public document)

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Exclusivity

- Exclusive vs. Non-Exclusive
- Exclusive Designation vs. Exclusive Rights
 - “The Official Pizza of FC Cincinnati”
 - Company is the exclusive sponsor of Team in the pizza category
- Scope of Exclusivity
 - Product purchases? Stadium product sales? Sponsorship? Use of Team Marks? Private events / suite use?
 - Broad exclusivity vs. exclusivity for specific competitors
- Exceptions to Exclusivity
 - League / Team / Player Sponsors
 - Major Events / Third Party Events
 - Other (Product purchases, TV commercials, No marks sponsorships)

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Term / Termination / ROFR

- For Convenience – rare
- Breach – materiality + cure
- Bankruptcy - see FTX
- Morals Termination – see handout
 - Common in Player Sponsorship Agreements
 - Scope / Language
 - Subjective standard
 - Who can trigger - Owners? Executives? Coaches? Players? All Employees?
 - Notice + Cure?
 - Mutual morals – Team / League Termination

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Term / Termination / ROFR

- League / Major Sponsorship with Competitor
- Performance Based - rare
- ROFR / Back End Rights
 - Normally reserved for high value partnerships
 - Can substantially limit Team/League's ability to secure replacement partnership
 - Why are they needed?
 - Can be important for sponsor to "protect" investment
 - Timing and details are important
 - ROFO vs. ROFR

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IP Rights and Approvals

- Teams / Leagues generally retain rights to approve all IP use
- Use of marks normally limited to specific commercial category
- Marketing Use vs. Product Licensing – different rights
- Social Media Issues
- Quality Standards / Exclusive Suppliers
- Ownership of Marketing Content Excluding Team / League Marks
 - Bud Bowl
 - AT&T Lily / March Madness

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Unavailable Benefits / Force Majeure

- Common Term – not a breach, but triggers a “make good”
- Thresholds to become Unavailable Benefit?
 - Change in League Rules?
 - Granted to Third Party?
 - Increase Cost / Difficulty?
- Make Good vs. Refund?
- Force Majeure
 - No fans / reduced capacity?

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Conclusion

- Make sure your business team understands the rights and limitations of the agreement
- Short Term vs. Long Term Agreement?
 - Legal provisions are significantly more important in long term agreement
- Be specific when possible
- Remember these agreements are more like “partnerships” than other vendor / supplier agreements

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Ohio Case Law Update - 2022

1:45 p.m. - 2:30 p.m.
CLE 0.75 hours, APC/Ethics

KMK | Law



Justice Patrick F. Fischer
The Supreme Court of Ohio



Meet the Speaker

KMK | Law

**A Glimpse Behind the Curtain: The Inner
Workings of an Appeal – From Briefing
to Oral Argument to Mandate**



2:30 p.m. - 3:00 p.m.
CLE 0.50 hours, General

**Paul R. Kerridge**

Of Counsel

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Meet the Speaker



Preliminary Stages

- Final judgment in the trial court case
- File a Notice of Appeal
- File the relevant parts of the record with the Court of Appeals
 - These preliminary stages are often reviewed by the Clerk of Courts and/or staff attorneys
- Motions Practice
 - Ruled upon by Presiding Judge in state court
 - Ruled upon by a Panel in federal court

Writing To Your Audience – Part 1

- In most chambers, the first person to look at your brief is a clerk
- The clerk will then prepare a bench brief for the Judge(s)
- Most judges will read the briefs, but often after reading the clerk's bench brief

So, who are the clerks?

Writing To Your Audience – Part 2

- Federal appellate judges generally have four clerks, only one of which can be a career clerk. The remaining clerks are term clerks serving a one-year or two-year term
- Age of a term clerk?
- Years of practice before becoming a term clerk?

Writing an Effective Brief

- Strategy:
 1. Only raise issues that change the outcome
 2. Limit the number of issues
 3. The easier you make it for the court to rule in your favor, the more likely it is to happen
- For a lengthier discussion regarding effective brief writing, see the article in your materials:
[Persuading Quickly: Tips for Writing an Effective Appellate Brief](#)

Oral Argument

- Will oral argument change the result in the case?
- Will oral argument change the scope of the decision?

Oral Argument - Tactics

- Make all of your key points
- Answer the judge's questions – including hypotheticals
- The judge's questions give clues to undecided issues or internal disagreements
- Little concessions earn significant credibility

Oral Argument – In-depth analysis

- For an in-depth analysis of how oral argument affects outcomes, see the article in materials:
- The Case Against Oral Argument: The Effects of Confirmation Bias on the Outcome of Selected Cases in the Seventh Circuit Court of Appeals
 - Section II. The Role and Function of Oral Argument in Judicial Decision-Making

Which Discretionary Appeals are Accepted for Review

- When there is a conflict
- When the issue comes up often and/or is far-reaching
- The lower court erred is not a primary reason to accept review
 - but it is an important secondary reason

Takeaways

- Write to your audience – but know your audience is not just the judge
- Explain why you win – but also explain why ruling in your favor is a simple solution to the case
- Even if you lose the battle, you might be able to win the war

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Questions?

KMK | Law

**What Does it Mean to Have a
“Professional Identity” as a Lawyer?**

 3:10 p.m. - 4:10 p.m.
CLE 1.0 hours, APC/Ethics

KMK | Law



Dean Mary J. Davis
University of Kentucky
J. David Rosenberg College of Law



Rosenberg
College of Law



Meet the Speaker

ABA Standard 303

Chapter 3: Program of legal education

Standard 303: Curriculum

- (b) a law school shall provide substantial opportunities to students for ...
- (3) the development of a professional identity.

- (c) a law school shall provide education to law students on bias, cross-cultural competency, and racism;
 - (1) at the start of the program of legal education, and
 - (2) at least once again before graduation



ABA GUIDANCE

NEW INTERPRETATIONS:

303-5: Professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society. The development of a professional identity should involve an intentional exploration of

the values,

guiding principles, and

well-being practices

considered foundational to successful legal practice.



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ABA GUIDANCE

NEW INTERPRETATIONS:

303-6: The importance of cross-cultural competence to professionally responsible representation and the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law should be among the values and responsibilities of the legal profession to which students are introduced.

303-7 Standard 303(c) may be satisfied by:

- (1) Orientation sessions for incoming students on bias, cross-cultural competency, and racism;
- (2) Guest lectures or trainings by experts in the areas of bias, cross-cultural competency, and racism;
- (3) Courses on racism and bias in the law; or
- (4) Other educational experiences that train students in cross-cultural competency. While law schools need not add a required upper-division course to satisfy this requirement, law schools must demonstrate that all law students are required to participate in a substantial activity designed to reinforce the skill of cultural competency and their obligation as future lawyers to work to eliminate racism in the legal profession.



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The Four Components of a Lawyer's Professional Identity



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Neil W. Hamilton and Louis D. Billionis, *Law Student Professional Development and Formation: Bridging Law School, Student, and Employer* (Cambridge University Press 2022)

A law school should help each student to understand, internalize, and demonstrate

1. A deep responsibility and care orientation to others, especially the client
2. Ownership of continuous professional development toward excellence at the major competencies that clients, employers, and the legal system need
3. Well-being practices, and
4. Client-centered relational skills, problem-solving, and good judgment that ground each student's responsibility to care for the client.



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Do you agree?

What is missing from this definition?

What comes to mind when you consider your own professional identity?

How was it formed?

Who helped you form it?

How should law schools provide training for professional identity formation?



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Bias, Cross-cultural Competency, and Racism

“The goal of striving for cultural competence is to remove barriers to access as cultural differences can obstruct communication and trust between a lawyer and her client. Barriers to access occur when misunderstandings or miscommunication prevent successful representation. With increased cross-cultural competency, lawyers have a better ability to build trusting relationships and communicate with their clients. When lawyers and clients come from different backgrounds and cultural viewpoints, they often have a more difficult time creating a trusting lawyer-client relationship in which both parties feel comfortable sharing honest and accurate information.”

S. Patel, *Cultural Competency Training: Preparing Law Students for Practice in our Multicultural World*,

<https://www.uclalawreview.org/cultural-competency-training-preparing-law-students-for-practice-in-our-multicultural-world-2/>



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How Law Schools Respond

Existing opportunities include:

- Orientation discussions
- First-year courses introduce issues in doctrinal discussion
 - Examples from Torts
- Professional responsibility
- Law and Inequality Course
- Experiential courses and clinics

Practicing Lawyers Respond:

- What's missing?
- Other models of professional development formation



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Audience Responses and Questions

What is missing in professional identity formation and cross-cultural bias/racism education?

What practices are you using to continue professional identity formation?

Other ideas?



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Thank you.



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Preparing for Compliance with Corporate Beneficial Ownership Reporting: The Corporate Transparency Act



4:10 p.m. - 4:25 p.m.
CLE .25 hours, General

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Meet the Speaker



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The Corporate Transparency Act

- Requires certain entities to disclose identifying and beneficial ownership information to the U.S. federal government
- January 1, 2024 with a one-year grace period for existing entities
- Entities created on or after January 1, 2024 will have 30 days to file their initial reports

112

Who Must Report?

- Corporations, limited liability companies, or entities created by the filing of a document with a secretary of state
- Exempt companies - public companies, majority-owned subsidiaries thereof, banks and credit unions, tax-exempt entities, broker-dealers, "large operating companies"
- Certain inactive entities

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Whose Information Must be Disclosed?

- Beneficial Owners
 - Ownership prong
 - "Substantial control" prong
 - Must disclose all individuals with "substantial control" and at least one beneficial owner must be disclosed who has "substantial control" regardless of whether they satisfy the ownership prong
- Company Applicants
 - Those responsible for filing/creating the entity

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What Information Must be Disclosed?

- Companies
 - Full legal name; principal place of business; jurisdiction of formation; and taxpayer identification number

- Beneficial Owners/Applicants
 - Full legal name; date of birth; residential address; unique identifying number; and image of the document showing the unique identifying number

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Penalties

- Civil and criminal penalties

- Up to \$500 a day and a criminal penalty of up to \$10,000 in fines and/or up to 2 years imprisonment

- Individual liability

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What You Need to Do Now

- Identify the relevant timeframe within which your organization must comply
- Compile entity lists and any “reporting companies” that will not be exempt
- Compile required beneficial ownership information
- Consider internal processes for future compliance

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Top Cases Every Attorney Should Know This Year



4:25 p.m. - 4:55 p.m.
CLE .50 hours, General



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Meet the Speaker



1. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. April 8, 2022), cert. denied (Nov. 14, 2022).

- Class action – Bonus case from last year.
- Panel Decision: 993 F.3d 744 (reversing district court certification of three subclasses).
- *En Banc* Decision: 31 F.4th 651 (reversing panel; affirming district court certification of all three subclasses).

1. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. April 8, 2022), *cert. denied* (Nov. 14, 2022).

- Cert. petition:
 - Whether, or in what circumstances, the presence of uninjured class members precludes class certification.
 - *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016).
 - Whether, or in what circumstances, plaintiffs can use representative evidence.
 - *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619 (D.C. Cir. 2019).

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1. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. April 8, 2022), *cert. denied* (Nov. 14, 2022).

- Preponderance of evidence standard applies at class certification.
- “In carrying the burden of proving facts necessary for certifying a class under Rule 23(b)(3), **plaintiffs may use any admissible evidence.** Plaintiffs frequently offer expert evidence, including statistical evidence or class-wide averages, to prove that they meet the prerequisites of Rule 23(b)(3). Where, as here, a defendant did not raise a *Daubert* challenge to the expert evidence before the district court, the defendant forfeits the ability to argue on appeal that the evidence was inadmissible, but may still argue that the evidence is not capable of answering a common question on a class-wide basis.”

122

1. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. April 8, 2022), cert. denied (Nov. 14, 2022).

- “[T]o prove there is a common question of law or fact that relates to a central issue in an antitrust class action, plaintiffs must establish that ‘essential elements of the cause of action’, such as the existence of an antitrust violation or antitrust impact, are **capable of being established through a common body of evidence, applicable to the whole case.**”
- “When individualized questions relate to the injury status of class members, Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters would predominate over common questions..... [W]e reject the dissent’s argument that Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members.”

123

1. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. April 8, 2022), cert. denied (Nov. 14, 2022).

- “To the extent that the [Defendants] argue that pooled regression models involve improper ‘averaging assumptions’ and therefore are inherently unreliable when used to analyze complex markets, we disagree.”
- “It is not implausible to conclude that a conspiracy could have a class-wide impact, even when the market involves diversity in products, marketing, and prices, especially where, as here, there is evidence that the conspiracy artificially inflated the baseline for price negotiations.”
- “A lack of persuasiveness is not fatal at certification.”

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2. *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890 (3d Cir. June 24, 2022).

- Class action.
- The district court certified a class; the Third Circuit reversed on numerosity and commonality.
- Plaintiffs sought certification of a Rule 23(b)(2) class: "All persons with qualified mobility disabilities who have attempted, or will attempt, to access the interior of any store owned or operated by [Ollie's] within the United States and have, or will have, experienced access barriers in interior paths of travel."

125

2. *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890 (3d Cir. June 24, 2022).

- Numerosity – Joinder impractical.
 - Census data of people with disabilities for each store zip code.
 - 12 email complaints over three years.
 - Declaration from witness observing 16 persons over 7 days at 2 stores.
- "In recent opinions, we have given the numerosity requirement real teeth. When plaintiffs cannot directly identify class members, they must show sufficient circumstantial evidence specific to the products, problems, parties, and geographic areas actually covered by the class definition to allow a district court to make a factual finding. Only then may the court rely on common sense to forgo precise calculations and exact numbers. And where a putative class is some subset of a larger pool, the trial court may not infer numerosity from the number in the larger pool alone."

126

2. *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890 (3d Cir. June 24, 2022).

- Commonality – District court abused its discretion in finding commonality for two reasons:
 - District court misapplied relevant standards for geographically overbroad class (no evidence of consistent national policies).
 - District court's use of terms like "common barriers" does not give rise to common injury (no evidence of common barriers, fixed or movable).
- Concurring Opinion – Court should hold that Federal Rules of Evidence apply at class certification stage.

127

2. *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890 (3d Cir. June 24, 2022).

- BONUS CASE – *Bowerman v. Field Asset Services, Inc.*, 39 F.4th 62 (9th Cir. July 5, 2022) (reversing district court's class certification order based on individualized injury and damages issues).
- BONUS CASE – *Tarrify Properties, LLC v. Cuyahoga County*, 37 F.4th 1101 (6th Cir. June 14, 2022) (affirming denial of putative class of owners of abandoned properties; common questions did not predominate).

128

3. National Assoc. of Realtors, et al., v. PLS.COM LLC, S. Ct. Dkt. No. 22-289 (Pet. filed Sept. 23, 2022).

- Antitrust.
- “This case concerns Petitioners’ well-established multiple listing services (“MLS”) platforms that facilitate home real estate sales nationwide – a multi-trillion-dollar industry responsible for 17 percent of the nation’s GDP.”
- 32 F.4th 824 (9th Cir. April 26, 2022) (reversing district court’s opinion granting Defendants’ motions to dismiss).

129

3. National Assoc. of Realtors, et al., v. PLS.COM LLC, S. Ct. Dkt. No. 22-289 (Pet. filed Sept. 23, 2022).

- “The Ninth Circuit flouted *Amex* (138 S. Ct. 2274 (2018)), creating confusion.”
- “The Ninth Circuit upended established law, including *Illinois Brick* (431 U.S. 720 (1977)) and *Brunswick* (429 U.S. 477 (1977)), by inviting competitors and co-conspirators to bring antitrust suits.”

130

4. *Jack Daniel's Properties, LLC v. VIP Products LLC, S.* Ct. Dkt No. 22-148 (cert. granted Nov. 21, 2022).

- Intellectual property.
- “Whether humorous use of another’s trademark as one’s own on a commercial product is subject to the Lanham Act’s traditional likelihood-of-confusion analysis, or instead receives heightened First Amendment protection from trademark-infringement claims.”
- Whether humorous use is “noncommercial,” thus barring a claim for dilution by tarnishment as a matter of law.

131

5. *Rogers v. BNSF Railway Co., Case No. 1:19-cv-03083* (N.D. III. Oct. 12, 2022).

- Data privacy and cybersecurity.
- Alleged fingerprinting without permission.
- Vicarious liability for actions of third party.

132

5. Rogers v. BNSF Railway Co., Case No. 1:19-cv-03083 (N.D. III. Oct. 12, 2022).

- Jury verdict for class in first case under Illinois' biometric privacy law.
- Jury concluded that there were 45,600 reckless or intentional violations (per person, not per scan).
- October 12, 2022 Judgment for \$228,000,000 against BNSF Railway Co. (\$1,000-\$5,000 in statutory damages per claim).
- October 21, 2022 Plaintiff's Proposal for Distribution of Judgment.
- November 9, 2022 BNSF Railway Co.'s Renewed Motion for Judgment as a matter of law and motion for a New Trial or to Alter or Amend Judgment.

133

6. In re Kronos Customer Data Sec. Breach Litig., 2022 U.S. Dist. Lexis 139325 (JPML Aug. 3, 2022).

- Data privacy, cybersecurity, and lots of other stuff.
- Kronos ransomware attack.
- Kronos is one of the largest human resources companies that handles payroll for a number of customers in the private and public sectors.

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6. In re Kronos Customer Data Sec. Breach Litig., 2022 U.S. Dist. Lexis 139325 (JPML Aug. 3, 2022).

- JPML decided not to consolidate multiple class action complaints filed in different jurisdictions.
- Host of legal issues:
 - Cybersecurity planning and timely notice
 - Vendor Liability
 - Who is liable under FLSA when you fail to make payroll? (And other statutory claims)?
 - Contractual waivers, indemnification, etc.

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7. In re Blackbaud, Inc. Customer Data Breach Litig., 2022 U.S. Dist. Lexis 114984 (D.S.C. June 28, 2022).

- Cybersecurity and civil procedure/choice of law.
- 2020 ransomware attack against Blackbaud.
- Choice of law factors:
 - Blackbaud is a South Carolina company.
 - Plaintiffs are in states around the country.
 - Blackbaud servers are located in multiple states.
 - Data from different plaintiffs is located on different servers.

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7. *In re Blackbaud, Inc. Customer Data Breach Litig.*, 2022 U.S. Dist. Lexis 114984 (D.S.C. June 28, 2022).

- The district court determined that the tort occurs where the server with plaintiffs' data was stored (Massachusetts).
- South Carolina choice of law: *lex loci delicti* analysis of the First Restatement of Conflict of Laws.
- "The cybercriminals intruded upon the information space by breaching the data servers located in Massachusetts..... The court finds that the last act necessary in which Blackbaud could potentially be liable for the common law claims of negligence, negligence per se, and invasion of privacy occurred in the state in which the servers were located."

137

7. *In re Blackbaud, Inc. Customer Data Breach Litig.*, 2022 U.S. Dist. Lexis 114984 (D.S.C. June 28, 2022).

- BONUS CASE – *In re Morgan Stanley Data Sec. Litig.*, 2022 U.S. Dist. Lexis 142743 (S.D.N.Y. Aug. 5, 2022) (\$60 million class action settlement following \$60 million OCC fine; case involved legacy equipment that was decommissioned by not wiped clean; equipment sold with unencrypted PII).
- BONUS CASE – *Clemens v. Execupharm, Inc.* 2022 U.S. App. Lexis 24808 (3d Cir. Sept. 3, 2022) (Article III standing in data breach case post-*Spokeo* and post-*Transunion*; dismissal reversed).

138

8. *Rose v. Target Stores*, 2022 U.S. Dist. Lexis 55357 (W.D. Tenn. Mar. 28, 2022).

- eDiscovery and adverse inferences (excluding reference to allegations at trial).
- “The Sixth Circuit has adopted the Second Circuit’s three-prong test in this regard.... A party seeking an adverse inference instruction based on the destruction of evidence must establish: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.” *Beaven v. United States Dept. of Justice*, 622 F.3d 540 (6th Cir. 2010).

139

9. *Fast v. GoDaddy.com*, 2022 U.S. Dist. Lexis 55591 (D. Ariz., Mar. 28, 2022).

- eDiscovery and Rule 37(e).
- Duty to preserve Facebook posts; Facebook Messenger messages; contents of iPhone; contents of email account; and Telegram Messenger messages.
- “This rule establishes three prerequisites to sanctions: the ESI should have been preserved in the anticipation or conduct of litigation, it is lost through a failure to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery.”
- Two levels of sanctions depending on prejudice and intent.

140

9. *Fast v. GoDaddy.com*, 2022 U.S. Dist. Lexis 55591 (D. Ariz., Mar. 28, 2022).

- BONUS CASE – *Owens v. Propes*, 2022 U.S. Dist. Lexis 67956 (M.D. Ga. April 13, 2022) (great Apple watch case; no violation of Stored Communications Act or Fourth Amendment; “Individuals have a legitimate expectation of privacy in the contents of their own personal electronic devices, such as cellphones. But a person does not have a legitimate expectation of privacy in information he voluntarily turns over to third parties.”).
- BONUS CASE – *Bartis v. Biomet, Inc.*, 2021 U.S. Dist. Lexis 97376 (E.D. Mo., May 24, 2021) (great Fitbit case; data from Fitbit and any other wearable device or other fitness tracker used by plaintiff was relevant to causation and damages in tort case).

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10. ???

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Contact with questions

2022 KMK Legal Update Seminar

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You're Invited

Happy Hour

Immediately Following the KMK Legal Update

5:00 - 6:00 p.m.

Registration Area Outside Pavillion Room

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