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

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

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

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

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

the sources of law

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

– Henry Clay

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

The law is really not as mysterious as some people perceive, and it can be broken down into four classifications:

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

Constitutional Law

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

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

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

The Ohio Constitution

The Ohio Constitution is the supreme law of the state and is like the U.S. Constitution in many respects. It establishes the government of Ohio and provides for legislative, executive and judicial branches; spells out the powers of state government; and lists fundamental individual rights. The Ohio Constitution, however, addresses more issues than the U.S. Constitution. For example, it establishes the right of referendum, whereby the people can adopt and repeal laws by direct vote; contains detailed provisions for
financing public works and various state programs; and establishes the organization and operation of local government. Still, the Ohio Constitution is subordinate to the U.S. Constitution. Thus, it would not be possible, for example, to amend the Ohio Constitution to require criminal defendants to testify at their trials, because the Fifth Amendment to the U.S. Constitution specifically states that no person shall be compelled to testify against himself or herself.

Statutory Law

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

Federal laws are compiled in the United States Code and deal with subjects such as the armed forces, bankruptcy, patent law and interstate commerce. State statutes are compiled in the Ohio Revised Code, and individual cities and villages maintain a code of municipal ordinances.

Federal Statutes

Federal laws are enacted by the Congress and affect the entire country. They are compiled in the United States Code, which, like the Ohio Revised Code, is arranged according to subject matter. Under the U.S. Constitution, only the U.S. Congress may deal with certain subjects, such as the armed forces, bankruptcy, patent law and interstate commerce. In other areas, federal law might govern some parts of an activity and state law might govern other parts. Sometimes both the state and federal government have similar laws covering the same subject. Usually, state law governs a particular activity within the state, and federal law governs the same activity in interstate and foreign commerce. For example, Ohio handles how firearms, explosives and drugs are bought, sold and controlled within the state, while federal law steps in to handle how firearms, explosives and drugs are bought, sold and controlled in interstate and foreign commerce.

In some areas, states may create laws only so long as they fit within a federal outline of law. For example, the U.S. Constitution gives citizens the right to bear arms. So long as they do not exceed the limits of federal law, states are permitted to enact statutes that place certain limitations on that right to bear arms, such as those that prohibit carrying concealed weapons. Today, the media informs us of the tension between those who feel states should be able to regulate guns, and those who believe the federal system prohibits states from doing so. As this section is being written, that debate has not reached a conclusion, since the courts have not yet ruled on the extent to which federal law prohibits a legislative body—state or federal—from regulating guns.

State Statutes

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

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

- the organization and operation of state and local governments
- agriculture
- financial institutions
- commercial transactions
- natural resources
- business organizations
- courts and procedures
- criminal law and procedure
- family law
- education
- elections
- health and safety
- insurance
Municipal Ordinances

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

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

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

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

Administrative Law

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

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

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

Adoption and Effect of Rules

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

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

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

The adoption of administrative rules in Ohio involves a detailed set of procedures, which include multiple public hearings. Once adopted, administrative rules carry the same force of law as statutes and can be enforced by the courts. Violating an administrative regulation may be a crime if the corresponding statute or ordinance says it is a crime and creates a penalty. If you fail to buy a hunting license, for example, you may be found guilty of a fourth degree misdemeanor.

Because agencies don’t have full legislative power, they cannot create new criminal classifications and criminal penalties. Limiting the power of the bureaucracy keeps the law-making functions of the state in the hands of the legislature, which is the intent of the Ohio Constitution.

Common Law

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

Case Law as Common Law

The common law is believed to have originated in England following the Norman Conquest (1066) and was brought to North America by English colonists, along with numerous English statutes. It owes its present vitality to the custom, begun in the 17th century, of recording judicial proceedings and decisions, as well as the principles and reasoning behind them. When a court decides a case and records its decision in a written opinion, that opinion, or case, becomes a precedent. That is, the principles on which the case was decided may be used to decide future cases with similar factual situations.

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

The common law provides a method called the “synthesis of decisions,” whereby the principle of a case can be applied to different fact patterns. This method involves the careful formulation of principles for general application, coupled with the extension of those principles through logic to meet new fact patterns.

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

Scope of the Common Law in Ohio

Many major divisions of Ohio law are governed almost entirely, or in significant respects, by the common law. One important subject governed almost entirely by common law is torts. Torts is the division of the law dealing with civil remedies for injuries or damages caused by negligence, or other wrongful acts or omissions. For example, most of the law governing the question of liability for injuries suffered in automobile accidents is based on the common law of torts.

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

The Importance of Common Law

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

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

- The U.S. and Ohio constitutions outline the powers given to national and state government, respectively. When there is a conflict between the two, the U.S. Constitution takes precedence.
- The law is divided into constitutional law, statutory law, administrative law and common law.
- State law is made up of statutes created by the Ohio General Assembly. Local laws are ordinances adopted by incorporated villages and cities.
- Administrative law establishes governmental agencies with the authority to regulate activities and adopt rules.
- Common law has evolved over time and continues to do so. It unifies the gaps between constitutional, statutory and administrative law, while providing the law with essential flexibility to adapt to societal changes.

Web Links:

U.S. Constitution:

Ohio Constitution:
http://www.legislature.state.oh.us/laws.cfm

Ohio General Assembly:
http://www.legislature.state.oh.us

United States Code:
http://www.gpoaccess.gov/uscode/

Ohio Revised Code and Ohio Administrative Code:
http://onlinedocs.andersonpublishing.com
Part II

the courts

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

– William H. Seward (1850)

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

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

Ohio Trial Courts

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

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

Unlike the other trial courts that are both authorized by the Ohio Constitution and established by statute, the court of claims is entirely created by statute.

Common Pleas Courts

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

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

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

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

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

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

Court Operations/ Common Pleas Judges

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

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

Municipal and County Courts

You find yourself running late for class or a job interview, so you push the speed limit, hoping to make up some time. As fate would have it, you’re stopped by a police officer and ticketed for speeding. To make matters worse, you forget to pay the fine, remembering only when a court summons arrives. Most likely, you will settle the matter before a municipal or county court judge. Mayors’ courts also may handle such matters. (See “Mayors’ Courts” on page 8.)

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

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

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

**Small Claims/Mediation**

Every municipal and county court maintains a small claims division that hears claims for money only (not exceeding $3,000). Although someone going to small claims court may employ a lawyer, it is not necessary for a couple of reasons. First, the procedure is simple and informal and does not require a jury. Second, the cost of hiring an attorney may exceed the $3,000 monetary limit for small claims cases.

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

**Court Territorial Jurisdiction/ Municipal and County Court Judges**

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

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

**Mayors’ Courts**

Mayors’ courts are the trial courts with the most limited authority. Mayors must take training and become qualified to hear cases; even then, they can hear only “guilty” and “no contest” pleas and only minor, non-jury cases involving violations of municipal ordinances or moving traffic violations under state law. They cannot hear any contested issues (“not guilty” pleas); those cases are transferred to municipal court. Each mayor has the option to hold court and serve as presiding judge in these minor cases even if he or she is not an attorney, or the mayor may appoint a magistrate, who must be an attorney, to hear the case.

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

**Court of Claims**

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

**Ohio Courts of Appeals**

The goal of every judicial system is to achieve complete and equal justice with every trial, but the world is imperfect. Trial courts sometimes make mistakes or parties may disagree about the outcome of a particular case, which is why the courts of appeals were established.

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

**Appellate Jurisdiction**

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

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

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

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

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

**Original Jurisdiction**

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

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

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

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

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

Consider another scenario where an extraordinary writ could be implemented: An individual is convicted of a crime by a trial court and sentenced to a prison term. Not willing to accept the court’s decision, the convicted individual files a petition for post-conviction relief in the lower court that tried the case, but the court refuses to act on the petition. Undeterred, that individual’s next step would be to file a *writ of procedendo* in a court of appeals, asking that the trial court be compelled to rule on the petition.
Organization of the Courts of Appeals

Ohio’s counties are organized into 12 appellate districts, and each district is served by a court of appeals.

To qualify for election, courts of appeals judges must be licensed attorneys with at least six years’ experience. Once elected, they serve six-year terms.

The Supreme Court of Ohio

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

Appellate and Original Jurisdiction

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

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

Prescribing Rules of Procedure

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

Supervision of the Courts

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

Supervision of the Practice of Law

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

Organization of the Supreme Court of Ohio

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

The Federal Courts

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

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

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

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

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

U.S. Courts of Appeals

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

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

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

The U.S. Supreme Court

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

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

Chapter Summary

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

From the OSBA’s Law Facts pamphlet series:
http://www.ohiobar.org/pub/lawfacts (search by title)
“Ohio’s Courts”

From the OSBA’s “Law You Can Use” column:
http://www.ohiobar.org/pub/lycu/ (search by title or topic)
“Election Judges: How Do Voters Decide?”
“Magistrates’ Service Is Widespread in Ohio Courts”
“Mental Health Court Can Save Time, Money and Lives”
“What Is a Drug Court?”
“What To Expect in Traffic Court”

From the Supreme Court of Ohio:
http://www.sconet.state.oh.us/

From the Ohio Judicial Conference:
http://www.ohiojudges.org/

From the U.S. Supreme Court:
http://www.supremecourtus.gov/

From National Center for State Courts (portal to state and federal courts):
http://www.ncsconline.org/
Choose “Information” and then “Court Web Sites”

Federal judicial Web sites:
http://www.ohsd.uscourts.gov
http://www.ohnd.uscourts.gov
http://www.uscourts.gov

From Cornell Law School Legal Information Institute:
http://www.law.cornell.edu/ (choose “law about,” then “all topics”)
appellate procedure
court rules
federal courts
judicial administration
judicial ethics
Part III

legal procedure

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

— James Adams

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

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

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

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

Procedure in Civil Actions

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

Stage 1: The plaintiff selects a court

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

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

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

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

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

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

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

Stage 2: Service of process

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

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

Stage 3: Further pleadings and motions

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

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

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

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

Stage 4: Pre-trial discovery

The discovery process allows the parties to a civil action to get relevant factual information from each other and from other persons before trial. Ordinarily, parties send each other discovery requests without court participation, but the court will enforce proper discovery requests if the opposing party fails to comply. One of the ways a party can gain this information is through a scheduled deposition of another person. The person called upon to provide information at a deposition may be another party to the legal action, a witness, a medical expert, or any other person who has information that may be useful in the case. At the deposition, the person being “deposed” is placed under oath by the stenographer (called a court reporter) who is also a notary public, and parties or their attorneys ask the person questions. The party who requests the deposition must pay for the reporter’s time there, but any party can pay the reporter for a transcript of the deposition testimony.

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

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

In the federal courts, each party to a civil action must disclose certain basic information to other parties even if the other parties do not request it.
Stage 5: Pre-trial conferences
In many civil actions, the court holds one or more pre-trial conferences after filing and before trial. While the purposes vary from judge to judge and depending on when the conference is held, the parties or their attorneys and the court may meet to accomplish such tasks as: 1) simplifying the issues in the action; 2) attempting to resolve the matter by arbitration or other alternative to litigation; 3) preparing and organizing the action for trial; 4) controlling discovery (see Stage 4 above); 5) scheduling the trial and any pre-trial proceedings; and 6) settling the action.

Stage 6: Motion(s) for summary judgment
After a reasonable time for discovery, a party (most commonly a defendant) sometimes makes a motion for summary judgment. In an action scheduled for trial by jury (see Stage 7), the defendant’s motion must make two arguments to the court: 1) based on affidavits or the evidence produced through the discovery process, no reasonable person could find in favor of the plaintiff; and 2) the defendant is entitled to judgment as a matter of law. If the court is persuaded by both arguments, the court will conclude that no trial is needed and will enter final judgment for the defendant. For example, in a “product liability” civil action brought by Mr. Rivera (the plaintiff) against the chain saw manufacturer (the defendant), the court might enter summary judgment against Mr. Rivera if the court determines on motion that no reasonable person could find that the manufacturer’s product was legally defective, so the manufacturer is entitled to win the case without consideration of any other issues.

Stage 7: Jury selection
State and federal constitutions and statutes provide for a right to trial by jury in many types of civil actions, particularly those seeking damages. Jury trial is not, however, automatic. Any party may demand a jury trial if such a right exists, but if a jury trial is not requested, the case will be decided at a bench trial in which the judge rather than a jury decides the facts.

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

Stage 8: The trial
If the civil action has not been settled, a trial is held. The trial begins with opening statements by the attorneys representing the parties, or, in some cases, by the parties themselves (in cases where they are not represented by counsel). Each party’s attorney summarizes the legal position of his or her client and how the evidence to be presented will support that position.

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

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

Or, similarly, Mr. Rivera’s representative may move for a directed verdict on the ground that, based on the evidence presented, a reasonable jury must find that the manufacturer marketed a defective chain saw that, in turn, caused Mr. Rivera’s injuries.

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

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

The jury then retires to deliberate and to reach a verdict. Once inside the jury room, the jury members select a foreperson who makes sure that discussion is orderly and who reports to the judge in the courtroom. In most civil actions, the jury returns a general verdict (for example, “For the defendant” or “For the plaintiff x in the amount of $y”). Occasionally, at a party’s request, the judge will ask the jury to answer certain specific questions that are relevant to the verdict (for example, “Do you find that the product manufactured by the defendant was defective?”).

Stage 9: Post-trial motions

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

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

Stage 10: Final judgment

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

Stage 11: Appealing the court’s decision

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

In deciding civil appeals, appellate courts have the power primarily to act based on errors of law and not to retry questions of fact already decided by the jury. Appellate courts make their determinations based on the written record of the trial, the briefs (written legal arguments) of the parties, and oral argument by the attorneys for the parties. A decision on a first appeal can be taken to a higher court (such as the Supreme Court of Ohio or the U.S. Supreme Court), but the higher court usually decides which appeals it will consider and which appeals it will decline even to hear.

### Procedure in Criminal Actions

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

#### Stage 1: The government begins the case

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

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

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

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

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

When the officer believes that the alleged offender will appear for court proceedings without an arrest, the officer can issue a summons or citation that directs the person to appear in court. In minor misdemeanor cases (offenses punishable by a fine of no more than $100), including minor traffic violations, an officer must issue a citation instead of arresting the accused, except where the person fails to show evidence of his or her identity or has failed before to appear in court in a
previous case, or requires medical care and cannot provide for his or her own safety, or if the person refuses to sign the citation. A citation (a traffic ticket is an example) is a form of combined complaint and summons, and it informs the defendant of the violation, and when and where he or she must appear in court.

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

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

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

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

In a few relatively rare cases, the prosecutor can begin a criminal case by filing in court a bill of information, a formal accusation made by the county prosecutor, that may be used instead of an indictment by a grand jury. Because a person has a constitutional right to indictment by grand jury in serious cases, the suspect can be tried on a bill of information only with his or her consent. Consequently, bills of information usually are filed as part of a plea bargain agreement between the prosecutor and the defendant.

Stage 2: Arraignment and bail

**Arraignment**

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

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

- the nature of the charges;
- the right to retain counsel and to a reasonable continuance of the arraignment proceedings to secure counsel, regardless of how the defendant intends to plead;
- the right to have the court appoint counsel if the defendant cannot afford counsel;
- the right to bail if the offense allows it;
- the right to refuse to make a statement at any point in the proceeding; and
- that any statement made can and may be used against the defendant by the prosecution.
For any arraignment, the judge will ask the accused to enter a plea. There are several pleas an accused can make during arraignment or at any later stage of the case:

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

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

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

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

**Bail**

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

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

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

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

Stage 3: Bindover and indictment in felony cases

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

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

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

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

When a person accused of a felony is bound over to the grand jury, the evidence against the accused is presented by the county prosecutor and examined by the grand jury. If the grand jury finds insufficient evidence to believe a crime was committed or, if one was committed, that the accused committed it, then it will return a no bill, meaning the case is dismissed.

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

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

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

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

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

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

Criminal discovery is more limited than the discovery in civil cases. In a criminal case, the defendant can (but is not required to) initiate discovery by asking the prosecutor to provide:
• statements made by the defendant or a co-defendant to the police;
• the defendant’s prior criminal record, if any;
• documents and other tangible evidence, which may be used during the trial;
• reports of photographs, examinations and tests;
• the names and addresses of witnesses, unless the court bars such disclosures because the information may subject the witness to harm; and
• evidence that is favorable to the defendant.

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

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

It is important to point out that a defendant’s deposition cannot be taken because defendants cannot be forced to give testimony. Defendants and witnesses have the constitutional right (under the 5th Amendment to the federal Constitution and Article 1, Section 10 of the Ohio Constitution) to refuse to say anything that might tend to incriminate them.

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

Stage 5: The trial

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

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

**Burden and standard of proof**

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

Persons accused of minor misdemeanor offenses, where the maximum penalty is a fine not exceeding $100, are not entitled to a jury trial.

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

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

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

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

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

**Jury selection**

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

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

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

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

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

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

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

**Opening statements**

After the jury is selected and sworn in, the attorneys for each party make their opening statements, beginning with the prosecutor and followed by the defendant’s attorney. The opening statement is an outline of the facts of the case, what the party expects to prove, and the evidence by which the party expects to prove it.

**Witnesses and evidence**

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

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

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

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

Evidence may be direct or circumstantial. **Direct evidence** is evidence that was seen, touched or heard by a witness directly. For example, if a witness sees rain coming down, he or she has direct evidence that it is raining. **Circumstantial evidence** comes from a reasonable conclusion of fact that a witness infers from direct evidence. An example of circumstantial evidence is the testimony of a witness who noted that, upon exiting a building, everything was wet and water was running down the street into the gutters. The testimony offers circumstantial evidence that it recently rained, even though the witness did not see or feel the actual rain. The other side in the case could introduce evidence to rebut this
circumstantial evidence. They could call a city street maintenance supervisor to testify that the operator of a city water tanker sprayed the entire area while preparing the street for a street-cleaning machine. The jury will draw its own conclusions based on testimony of the witnesses and can choose to ignore all or part of the testimony of any witness. Contrary to popular opinion, circumstantial evidence is often reliable evidence and can be more persuasive than direct evidence. Even criminal convictions can be based on circumstantial evidence.

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

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

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

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

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

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

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

**Closing arguments**

Once all the evidence has been presented, the attorneys deliver their closing arguments to the jury. The prosecutor goes first, because the prosecution has the burden of proving the case.
When the prosecutor is finished, it is the defense attorney’s turn. The prosecutor may reserve part of his or her time for rebuttal after the defense attorney is finished.

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

**Jury instructions**

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

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

**Verdict**

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

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

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

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

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

**Stage 6: Sentencing and motions after the trial**

**Sentencing in criminal cases**

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

**Proceedings after the trial**

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

**Appeal**

In criminal cases, a person who is convicted may appeal, but the state’s (prosecution’s) right of appeal is very limited because of the constitutional protection against double jeopardy. In general, double jeopardy means a person cannot be tried or punished more than once for the same offense. (See “Double Jeopardy” in Part IV, “Criminal Law.”)

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

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

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

**Other post-trial proceedings**

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

If an offender is placed on community control sanctions, but then violates one of the conditions of the sanctions, the court may hold a hearing to determine if the sanctions should be revoked and the offender sent back to jail or prison.

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

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

- The law defines our rights and obligations as citizens, while legal procedure provides the means for enforcing those rights and obligations fairly and effectively.
- Legal procedures identify where, when and how legal action is to be started, conducted and concluded.
- **Jurisdiction** refers to the power and authority of a court. Different courts have different powers, and a case can be brought only in a court with authority to deal with it.
- **Venue** refers to the place where a case must be tried.
- **Statutes of limitations** provide time limits for beginning legal actions to discourage unreasonable delay in bringing civil lawsuits and criminal prosecutions.
- A civil case begins when the claimant, or plaintiff, files a written pleading, or complaint, with the proper court. The defendant in a lawsuit is entitled to know he or she is being sued and why, and given time to answer the lawsuit. The parties to any civil lawsuit can challenge each other’s pleadings by means of motions, or written requests filed with the court.
- **Discovery** is the process whereby the parties to a civil lawsuit obtain information or evidence from each other, often in written question or oral deposition form.
- A criminal case can begin when a proper arrest is made (followed by the filing of a complaint); when a grand jury returns an indictment; when a private citizen files a complaint; or when a summons or citation is issued.
- **Bail** is the pre-trial release of an accused, provided the court is satisfied that the accused will attend all court hearings. An arrested person who qualifies for bail must be given the opportunity to be free on bail as soon as possible, although different guarantees of appearance in court may be required.
- A person who is arrested for a felony must be given a preliminary hearing without delay. The purpose of a preliminary hearing is to look at the evidence against the accused, and determine if it is sufficient to warrant further proceedings.
- An **indictment** is a formal accusation made by a grand jury, charging a named person with a specific crime.

Continued on p. 30
Chapter Summary continued

- An arraignment follows an arrest or indictment. The purpose of an arraignment is to inform the defendant of the nature of the charge, advise the defendant about his or her rights, and obtain his or her plea to the charge.
- Unlike civil cases, the defendant in a criminal case does not file a written pleading (an answer) in response to the charge; the defendant’s oral plea in court serves the same function.
- Criminal discovery is more limited than the discovery in civil cases and can be initiated by the defendant.
- Pre-trial conferences are used in criminal cases for plea negotiations and for the same purposes as civil pre-trial conferences.
- A trial is a contest between adversaries. The role of the judge is to control the contest as a neutral referee and to rule on questions of law. The role of the jury is to decide questions of fact.
- The main steps in civil and criminal trials include selection of a jury, opening statements by the attorneys, presentation of witnesses and evidence, closing arguments by the attorneys, instructions by the judge to the jury, and deliberation and decision (verdict) by the jury.
- The right to trial by jury applies in many situations, though not all, situations. The process of choosing jurors is called voir dire.
- A number of legal proceedings may be conducted after the trial is over. Any party may file an appeal in civil cases. However, because of double jeopardy provisions in the U.S. and Ohio constitutions, the prosecution’s right to appeal in criminal cases is more limited.

Web Links:

From the OSBA’s “Law You Can Use” columns:
http://www.ohiobar.org/pub/lycu (search by title or topic)
  “Civil Trials: How Are Jurors Selected?”
  “Constitution Provides for Reasonable Bail in Criminal Cases”
  “Expert Witnesses Help Judges and Juries Find the Truth”
  “How Does a Grand Jury Operate?”
  “Perjury Can Lead to Prison”
  “Rules of Evidence: Hearsay”
  “What You Should Know about Obstruction of Justice”
criminal law

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

– Magna Carta

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

What Constitutes an Offense?

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

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

Depending on the specific crime with which an offender is charged, it must be shown that he or she:
• acted in a reckless manner; or
• acted with purpose or knowledge; or
• acted with criminal negligence.

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

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

The exceptions to requiring a culpable mental state generally have to do with regulatory offenses dealing with public health and safety. Selling impure food, for example, is a violation of the pure food and drug laws even if the seller did not know the food was tainted. Such crimes are commonly known as strict liability offenses.

Kinds of Crimes

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

Felonies are the most serious crimes and, in Ohio, they carry a potential penalty of from six months or more in a state prison to a penalty of death for aggravated murder. Punishment for felons (persons committing felonies) may include imprisonment, community sanctions and various financial penalties.

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

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

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

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

**Crimes in the Ohio Criminal Code**

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

Subjects covered include:

- homicide, assault and menacing threats;
- kidnapping, abduction, false imprisonment, extortion and coercion;
- patient abuse and neglect;
- rape and other sexual assaults, prostitution, obscenity and disseminating matter harmful to juveniles;
- arson and other property damage offenses;
- robbery, burglary, breaking and entering, safecracking and trespassing;
- theft, bad check and credit card offenses, forgery, fraud and other theft offenses;
- gambling;

- inciting violence;
- riot, disorderly conduct and false alarms;
- certain aspects of abortion, nonsupport, endangering children and domestic violence;
- bribery, perjury, resisting arrest, harboring criminals, escape, graft, conflict of interest, dereliction of public duty and violation of civil rights;
- conspiracy, attempt and complicity;
- weapons and explosives control;
- corrupt activity (racketeering); and
- drug offenses including possession, sale, manufacture and cultivation.

**Crimes Outside the Ohio Criminal Code**

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

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

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

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

One of the most important features of the Ohio Criminal Code is its plan for penalties and sentencing and its treatment of offenders. Penalties are listed according to the comparative seriousness of offenses. Within each degree of crime a range of penalties is provided, permitting judges to tailor penalties to individual offenders rather than basing the penalties on their offenses alone. The sentencing law provides that judges should give progressively strict penalties for certain repeat offenders, for those who use or threaten the use of violence and for those who use or carry firearms while committing a crime. (See chart on page 36 showing potential felony penalties and sentencing under Ohio law.)

Penalties

The Ohio Criminal Code was revised in July 1996, when Senate Bill 2 became law. Now, in most cases, the prison sentence imposed in open court upon a convicted felon is the actual time he or she will serve, minus credit for any time spent in jail while awaiting trial or sentencing.

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

Ultimate control over each offender’s actual sentence is now left to the sentencing judge. The law prevents the Parole Board from releasing people from non-life sentences for acts committed after July 1996. With very narrow exceptions, only a judge can modify a sentence. The judge can do this by judicial release (formerly known as shock probation) for eligible offenders and by allowing the offender to be placed in a boot camp treatment or furlough program.

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

Mandatory Terms

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

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

- aggravated murder when a death sentence is not imposed;
- murder;
- any rape and any attempted rape when the victim is younger than 13 years old;
- first- or second-degree felonies when the offender has a prior second-degree or higher felony conviction;
- first-, second-, or third-degree drug offenses when specified as mandatory by statute;
- corrupt activity (racketeering) when the most serious underlying offense is a first-degree felony;
- felony vehicular homicides and assaults or drunk driving when specified by statute;
- having a firearm in the commission of a felony;
- gross sexual imposition or sexual battery if the offender has a prior conviction for either, or for rape, involving a victim under age 13;
- any sexual offense where the indictment states that the perpetrator is found to be a sexually violent offender;
- the wearing or carrying of body armor while committing a felony; and
illegal conveyance, by a prison employee, of contraband items (such as narcotics, alcoholic beverages, weapons or pornography) into a prison facility.

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

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

**Sentencing Discretion**

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

In deciding whether to sentence a person to prison for a fourth- or fifth-degree felony, the judge must first determine if the offense:
- brought physical harm to a person;
- involved an attempted or actual threat of harm with a weapon;
- involved an attempted or actual threat of such harm without a weapon when the offender has a prior conviction for causing harm;
- was committed by an offender possessing a firearm;
- was related to a public office or position of trust;
- was for hire or as part of organized crime;
- was a sex offense;
- was committed by an offender who has been to prison before; or
- was committed while the offender was under indictment or under community control for another offense.

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

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

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

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

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

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

The Ohio Criminal Code generally instructs judges that a prison-bound felon should be sentenced to the minimum term if the offender has not previously served a prison sentence. A judge can choose a longer term, provided it is consistent with other basic sentencing principles. Conversely, the Code instructs judges to impose the longest sentence, from the range stated by law, for the worst offenders. If the court imposes the longest (“maximum”) sentence, the defendant has the right to have a court of appeals review the sentence.

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

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

• ordering a sentence to be served in a local jail on weekends or overnight, enabling the offender to keep a job and maintain family responsibilities (much more common for misdemeanants than for felons);
• suspending all or any portion of a fine imposed for an offense or permit payment in installments;
• providing for commitment and treatment options for offenders determined to be mentally deficient, mentally ill or drug- or alcohol-dependent.
**Felony Penalty Table**

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<thead>
<tr>
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<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>F-1</td>
<td>Presumption for prison (also applies to “in favor” drug offenses)</td>
<td>3, 4, 5, 6, 7, 8, 9, or 10 years</td>
<td>$20,000</td>
<td>1, 2, 3, 4, 5, 6, 7, 8, 9, or 10 years</td>
<td>Yes</td>
<td>5 years, no reduction</td>
</tr>
<tr>
<td>F-2</td>
<td>No guidance other than purposes &amp; principles (also applies to “Div. (C)” drug offenses)</td>
<td>2, 3, 4, 5, 6, 7, or 8 years</td>
<td>$15,000</td>
<td>For F-2 involving attempted serious harm or for invol. manslaughter: 1, 2, 3, 4, 5, 6, 7, 8, 9, or 10 years; otherwise none</td>
<td>Yes if sex or violent offense; otherwise optional</td>
<td>If sex offense, 5 years, no reduction; otherwise, 3 years, reducible by Parole Board</td>
</tr>
<tr>
<td>F-3</td>
<td>If any of 9 factors &amp; not amenable to other sanction(s), guidance for prison. If none of 9 factors, guidance against prison. (Also applies to “Div. (B)” drug offenses)</td>
<td>6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, or 18 months</td>
<td>$5,000</td>
<td>None</td>
<td>Yes if sex offense; otherwise optional</td>
<td></td>
</tr>
<tr>
<td>F-4</td>
<td>6, 7, 8, 9, 10, 11, or 12 months</td>
<td>$2,500</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>F-5</td>
<td>6, 7, 8, 9, 10, 11, or 12 months</td>
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<td></td>
<td></td>
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</tbody>
</table>

**Judicial Release** ($§2929.20) -- Eligibility: Any non-mandatory term ≤ 10 years. (If serving such a non-mandatory term consecutive to a mandatory term, eligible after serving mandatory.) **Filing**: If F-4 & F-5, file in 30 to 90 days; if F-1, F-2, & F-3 serving < 5 years, file after 180 days; if serving 5 years, file after 4 years; if serving 5+ to 10 years, file after 5 years. **Hearing**: May deny without hearing. Must hold hearing before granting. **Presumption**: Against granting to F-1 or F-2.

**Repeat Violent Offenders** are ($§2929.01(DD)): (1) Being sentenced for: agg. murder, murder, involuntary manslaughter, any non-drug F-1, or any drug F-1 or any F-2 resulting in death or physical harm, including complicity or attempt (prior may be as juvenile); (2) Previously served, or is serving, a prison term for agg. murder, murder, involuntary manslaughter, rape, FSP, or another F-1 or F-2 resulting in death or physical harm, including complicity or attempt.

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

*Maximum Fines* -- Cover conventional and day fines. There are possible exceptions in drug trafficking cases ($§2929.18(B)(4)-(7)). And, if a superfine is available, the maximum is $1 million ($§2929.25). (For the fine when the offender is an organization, see §2929.31.)

Prepared by the OHIO CRIMINAL SENTENCING COMMISSION with support from the OHIO JUDICIAL CONFERENCE--May 2002
Misdemeanor Penalty Table

Misdemeanors are punishable by a definite term in jail, or a fine, or both. Minor misdemeanors are punishable only by a fine of $150 or less. The judge fixes the sentence from the permissible range. Jail terms and fines may not exceed the maximums specified in the statute. The following table contains the basic misdemeanor jail terms and fines stated in the Ohio Criminal Code. (The judge also may impose a jail term, suspend it, and place the misdemeanant on probation.) NOTE: This table does not specifically cover the mandatory jail or prison sentences to be imposed when an offender is convicted of driving while under the influence of alcohol or drugs.

<table>
<thead>
<tr>
<th>Offense</th>
<th>Maximum Term</th>
<th>Maximum Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st degree misdemeanor</td>
<td>180 days</td>
<td>$1,000</td>
</tr>
<tr>
<td>2nd degree misdemeanor</td>
<td>90 days</td>
<td>$750</td>
</tr>
<tr>
<td>3rd degree misdemeanor</td>
<td>60 days</td>
<td>$500</td>
</tr>
<tr>
<td>4th degree misdemeanor</td>
<td>30 days</td>
<td>$250</td>
</tr>
<tr>
<td>Minor misdemeanor</td>
<td>None</td>
<td>$150</td>
</tr>
</tbody>
</table>

Goals of Sentencing and Corrections

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

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

Community Control Sanctions

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

Felons not facing mandatory prison terms are eligible for the following residential and non-residential sanctions outlined in the Ohio Criminal Code (the non-residential and financial sanctions also are available to misdemeanants):

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

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

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

**Intervention in Lieu of Conviction and Diversion Programs**

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

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

**Criminal Law and Constitutional Rights**

The U.S. and Ohio constitutions provide people accused of crimes with basic rights that are designed to protect the individual from unreasonable government intrusion and to ensure fundamental fairness. These rights are so important that violating them may result in the suppression of evidence or dismissal of criminal charges and/or charges against those responsible for violating those rights.

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

**Equal Protection Under the Law**

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

**Due Process of Law**

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

**Double Jeopardy**

Both the U.S. and Ohio constitutions provide that no one can be placed in jeopardy, or tried, more than once for the same crime. In general, this means that in criminal prosecutions, the state has only one chance to prove the accused committed the crime. If a person is found not guilty, the state cannot appeal or attempt to try that person again. The same is true if an accused is found guilty. The state cannot accuse a person again and attempt to inflict double punishment for the crime. The rule prohibiting a second trial does not apply if the second trial is held when the accused was found guilty and the guilty finding was overturned on appeal.

**Search and Seizure**

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

Self-Incrimination

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

Right to Counsel

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

Indictment by a Grand Jury

Both the U.S. and Ohio constitutions provide that no one can be brought to trial for a felony unless a grand jury hands down an indictment, or the prosecutor files an information statement saying that there is “probable cause” to believe the accused has committed the crime. Indictment by a grand jury helps ensure that no one is subjected to trial on false or spiteful accusations.

Notice of Charge

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

Speedy Trial

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

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

- 30 days for trial in mayors’ courts or minor misdemeanors in any court;
- 45 days for misdemeanors carrying a maximum penalty of 60 days in jail;
- 90 days for more serious misdemeanors;
- 15 days for preliminary hearings in felony cases;
- 270 days for trials in felony cases.

Ohio law provides that when counting prison time, each day spent in jail awaiting trial is counted as three days. For example, the accused felon who cannot make bail must be given a preliminary hearing within five days (15 days ÷ 3 = 5) after the arrest, and must be brought to trial within 90 days (270 days ÷ 3 = 90) after the arrest.

Public Trial in a Locality

Both the U.S. and Ohio constitutions give an accused the right to a public trial, thus ensuring that trials are not held in secret, but are conducted openly, fairly and properly. An accused also has the right to be tried where the alleged offense was committed so that witnesses and evidence are readily available and the state cannot transfer the trial to a place where the atmosphere is hostile toward the accused. Even so, accused persons who believe they cannot get a fair trial in the place where the alleged crime occurred can have their trials transferred (called a change of venue).

Confronting Accusers and Securing Witnesses

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

**Trial by Jury**

Under the U.S. Constitution, a defendant is entitled to trial by jury if it is possible for the defendant to receive a punishment of more than six months in prison. Ohio’s constitution and statutes are even more stringent and entitle an accused to a jury trial if the potential penalty is greater than a $100 fine. There are eight jurors in a misdemeanor case, and 12 jurors in a felony case. All decisions, whether guilty or not guilty, must be unanimous. If the jurors cannot agree, there is a hung jury and the prosecution has the option to retry the accused or dismiss the charges.

**Other Constitutional Rights**

In addition to the rights mentioned above, other constitutional rights are important in all criminal proceedings. These include constitutional prohibitions against certain kinds of laws as well as constitutional rights that limit criminal laws. The following paragraphs explain some of these constitutional rights.

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

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

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

The U.S. and Ohio constitutions also guarantee certain basic civil rights to everyone and state that laws prohibiting or interfering with these rights are invalid. Everyone is entitled to:

- practice a religion of choice;
- freely express and write their opinions as long as the opinions are not slanderous, libelous or pose a public danger;
- assemble for peaceful purposes; and
- petition the government to have grievances heard.

Similarly, the federal government cannot prohibit a state from forming a militia. Also, because of the U.S. and Ohio constitutions, persons in Ohio are entitled to keep and bear weapons for their own defense. However, the state and federal government can impose specific restrictions on the possession, sale or use of certain firearms. The state is also permitted to prohibit the carrying of concealed weapons and the possession of weapons, whether concealed or not, in liquor establishments, on airplanes or in jails or prisons.

**Informing the Accused of Rights**

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

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

Enforcement of Rights
Constitutional rights can be enforced in a variety of ways:

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

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

Review on Appeal
In Ohio, a defendant who has a trial and is found guilty of a crime has the right of appeal. If the defendant cannot afford it, the state must provide legal counsel and a transcript of the trial proceedings. The appeal is limited to questions of law or issues appearing in the official court record (the trial transcript), or in papers filed in the case. If the court of appeals finds that an error occurred that affected the outcome of the trial, it will reverse the conviction and send the case back to the trial court for retrial or other proceedings. If no prejudicial error occurred (an error that might have unfairly prejudiced the jury against the defendant), the court of appeals will uphold the conviction.

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

In general, the Supreme Court of Ohio does not have to accept an appeal in non-death-penalty cases, but may do so depending on the issues raised in the appeal and how the court of appeals’ decision affects Ohio law. If the Supreme Court of Ohio decides not to hear the defendant’s appeal or if it allows the appeal but then upholds the conviction, the defendant may petition the U.S. Supreme Court to review the case. The U.S. Supreme Court can review only issues involving rights granted or claimed under the U.S. Constitution. The high court is not required to allow an appeal, but may do so depending upon the issues presented in the appeal.
Strict time limitations must be met when filing an appeal, and a document called a notice of appeal must be filed within the required time to secure the review of a court decision by a higher court. If an appeal is by right (according to statutory law in death-penalty cases), counsel is always appointed to represent the defendant. If an appeal is not by statutory right (non-death-penalty cases), the accused must retain his or her own attorney or file the appeal pro se (on his or her own behalf).

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

**Review of Sentence on Appeal**

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

The defendant may appeal to the court of appeals when:
- the maximum prison term is imposed;
- there was guidance against a prison sentence and the judge sentenced the offender to prison anyway; and
- the sentence is otherwise contrary to law.

The prosecution may appeal to the same court of appeals when:
- a first- or second-degree felon did not receive a prison sentence;
- the felon is granted judicial release; and
- the sentence was otherwise contrary to law.

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

**Post-Conviction Relief**

The appeal procedure outlined above, referred to as direct appeal, only allows for a review of issues that appear in the record. Sometimes defendants claim errors occurred that violated their constitutional rights and contributed to their convictions, but the errors are not included in the court’s record.

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

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

**Victims’ Rights**

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

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

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

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

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

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

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

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

- Victims in any felony case, and in misdemeanor cases involving actual or threatened violence, have the right to be informed about the process and the right to be heard.
- Law enforcement officers must give victims certain information when investigating a crime, including notice of any arrest in the case.
- When practical, prosecutors must meet with victims and brief them on pre-trial matters.
- A prosecutor must provide notice of proceedings, convictions and appeals in a case if the victim asks.
- A victim has the right to be present when the defendant is present at any proceeding that is on the record.
- Courts must consider victims’ objections to delays and allow them to make victim-impact statements at sentencing.
- The court must consider the impact of the crime on the victim in choosing an appropriate sentence.
- Levels of compensation courts may provide to victims of crime have been increased.
- Upon request by a victim, prisons and jails must notify the victim when the victim’s assailant is released.
- The court must make a reasonable effort to minimize contact between victims and defendants. When practical, separate court waiting rooms must be made available so victims do not have to be near the accused.
- Victims of sexual offenders are notified when the defendants are released from prison. All sex offenders must register with the county sheriff in the county in which they reside.
- Sexual offenders who are declared sexual predators and/or repeat sexual offenders must register with the county sheriff for at least 10 years and, in the case of sexual predators and some repeat sexual offenders, neighbors, schools and day care centers are notified by the sheriff of the county in which the offenders live. In larger cities, the location of sexual predators is on the Web sites of county sheriffs.
- The court may grant a motion to prevent disclosure of a victim’s address, place of employment, or similar information when the victim fears violence or intimidation by the defendant.
- Employers may not discipline victims for the reasonable exercise of these rights.
- In most cases, victims are entitled to the prompt return of their property.
• Prosecutors have authority to seek compliance with the law on behalf of victims (e.g., if a court clerk ignores the law’s victim notice requirements, the prosecutor can petition the court to compel the clerk to follow the law).

Chapter Summary

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

*From the OSBA’s LawFacts pamphlet series:*
http://www.ohiobar.org/pub/lawfacts/ (search by title)
  “Being a Witness”
  “Your Rights if Questioned, Stopped or Arrested by the Police”

*From the OSBA’s “Law You Can Use” columns:*
http://www.ohiobar.org/pub/lycu/ (search by title or topic)
  “Criminals May Go Free When Constable Blunders”
  “Guns at Home Can Make Parents Liable for Child’s Criminal Actions”
  “SYO’ Sentences Combine Juvenile and Adult Penalties for Serious Crimes”
  “Understanding How Criminal Records Are Expunged”
  “Victims of Domestic Violence Should Know Legal Remedies”
  “What You Should Know about Crime Victims’ Rights”
  “What You Should Know about ‘Truth in Sentencing’ for Felons”

*From the Ohio Sentencing Commission:*
http://www.sconet.state.oh.us/sentencing_commission/default.asp

*From Hieros Gamos’s Web site:*
http://www.hg.org/crime.html

*From Cornell Law School Legal Information Institute:*
http://www.law.cornell.edu/wex/index.php/Criminal_law
http://www.law.cornell.edu/wex/index.php/Criminal_procedure
Civil (vs. Criminal) Wrongs

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

Although a criminal act usually has an individual victim, the act is a crime because it is also a serious offense against a public interest: the peace and safety of the community. The alleged wrongdoer is brought to court by a prosecutor on behalf of the public, and if the defendant is found guilty, he or she is punished by the state.

On the other hand, a tort is a civil wrong that has injured a victim. That victim, not the state, brings the claim to court, and if the defendant is found responsible, he or she may be ordered to pay money damages to the victim to compensate for the injury or wrong. In a tort case, the chief goal is not to punish the wrongdoer but to “make the victim whole” to the extent that money can do so.

In tort cases (and other types of civil lawsuits) the victim claiming to be injured and seeking compensation for alleged damages is called the plaintiff, and the party from whom the compensation for damages is sought is called the defendant.

What Makes a Tort?

Four things together make a tort, and a tort lawsuit will succeed only if the plaintiff who brings the suit against the defendant proves all four:

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

A Legal Duty Owed to the Plaintiff

First, there is no tort unless the defendant owed a legal duty to the plaintiff. For example, the owner of a ballpark ordinarily has no duty to prevent a spectator from being struck by a batted ball because such a risk is inherent in the sport.

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

Sometimes the duty is created and defined by a statute or ordinance (such as the traffic laws that require drivers to stop at red lights and maintain a safe following distance), but many legal duties are defined by case (common) law. The duties recognized in case law have grown out of previous court decisions or other legal customs, and some of them have been used for decades, or even centuries. One of these common law standards is
the broad rule that a person must act with reasonable care for the safety of others.

Violating the Duty
Second, there is no tort unless the defendant breached his or her legal duty. If the material or controlling facts in a case are not disputed, a judge can decide whether the defendant’s actions (or failure to act) under the given circumstances violated a legal duty. If the facts are in dispute, usually a jury decides whether a breach of duty has occurred.

Injury or Loss to the Plaintiff
Third, there is no tort unless the plaintiff suffered an injury. A breach of duty without an injury is wrong without harm, so it is not a tort. The injury may be physical damage to a person or property, or injury to (or loss of) a valuable right or interest. The injury need not be great, but it cannot be insignificant. The legal rule dismissing non-significant losses is \textit{de minimus non curat lex} (literally, “The law does not cure trifles”).

Violation of the Duty is the Direct Cause of the Injury or Loss
Fourth and finally, there is no tort unless the defendant’s breach of duty directly and proximately caused the plaintiff’s injury. If the breach did not result in the injury, or if the same injury would have happened even without the breach, then the breach did not cause the injury.

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

Owing a Duty
Suppose a trespassing woman is injured when she sneaks into a man’s yard after dark and falls into a ditch. Neighborhood children have often played on the property with the man’s permission. If the property owner had been reasonably careful, he would have put a fence around the ditch to prevent accidents. Still, the man had no reason to expect the presence of a trespasser. The man has not committed a tort because a landowner ordinarily does not owe the duty of reasonable care to an adult trespasser. In this context, the property owner’s duty is simply to not intentionally injure the trespasser. Legally, it does not matter that the landowner did not use reasonable care to keep his yard safe, or that someone was injured because of his failure to do so.

Violating the Duty
Suppose a doctor performs surgery on a heart patient, and she completes the operation exactly the way a good heart surgeon is supposed to do. Nevertheless, as even the most careful surgery involves the risk of infection, this patient is infected during surgery and his heart is damaged further. Assuming she informed the patient of the risks before surgery, the doctor has not committed a tort. She had a duty to so advise the patient and treat the patient with the degree of reasonable care used by competent heart surgeons, but because she performed the surgery according to reasonable professional standards, she did not breach or violate that duty. The patient was injured as a result of the surgery, but not as a result of anything the doctor did wrong.

Injury to the Plaintiff
Suppose a barber sees a spot of grease just inside his shop’s front door, but turns away to answer his telephone and forgets to clean up the spot. Five minutes later, a customer walks in the door and slips on the grease. He is able to keep from falling by grabbing onto a railing, but he is embarrassed that people have seen him lurch so clumsily because he is well known locally as an athlete. The barber has not committed a tort. She had a duty to so advise the patient and treat the patient with the degree of reasonable care used by competent heart surgeons, but because she performed the surgery according to reasonable professional standards, she did not breach or violate that duty. The patient was injured as a result of the surgery, but not as a result of anything the doctor did wrong.
not enough to count as an injury for purposes of the law.

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

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

Torts That Are Crimes

Sometimes an act, or the failure to act when action is legally required, is both a tort and a crime. For example, a man who shakes his girlfriend’s crying baby so recklessly that the baby dies may be prosecuted for the crime of involuntary manslaughter—meaning that he did not intend to kill the baby, but his criminal violence caused the death just the same. Because the man’s gross (or extreme) lack of reasonable care directly caused serious injury, he committed a tort as well as a crime, so he may be prosecuted. Also, the baby’s mother may sue him for the damages he caused. In some criminal cases, the court can order the defendant to pay restitution (that is, to compensate the victim for his or her loss). Usually, however, in order to recover money damages for such a tort, the victim must sue the wrongdoer in a civil case separate from the criminal prosecution. (Often, no suit is pursued because, although the victim can prove a legal right to compensation, the defendant has no money to pay the amount a court would order him or her to pay).

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

Tort Cases: Negligence

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

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

Proof of Negligence

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

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

Typical negligence cases arise out of:

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

Other Tort Lawsuits

Negligence is the most common basis of liability used in tort law, but there are others. Some of these are: intentional interference with individuals or property; misuse of the legal process; defamation of character; and product liability.

Intentional Interference with Property or Persons

Trespass is an unauthorized entry onto real property, such as land or buildings. Trespass also can be an invasion of another’s personal property, such as tampering with his or her car. Another example is conversion (the civil aspect of property theft), which occurs when one person improperly assumes control of another’s property for his or her own use or benefit. Stealing another person’s watch and pawnning it is an example of the tort of conversion.

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

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

In torts based on intentional interference with people or property, defendants can avoid legal liability if they prove that:
• the defendant’s conduct was permitted (privileged) in the circumstances;
• the plaintiff consented to the conduct;
• the defendant was acting in self-defense or protecting his or her property; or
• the defendant was driven by necessity.

Misuse of Legal Procedure

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

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

Defamation of Character

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

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

Strict Liability/Product Liability

In cases of strict liability, the plaintiff does not need to prove that the defendant acted intentionally, recklessly or negligently, but only that the defendant’s conduct caused the plaintiff’s injury or loss.

Strict liability applies where the plaintiff’s injury was caused by a dangerous substance (such as explosives, poison, or radioactive materials) that was under the defendant’s control. Strict liability also applies in product-liability cases, where the plaintiff’s injury was caused by a defective product created or sold by the defendant. A well-publicized example of strict liability is the class-action lawsuit filed against Firestone in the late 1990s. In that case, the plaintiffs claimed that many people had been killed or seriously injured when the company’s tires blew out, and that the blowouts were a result of a defective tire design.

A product may be defective in several ways: in its design or formulation; in its manufacture or construction; because the instructions or warnings as to its use were inadequate; or because it did not work as advertised or intended.

Traffic Accidents

A person who operates or is responsible for a motor vehicle may be involved in an injury accident that results in a lawsuit. In such cases, the injured person bringing suit (the plaintiff) usually claims that the injury was caused because the defendant failed to exercise reasonable care in operating a motor vehicle. Even though the person operating the vehicle may have been directly responsible for the accident, others also may be liable for the plaintiff’s injury. For example, the driver as well as the driver’s employer may be held liable if the driver was driving the vehicle in the course and scope of the employment.
Because traffic accidents are the most common form of tort suit, Ohio law requires persons applying for a vehicle registration or an operator’s license to prove their ability to pay for damages caused in an accident—no matter whose conduct causes the accident. The most common way to show financial responsibility is proof of a valid insurance policy with liability coverage.

The minimum amount of coverage required by Ohio law is:
- $12,500 for personal injury or death of one person in any one accident;
- $25,000 for personal injury or death of two or more persons in any one accident; and
- $7,500 for damages to another’s property in any one accident.

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

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

Financial Responsibility Accident Report

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

Stopping and Exchanging Information at an Accident

Ohio law requires a driver who is involved in a motor-vehicle accident to stop the vehicle immediately and provide information to the owner, driver or person in charge of the other vehicle, anyone injured in the accident, or to a law-enforcement officer at the scene. That information is: the driver’s name and address; the vehicle registration number; and, if the driver is not the owner of the vehicle, the name and address of the owner. Here are some other rules about traffic accidents:
- If an injured individual cannot understand or write down pertinent information, the other driver must notify the police department and wait until a police officer arrives at the scene, unless the other driver is transported to a hospital by an ambulance or other emergency vehicle.
- If an accident occurs on public or private property other than a public road (in a shopping center parking lot, for example), all drivers involved in the accident must give the required
information, on request, to any injured person, and to the owner of the damaged property. Drivers must also show their operator’s license upon request. If drivers do not provide the information at the time of the accident, it must be reported to the police within 24 hours of the accident.

- If an accident causes damage to land, or to property attached to the land, such as a building or utility pole, the driver must stop and take reasonable steps to locate the owner of the property. If the owner cannot be located, the driver must report the accident and supply personal information to local law-enforcement authorities within 24 hours.
- If an accident damages an unattended vehicle, the driver must leave a written note—normally placed under the windshield wiper—providing personal contact information.
- Leaving the scene of an accident or failing to provide the necessary personal information is a serious offense, and people who do so are liable for a maximum fine of $1,000, or a six-month jail term, or both. In some cases of leaving the scene of an accident, a court can impose a license suspension of at least six months and up to three years. Also, because leaving the scene may be interpreted as an admission of fault, fleeing may be used as evidence against the driver if a lawsuit is filed.

### What to do at accident scenes

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

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

Responsibility for Employees and Agents

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

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

Because an employer is usually not liable for the acts of independent contractors, it is necessary in some cases to determine whether a person is an independent contractor, on one hand, or an employee or agent, on the other. Such cases often turn on the degree of control that the employer exercised over the person in question. If the worker has agreed to accomplish a particular task, but is free to decide how and when to do the work, the worker is probably an independent contractor. It is fair for the employer to be free from liability for such a worker’s negligence because the employer has little or no right to control what the worker does. For example, suppose a publisher hires a woman to deliver newspapers door-to-door. They agree that the worker will provide her own transportation, will deliver to certain addresses, will finish the work before a particular time, and that payment will be based on the number of papers delivered. The worker is free to decide what transportation to use, the order in which deliveries are made, the time of the deliveries (that is, any time before the deadline) and exactly where and how the papers are placed when delivered. If the worker, in crossing a subscriber’s yard before sunrise, stumbles through a garden and uproots an expensive ornamental bush, the employer probably will not be responsible for the damage caused by the worker’s lack of reasonable care.

Responsibility for Children and Minors

With some exceptions, parents or guardians are responsible for the acts of their child only if they knew the child would commit the act but failed to take reasonable steps to prevent the act.

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

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

Comparative Negligence and
Assumption of Risk

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

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

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

Assumption of risk is another defense to negligence claims. In the broadest terms, this rule of law provides that an adult who knows that he or she is voluntarily taking a specific, high, risk by engaging in particular conduct (say, playing Russian Roulette with a loaded pistol), will not be allowed to recover compensation for his or her injuries from someone whose negligence helped to create the dangerous situation (perhaps, the gun’s owner, who negligently failed to lock it away). Evidence of assumption of risk is considered by the judge or jury as part of its comparative negligence analysis. That is, the conduct of the injured person in voluntarily taking a high risk is compared to whatever the defendant did that helped bring about the injury. In two types of cases, assumption of risk can still be a complete bar to recovery. First, where one party has expressly agreed to assume the risk of injuries arising from certain conduct (by signing a waiver of liability, for example), the agreement may be enforced by the court if the parties had equal bargaining power and the release does not violate some other law or public policy. Second, a recreation provider ordinarily owes no duty to protect a participant or spectator against risks so inherent in the activity that they cannot be eliminated. This rule of primary assumption of risk therefore bars recovery where a baseball player or fan is injured by a batted ball, for example.

Statutes of Limitations

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

Determining the proper statute of limitations is, however, sometimes very complicated.
Depending on the type of the claim, the limit may be calculated from the date of the injury, or the date the plaintiff discovered the injury, or the date the plaintiff identified the defendant’s conduct as a possible cause of the injury, or the last day of the professional relationship between the plaintiff and the defendant.

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

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

Remedies for Tort

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

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

Workplace Torts

Some types of tort cases arise as a result of legally wrongful conduct in the workplace. For example, claims based on sexual harassment are sometimes called *workplace torts*, and certain cases of workplace injury—arising out of certain dangerous conditions known to the employer—are called *intentional torts* and may form the basis of a tort claim even though injury lawsuits against employers are generally prohibited by the law that provides workers’ compensation to injured employees. (For more information on workplace torts, see Part XI, “Workplace Law.”)

Resolving Disputes Without a Trial

Some tort claims are resolved by a trial in which a judge or jury decides whether the defendant is liable to the plaintiff and, if so, the amount of compensation required. However, because such litigation is often a long, stressful and expensive process, lawyers and other interested persons have developed several additional ways of resolving disputes. Generally, these methods or techniques are grouped under the name *dispute resolution*.

Dispute resolution techniques include negotiation, mediation, arbitration, the mini-trial and the summary jury trial, and private judge trials. The method used depends upon the nature of the dispute, the people involved, the amount of
money at risk and many other factors. Some conflicts are not well-suited to dispute resolution, such as where the plaintiff wants to convince a court to change an existing law so that people in later cases will also be able to recover damages, or where one party previously used violence against the other. In many cases, however, dispute resolution helps the plaintiff and defendant resolve the conflict in a way both can accept, with more speed and creativity, and less stress and expense, than full-blown litigation would require. (Dispute resolution is also discussed in Part III at “Pre-trial Conference.”)

Negotiation

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

Mediation

Mediation is a formal process for discussing settlement. The disputing persons, with or without their lawyers, meet with a neutral third party called a mediator who has nothing to gain or lose from the outcome of the dispute. The mediator carefully leads the parties through a discussion of all aspects of the conflict and helps each of the parties evaluate realistically the advantages and disadvantages of a settlement.

The mediator is not a judge and cannot require the parties to agree to anything, but often can help create an atmosphere in which the parties themselves can develop a reasonable, mutually acceptable resolution of the dispute.

Arbitration

One or more neutral third parties (called arbitrators) may be used to resolve disputes through a process known as arbitration. Arbitration may result from an agreement or a contractual provision between the parties, or it may be ordered by a court. The parties present their cases to the arbitrator, offering evidence and legal arguments to support the position of their clients. The parties will have agreed in advance what issues the arbitrator will decide (often, the entire case) and whether the arbitration decision is final and binding (often, it is). The arbitrator does not necessarily need to enforce the rules of evidence that apply in trials, or to follow existing law in making a decision. Rather, the arbitrator reaches a solution that he or she believes is fair and reasonable. Clearly, then, the arbitrator has much more power than a mediator, and sometimes disputes are submitted to arbitration after the parties could not agree to a mediated settlement. For example, a major league baseball player who cannot reach a salary agreement with the owner of his team may choose to submit the dispute to an arbitrator, who will consider the matter using rules that the owners and players adopted years ago. At the end of that process, the arbitrator decides what the player will be paid.

Mini-Trials/Summary-Jury Trials

Although usually more complicated than arbitration, mini-trials and summary-jury trials are also ways of resolving disputes without the investment in time and expense of a full trial. In a mini-trial, attorneys for the parties present a shortened version of their cases to a panel of persons they have agreed upon. The panel usually consists of representatives of the parties (sometimes including the insurance companies of the parties). After the presentations, a neutral third party encourages discussion among the representatives and their attorneys. Because they have gained a clearer understanding of both sides of the
case during this process, often the parties are able to evaluate their positions more realistically and so can agree to a settlement.

In a summary-jury trial, lawyers present shortened versions of their cases to a panel of jurors—that is, people who do not have a stake in the outcome of the dispute. Afterwards, the jurors talk among themselves about the issues and reach a non-binding or advisory verdict. They then discuss the reasons for the verdict with the parties and attorneys. This information also often helps parties reach settlement because it helps them see their cases the way an unbiased group of ordinary people do.

Private Judging

Disputes also may be resolved by adversary proceedings that take place privately, outside the regular court system. Private judges, who may be former judges or similarly trained individuals, are sometimes hired by the parties to hear a dispute. There are two types of proceedings in which private judges may be used. In one type, a private judge is retained and will hear the case and render a binding decision that the parties may or may not appeal, depending upon their agreement. The other type of private judging is conducted like a regular case and according to statute. While costly, private judging helps to ease the over-loaded dockets of many Ohio courts, especially in complex and expensive cases (e.g., medical malpractice cases).

Chapter Summary

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

From the OSBA’s “Law You Can Use” column:
http://www.ohiobar.org/pub/lycu/ (search by title or topic)

“Auto Accidents: Do You Know Your Legal Responsibilities?”
“Business Owners Shoulder Responsibility for Employed Drivers”
“Consumers Use Arbitration To Settle Lemon Law Disputes”
“Employers Should Know Extent of Responsibility for Employees’ Injuries”
“How Do I Choose Representation in My Personal Injury Case?”
“Law Allows Citizens To Help Heart Attack Victims”
“Legislation Changes the Landscape for the Average Fender-Bender”
“Ohio’s Lemon Law Protects Consumers”
“Parents May Be Liable for Child’s Actions”
“Settlement Week Encourages Mediation”
“What You Should Know about Auto Insurance Law”
“What You Should Know about Loaning Your Car to Others”

From the OSBA’s LawFacts pamphlet series:
http://www.ohiobar.org/pub/lawfacts/ (search by title)

“Court Mediation”
“Traffic Accidents”

From Cornell Law School Legal Information Institute (topic discernible from Web address):
http://www.law.cornell.edu/wex/index.php/Damages
http://www.law.cornell.edu/wex/index.php/Products_liability

Hieros Gamos’s general torts page:
http://www.hg.org/torts.html
contracts

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

– Archibald MacLeish

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

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

What Is a Contract?

The law defines a contract as nothing more than “a promise the law will enforce.” However, this simple definition is deceptive, because the law will enforce some promises but not others. As will be seen, the law of contracts imposes numerous limitations on the types of promises that are enforceable and on the circumstances in which they will be enforced.

Basic Requirements for a Contract

The basic requirements for a contract are mutual agreement, usually made through a process of offer and acceptance, and consideration, or one of its substitutes. In addition, the parties must be 18 years of age, and otherwise mentally competent, the terms of the agreement must be defined in enough detail that a court (and the parties) can determine their obligations, and the subject matter of the agreement must not be illegal.

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

The Offer

An offer is the outward expression of a willingness to enter into an agreement. The agreement between you and your neighbor arises from an oral offer. Offers also can be written or even implied from conduct. Let us say you go to the doctor to be treated for the flu. The fact that you sought treatment from the doctor implies that you
offered to pay the doctor for her medical services and that she agreed to treat you in exchange for your implied promise to pay. In rare cases, an advertisement also can be an offer, although the usual advertisement is nothing more than an invitation to patronize the advertiser’s business.

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

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

**The Acceptance**

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

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

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

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

**Consideration and Reliance**

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

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

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

A promise to make a gift to a family member also might be enforceable if the family member takes some definite action in reliance on the promise. For example, if a rich uncle promises to give his niece $5,000 so she can take a trip to Europe, and the niece relies on the promise of the gift and actually goes on the trip, the niece will probably be able to sue her uncle for the money if he later tries to back out of his promise.

Fortunately, charities and family members usually are reluctant to sue people who have made such promises. They hope that the promised gift will eventually be made and that the donor will make even larger gifts in the future.

Other Requirements: Certainty, Legality, and Competence of the Parties

A contract cannot be enforced if its terms are so vague that no one can determine what to enforce. There is an offer and acceptance of sorts when, for example, you tell a friend you will do something for him or her in the future and the friend agrees. Because there is neither certainty about what to do or when to do it, nor certainty about the consideration for doing it, the contract (if there is one) would be unenforceable because of any one of these uncertainties.

In addition, the agreement must be for something that is legal for the parties to agree about. An agreement to do something illegal is not a contract, though it may be a conspiracy to commit a crime that could expose both parties to criminal prosecution. Likewise, an agreement to do something that the law will not permit, even if it is not a crime, cannot be enforced as a contract. Thus, an agreement to construct a building in violation of a zoning rule might not be enforceable.

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

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

**Express and Implied Contracts**

The terms “express contract” and “implied contract” refer to nothing more than the formality or informality of the method used to create the contract. Many express contracts are created by signing a detailed written agreement, containing all or most of the terms the parties have agreed upon, such as a contract for the purchase of a home or a new car. So-called “implied contracts” are created with little or no formality, such as the implied contract that is made when someone asks a mechanic to perform a necessary car repair. By asking the mechanic to do the work, the car owner implies that he or she agrees to pay the mechanic’s usual hourly service fee together with the cost of any parts necessary to complete the repairs. By taking the car, the mechanic agrees to perform the work within a reasonable time and to do so in a professional manner for the usual hourly fee. If the charge is too high, or the work takes too long, a court might have to determine the precise meaning of these agreed terms. However, there would be little doubt that the parties entered into some type of agreement for the repair of the car even if they signed nothing and even if neither of them made a real “offer” or “acceptance.”

**Written and Oral Contracts**

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

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

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

The requirement that these contracts be written dates back to the English “Statute of Frauds.” The legislatures of Ohio and other states have adopted their own versions of this 17th Century English law.

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

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

**Performance of Contracts and the Consequences of Breach**

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

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

The situation becomes more complicated when a person “partially performs” a promise, but does not “substantially perform.” If a person only partially performs a contract, he or she may not even be able to get paid for the value of his or her partial performance, and likely will be responsible for any harm caused to the other party. Let us say, for example, that a bricklayer only performs 20 percent of the patio he promised to install. If the homeowner must pay another bricklayer a higher price to get the job finished, then the cost of paying the new bricklayer might be higher than the value of the work done by the original bricklayer who started the job.

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

Substantial Performance & Material Breach

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

An example will illustrate how this works. Mr. Smith has several dead trees on his property and enters into a contract with ABC Tree Company to cut down and remove the trees for a price of $700. ABC cuts the trees down, but simply leaves them lying on the lawn without removing them as promised. This is not only a breach; it is probably a material breach because it does not fulfill the essential purpose of the contract, which was to get rid of the trees. If, as a result of ABC’s breach, Smith has to hire another company, which charges him $800 to cut up the trees and haul them off, Smith will not have to pay ABC anything. In fact, ABC would owe Smith the $100 difference between the $700 it agreed to charge for the job and the $800 Smith ended up having to pay to have the job finished.

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

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

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

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

Excuses for Nonperformance or Breach of Contract

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

Consider, for example, a contract between a shopkeeper and one of the shop’s suppliers for merchandise to be delivered immediately, but paid for some time later, such as at the end of the month. If the shopkeeper goes out of business, the supplier is likely to be excused from delivering the merchandise as promised, even though payment is not due until a month after the goods will be delivered. The likelihood that shopkeeper will be unable to pay will justify the supplier in making a written demand for adequate assurances of performance and in refusing to deliver the goods until the shopkeeper provides adequate assurance that the goods will be paid for if they are delivered.

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

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

Prevention of Performance

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

**Impossibility of Performance**

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

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

**Remedies for Breach of Contract**

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

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

**Money Damages for Breach of Contract**

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

**Specific Performance**

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

The technical term for cancellation of a contract is *rescission*, which refers to an action the injured party can take without going to court. In the earlier example involving the insolvent storeowner, the supplier probably would call the storeowner to say the contract is canceled, and probably should formalize and record the cancellation of delivery by writing a letter to the storeowner. In some cases, however, a party might remain bound to a contract despite a breach by the other party. In such instances, the first party may have to go to court to have the contract rescinded.

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

Injunction

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

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

Quasi-Contract or “Restitution”

Sometimes the law infers a contract-like relationship among parties to prevent someone from benefiting unjustly (legally called an _unjust enrichment_). Such a quasi-contract is used to protect one party from taking advantage of another, especially when the event in question arose innocently or accidentally.

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

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

Web Links:

OSBA’s “Law You Can Use” articles:
(go to http://www.ohiobar.org/pub/lycu and search for article by title or topic)
  “Digital Signatures: Might You Sign a Contract Without Realizing It?”
  “Know Which Contracts Can Be Canceled Within Three-Day Period”
  “Understand Recording Company Contracts Before You Sign”

From FindLaw’s Web site:
  http://library.findlaw.com/ (choose “Commercial Law and Contracts”)

From Cornell Law School Legal Information Institute:
  http://www.law.cornell.edu/wex/index.php/Contracts
Part VII

business transactions and organizations

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

– Mark Twain

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

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

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

Business Transactions in General

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

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

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

Commercial Paper

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

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

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

Negotiability

Commercial paper is considered a negotiable instrument if it:

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

**How Commercial Paper Is Negotiated**

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

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

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

**Holder in Due Course**

The *holder in due course* doctrine is a mechanism used to give some assurance to parties not involved in an original transaction that the commercial paper (or negotiable instrument) is valid. It ensures that commercial paper moves freely and is honored (paid) by the business and banking worlds.

To become a holder in due course, a person to whom commercial paper is transferred must:
• give something of value in return for having the instrument transferred;
• complete the transaction in good faith; and
• complete the transaction without notice of any problems with the instrument.

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

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

The bank then takes the promissory note to another financial institution and has it discounted again to increase the bank’s supply of money or credit. In each case, the note is transferred by endorsement. Mary, as the maker of the note and the buyer of the vases for her floral shop, is primarily liable to repay the note. However, the holder in due course, that is, the “holder” of the note, does not have to look to the maker (Mary) alone—or even at all—for payment. Mary, as well as the vase supplier who had the note discounted, and the bank, which also had the note discounted, are all liable to the holder in due course for the note.
Mary agrees to pay the note when it is due. If Mary dishonors (does not pay) the note, both the supplier and the bank will be liable for paying the holder, since each, by endorsement, has agreed to make payment. The endorsement by the supplier and the endorsement by the bank are individual agreements by which each has committed to be liable for payment if Mary does not pay the note.

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

Cognovit Notes

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

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

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

Consumer Transactions in General

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

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

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

Individuals have the right to read all parts of applications, contracts and disclosure statements. In fact, Ohio case law states that, generally, a person must honor the terms contained in the document he or she signs, unless the person was kept from reading it. Before signing anything, an individual should ask questions about any aspects
of the documents that are not absolutely clear and get satisfactory answers to all questions. Someone who signs a document is bound to its terms, even if he or she has not read it. An individual who does not understand a document should ask for the opportunity to study the document, or to have an attorney review it. Moreover, if an individual has trouble getting information, it should be taken as a sign of potential problems with the transaction.

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

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

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

**Disclosure to the Buyer**

In most consumer transactions, the buyer receives paperwork that includes disclosure forms required by the Federal Truth in Lending Act and certain state laws. Disclosure forms vary. Sellers and lenders may, with certain limitations, modify the disclosure forms, and the forms may or may not be separate from the contract. Even where disclosure forms are part of a contract, the information shown in the form also must clearly appear in the contract itself.

For example, if Mary decides to open a credit card account to purchase the vases for her floral business, then, before opening the account, the bank providing the credit card must fully explain her rights and responsibilities as a cardholder. The bank also must provide certain additional disclosures with every periodic statement or bill issued upon the account. (The information contained in disclosure forms for charge accounts and credit cards is similar to “Amount Financed Itemization” below, but is designed for credit card transactions. Buyers who use credit cards should read and understand this information.)

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

Let’s examine the concept of disclosure for something other than credit cards. After buying the vases, Mary decides to buy a delivery van for the business. A disclosure statement for the purchase of the van from Big Wheel Auto on May 1, 2001, for example, would address the following conditions: 1) the price of the van was $7,607.50; 2) Mary paid Big Wheel a down payment of $1,500 and financed the remaining $6,107.50 for 36 months at an annual percentage rate (APR) of 14.84 percent; and 3) the monthly payments are $211.23, with the first payment due June 1, 2005.
As a buyer, Mary should obtain and study the disclosure form and contract before making a final commitment to Big Wheel Auto, the seller. For this transaction, the disclosure form (before purchase) would show, among other things, that the annual percentage rate (APR) is 14.84 percent and that the total finance charge equals $1,496.80. Essentially, it will cost Mary $1,496.80 to finance $6,107.50 under the contract for three years at an APR of 14.84 percent. In other words, under this contract, Mary would have to pay back $7,604.30, or an interest amount of $1,496.80 more than the $6,107.50 she financed or borrowed.

The disclosure form would show:
- the total amount, including down payment, that Mary will pay;
- the number, amount and date when payments are due;
- that credit life insurance will be purchased for $120;
- that the seller will retain a security interest in the van (the van may be repossessed and sold by the seller if Mary fails to make payments);
- that certain filing fees will be paid;
- that late charges will be assessed; and
- that Mary may qualify for a refund of some of the finance charge if she completes all payments before three years.

A disclosure form will generally contain only that information required by the Federal Truth in Lending Act. The disclosure form is not the entire contract and typically does not identify the make, model, color or serial number of the car. In fact, the disclosure form probably refers the buyer to the contract documents for this information.

### Amount Financed Itemization

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

<table>
<thead>
<tr>
<th>Itemization of the Amount Financed of $6,107.50</th>
</tr>
</thead>
<tbody>
<tr>
<td>$ -0- Amount given to you directly</td>
</tr>
<tr>
<td>$ 5975.00 Amount paid to your account or paid directly to Big Wheel Auto</td>
</tr>
</tbody>
</table>

**Amount Paid on Your Behalf**

<table>
<thead>
<tr>
<th>Amount</th>
<th>Destination</th>
</tr>
</thead>
<tbody>
<tr>
<td>$ 12.50</td>
<td>to Motor Vehicle Bureau</td>
</tr>
<tr>
<td>$ 120.00</td>
<td>to Credit Life Insurance Co.</td>
</tr>
<tr>
<td>$ -0-</td>
<td>Prepaid finance charge</td>
</tr>
</tbody>
</table>

$6,107.50 Total

Such information is helpful because it shows the distribution of the amount financed.

### Credit Cards

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

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

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

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

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

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

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

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

Credit Card Law (In General)

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

• Credit cards cannot be issued indiscriminately. They can be issued only in response to a written or oral request, or as a renewal or replacement of an existing card. While companies sometimes issue unsolicited credit card offers that may include actual credit cards, no card can be activated for use without the written or oral agreement of the person to whom the card was issued.

• If a credit card is stolen or lost, the cardholder is liable for paying no more than $50 in any unauthorized charges, and maybe nothing at all, depending upon the credit card issuer. (The maximum liability can be reduced by contract or through negotiation. Further, the cardholder can
reduce the maximum liability by reporting the loss as soon as possible after the loss is discovered.)

- A cardholder may, with limitations, withhold payments when a dispute arises over a particular purchase. For the cardholder to exercise this right, however, the initial transaction must have 1) exceeded $50 and 2) taken place within the same state as the cardholder’s mailing address or within 100 miles from that address. If these requirements are met and the cardholder has made a good faith attempt to resolve the disagreement with the merchant, then the card issuer may not attempt to collect the amount in dispute or issue adverse credit reports against the cardholder until the dispute is settled.

**Disclosure to Buyer (Cardholder)**

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

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

- the periodic (monthly) rate used to determine finance charges and the annual percentage rate of the finance charges;
- when finance charges begin accruing and any grace period (a period where no interest or finance charges are made);
- the method used to determine the balance upon which the finance charge is computed;
- a description of the property or item purchased by the cardholder, if the lender keeps a security interest.

Finally, the initial disclosure must contain a statement of the cardholder’s billing rights under the Federal Fair Credit Billing Act.

The cardholder also must receive **periodic statements** (bills) when there is an outstanding balance on the account. The terms used in the periodic statements must be the same as those in the initial disclosure and must show:

- the previous balance of the account;
- the transactions within the billing period;
- credits to the account;
- periodic rates;
- the balance on which the finance charge is being computed;
- the finance charge;
- the annual percentage rate and any other charges;
- the closing date of the billing cycle; and
- the address for notices of billing errors.

In addition to the initial disclosure and periodic statements, the card issuer must provide the following:

- an annual statement of billing rights, if billing rights are not stated on each periodic statement (bill);
- a written notice of any changes in terms of the contract on the account (such notices must be made at least 15 days before the effective date of the change); and
- the existence and amount of any surcharge.

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

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

- Upon identifying the billing error, the card issuer must correct the error and send a written notice of correction to the cardholder.
- If a billing error did not occur, the card issuer must send the cardholder a written explanation and may then bill the cardholder for the amount due, including finance charges on the disputed amount.

Retail Installment Sales

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

Balloon Notes

A buyer signs a *balloon note* when promising to pay a series of small installments and a final large installment (or balloon payment) for the remaining balance. Balloon notes are permitted in consumer transactions only if the note specifically allows the buyer to refinance the balance due on the final installment at the same, or better, terms as the small installments. For example, Joe buys a used car for $1,000. He makes a down payment of $100 and finances the balance of the loan for two years at an interest rate of X percent. With the finance charges added to the unpaid balance, Joe normally would pay monthly installments of more than $50. To reduce these payments, Joe could secure a balloon note requiring 23 installments of $35 each and a final installment of $397. According to Ohio law, Joe must be allowed to refinance the final installment amount at the same interest rate of X percent, or less.

Acceleration of Payments

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

Interest Refund

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

Home Solicitation Sales

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

Common abuses included:
- deception and high-pressure salesmanship;
- the sale of goods and services the consumer did not want or need; and
- the sale of inferior goods and services at grossly inflated prices.
Another common abuse involved the business practices of transient salespersons. Door-to-door salespeople would sell the consumers’ promissory notes—their written promise to pay—to finance companies or banks for less than the face amount of the note before leaving the area. In effect, they left the consumer owing a finance company or bank, but did not provide the name of a person or company to contact about any problems with the sale or with the goods and services. Note, how-ever, that the good-faith sale of promissory notes at a discount by sellers of goods and services is a common and legitimate business practice.

**Basic Requirements for a Home Solicitation Sale**

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

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

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

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

**Right of Cancellation**

A buyer in a home solicitation sale may cancel the contract at any time within three days (the grace period) after it is signed by providing a written notice of the cancellation to the seller. If the sale is canceled, the seller must return any money paid, plus any trade-in or deposit. Also, the seller cannot discount the note until five days after the sale, nor can the seller *negotiate* (transfer) the note after the sale has been canceled. In such cases, the note must be returned to the buyer. If the note is negotiated, the laws on retail installment sales apply and the *transferee* (the person or entity who received the note from the seller) must notify the buyer of the transfer and give the buyer 15 days to say why the note is not valid. For example, the buyer may state that the note is not valid because he or she had cancelled the transaction within three days. A buyer who cancels a home-solicitation sale must return any goods in substantially as good a condition as when the buyer received them.

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

**Purchase of New Motor Vehicles (Ohio’s Lemon Law)**

Ohio’s “Lemon Law,” enacted in November 1987, protects consumers against manufacturers’ defects that substantially impair the use, value or safety of a new motor vehicle, either purchased or leased. These defects must be reported in the first year or within 18,000 miles, whichever comes first. The law protects passenger cars, light trucks (no more than one ton capacity and not used for business), motor homes (vehicle portion only) and motorcycles. If the manufacturer is unable to repair the defect after a reasonable number of repair attempts, the consumer may be eligible for a refund or replacement. The manufacturer is presumed to have made a reasonable number of repair attempts if any of the following have taken
place within the first year or 18,000 miles, whichever occurs first:
• There have been three or more attempts to repair one problem and the problem either continues to exist or reoccurs.
• The vehicle has been out of service for repair for 30 days or more.
• There have been eight or more attempts to repair different defects that substantially impair the use, value or safety of the vehicle.
• There has been one attempt to repair a manufacturer’s defect that could result in serious injury or death and the problem continues to exist or reoccurs.

(For more information about Ohio’s Lemon Law, see www.ohiobar.org. Go to “Public,” then “Resources,” then “Law You Can Use.” Type the word “lemon” in the search box.)

Other Consumer Credit Transactions

Other means of extending consumer credit are through electronic fund transfers, small loans and payday lenders.

Electronic Fund Transfers

The Electronic Fund Transfer Act establishes the basic rights, liabilities and responsibilities of individuals who receive electronic transfers to their accounts and make debit card transactions using electronic-fund-transfer machines, more commonly known as automatic teller machines (ATMs) and point-of-sale terminals. The terms and conditions involving an individual’s account must be disclosed in understandable language when such transactions occur.

In addition to certain other specific requirements, the disclosure must include:
• the consumer’s liability for unauthorized transfers;
• the person or office to contact with questions;
• a statement of any charges assessed for the service;
• the circumstances under which the financial institution will, in the ordinary course of business, disclose information about the customer’s account to third persons;
• the consumer’s right to stop payment of a pre-authorized electronic fund transfer and how to initiate a stop-payment order; and
• a statement of the consumer’s right to receive documentation of electronic fund transfers.

Gramm-Leach-Bliley Act

Signed into law in 1999, the Gramm-Leach-Bliley Act requires financial institutions to give customers notice about its privacy policies and practices when initiating the customer relationship, and annually once a customer relationship is established.

Banks, credit card issuers and all other types of businesses that offer financial products and services to consumers are required to protect the privacy of non-public, personal information about customers. Such institutions may not disclose non-public personal information to non-affiliated third parties, unless the financial institution meets various disclosure and opt-out requirements, and the customer has not chosen to opt out of the disclosure. This means financial institutions must send out initial and annual notices of their privacy policies to customers, notifying them of their right to maintain the confidentiality of personal or private (protected) information with non-affiliated entities, except in limited cases.

Small Loans

All loan companies must be licensed by the state of Ohio. According to state law, loan companies are allowed to make small loans—up to $5,000—at special interest rates. They may charge up to 28 percent per year on the first $1,000 and 22 percent on loans of more than $1,000. Interest rates are negotiable, meaning buyers can shop for the best interest rate and terms. Sellers of money as well as sellers of merchandise can change the terms of their documents, and interest rates on this type of transaction might fluctuate.
Payday Lenders

Payday lenders make small, short-term, high-rate loans, called payday loans, cash advance loans, check advance loans, post-dated check loans or deferred deposit check loans. Typically, an individual writes a personal check payable to the lender for an amount plus a fee. The lender gives the individual the amount of the check minus the fee. An individual who extends the loan for payment at a later time pays a fee for each extension.

The federal Truth in Lending Act requires payday lenders to disclose the cost of payday loans. Individuals must receive, in writing, the dollar amount of the finance charge and the annual percentage rate.

Payday or cash advance loans secured by a personal check are very expensive credit. Throughout the 1990s, state public interest research groups and the Consumer Federation of America studied payday lenders and found they were making short-term consumer loans of $100 to $400 at legal interest rates from 390 percent to 871 percent in states where payday lending was allowed.

Under Ohio law, check-cashing businesses can make loans provided that each loan meets all of the following conditions:
- the total amount of the loan is not more than $800;
- the length of the loan is not more than six months;
- the interest on the loan is not more than five percent per month, and no unpaid interest can be deducted from the loan proceeds or paid in advance;
- the loan is under a written contract;
- the contract states the terms and conditions of the loan;
- the contract discloses the total amount of the fees, charges and the rate of interest, calculated both as an annual percentage rate based on the loan principal and as an annual percentage rate based on the sum of the loan principal plus any loan origination fee, check collection charge or other fee under the loan contract;
- any loan origination fee is not more than $5 per $50 of the loan amount;
- the contract states the total amount of each payment, when each payment is due, and the total number of payments that will be made under the loan contract;
- the contract contains a highly visible statement, warning that the rate of interest charged on the loan is higher than the average rate of interest charged by financial institutions on substantially similar loans; and
- the loan is not made for the purpose of paying off an existing payday loan.

Bankruptcy

No discussion of business law would be complete without an examination of bankruptcy. The U.S. Bankruptcy Court is part of the federal court system. (See Part II, “The Courts.”) Individuals and businesses use bankruptcy as a way to obtain relief from debts owed to creditors. Title 11 of the United States Code governs bankruptcy. The U.S. Bankruptcy Code has been amended several times since it was enacted in 1978, most recently with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. As federal law, it supersedes any conflicting state law, and with the exception of certain exemptions, it is fairly uniform from state to state.

Types of Bankruptcy

There are four kinds of bankruptcy proceedings, and they are named for the chapters of the Bankruptcy Code that describe them. The chapter best suited for a business or individual depends on the nature of the debts and the nature and value of assets.

Chapter 7

Chapter 7 bankruptcy, known as a straight liquidation, is available to qualified individuals, married couples, corporations and business partnerships. A Chapter 7 trustee, assigned by the U.S. Trustee’s Office or chosen by the creditors,
liquidates (sells) any assets that are not protected by the court (non-exempt assets) to pay all or a portion of the debts owed to creditors. Depending on where the individual debtor lived before filing bankruptcy, he or she may be entitled to keep (or exempt) some or all of the equity in certain kinds of property (such as a house, car, boat or household item).

Unless the money raised from the sale of the property is expected to be greater than these exemptions and any liens or mortgages, the trustee may decide to abandon the item of property, meaning that the debtor gets to keep it. Through this liquidation process, any debts not paid by the trustee, with certain exceptions, will be discharged (eliminated), and creditors cannot force the debtor to pay any remaining amount owed.

Chapter 13

Chapter 13 of the Bankruptcy Code provides for an individual reorganization, an alternative to Chapter 7 that generally allows a debtor to keep personal property. A Chapter 13 debtor must have regular income and meet certain debt and asset limits. Effective October 17, 2005 under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, individuals who earn more than the median income in the state where they lived before filing bankruptcy, and who can repay at least $6,000 of their debt over five years, are no longer eligible to have all their debts eliminated.

Instead, these individuals must repay their creditors over time and enroll in a financial counseling program. Under Chapter 13, an individual debtor submits a plan detailing how all of his or her debts will be paid from disposable monthly income (income after providing for ordinary living expenses) over a period of time of up to five years. A plan or reorganization is monitored by a Chapter 13 trustee and supervised by the bankruptcy court. A Chapter 13 debtor must pay creditors at least as much as they would be paid if the debtor’s assets had been liquidated in a Chapter 7 case.

Chapter 11

Corporations or other businesses typically use Chapter 11 reorganization as an alternative to Chapter 7 liquidation. It also may be available for individuals who do not qualify for the Chapter 13 individual reorganization because they cannot meet the debt and asset limits, or for those who do not wish to reorganize under Chapter 13.

In a Chapter 11 reorganization, as in a Chapter 13 reorganization, the business debtor may keep certain property and be required to pay creditors with future earnings according to a reorganization plan.

Chapter 12

Chapter 12 is a special reorganization for family farmers. To qualify, a family farmer must earn most of his or her income from family farming operations.

Process of Filing for Bankruptcy

To file for bankruptcy, the debtor files a petition with the appropriate bankruptcy court and pays a filing fee, unless that requirement is waived by the bankruptcy court. In addition to filing a petition, the debtor must provide the court with detailed information about assets and liabilities on documents called schedules. These documents must include an accurate list of everything owned and everything owed to creditors, as well as personal information concerning employment and transfers of money or other property the debtor may have made before filing for bankruptcy.

After these documents are filed, the debtor meets with a trustee. The debtor’s creditors are invited to this meeting. The trustee checks the petition and schedules for accuracy. Also, the trustee and creditors may ask questions about the debtor’s financial situation.

In a Chapter 7 case, the debtor must provide the trustee with any non-exempt property or its value in cash. If no creditor objects, claiming that a particular debt is not dischargeable (for
example, because it was incurred by fraud), the court will issue a discharge of all qualifying debts in about three to six months after the original bankruptcy filing. At that point, the case is complete.

In a Chapter 13 proceeding, the debtor files the same forms and a proposed repayment plan. The plan describes how the debtor intends to repay the debts over the next three to five years. Again, the debtor and trustee hold a meeting with the creditors to give them a chance to review and question the schedules. After the meeting, the debtor attends a hearing before a bankruptcy judge who either “confirms” or “denies” the plan. If the plan is confirmed and all the payments under the plan are made, the debtor often receives a discharge of any remaining balance owed.

Exemptions

The U.S. Bankruptcy Code and Ohio Revised Code include a list of items bankruptcy filers are permitted to keep from creditors during the bankruptcy proceedings. These items are called exemptions. Again, depending on where the individual debtor lived before filing bankruptcy, he or she may be entitled to keep (or exempt) some or all of the equity in certain kinds of property. In general, the exemptions available to debtors are as follows:

• **Equity in the home:** The homestead exemption may allow debtors to protect all or some of the equity in their homes.

• **Insurance:** Debtors may be permitted to keep the cash value of their life insurance policies.

• **Retirement plans:** Pensions that qualify under the Employee Retirement Income Security Act (ERISA) are fully protected from bankruptcy proceedings. In addition, many other retirement benefits are protected; however, IRAs and Keoghs are not.

• **Personal property:** Most household goods, furniture, furnishings, clothing (other than furs), appliances, books and musical instruments are exempt up to a certain amount. Debtors may be limited in how much jewelry they can keep.

Most states allow a debtor to keep a vehicle if the debtor has paid off more than $2,400 of the vehicle debt; many states give debtors a prescribed (or “wild card”) amount of money that they can apply toward any property. Ohio permits $400 of wild card money.

• **Public benefits:** All public benefits, such as welfare, Social Security and unemployment insurance, are fully protected.

• **Tools used on the job:** Debtors may be able to keep a few thousand dollars worth of tools used in their trade or profession.

• **Wages:** In most states, including Ohio, the debtor can protect at least 75 percent of wages that have been earned but not yet paid.

Discharge of Debts

Individuals frequently opt for a Chapter 7 bankruptcy because the debtor receives a discharge of most unsecured debts within several months of filing the case. If the debtor’s income appears high enough to permit some repayment of debt, the trustee or the court may move to dismiss the case for substantial abuse. The theory is that allowing someone with the ability to repay to file Chapter 7 and avoid repayment abuses the bankruptcy system. This is why Chapter 13 is often a better choice for debtors if they:

• have debts that cannot be discharged in Chapter 7;

• default on mortgages or car payments;

• own more property than can be exempted from creditors in Chapter 7;

• owe taxes or other debts that are not discharged under Chapter 7.

Chapter 11 bankruptcy is a form of reorganization available to individuals, corporations and partnerships. It is the typical choice for large businesses seeking to restructure their debt. The debtor entity usually remains in possession of its assets and operates the business under the supervision of the court and for the benefit of creditors. A Chapter 11 plan is allowed only with a vote of approval by creditors, who are divided into classes based on the characteristics of
their claims, and whose votes are allocated based on the amount of their claims against the debtor.

The filing of a bankruptcy petition does not guarantee the discharge of debts. The bankruptcy court may deny a general discharge of debts if the debtor commits certain acts of misconduct before or after filing the bankruptcy petition, such as destroying, concealing or removing assets that might otherwise be used to pay creditors. Also, a discharge of debts may be denied if the debtor has destroyed or concealed records that show what assets are available to pay creditors. Finally, the bankruptcy court may deny a general discharge if the debtor has lied under oath during the bankruptcy case, or has refused to answer questions without a good reason. In addition to acts of misconduct, a debtor will not be granted a general discharge if he or she has obtained a discharge in a Chapter 7 case within six years of the date that a second bankruptcy is filed.

Even if a general discharge is granted, some debts are not discharged in bankruptcy. Also, the type of bankruptcy affects which debts may be discharged. Generally, more debts are discharged in Chapter 13 than in Chapter 7. Congress provided for greater relief under Chapter 13 as an incentive to encourage debtors to repay their debts through a reorganization plan.

Debts that are generally not discharged in bankruptcy include taxes assessed within 240 days of the bankruptcy filing, certain student loan debts, some child or spousal support debts arising from a divorce, criminal fines and debts arising from operating a vehicle while impaired (OVI), and any debt incurred because the debtor has committed fraud, breached a fiduciary duty as a trustee, or committed a “willful” act causing injury to a creditor. The bankruptcy court ultimately decides whether these types of debts will be discharged based on a particular debtor’s circumstances.

Common Sense in Business Transactions

Individuals and businesses often find themselves in difficult situations because they do not wisely manage their business affairs. This is particularly true when it comes to consumer credit transactions. Most troubles of this kind can be avoided by following five simple rules:

• use credit sparingly;
• stay within a written budget;
• understand the terms of business transactions before entering into them;
• meet personal or business obligations, but if trouble arises in meeting those obligations, let the other party know immediately; and
• keep accurate records.

Use Credit Sparingly

Consumer credit can be expensive and should be used carefully. In the long run, it may be better to pay cash and use the money saved on interest to buy more goods and services. Often individuals buy things because they believe they have an immediate need. Usually, however, it is smarter to save and pay cash later rather than to buy now on credit and pay more in interest. Further, regular savings through a bank, credit union, or investment can make an individual’s savings grow.

Stay Within a Written Budget

Individuals should not commit to payments they may have trouble meeting. Remember, pay the essentials first, such as housing, health care, transportation, food and clothing, saving a little extra for emergencies and leisure. Many individuals have discovered that adhering to a written budget is extremely valuable to their financial planning and helps limit the number of impulse purchases.
Further, do not calculate overtime pay when determining long-term payments. The fact that an individual is currently getting substantial overtime pay is no guarantee that the overtime will continue.

Understand the Terms

Entering into a business transaction without fully understanding the particulars is like hiking an unfamiliar mountain trail in the dark. It is unwise and you may get hurt.

You should understand your rights and obligations. Read and understand all paperwork, and do not sign anything with blank spaces on it; everything should be filled in, or crossed out if it does not apply. Do not rely on sales talk. Rely only on what is written in the contract, note, security agreement, mortgage, or other papers that formalize the agreement. Consult a lawyer if you cannot understand the terms of a contract or agreement. A lawyer can greatly assist in providing guidance before you close a particular deal.

Meet Personal or Business Obligations/Pay on Time

Keep your promises once you make them. A good credit rating is invaluable. A bad credit rating can restrict you financially and may prevent you from obtaining credit in the future, or make future credit more expensive. In fact, a bankruptcy filing likely will remain on your credit report for seven years leaving you with limited credit options during that period.

If you have trouble making payments on time, contact your creditors to discuss the situation. Creditors are often willing to adjust or temporarily delay payments.

People in the business of extending consumer credit know that if they pressure a debtor in financial trouble too much or too quickly, they may destroy the debtor’s ability to eventually make complete payment. A debtor who does not contact creditors when in financial difficulty may give the creditors the impression that the debtor has no intention of paying.

Keep Accurate Records

It is important to keep:
• copies of all signed papers;
• copies of all correspondence concerning purchases and payments;
• records of all tax payments in case a dispute, error or question arises; and
• mortgage and home-equity loan records as proof of the interest paid on these loans, which may be deductible for federal income tax purposes.

Business Organizations

The law of business organizations concerns the various forms of businesses, such as corporations, limited-liability companies and partnerships, and the legal consequences that arise from each form of business.

Business Formation in General

There are several legal forms that a for-profit business can take. Each form requires complicated legal and taxation decisions that can affect the business entity and its owners far into the future. New businesses must consider the following issues:
• start-up expenses;
• the management structure desired;
• personal liability issues;
• tax consequences; and
• the continuing legal requirements imposed on the business form by statutes and regulations.

Most businesses choose from among the following forms: sole proprietorship; partnership; limited liability company; or corporation.
Sole Proprietorship

*Sole proprietorship* offers the simplest form of organization, combining ownership and management in one person. The business has no separate existence. The owner is directly affected by business profits as well as losses. Income is taxed on the owner’s personal return and not at the business level (business activity is shown on a separate schedule). Sole proprietorships are popular, but a disadvantage is that sole proprietors are completely and personally liable for business obligations. This means that their personal assets, such as homes and automobiles, are not protected from debt obligations. A sole proprietor can start a business at any time, but must obtain any needed licenses and obey employment laws.

Partnership

There are various kinds of partnerships: general partnerships, limited partnerships and limited liability partnerships. A *partnership* is similar to a sole proprietorship; however, it involves two or more owners operating a business for profit. As in a sole proprietorship, the partners pay the partnership taxes themselves (the partnership must file a tax return to show its taxable income and allocate it among the partners according to their interests). Also, in a general partnership, all the partners are personally liable for business obligations.

Ohio recognizes three partnership forms:

1. **The general partnership** involves two or more owners conducting a business for profit. General partners share equally in the right and responsibility to manage the business, and any individual partner can bind the entire group to a legal obligation. Each individual partner assumes full responsibility for all of the business’s debts and obligations. The tax advantage of a general partnership is that profits or losses are not taxed to the business, but pass through to the partners, who include the gains on their individual tax returns at a lower rate or use the losses to offset other ordinary income. No formal filing is required to create a general partnership, though if it is operating under a name other than that of its partners, it may need to file a certificate with the county recorder’s office.

2. **The limited partnership** can be formed only by filing a certificate of limited partnership with the Secretary of State. Once formed, a limited partnership offers personal liability protection for some of its participants. The “limited partners” have no voice in managing the business and are not liable for its debts. However, as in a general partnership, limited partners are liable for the tax on their shares of the partnership income. Every limited partnership must have at least one general partner who manages the partnership and is liable for its debts.

Ohio does not require a written partnership agreement. In the absence of an agreement, the rights and obligations of the partners in a general partnership are determined by Ohio’s version of the Uniform Partnership Act. Ohio’s Revised Uniform Limited Partnership Act governs the rights and responsibilities of limited partnerships. However, it is wise for partners to define these matters for themselves through a written partnership agreement. Such efforts may help settle disputes if they arise.

3. **The limited liability partnership** is similar to the general partnership, except that a partner in an LLP is not personally liable for the negligence or wrongful acts of other partners or of employees who have not been directly supervised by a partner. The partner is still personally liable for contracts entered into by anyone on behalf of the partnership. To create a limited liability partnership, a registration application must be filed with the Secretary of State, and a report must be filed with the Secretary of State every two years.

Incorporation

The *corporation* is a separate legal entity that is liable for its own taxes and obligations. This form insulates the owners, directors and officers of the business from personal responsibility for taxes and debts. A corporation can sell owner-
ship interests, or shares, in the company to raise capital. Two different kinds of tax treatment are available for corporations, depending on whether the corporation qualifies for, and elects to be taxed under, Subchapter S of the Internal Revenue Code.

A corporation is formed by filing articles of incorporation with the Secretary of State. Various other formalities, such as electing directors, adopting regulations and accepting subscriptions for shares, need to be carried out before the corporation begins to operate.

• C-Corporations
A C-corporation is a corporation that has not elected special tax treatment under the Internal Revenue Code. It is subject to corporate income tax on its profits and its shareholders are generally taxed on any dividends at a maximum rate of 15 percent. The application of these two layers of tax is sometimes referred to as double (or dual) taxation.

One advantage of establishing a C-corporation is that income tax brackets are lower than individual rates for the first $75,000 of income. Due to double taxation, however, the shareholders benefit most if earnings are retained and reinvested rather than paid out to shareholders as dividends. A C-corporation has the flexibility to create different classes of stock containing varied distribution and voting rights.

One of the disadvantages of C-corporation status is double taxation (described above), and another is the trapping of losses in the corporation. This means that losses are suspended and carried forward until they can offset corporate income. Shareholders of a C-corporation cannot use losses to offset their individual income as owners in a sole proprietorship or partnership can do. Finally, in Ohio and many other states, the C-corporation is subject to a separate state franchise tax, which does not apply to S-corporations or limited liability companies (LLCs).

• S-Corporations
An S-corporation is a corporation that has elected to have its income and losses taxed like a partnership. The chief advantage of an S-corporation is the ability to obtain limited liability while eliminating the second layer of taxation. Also, shareholders can use corporate losses to offset their income from other sources.

One disadvantage of an S-corporation is its rigid structure (only one class of stock is permissible). Also, the number of shareholders is limited to 75, and there are restrictions on who can be a shareholder. Only individuals, estates and certain trusts and tax-exempt entities can be S-corporation shareholders. Corporations and other entities generally cannot own S-corporation stock.

• Limited Liability Companies
The limited liability company is Ohio’s newest form of business entity. Its owners are identified as members. To form an LLC, articles of organization must be filed with the Secretary of State. Fewer formalities are required in the ongoing operation of an LLC than are required for a corporation. Members of an LLC are not liable out of their personal assets for debts or obligations of the business, unless they have specifically agreed to personally guarantee the debt. Members are liable only for the amounts they have agreed to invest in the business.

An LLC may elect to be taxed under the same rules that apply to partnerships. This means that the business itself only files an information return with the IRS, and the income and losses of the limited liability company are taxed to the members on their personal income tax returns. The LLC, unlike the S-corporation, can create different classes of membership interests having different preferences in earnings and different distribution rights upon liquidation.

An LLC may be managed by all its members, just as a general partnership is managed by all its partners. Alternatively, the members can be creative in developing a management structure. The LLC can be managed by a manager, by a board, or by a combination of members and managers. As a result, the LLC structure, as
described in its operating agreement, can resemble that of a corporation, a partnership or something in between.

One of the disadvantages of the LLC is that employment taxes apply to all LLC distributive shares of member-employees. Also, because LLCs are a relatively new type of entity, there may be issues regarding LLCs upon which the courts have not yet ruled. In the area of taxation, however, members can turn to the body of partnership law for answers if the LLC has not opted out of pass-through taxation.

Most owners desire the protection of limited liability. Both corporations and LLCs afford their owner-employees limited liability from obligations and liabilities of the company. In choosing among the various business entities, the facts and circumstances of each business must be considered. For many businesses that wish to avoid the double taxation of a C-corporation, but want flexibility in management and distributions, the LLC is an increasingly popular choice.

Nonprofit and Tax-Exempt Organizations

A nonprofit corporation is a corporation that is not formed for its members’ financial gain or profit. The net earnings of a nonprofit corporation are not distributed to its members, directors, officers or other private persons. A nonprofit corporation must follow the specific guidelines set forth in Section 501(c) of the Internal Revenue Code of 1986 if it wishes to obtain an exemption from federal and state taxes that might otherwise be imposed upon the income it receives. Nonprofit corporations that qualify as charitable, religious, scientific, literary or educational organizations under Section 501(c)(3) also may receive contributions that are tax-deductible to their donors. The government has granted special tax treatment to nonprofit organizations because of the benefits the public derives from them. Many states also regulate nonprofit corporations that engage in certain charitable activities.

Structuring an organization as a nonprofit corporation protects its directors, officers and members from personal liability for the corporation’s debts and liabilities. Of course, its directors and officers remain personally liable for their own negligence in carrying out their duties to the nonprofit organization.
Chapter Summary:

- Special sets of rules govern many daily business transactions.
- Business transactions may involve several major fields of the law, particularly the law of contracts and the law of property.
- Ohio and other states have adopted the Uniform Commercial Code (UCC) to govern a wide range of commercial transactions that may cross state lines.
- Checks and promissory notes are the most common forms of commercial paper. Drafts, bills of exchange and certificates of deposit also are common forms.
- Commercial paper is transferred or negotiated by endorsement.
- Holder in due course is a doctrine giving some assurance to individuals (or entities) who were not parties to an original transaction that the commercial paper (or “negotiable instrument”) is valid.
- The maker of a cognovit note acknowledges the debt and authorizes the creditor to enter a judgment against him or her without notice or a hearing in case of default. In Ohio, cognovit notes cannot be used in consumer transactions.
- Consumer transactions often depend upon the use of credit.
- State and federal laws cover most consumer transactions, including those involving credit.
- The credit card is perhaps the most widespread method of extending consumer credit.
- A credit card represents the credit card holder’s contract with the card issuer to maintain a revolving charge account in the cardholder’s name. This allows the cardholder to use the card to buy goods and services.
- A retail installment sale is any transaction where the purchase price is paid over time by making periodic payments.
- In a retail installment sale, the buyer always gives the seller an installment note and often a security interest or lien (similar to a mortgage) in the items purchased, permitting the seller to repossess the items if the debt is not paid.
- In a home-solicitation sale, the seller (commonly known as a door-to-door sales-person) comes to the buyer’s home to solicit and close the sale.
- “Lemon Laws” protect consumers who buy or lease vehicles by requiring manufacturers, under certain circumstances, to replace or buy back defective vehicles that cannot be or have not been properly repaired in a timely manner.
- Consumers also may get credit through electronic fund transfers, small loans and payday lenders.
- Bankruptcy is a process designed to help consumers and businesses eliminate their debts or repay debts under the protection of the bankruptcy court.
- The law of business organizations concerns the various forms of businesses, such as corporations, limited-liability companies and partnerships, and the legal consequences that arise from each form of business.
- A nonprofit corporation is a corporation not formed for financial gain or profit, and none of its net earnings may be distributed to its members, directors, officers or other private persons.
Web Links:

From OSBA’s “LawFacts” pamphlet series:
(go to http://www.ohiobar.org/pub/lawfacts/ and locate topic by title)
“What you should know about… Bankruptcy”

From OSBA’s “Law You Can Use” articles:
(go to http://www.ohiobar.org/pub/lycu and search for article by title or by topic)
“Consumers Use Arbitration to Settle Lemon Law Disputes”
“Consumers Should Exercise Care When Purchasing Health Products Online”
“Consumers Should Watch Out for Predatory Lenders”
“Federal Law Restricts Telemarketing and Unsolicited Fax Advertisements”
“Franchise Laws Protect Investors”
“Guard Against Identity Theft”
“Holiday Spending with Credit Cards: How Much Do You Know About It?”
“How Do Consumer Class Action Lawsuits Work?”
“Know Which Contracts Can Be Canceled within a Three-Day Period”
“New Bankruptcy Law Limits Filing Choices”
“New Bankruptcy Law Redefines Debt Relief Agencies”
“Ohio’s Lemon Law Protects Consumers”
“Stores Must Honor Shelf Prices”
“To Lease or Buy: Know the Differences Before You Decide”
“What Consumers Should Know Before Selecting a Credit Counseling Agency”
“What You Should Know about On-Line Shopping”

From OSBA’s Legal Basics for Small Business, 2004 Edition:
(go to http://www.ohiobar.org; then “Public,” then “Resources,” then “Legal Basics for Small Business”)
Includes articles about business organization types

From Nolo.com:
http://www.nolo.com
Links to resources and information of interest to small businesses
Search by topic: under “property and money” and “rights and disputes”

Continued on page 88
Web Links continued

From the Ohio Attorney General’s Web site:
http://www.ag.state.oh.us/online_publications/consumer_protection/Consumerprotection

From the federal government:
http://www.consumer.gov/Consumer information and National Do Not Call Registry

From Hieros Gamos:
http://www.hg.org/consume.html
http://www.hg.org/credit.html
Consumer and credit law

From the Consumer Federation of America:
http://www.consumerfed.org/
Search: payday loans

From the U.S. Small Business Association:
http://www.sba.gov/

From the Ohio Secretary of State’s Web page:
http://www.state.oh.us/sos/
(click on “business services”)
Business services information, including how to incorporate a business

From Findlaw:
http://www.findlaw.com/01topics/ FindLaw’s encyclopedia of legal topics
(click on “bankruptcy”)

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Davidson III, Robert L. *The Small Business Incorporation Kit.*

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Burton, Kermit. *Non-Lawyers Non-Profit Corporation.*

Hopkins, Bruce R. *Starting and Managing a Nonprofit Organization: A Legal Guide.*

*Why Tax Exemption? The Public Service Role of America’s Independent Sector.*
Part VIII

property law

“To those who are engaged in commercial dealings, justice is indispensable for the conduct of business.”

– Cicero

Buying property is considered a vital part of living the “American Dream.” While most people buy property for personal enjoyment, some individuals make a business of buying, selling, leasing, or renting real property. So, whether someone is a homeowner, business owner, real estate magnate, or merely interested in purchasing land as an investment, it is important to understand the large and complex world of property law, and, in particular, real property law.

Kinds of Property

The word “property” has many meanings. In a strict legal sense, it signifies ownership. As a practical matter, it refers to objects that can be owned. The two main classifications of property are real property and personal property. Real property law deals with land, fixtures on land, and rights and other intangible interests relating to land that are capable of ownership. It may include land, a single-family house, a condominium, or a vacation home. Personal property is anything that is not related or attached to real estate; it may be tangible or intangible. Personal property might include cars, clothes, furniture, refrigerators, tools and cash as well as various rights or interests such as stocks or bonds.

(Different aspects of personal property law are dealt with in this section, Part VI, “Contracts,” and Part VII, “Business Transactions and Organizations.”)

Real Property

The terms real property, real estate and realty refer to land, buildings and other fixtures on land. They also refer to different kinds of interests in land and to various rights that go along with land or some interest in it.

The term land includes the actual surface area and everything under and above a parcel of ground. In the past, ownership of a parcel of land began at the center of the earth and extended through the boundaries of the parcel out into space. Today, the airspace above the parcel is not exclusive; it is considered to be part of the public domain and subject to rights of navigation, which means that members of the general public can travel through or use that airspace.

Generally, a fixture is something not naturally a part of the land, but affixed to the land in such a way that it cannot readily be removed without causing damage. Because buildings are usually affixed to land, they are thought of as real property. A furnace is personal property until it is installed, when it becomes a fixture. If something on the land is portable, such as a mobile home, it may or may not be considered part of the land, depending on how it is installed. For example, crops and trees are part of the land while growing, but become personal property when they are harvested. The same is true of minerals, which are part of the land in their natural state, but become personal property when mined, quarried, pumped, or otherwise removed. Fixtures such as crops and minerals are sometimes referred to as mixed property, because they have some characteristics of both real and personal property.

There are many degrees of land ownership, ranging from full ownership—that is, including all rights relating to it, such as the right to sell it or give it away—to rental (permission from the owner to use a portion of the land for specific purposes). (Of course, all interests in property are subject to the rights of the community. Thus, even the full owner of real estate must comply with zoning and building codes, for example.) Someone who has less than full ownership of land is
said to have a *partial interest* in the land. Certain types of ownership carry particular rights, such as the right of a landowner to receive any rent the land might yield.

**Personal Property**

Personal property is anything that is not real estate or affixed to real estate. Personal property can be tangible or intangible.

Tangible personal property can be transported, seen and touched. Examples of tangible personal property include cars, clothes, furniture, refrigerators, tools and cash.

Intangible personal property includes various rights or interests that cannot be seen or touched. Examples include ownership of stocks and bonds, ownership of a debt and the right to bring a legal action. Stocks and bonds merely represent the value of the underlying interest; it is not the underlying interest. For example, a stock certificate represents an amount and kind of ownership interest in a particular corporation.

Personal property includes money in a bank account, interest in a joint bank account, or a payable-on-death account. A joint-and-survivorship bank account is an account in the names of two or more individuals who have an equal right to the assets in the account with ownership passing to the survivor(s) on the death of one of them. The payable-on-death account (POD) is an account owned by one person during his or her lifetime, which passes, on the owner’s death, to one or more named persons.

Personal property is subject to a set of rules that is different from those governing real property. Because there is such a wide variation in types of personal property, a variety of rules govern its ownership and use.

**Types of Real Property Ownership**

When an individual is said to own real estate, it usually means that he or she is the full owner of a particular piece of property. Full ownership is only one of the ways to own real property. Or, someone with a lesser degree of ownership might have an interest in a property for a lifetime (*life estate*), or for a period of years, months or even weeks. Ownership also may be shared in various ways.

Property may act as security for debt, and the *security interest* is a kind of ownership. An individual may own an interest in real property merely by having the owner’s permission to use it in a certain way, such as where the owner of a large yard allows the neighborhood children to play ball there. Many different kinds of interests can be separated from the full ownership and can be owned or disposed of separately. For example, the mineral rights of a piece of property can be sold while the property owner continues to own the land and live on it.

**Fee Simple**

Full ownership of real property is called *fee simple ownership*, *fee simple title*, or, sometimes, *ownership in fee*. The distinguishing characteristic of a fee simple title from lesser grades of ownership is the right to pass full ownership to someone else, whether during the original owner’s lifetime or upon his or her death.

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**Fee simple ownership** also gives the right to...

- use the real property as the owner sees fit;
- collect rents or profits the property yields;
- mortgage the property;
- limit the use of the property by other people;
- allow others to use the property; and
- sell, rent or lease the property.
Fee simple ownership of real property is sometimes described as absolute ownership. This description is misleading because there are substantial limits on how a fee simple owner may use the land (real property). For example, the fee simple owner must pay taxes on the land, abide by zoning and other restrictions on the use of the land, and honor the rights of others who own an interest in the land (tenants, lessees, mortgagees, holders of easements, etc.). Further, the fee simple owner's use of the land must not interfere with the rights of other landowners or the public.

**Life Estate and Remainder Interest**

A fee simple property owner can grant ownership of the property to another person for the duration of the other person's life. This type of ownership is called a life estate. The person who holds the life estate is called a life tenant. (The term tenant may be confusing. In this context, tenant does not refer to a participant in a rental arrangement, but to a kind of ownership in real property.) With certain important exceptions, a life tenant can treat the property in much the same way that a fee simple owner can treat the property. For example, a life tenant has access to the property and is entitled to use the property, to lease it, and to retain any rents or profits the property may yield. However, by definition, the life tenant's interest in the property ends at his or her death. The life tenant cannot sell a fee simple interest in the property. Further, the life tenant cannot destroy or waste the property because such action affects the rights of those who will own the property after the life tenant dies.

When a life estate is created, a remainder interest is also created. The person who holds the remainder interest (called the remainderman) automatically acquires the fee simple title to the property when the life tenant dies. The terms of the original grant determine whether the fee simple title stays with the remainderman. If no remainderman is named, fee simple ownership reverts to the original owner or to the owner's heirs upon the death of the life tenant.

**Types of Joint or Common Ownership**

In Ohio, there are two different forms of ownership of real property where two or more own the property: tenancy in common and survivorship tenancy.

In a tenancy in common, each owner has an undivided, fractional share of the property. Depending on how the tenancy in common is created and the transactions that subsequently take place, the shares may be equal or unequal. Regardless of the size of an individual's share, each tenant in common enjoys full ownership of his or her share, and can sell, mortgage, use, or dispose of it as a full owner. On his or her death, the tenancy passes to heirs or to those named in the tenant-in-common's will.

For example, if one tenant wishes to take a share in the sense of taking control of his or her rights in the property, or to obtain the monetary value for that part, the tenant may file a lawsuit to divide or partition the property. If partition is ordered, the property may be physically divided and a fee simple portion given to each tenant in common, or the property may be sold as a unit and the proceeds divided among the tenants in proportion to their respective shares.

In Ohio, a survivorship tenancy is a form of ownership created by statute. A survivorship tenancy is similar to tenancy in common, except that joint tenants have a right of survivorship. That is, when one joint tenant dies still owning his or her share, the share passes automatically to the surviving tenant(s). Thus, a survivorship tenancy cannot be transferred by will, as the nature of this form of ownership is that it automatically passes to the survivor(s).

The right of survivorship also may be ended where, for example, all joint tenants transfer or convey their interest.

In most states, the right of survivorship is automatically created when a joint tenancy is created. In Ohio, however, the right of survivorship must be specifically described in the document that creates it. The statute allowing joint tenancy with right of survivorship states that this
law should be liberally interpreted to comply with the intent of the owners. However, the legal document that creates the joint tenancy must use clear survivorship language. If the document does not have such a provision, the result will probably be tenancy in common.

It should be noted that joint and survivor ownership is commonly used for both personal property and real property—a bank account with more than one name on it, for example, normally is joint and survivor property, because the signature card that opens the account usually contains survivorship language.

Tenancy by the entireties is essentially a survivorship tenancy created by a husband and wife. Ohio allowed tenancy by the entireties by statute from 1972 to 1984. Under it, each spouse owned the entire property. As with joint tenancy, survivorship is a predominant feature of tenancy by the entireties. Tenancy by the entireties can no longer be created in Ohio, although those interests that were created while the statute was in effect are still valid.

Condominium ownership is a hybrid of individual and group ownership. An individual condominium owner normally owns a portion of the property (such as one apartment) outright, and a portion (the common areas) as a tenant in common. For example, each resident might be a fee simple owner of the apartment (unit) and be a tenant in common with other apartment owners as to halls, stairways, recreational facilities, walkways and other common areas, including the ground on which the building stands. Of course, because each owner has an interest in these common areas, he or she also must contribute toward their maintenance and repair.

Leasehold Estate

A property owner may give temporary possession and use of a particular property to another individual in return for the payment of rent or something else of value. If the owner does this by means of a written agreement called a lease, the party taking possession of the property acquires a leasehold interest or leasehold estate. In such a case, the landowner is called the lessor or landlord and the person to whom the property is rented is called the lessee or tenant. The term of the lease may be weeks, months, or years. Many residential property leases are for one year, whereas business property leases are often for five, 10, or 20 years or longer. A lease may provide one or more renewal options. An example of a renewal option is a provision that states the tenant may extend the lease for another year at a rate that will be adjusted by a certain formula. This gives the tenant the security of knowing that the lessor will not lease the property to someone else at the end of the term without first giving the tenant the right to stay.

Commonly, leases state that a tenant or lessee cannot sell a leasehold interest (that is, sublet the property or assign the lease to someone else without the lessor’s [owner’s] permission).

If the lessor sells fee simple title to the property during the term of a lease, the new owner must honor the lease.

Sometimes a lease provides for automatic renewal; that is, if the lessee does not tell the owner he or she is going to leave the property at the end of the term, the lease is automatically renewed. Sometimes the lease will specify a tenant’s holdover (failure to leave the property) is not an automatic renewal of the lease term, but converts the tenancy to one running from month-to-month, week-to-week, or at will.

Obviously, it is very important to read and fully understand the specific terms of a particular lease or rental agreement, as the terms can vary widely.

Tenancy from Month-to-Month, Week-to-Week, or at Will

Rental arrangements not bound by a lease may be either by the month or at the pleasure of the parties. (See “Landlord and Tenant” on page 104 for more information.) Usually, when residential property is rented without a lease, it is on a month-to-month basis. The tenant is entitled to possession for one month at a time, and if he or she stays on the premises for even one day into
the following month, occupancy is renewed for that entire month. One month’s notice by either the landlord or tenant is necessary to terminate a month-to-month rental agreement, and one week’s notice is necessary to terminate a week-to-week agreement.

Transient accommodations, such as furnished rooms, are often rented by the day, and rental arrangements of this sort can usually be terminated by either party without advance notice, that is, terminated at will.

Liens and Mortgages

A lien is a claim against property to secure the payment of a debt or the performance of some act. The most common form of lien is created when an individual mortgages his or her property to another person to ensure repayment of a loan.

That is really what a mortgage is about: a bank loans a large amount of money to a real estate buyer, but nobody is likely to loan a buyer $100,000 without some protection. That protection is the signed mortgage that gives the bank a special kind of lien on the property. Because of the mortgage, the real estate owner cannot convey (sell) a fee-simple interest in the property to someone else without first paying off the bank loan. And if the real estate owner fails to pay this loan, the bank can foreclose its mortgage lien, sell the property, and pay off the loan from the proceeds of the sale.

There are many other types of liens:

- A tax lien attaches to property at the beginning of each tax year, even though the actual amount of the property taxes has not been determined and the taxes are not yet due. A tax lien is just like a mortgage lien, but it exists automatically, because all property owners have a duty to pay real estate taxes to the community. To ensure that those taxes are paid, the community automatically has the protection of this lien on the property. If taxes are not paid for a long enough period, the community—that is, county authorities—can have the property sold in order to pay off the tax debt.

- A judgment lien may be used when someone has won a money judgment in a lawsuit and wants to make sure to collect the money that is owed. Let us say Mr. Smith was awarded $25,000 from a lawsuit against Mr. Jones over injuries sustained in a traffic accident. If the $25,000 is not paid, Mr. Smith can file a judgment lien on Mr. Jones’s property, and ultimately can ask the court to have Mr. Jones’s property sold to generate cash to pay off the $25,000 judgment.

- One way of making sure an arrested person will appear for a criminal trial is for the state to place a lien on the defendant’s property by the terms of the bail bond he signs.

- A mechanic’s lien protects those people who build or repair homes or other buildings. If the owner does not pay the bill within a certain period of time, the party supplying labor or materials can file documents to secure a lien against that property. Again, the property cannot be sold to a third person without paying the amount owed, and the lienholder (for example, the contractor) ultimately can ask the court to have the property sold and the proceeds of the sale applied to pay the outstanding bills.

Property is frequently subject to many liens. In such cases, it is desirable to avoid a series of foreclosures and forced sales. Accordingly, when one lienholder sues to foreclose, all lienholders are notified and their claims dealt with within the same suit. This process is called marshaling of liens.

When there are many liens, the property may not be worth enough to cover all liens, so it is necessary to determine the priority of liens. The general rule is that the first lien in time is the first lien in priority (“first come, first served”). Thus, when the property is sold, the first lienholder will be paid. If enough money is left, the second lienholder will be paid, and so on in order of priority. The priority of some liens is outlined by statute. Thus, for example, tax liens almost always take priority over other kinds of liens.
Easements and Licenses

Sometimes a landowner will give someone permission to use part of his or her property for a specific purpose. Such permission may be either an easement or a license.

An easement is formal permission, granted in writing by deed or similar document, to use another’s property. An easement runs with the land, meaning it remains valid even though the property involved is rented, mortgaged, sold, or transferred through a succession of owners. Normally, an easement is automatically canceled when it is no longer used for the specific purpose for which it was granted. Easements are commonly granted to utility companies to install and maintain water, sewer, gas, electric, and telephone and cable lines across private property. Sometimes an owner whose property has no entryway (ingress) or exit (egress) will acquire an access easement across adjoining property.

A license is informal permission to use another’s property. It may be in writing, but is more often oral and may be implied from the conduct of the parties. Licenses do not run with the land, so that the holder of a license cannot sell or otherwise transfer it to someone else. Also, the property owner can terminate a license at any time. A typical example of a license would be oral permission to hunt on an individual’s property.

Because an easement is a genuine interest in property while a license is not, a land dispute may arise about what kind of permission was given. If the court decides that an easement was granted, the permission is an enforceable property right, whereas if the court decides that only a license was granted, then no property right is involved.

Mineral Rights and Similar Interests

Rights to search for and develop minerals and harvest timber are among important real property interests that may be owned separately. Typically, these activities require a lot of money, so landowners often lease mineral or lumber rights to professionals. For example, a landowner might lease the mineral rights to his or her property to an oil-exploration company in return for a flat payment when the lease is signed, plus a royalty of, say, one-eighth of the value of any oil or natural gas brought to the surface. Leases to mine coal, quarry stone, sand, or gravel usually involve fixed rent rather than royalties. Timber leases often are granted for a single, flat payment, but sometimes also include payment based on the amount of timber cut.

Sometimes, ownership of the property itself, and of the mineral rights, is transferred separately. Thus, there are many areas in Ohio, for example, where mineral rights were transferred more than 50 years ago; the land is now owned by grandchildren of the original landowner, and the original oil company long ago sold out to a major producer—but the land is still being farmed, and the wells are still producing oil.

How Real Property Ownership Is Transferred

Property is a commodity, or product, meaning it often changes hands from one individual to another. An individual can acquire an interest in real property through:

• a written document, such as a deed, lease, mortgage, or other conveyance;
• inheritance;
• the operation of law (such as a property transfer following abandonment by the owner or a transfer ordered by a court following a lawsuit); or
• adverse possession or prescription, that is, through “squatter’s rights.”

Deeds, Leases, Mortgages and other Conveyances

Fee-simple interest in land is generally granted through a deed. A leasehold estate is granted by means of a lease. A mortgage is an interest in land where the land is pledged to secure or guarantee payment; it is created by a document
called a mortgage deed, or, more simply, a mortgage. A conveyance is any transfer of an interest in real property, whether done by deed, lease, or mortgage. Deeds, leases and mortgages are not only conveyances (transfers) of real property interest, but they also may be contracts or contained in contracts, meaning that other rights and obligations may be spelled out, which must be honored by the parties.

The higher degrees of ownership in land are almost always granted by means of a deed or similar document that:

• names the person making the grant (the grantor) and the person to whom the grant is being made (the grantee);
• describes the property or interest being granted in formal, technical terms;
• is signed by the grantor; and
• is acknowledged by the grantor as his or her “free act and deed.”

In a warranty deed, the grantor guarantees that he or she has legal authority to transfer the property against all claims of other people. If the grantee’s title is successfully challenged at a later date, the grantee has a claim against the grantor based on the grantor’s warranty. Warranty deeds are used to convey fee simple title. A quitclaim deed is similar to a warranty deed, except that it does not guarantee the grantor’s title to the property. The effect of a quitclaim deed is to convey the grantor’s interest in the property (if he or she has any), without guaranteeing that he or she has any interest to convey, or without guaranteeing that the property is free from liens or other claims. Quitclaim deeds are often used to adjust boundaries, correct errors in previous deeds and to obtain releases in land disputes.

A lease is used to bind a property rental agreement and is both a contract and a transfer of an interest in the property. A lease names the property owner (the landlord or lessor) and the renter (the tenant or lessee) and describes the premises involved. It states the period of the lease and the amount and method of payment of the rent. The lessor usually promises to protect the lessee’s possession and “quiet enjoyment” of the property. The lessee promises to pay the rent as agreed, use the premises for proper purposes, protect the property from undue harm and return it in good condition when the lease expires. The terms of a lease frequently cover a variety of other matters, such as renewal, holdover and assignment.

A mortgage is similar to a deed, except that the mortgage lender’s ownership of the property is conditional rather than absolute. A mortgage states the promissory note amount and terms for the repayment of the debt, as well as the language usually found in a deed. The borrower or mortgagor may have to take steps to protect the lender’s security, such as paying the taxes when due and keeping various insurance policies up to date.

Further, it states that if the borrower or mortgagor pays the debt in full as agreed, the mortgage will become null and void and the lien will be released; but if the debt is not paid according to the terms of the promissory note, the lender can ask a court to foreclose the mortgage and transfer full ownership of the property to the lender.

Transfer by Inheritance

When someone dies owning or holding some interest in real property, that individual’s interest must be transferred to another person or entity. That other individual may be a beneficiary named by the original owner’s will, or the person entitled by law to the property when there is no will. This other individual also may acquire the property of the deceased because he or she owns the remainder interest after a life estate, or because of a right of survivorship. Ohio also recognizes transfer-on-death (TOD) deeds. Such deeds transfer ownership to an individual named in the deed upon the death of the property owner. Transfer-on-death deeds differ from right of survivorship deeds in that survivorship property is owned jointly by the two people during the life of both of them, whereas ownership of TOD property goes to the
second individual in the deed only upon the death of the title owner.

A feature that distinguishes real property from personal property is that real property automatically belongs to the successor on the death of the lifetime owner. When an individual has a right of inheritance or survivorship in real property, that interest passes when the property owner dies. Title to personal property, on the other hand, is not automatically assigned to heirs. It should be noted that, although the title to real property passes immediately upon death, real property and interests in real property may have to go through an estate administration process to ensure that the deceased’s debts and taxes are paid and that the transfer of title to the property is properly recorded in public records. (See Part IX, “Probate Law,” for a more complete discussion of inheritance and estates.)

Transfer by Operation of Law
Ownership in real property may be transferred without a formal procedure. Such a transfer may occur as the result of a judgment in a lawsuit. For example, a divorce decree, or the court order in dissolution of marriage that approves a separation agreement, may award the family home to the wife (or husband), and the decree, or order, may have an effect similar to a deed. Another method for transferring ownership of land is accretion, where, for example, the natural flow of a stream erodes soil from one individual’s land and deposits it on another’s property. In this case, the amount of one owner’s land is reduced, while the other’s is increased.

Transfer By Adverse Possession or Prescription
Sometimes the title to real property or an interest in real property is transferred because the original owner neglects his or her rights. For example, an individual may acquire title to another person’s real property by adverse possession (which, in lay terms, is something like “squatter’s rights”). Adverse possession is simply occupying property without permission continuously for 21 years, provided that the occupation is perfectly obvious and that the landowner does nothing significant to assert his or her rights as owner. Sometimes entire tracts of land are acquired by adverse possession, although the usual case involves a small portion of someone’s property that an adjoining owner uses for 21 years. For example, one individual may build a fence three feet into his neighbor’s side of the property line, without realizing it is the neighbor’s property. If the neighbor fails to dispute the fence’s location and this situation continues for 21 years, the individual who built the fence will acquire title to the property as his own by operation of this legal principle.

Similarly, rights to use real property, notably easements, may be acquired by prescription, or by actual use coupled with the landowner’s failure to prevent the use. An example of a prescriptive right is a right-of-way acquired over another’s property by using the property for driveway purposes for a substantial period of time without complaint by the owner; the non-owning person acquires an easement by prescription.

Encouraging Unrestricted Transfer
Feudal land laws in medieval times allowed the concentration and retention of land (and thus wealth and power) in the hands of a few families, thus stifling economic growth. In response, society developed a policy that land should be freely transferable. The law gradually developed legal rules implementing this policy. The proper development, use and transfer of land is essential to the health of our national economy.

Adverse possession is an outgrowth of this policy to encourage free transferability of land by allowing owners who neglect their property rights to lose them. The law generally does not permit grantors (those who transfer their property) to keep future owners from selling, leasing, mortgaging, or otherwise disposing of the property as the future owners see fit.

The rule against perpetuities is another rule that encourages free transfer of property by
limiting the period of time a property owner can delay a change of ownership. This rule states that any grant of interest in real property in the future must take effect, if at all, within the period of the life or lives of beneficiaries living at the time of the grant, plus 21 years. *(The rule against perpetuities is discussed in Part IX, “Probate Law,” at “Limitations On Wills; Special Provisions.”)*

**Land Records**

Ownership of real property is recorded in a government office for the owner’s protection. Under the law, if an individual’s ownership interest is not made a matter of public record, he or she may not be able to assert title—especially against those who innocently purchased the property from a former owner. Every state maintains public records of land and transactions and events affecting land ownership. In Ohio, the county recorder of each of the state’s 88 counties maintains ownership records for the land within its geographical borders. A careful search of these records will reveal the status of the record title or ownership of any given parcel of land.

**Necessity for Land Records**

Just because someone lives in a house on a certain property does not mean that person is the property owner. The actual owner may or may not live on the land. Further, the actual owner of the land may be an international corporation with headquarters outside of the country. Consequently, some system of land records is necessary to keep track of land titles and interests. The primary value of land records is to give notice to anyone examining these records of the existence and nature of interests in, and claims on, real property.

An individual with an interest in real property is responsible for filing documents to prove he or she has a right to that property. Failure to file does not, in itself, destroy the individual’s interest in the property, but it may prevent the individual from taking action against anyone who might challenge that interest.

If a property seller should try to challenge the buyer’s interest in the property, it would be difficult, since the seller cannot argue he or she did not know about the transaction. However, if the new holder of the interest has not recorded that fact, he or she may not be able to make a valid claim against a third person who acquired the property without knowing about the holder’s claim. The reasoning behind this is clear. Since the holder’s claim, while valid, was not recorded in public records, others who might have a potential interest in the property cannot be expected to know about the claim. In fact, a third person may acquire the real property innocently, relying on public records.

Or, let’s suppose a landowner mortgages the property as security for a loan, but the lender neglects to file the mortgage deed in the county records. Later, the owner sells the property to a third person who does not know about the unrecorded mortgage. The mortgagee (lender) is now powerless to foreclose its mortgage on the real estate, because its claimed lien on the property was not made a matter of public record. The property that secured the mortgage has been transferred to a third party who had no knowledge of the mortgage. If the mortgage had been filed, it could have been foreclosed. The buyer legally would have been presumed to know about the existence of the mortgage, even if the buyer neglected to examine the public record.

**Types of Land Records**

In Ohio, the county recorder’s office has records of mechanic’s liens, property bonds posted for bail, deeds, mortgages and indexes for these records. The most numerous are the records of deeds and mortgages. Mortgages and deeds to be filed with the recorder’s office are copied in detail and bound. This information is also maintained on computer databases. When a deed or mortgage is recorded and placed in its proper book, the volume and page where it appears is noted in a general index. The simplest form of
index is arranged alphabetically according to grantors (sellers), with a reverse index of grantees (buyers). In many counties, indexes and copies of records are in electronic files or on microfilm, and books are no longer used for new filings.

A land registry is another important set of land records kept in some counties, and is part of an entirely different and separate system of recording. Land registration requires a court proceeding (a land registration suit) to establish the status of the title. Once the status of the title is determined, a certificate of registration is filed and all mortgages, liens, subsequent transactions and other claims are noted on the certificate. The system is called the “Torrens” system, and registered land is often described as “Torrenized” land. Such certificates are used in only a few Ohio counties today. Although the original goal of land registration was to compile all records relating to a parcel on a single certificate, and thus to simplify record-keeping, in actual practice it has turned out to be more complex. Therefore, registration has become unpopular.

The county recorder’s office is the repository for plats and surveys. A plat is a map of subdivided land, showing the various lots, the portions of the land dedicated for roads or other public uses, and the easements for utilities and other features. Surveys are exact descriptions of land parcels using “compass calls” and precise measurements that come from actual observation and measurement by means of instruments such as a compass, transit, theodolite, or surveyor’s chain.

Other county officials also keep important land records. For example, the county auditor and county treasurer are responsible for keeping track of property taxes. (Taxes are mentioned here because they act as liens, or charges, on real property.) The auditor’s tax maps can be used to identify property and are often the starting point for a title search. Also, records kept by the clerk of common pleas courts must be searched because lawsuits and judgments can affect the title to property. Similarly, probate court records are extremely important in determining the status of property ownership. The county sheriff also keeps a record of “foreign” judgments filed in the county (a foreign judgment being one rendered in a court in another county). Thus, if a judgment is issued in a lawsuit in Montana against someone who owns property in Ohio, the foreign judgment can be recorded in Ohio and thereby becomes a lien on the Ohio property.

Descriptions of Property
The usefulness of a public land record often depends on its accuracy. There are several ways to describe a parcel of real property, but the most common method includes some sort of map reference to locate the parcel in the county, plus a series of bearings and distances called metes and bounds, describing the exact boundaries of the parcel. If property is subdivided and platted, a parcel can be accurately described by giving the subdivision name, lot number and location of the recorded plat.

Title Examination; Marketable Title
Searching land records and determining the status of land titles is a job for professionals because of the many different kinds of interests in real property, and the complexity of land records. Any person interested in finding the title to a particular piece of property should contact an attorney.

A typical title examination is a backward search of the records, beginning with the present owner and tracing back through each preceding owner. The object of this examination is to establish the chain of title. The present owner’s claim is good if his or her title proves to be part of an unbroken chain of ownership.

In a complete title examination, the chain of title is taken back to the original source, which, in Ohio, will vary depending on the location of the property. The original sources of Ohio property usually date back to land grants from Congress or from various state legislatures (especially those of Virginia and Connecticut, both of which granted land in the “Ohio Country” to Revolutionary
War veterans after the war as payment for their services).

A complete title examination is tedious and can be difficult or impossible to obtain. Many early records have been destroyed, since nearly every courthouse in Ohio has been damaged or destroyed by fire at least once. Further, older records are not reliable because the men who created them were mostly illiterate and used crude instruments. Harsh and hostile environmental conditions did not help matters. Old land descriptions can be irritatingly vague. They can read, for example:

“Beginning at a clump of black locust located at the northeast corner of the Peter Schweitzer farm, then northeasterly 250 rods, more or less, to a large flat rock on the southerly bank of Moccasin Creek.”

There are numerous potential difficulties with this description. For example, the surveyor’s compass was inaccurate; the locust trees died of natural causes or were cut for fence posts; the record of Peter Schweitzer’s farm was possibly destroyed in the courthouse fire of 1831; and the large flat rock could have been washed away in the 1913 flood when Moccasin Creek cut a new bed, etc.

In Ohio, complete title examinations are usually unnecessary. Statutory or written laws set the rules about what constitutes a marketable title (one that can be relied upon when buying and selling property). Standards for searching titles have been established by the courts, title insurance companies, lenders and the Ohio State Bar Association. Under Ohio law, if a title search shows that there is an unbroken chain of recorded title that goes back 40 years, it is considered proof of fee title. Further, it can be assumed that the current owner has fee title, that is, the right to pass title. This right to pass title is established by the first title recorded 40 years before the search, called the root of title.

It must be noted that a title search often must go beyond the root of title. For example, a 99-year lease, or easement, which was effective in 1950 would be beyond 40 years of a search conducted in 2001, but still could affect the title to the property. In such a situation, fee title could be passed, but the title might be subject to the lease or easement made in 1950, which would not be found if the search were limited to 40 years. Many title examiners follow a 65-year standard.

### Purchase and Sale of Real Estate

The most common real estate transaction is the purchase or sale of a home. This section outlines some of the matters to be considered in purchasing or selling a home, including a contract of sale, financing, title examination and closing.

#### Contract of Sale

Real estate brokers use one of several standard form contracts (developed by their legal departments) for the purchase and sale of residential property. The contract contains an offer by the prospective buyer, with a space for acceptance by the seller. Frequently, offers are limited in time; that is, the offer is automatically withdrawn if it is not accepted by a specified time.

As used in the chart on page 101, explaining what the offer does, premises means land plus any buildings upon the land. It can also mean a particular part of a building.

Both parties are bound by the contract when the seller accepts it. If the buyer defaults, the seller may hold the buyer liable for the difference between the contract price and the price at which the seller is eventually able to sell the property (assuming it is lower than the original contract price). If the seller defaults, the buyer may compel the seller to specifically perform the contract, or may sue for damages. In either case, liability can have serious consequences. A buyer should not sign an offer until he or she has read all of it and understands all of the terms. Similarly, a seller should not accept a contract (the offer to
purchase) until he or she has read all of it and understands all of the terms. If either party has any questions, an attorney should be consulted before any paperwork is signed.

What the offer does...

- identifies the premises, usually by street address;
- states the proposed terms of the purchase, such as amount of down payment, type of financing and maximum interest rate;
- specifies the type of evidence or proof of title (certificate of title, abstract of title, or title insurance) to be furnished by the seller;
- provides for payment of unpaid taxes and assessments (usually these will be pro-rated between buyer and seller, based on the amount of taxes accrued but not yet payable when the sale is completed);
- lists the various kinds of personal property to be included in the transaction, such as rugs, drapes, dishwasher and other items; and
- states other terms and conditions.

In Ohio, certain transferors of real estate, including home-sellers, must provide a disclosure form around the time the contract is signed. On this form, sellers must summarize what they know about any problems with the water supply, the sewage system, the walls and the foundation, the presence of hazardous substances, such as lead-based paint, asbestos, and radon gas and any other material defects. In certain situations, when undisclosed defects are discovered before the closing, the buyer may rescind the contract without any liability.

This law does not apply to a number of common transfers or sales. For example, it does not apply to sales of new homes that have never been inhabited, sales to persons who have already inhabited the property for one year or more, or in general, to transfers made as part of a court order. Federal law also requires sellers to advise buyers if a home was built before 1978, and to allow the buyers to inspect the home for lead-based paints.

Finally, buyers should understand their relationship with a real estate agent, whether the agent is hired by the buyer or the seller. An agent may work for the seller, the buyer, and, in some cases, may represent both the buyer and seller. This representation of both the buyer and seller is referred to as dual agency. The agent must give the client(s) (the buyer or seller or both) a Consumer Guide to Agency Relationships, which explains the various relationships between brokers and their clients. The agent also must provide an Agency Disclosure Statement, which describes the particular relationship between the agent and the client(s).

Financing the Purchase

Most people borrow money to buy a house. The usual ways for financing are a conventional mortgage, an FHA or VA mortgage, a mortgage assumption, or a land contract.

All buyers should ask themselves, “Can I afford to buy this house?” No matter how carefully a family may budget its income and expenditures there are limits on how much housing debt a family can afford. Other expenses, such as food, medical and automobile insurance, etc., also must be paid. One rule of thumb (though not the only one) is to limit monthly housing expense to one week’s take-home pay. “Housing expense” includes the mortgage payments (principal and interest), plus fire or home-owner’s insurance premiums and property taxes and assessments.

For example, suppose the monthly payment on a proposed mortgage is $600, the homeowner’s insurance costs are $192 per year or $16 per month, and the property taxes are $720 per year or $60 per month. Adding these costs together, the total monthly housing expense would be $676 ($600+$16+$60). To handle this expense comfortably, the buyer should earn at least $676 per week.
Money may be borrowed from various types of financial institutions, including savings and loan companies, banks, mortgage bankers and mortgage brokers. Many of the larger insurance companies, which must keep their funds invested in a high percentage of first mortgages, have mortgage departments and many acquire their mortgages through mortgage bankers and brokers. The federal government insures some kinds of mortgages through agencies such as the Federal Housing Administration (FHA) or the Veterans Administration (VA).

Other mortgages are called *conventional mortgages*. Usually, a purchase on an FHA or VA mortgage will require a smaller down payment than purchase on a conventional mortgage, although the total purchase price in an FHA or VA transaction may be higher because of the increased risk involved in a *high-ratio loan* (a loan where the amount of the loan is high in relation to the value of the property).

Sometimes, when mortgage money is especially hard to find or interest rates are very high, a seller may sell a home on the condition that the buyer assumes and agrees to pay the seller’s existing mortgage. This arrangement is called a *mortgage assumption*. The buyer who assumes a mortgage takes over the seller’s mortgage and the interest rate of that mortgage. If the mortgage’s interest rate is lower than the current market rate, it would be an advantage to the buyer, although the loan assumption may require a higher down payment than a conventional loan.

It is important to note that, for a mortgage assumption to be legal, the seller’s mortgage must allow assumption. Many mortgages do not allow assumption. Also, the seller generally remains liable on an assumed mortgage, so the seller must choose a buyer who can and will keep the payments current. A seller also can accept a mortgage from the buyer. This means that the seller, rather than a bank or other financial institution, becomes the lender. This usually occurs only where the buyer cannot qualify for a loan from a bank or other commercial lender. However, it is more common for a seller to sell the property on an installment land contract because, under this kind of a contract, the seller does not have to give the buyer title to the property until the full purchase price is paid.

**Title Examination and Evidence of Title**

If a home purchase is to be financed through a bank or other financial institution, the lender will require a title examination. If the lender does not require it, or if there is no institutional lender, the buyer should contact an attorney to have the title examined. The seller’s promise to furnish a good title is not a guarantee that the seller actually can, or will, furnish such a title.

In some parts of the state, the buyer is responsible for protecting himself or herself by securing the title examination. In other areas of Ohio, purchase contracts require that evidence of title be furnished by the seller in one of three ways. One way is to have an attorney give a certificate stating the title is good. The certificate often may list a series of exceptions—issues or areas the lawyer has not researched or cannot research. Another way is to obtain an abstract of title, which is a chronological summary of all transactions concerning the property found in the public records.

The third and most common method is to purchase *title insurance*. Title insurance provides protection against claims arising from title problems that may not be uncovered by a title search. If the buyer only pays for a title insurance policy on the loan, then the title company would only pay the mortgagee (lender) if the title to the property is successfully challenged in court. By paying an additional premium, the buyer can get an owner’s title insurance policy that will pay the buyer if there is a title defect that the title insurance company did not discover.

**Environmental Concerns**

Identifying certain potential environmental risks or concerns before purchasing property can
alleviate future stress and expense. Home-buyers may be concerned about lead-based paints, asbestos, radon gas and gases emanating from fuel storage tanks, or the home’s water supply and septic system, for example. A property inspection can reveal environmental concerns. Some of these matters may be regulated by either the federal Environmental Protection Agency (EPA) or the Ohio Environmental Protection Agency (OEPA) or both.

The EPA is the federal agency charged with implementing the environmental laws passed by Congress. The OEPA was created in 1972 to implement Ohio laws and regulations regarding air and water quality standards; solid, hazardous and infectious waste disposal standards; water quality planning, supervision of sewage treatment and public drinking water supplies; and cleanup of unregulated hazardous waste sites.

Closing

A contract of sale is closed when:
• a title has been examined and all necessary documents are signed;
• closing costs and the purchase price are paid (either entirely by the buyer, or partially via the mortgage lender);
• the property is transferred to the buyer by the seller’s delivery of the deed; and
• the seller’s mortgage and any other liens are paid from the purchase price, to clear the buyer’s title.

This process is called a closing. There are two kinds of closings: round table and escrow. A round table closing is an actual meeting where the buyer, seller, lender and their representatives meet, make payments and adjustments and actually sign and exchange the various documents. The deed is recorded shortly after a round table closing. An escrow closing is not an actual meeting. All the necessary documents, payments and adjustments are delivered to a neutral third party, and on the scheduled day, the escrow agent delivers the deed and money, with neither buyer nor seller present. The purpose of both types of closings is similar, although which one is used depends on local custom and the needs of the individual transaction.

During a closing, the balance of the purchase price is paid and the deed signed and given to the buyer. Various deductions and adjustments are made in the amount paid to the seller. The buyer and seller each receive a closing statement, which is prepared before closing so that the transaction can be completed. The statement lists the purchase price of the property and all adjustments to that price.

The statement includes specific entries for the:
• buyer’s down payment (or “earnest money” deposits);
• amount of cash, if any, that is to be paid to the seller;
• pay-off price of the seller’s existing mortgage;
• transfer tax the seller is required to pay to the county;
• cost of the title examination and the cost of the title insurance policy;
• proration of real estate taxes between the buyer and seller;
• cost of document preparation and recording (the seller is usually required to pay for the release of the existing mortgage and for the preparation and recording of the documents necessary to cure defects in title);
• cost of the insurance and tax escrows that lender may require of the buyer; and
• real estate commission (the seller is usually responsible for the commission).

As stated above, the buyer also executes (signs) the promissory note and mortgage to the lender. The buyer should make certain that all of the contract’s terms are completed before signing the mortgage. The contract of sale becomes merged in the deed when the deed is accepted and the parties may lose the right to enforce any unperformed contract obligations. Also, the buyer is theoretically entitled to possession of the property immediately upon closing, but it is not uncommon for the contract to provide for delayed possession (from one to five days after closing), which is usually one of the contract provisions.
Landlord and Tenant

The first time many people encounter aspects of real property law is when they rent their first apartment or house. Laws addressing real property transactions as well as certain aspects of the rights, obligations and remedies of landlords and tenants can be found in Chapter 5321 of the Ohio Revised Code.

What is a Rental Agreement?
A rental agreement or lease is a written or oral contract between a lessee (tenant) and lessor (landlord). A properly written agreement will eliminate most of the misunderstandings and problems that commonly arise between a landlord and a tenant.

A rental agreement benefits and protects both parties and is an efficient way of handling a business transaction. A written agreement may create a tenancy from week to week, month to month, or year to year. To protect the landlord and the tenant, it is wise to specify the exact manner in which the rental agreement may be terminated. If there is no written lease or rental agreement, the landlord or the tenant may end a week-to-week tenancy by giving the other party at least seven days notice prior to termination. Either party may end a month-to-month oral tenancy by giving the other party at least 30 days’ notice before the end of the current monthly term.

A landlord may not use a contract clause to limit or escape certain types of responsibility that are mandated by law. If such a clause is included in a signed rental agreement, it cannot legally be used against the tenant.

Ordinarily, the landlord prepares a rental agreement. For this reason, any doubtful or ambiguous terms are decided against the landlord and in favor of the tenant, if a dispute arises and ends up in court.

Under Ohio law, both tenants and landlords may recover damages and reasonable attorneys’ fees, in some situations, for certain unlawful acts of the other party.

Obligations of the Landlord
A landlord must keep the rented or leased property (premises) decently habitable and may not unreasonably interfere with the tenant’s privacy.

The landlord must ensure that common areas (parking lots, stairs, halls, sidewalks, etc.) are clean and safe, and that the structure complies with building and housing codes. Specifically, electrical, plumbing, heating and ventilating equipment must be maintained. The landlord also must provide water and heat, unless these utilities are under the tenant’s control. If the building contains four or more dwelling units, the landlord must provide trash containers and trash removal. The landlord cannot insist on having unreasonable access to the rental premises and must give reasonable advance notice of the intention to enter the tenant’s suite, apartment or area. Finally, the landlord may not attempt to evict a tenant by changing the lock, terminating utility service or removing the tenant’s belongings without a court order.

Obligations of the Tenant
Tenants have a variety of obligations beyond paying rent or lease payments on time. Specifically, a tenant must:
• keep the premises clean and safe;
• properly dispose of trash;
• keep plumbing fixtures as clean as their condition permits;
• properly use electrical and plumbing equipment;
• maintain appliances furnished as part of the lease;
• cause no disturbance and forbid family, friends and guests to disturb other tenants;
• see that controlled substances (such as certain drugs) are not illegally used on the property;
• comply with housing, health and safety codes; and
• allow the landlord reasonable access to the premises (upon 24 hours’ notice) to inspect, make repairs, deliver large parcels, or show the property to prospective buyers or tenants.
The tenant cannot change any of these legal duties. However, the landlord may agree to assume responsibility for fulfilling any of these tenant duties.

**Security Deposits**

A landlord often will require a new tenant to post a *security deposit* (commonly equal to one month’s rent). The purpose of the deposit is to cover any damage to the rental property caused by the tenant, and, in some instances, unpaid rent. If the deposit is more than $50, or one month’s rent (whichever is greater), and the tenant is in possession of the property for six months or more, the landlord must credit the deposit with five percent interest. Within 30 days after a tenancy ends, the landlord must itemize every deduction from the security deposit and give the tenant a copy. If the tenant has furnished the landlord with a forwarding address, the landlord must refund the deposit plus interest and minus any valid deductions. If the landlord fails to provide a refund and/or explanation of any deductions, it could cost the landlord double the amount due, plus reasonable attorney fees should the tenant pursue legal action.

**Rent Withholding**

A tenant living in a building with four or more dwelling units may place the rent in escrow, if the tenant reasonably believes the landlord has failed to live up to his or her obligations, or if the landlord is found to be in violation of any law or regulation affecting health or safety. However, if the tenant does not do this properly, the tenant may face eviction for non-payment. To withhold rent properly, the tenant must be current in rent payments and give the landlord 30 days’ notice of the health or safety problem. The 30-day period gives the landlord an opportunity to remedy the problem. If the problem is not fixed, the tenant may deposit the rent payment by the due date with the clerk of the local municipal or county court instead of paying it to the landlord. At the direction of the court, the withheld rent may be applied to correct the problem, or the court may order the monthly rent reduced until the problem is remedied.

**Retaliatory Eviction**

A landlord cannot raise the rent, withhold services, or attempt to evict a tenant when a tenant rightfully withholds rent. Acts of the landlord are not considered retaliatory if:

- the tenant created the problem that is the basis for withholding rent payments;
- the tenant owes back rent;
- the tenant has failed to leave at the end of the rental term;
- correction of the problem would require demolition or remodeling of such major proportions that the tenant would lose the use of the premises; or
- the rent increase is to cover improvements or increased costs.

If a landlord takes retaliatory action, the tenant can recover possession of the premises (if evicted), terminate the rental agreement, or use the retaliatory action as a legal defense when protesting an eviction. The tenant also may recover damages and reasonable attorney fees.

**Eviction**

The technical name for an eviction action in Ohio is *forcible entry and detainer*. Eviction actions allow landlords to recover rented or leased premises, provided their tenants’ rights are not violated.

Before bringing an eviction action, the landlord must give the tenant at least three days’ written notice to leave in a specified form. The notice must include a recommendation that the tenant seek legal advice.

After the eviction suit is filed, the summons issued by the court to the tenant must state that the tenant:

- cannot be evicted unless the tenant’s right to possession has terminated (a tenant’s right to remain on the premises is terminated when, for example, the term of the lease or agreement is over, or the tenant has breached the agreement);
• cannot be evicted in retaliation for an assertion of rights covered by the law;
• should continue depositing rent with the court if already doing so;
• has a right to jury trial in the eviction action; and
• has a right to legal assistance.

In an eviction case, the court determines who has the right to possession of the rented or leased property. It may also determine all rights and liabilities of the landlord and the tenant. For example, the court may order an appropriate governmental agency to inspect the property and report if any condition of the property violates the law. If such a condition exists and was caused or was allowed to occur by the tenant, the court may order the tenant to pay the landlord the reasonable cost of repairing the condition. Where the tenant did not cause such a condition and the court decides the tenant should have possession, the court may order the landlord to correct the condition. If the tenant did not cause such a condition and the court decides that the tenant should not have possession, the court may forbid the landlord from renting the property until the condition is corrected.

Other Real Property Issues

Zoning

Zoning is the process by which political subdivisions (cities, villages, townships and counties) regulate land use. These political subdivisions are further divided into districts or zones. Subdivision officials enact regulations to control the types of buildings and uses within each of these districts. The primary purpose for zoning is to facilitate planning and land development on a community-wide basis. Zoning legislation may regulate uses of land. It also may regulate such things as the size of lots and buildings; minimum front, back and side yard requirements; or the minimum number of parking spaces required for certain types of buildings, depending on the use.

Planning commissions, appointed by the local legislatures of political subdivisions, review land use within the community and propose a comprehensive land use plan. This plan serves as a guide for dividing the political subdivision into districts or zones. The most common types of districts are residential, commercial and industrial. These districts may be further divided. For example, a residential district may be restricted for only single-family homes, or an area may allow multifamily buildings.

A comprehensive plan may be adopted only if the proposed zoning regulations are reasonable. The local legislature, whether a city or village council, board of township trustees or board of county commissioners, is responsible for enacting the plan and the zoning regulations that define each zone. Because comprehensive plans and zoning regulations provide a blueprint for future growth and development, they should be periodically updated to reflect changes in the community.

Violation of a zoning regulation (for example, establishing a commercial business in an area zoned for residential use only) is a civil rather than a criminal matter. Zoning inspectors may issue orders to stop a violation. That might be followed by a court action resulting in a penalty, which might continue as long as the violation remains uncorrected.

Because properties have different sizes, shapes and topographies, applying a zoning regulation to a specific property may be unreasonable for either the property owner or the city or both. For example, a residential lot in the inner city might not be large enough, under current zoning regulations, for a house to be built. Such a problem may be resolved by the granting of a variance, or a “special case” change in zoning regulations. A board of zoning appeals, appointed by the legislative body, hears and acts upon requests for variances from the zoning regulations. If a board agrees that applying a zoning regulation to a specific property is unreasonable, it will grant a variance. Generally, a board of zoning
appeals will try to grant the minimum variance necessary to resolve the conflict.

The two types of variances are an area variance and a use variance. An area variance may permit a property owner to develop a property with narrower yard setbacks, smaller lot size, larger building size, or fewer parking spaces than those otherwise permitted in the zoning district where the property is located. A use variance may allow a property to be used in a way that is not permitted in a specific district (for example, a home-operated beauty parlor operating in a residential district). Use variances tend to be more difficult to obtain because they are often perceived as property re-zoning. In order to grant either type of variance, the board of zoning appeals must apply standards that are incorporated into the zoning regulations.

**Planned Unit Development**

A planned unit development (or PUD) is a technique to provide flexibility for new construction in a community. Instead of rigidly dividing land into exclusively residential, commercial and industrial zones, PUDs mix these and other uses. Planners generally agree that a mix of residential and commercial development along with public spaces such as parks can provide a very appealing environment.

Planned unit developments are often part of a zoning code. If they are not, many communities allow them by variance or with a conditional use permit. However, courts can view PUDs as rezonings, so local government officials must be careful about using the variance or conditional use procedure to allow PUDs to be implemented. It is better for local governments to enact zoning provisions if they want to allow for PUDs, so that standards are uniform throughout the community.

Some common characteristics of a PUD include:

- a large plot of land that is developed under unified control and planned and developed as a whole;
- a mix of compatible uses such as commercial, residential, governmental (e.g., schools) and public spaces, or mixed single-family and multiple-family units;
- comprehensive plans for developing the particular piece of land from the utilities to the aesthetics and relationship of the buildings to one another (can be as detailed as predetermined site plans, floor plans and building elevations);
- a program for the occupants of the district to maintain the common areas and facilities; and
- restrictive agreements to prevent incompatible changes to the structures and appearance of the development.

The PUD’s mixed uses can provide for a more dynamic, vibrant community as well as more green space and public areas. Green space is often gained by clustering residential areas to achieve open space and preserve natural features of the land. Most PUDs require a unified exterior appearance—such as the same color scheme and roofs on all units.

The process for getting a PUD approved is usually very complicated and extensive. The approval process is likely to include a detailed review of the site plan by a local government’s planning staff, planning commission, zoning board and often the local legislative body as well as input from the public. In some communities, public input may include a ballot vote to approve or disapprove the development in question. Additionally, some sites are large and must be developed in phases. Thus, the approval process can be ongoing.

Opponents may object to the cluster home concept that is an integral part of many PUDs. Developers can counter such negative reactions by creating high-quality, aesthetically pleasing plans and by communicating and cooperating with local government officials and the public. Developers often bargain with local governments, providing some benefit to the overall community, such as the creation of a public park, in exchange for approval.
Covenants, Conditions and Restrictions

In addition to government land use restrictions, private party agreements and other restrictions also may control how owners use their property. For example, certain restrictions in a private purchase contract may dictate how a home in a subdivision or a condominium may be built, designed or used. These restrictions are typically referred to as covenants, conditions and restrictions (CC&Rs); they set forth conditions on lot size, architectural design, setbacks from the street, fence design or vehicle parking. If the terms of a private party agreement are violated, a suit may be brought against the violator. The violator may have to pay money damages or may be ordered to remove the violation (such as a fence that was prohibited by the terms of the private party agreement). The court injunction to remove the violation also would prohibit future violations.

Chapter Summary

- Real property law deals with land, fixtures on land, movable property that is not associated with land, and rights and other intangible interests that may be owned.
- The two main classifications of property are real property and personal property.
- Real property, real estate and realty refer to land, buildings and other fixtures on land. These terms also may refer to different kinds of interests in land and to various rights that go along with land or some interest in it.
- Personal property is anything that can be moved by its owner or possessor. Personal property can be tangible or intangible.
- Full ownership of real property is called fee simple ownership, fee simple title, or sometimes just ownership in fee.
- A fee simple owner can grant ownership of his or her property to another person for the duration of the other person’s life. This type of ownership is called a life estate. The person who holds the life estate is called a life tenant.
- In Ohio, there are two different forms of property ownership where two or more own the property: tenancy in common and survivorship tenancy.
- Ohio also recognizes transfer-on-death (TOD) interests in property.
- A property owner may give temporary possession and use of a particular property to another individual in return for the payment of rent or something else of value. If the owner does this by means of a written agreement called a lease, the party to whom possession of the property is given acquires a leasehold interest or leasehold estate.
- A lien is an enforceable claim against property to secure the payment of a debt or the performance of some act. Three types of liens are tax, judgment, and mechanics’ liens.
- Sometimes a landowner will grant another person permission to use a portion of his or her property for a specific purpose. Such permission may be either an easement or a license.
- Rights to explore for and develop minerals and harvest timber are among important real property interests that may be owned separately from the real estate itself.

Continued on page 109
Chapter Summary continued

• Property is a commodity, meaning it often changes hands from one individual to another. There are many methods individuals use to acquire interests in real property.
• Interest in land is granted through a deed. A **leasehold estate** is granted by means of a lease.
• A **mortgage** is an interest in land where the land is pledged to secure or guarantee payment; it is created by a document called a **mortgage deed**, or, simply, a mortgage. A **conveyance** is the transfer of an interest in real property.
• When someone dies owning or holding some interest in real property, that individual’s interest must be transferred to another person or to an entity. That other individual may be a beneficiary named by the original owner’s will, or entitled by law to the property when there is no will. The other individual also may acquire the property of the deceased because he or she owns the **remainder interest** to a life estate, or because of a **right of survivorship**.
• Sometimes the title to real property or an interest in real property is transferred because the original owner neglects his or her rights. **Adverse possession** is simply taking possession and keeping possession continuously for 21 years, provided that the possession is obvious and open, and that the landowner does nothing significant to assert his or her rights as owner.
• Ownership of real property is a matter of public record. Every state maintains public records of land and transactions and events affecting the ownership of land. In Ohio, the county recorder of each of the state’s 88 counties maintains these records for the land within its geographical borders.
• The most common real estate transaction is the purchase or sale of a home. The elements involved in the purchase or sale of a home include a contract of sale, financing, title examination and closing.
• The Environmental Protection Agency (EPA) is the federal agency charged with implementing the environmental laws passed by Congress and the Ohio Environmental Protection Agency (OEPA) implements state laws and regulations regarding air and water quality standards; solid, hazardous and infectious waste disposal standards; water quality planning, supervision of sewage treatment and public drinking water supplies; and cleanup of unregulated hazardous waste sites. Any property purchase should include an environmental inspection.
• The first time many people encounter aspects of real property law is when they rent their first apartment or house. The law respecting such transactions is addressed by sections of the **Ohio Revised Code** reviewing particular aspects of the rights, obligations and remedies of landlords and tenants.
• A **rental agreement** or **lease** is a written or oral contract between a **landlord** (lessor) and **tenant** (lessee).
• A rental agreement benefits and protects both parties and is an efficient way of handling a business transaction. A written agreement may create a tenancy from week to week, month to month, or year to year.
• **Zoning** is the process by which political subdivisions (cities, villages, townships and counties) regulate land use by dividing themselves into districts or zones and enacting regulations to control the buildings and uses within each district.
• A **planned unit development** (or PUD) is a technique to provide flexibility for new construction in a community. Instead of rigidly dividing land into exclusively residential, commercial and industrial zones, PUDs mix these and other uses.
Web Links:

From OSBA’s “Law You Can Use” articles:
(go to http://www.ohiobar.org/pub/lycu and search for article by title or topic)

“After Foreclosure: What You Should Know”
“Agricultural Easements Help Protect Farmland”
“Agricultural Districts Protect Farms and Farmers”
“Ask Questions When Using Title Insurance Agencies”
“Be Careful When Using Home Equity Loans”
“Brownfields Development on the Rise – But There’s Good Reason for Caution”
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“Eminent Domain: What Every Property Owner Should Know”
“Home-Buyers Should Determine Asbestos and Lead Paint Risks”
“Home-Buyers Should Determine Environmental Risks”
“Home-Buyers Should Investigate Water and Septic Systems”
“Homeowners’ Insurance Covers Wide Range of Goods and Services”
“Joint Economic Development Districts Aid Local Development”
“Joint Ownership of Property: Common Sense Advice for Older Persons”
“Know about Eviction Procedures in Ohio”
“Know about Evictions of Month-to-Month Tenants in Ohio”
“Know Basics of Condominium Law”
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“Mold: An Old Contaminant Creates New Concerns for Homeowners”
“New Condominium Laws: Your Questions Answered”
“New Environmental Insurance Policies Are Worth a Look”
“Ohio EPA Now Controls Isolated Wetlands Permits”
“Planned Unit Developments Provide Flexibility for New Construction”
“Property Owners Must Share Fence Costs”
“Quitclaim Deed Transfers Property Without Ownership Guarantee”
“Realtors May Act as Agents for Both Buyers and Sellers”
“Sorting Out Housing Options for Seniors”
“State Law Regulates Most Ohio Cemeteries”
“Tenants Have Security Deposit Rights”
“Tenants Should Look Out for Intent-To-Vacate Clauses”
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“Transfer-on-Death Deed Avoids Probate”
“What You Should Know Before Using ‘Free’ Gas”
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“Zoning Laws Aid Community Planning”

From Cornell Law School Legal Information Institute:
http://www.law.cornell.edu/wex/index.php/Real_property
he probate division of the court of common pleas (often referred to simply as the “probate court”) in each of Ohio’s 88 counties is one of the busiest in the court system. Most people think of probate law as governing the administration of the estates that are left behind when people die. Such administration includes, among other things, the payment of taxes and debts, and the transfer of all probate estate property to the appropriate individuals or entities.

But probate law is much more than that. Generally, the probate division is responsible for protecting people who need care, safeguarding personal and property rights, and supervising people in positions of trust. For example, the probate division handles:

- the issuance of marriage licenses;
- adoption;
- appointment of guardians to care for children and other persons who cannot care for themselves or their property;
- proper care and treatment for the mentally ill, mentally retarded, or persons suffering from developmental or physical disabilities; and
- name changes.

Protecting Individuals in Need of Care

Some people need special protection, including children who are orphaned, parents who are unable to care for their children and individuals suffering from mental illness, developmental disabilities and physical disabilities. Additionally, age or illness can affect an individual’s physical ability or mental capacity, or both, including the ability to care for one’s self or one’s property. In Ohio, the probate court has the jurisdiction (the obligation and authority) to supervise the protection of minors and those with physical or mental disabilities. For example, the probate court appoints guardians for both minors and adults, manages adoptions, and the court handles applications to hospitalize persons for treatment of mental illnesses.

Safeguarding Personal and Property Rights

When an individual dies, his or her property must be transferred to:

- the person or persons named in that individual’s last will and testament;
- heirs designated according to Ohio law, when there is no will; or
- the person(s) identified in a will substitute, such as the survivor designated in a survivorship deed, or the person designated in a payable-on-death arrangement.

Supervising Those in Positions of Trust

Individuals serving in positions of trust, whether they are executors, administrators, guardians, conservators, trustees, attorneys-in-fact, or other persons who act on behalf of third persons, are called fiduciaries. Fiduciaries owe a special duty to those whose interests and property they control or manage. When, for example, an executor or administrator is appointed to settle an estate, or a guardian is appointed to look after the affairs of a child or a person who has become incompetent, it is important that the fiduciary’s conduct be supervised. Fiduciaries are in positions of trust, and historically, many types of fiduciaries act under the supervision of the probate court. They must regularly report their activities, particularly their financial activities, to the probate court. However, trustees serving under trust agreements created outside a will generally need not regularly report to the probate court; their acts are reviewed by the court only upon request of a beneficiary or other interested party.
Wills

As we explained in Part VIII, the current owner of private property can dictate who is to be the future owner when the current owner dies. The most common device to transfer ownership upon death is a will, or more formally, a last will and testament. Increasingly, people are using will substitutes, such as living trusts to transfer private property to surviving spouses, children or other beneficiaries without going through the probate process.

Who Can Make a Will

Under Ohio law, any person age 18 or older who has a sound mind and memory, and is not under restraint, can make a valid will.

The requirement of sound mind and memory does not mean that the testator (the individual making the will) must be in total possession of his or her faculties. The testator’s mind may be dulled by pain or sickness or enfeebled by age; he or she may even suffer to some extent from mental deficiency or mental illness. So long as the testator knows who his or her family members are, generally knows the nature and extent of what he or she owns, and understands that the document is a will, the testator has the legal capacity to make a will.

The fact that a will makes an apparently unfair or unequal distribution of a testator’s property does not necessarily indicate that the testator lacked the mental capacity to make the will. A testator’s will may disregard family and friends of long standing and still be valid. (See “Limitations on Wills: Special Provisions” later in this chapter, for a discussion of the rights of a surviving spouse.)

The requirement that a testator not be under restraint means that testator must be free to choose to make a will and to make it the way he or she wants, and is not coerced, defrauded, or improperly influenced to do so.

Requirements for Making a Will

1) Except as explained below (at #5), for a will to be valid, it must be in writing and signed by the testator, and the signing must be confirmed by two competent and impartial witnesses. (Those witnesses do not have to know the contents of the will, but only that the testator signed it voluntarily.) These basic requirements are strictly enforced, although there is some leeway in how the requirements can actually be met.

2) The will may be typed or handwritten, or the will may even be partially typed and partially handwritten. Another individual may sign the will for the testator, provided this person does so at the testator’s specific direction and in the presence of the testator and the two independent witnesses. (Please note that a will does not have to be notarized.)

3) There may be a problem with potential beneficiaries under a will serving as witnesses to that will. The possible problem is that a witness to a will may not receive more under the will than he or she would have received as an heir if there were no will. This could significantly reduce the amount the witness/beneficiary receives in comparison to what the testator had intended to leave that person. This rule affects only the particular witness/beneficiary; it does not mean that the entire will becomes invalid simply because a witness is named in the will to receive a gift.

Further, a murderer cannot inherit from his or her victim, and a gift to such a murderer in the deceased person’s will is ignored when the estate is distributed.

4) While people can draft their own wills, certain precise concepts and legal language must be used to ensure that the will is valid and complete. Some “do-it-yourself” forms and computer programs may be adequate, but these one-size-fits-all documents often are prepared for nationwide distribution, and they may not fully conform to Ohio law or to the testator’s wishes.
Clearly, use of such forms does not give the testator the benefit of the interview process, and the ideas that a professional can bring to the estate planning process. Therefore, an individual should consult a lawyer about writing and signing a will. It should be noted that lawyers who draft wills are under professional limitations similar to those of witnesses. In general, the lawyer who drafts a will cannot be a beneficiary of it, unless related to the testator.

5) There is only one exception to the requirement that a will be in writing. An oral (or nuncupative) will is valid to transfer personal property—not real property—under certain conditions. The conditions are:
- the will is made in a “deathbed” situation by a testator who knows he or she is dying;
- the testator states his or her intended property distributions to two competent, impartial witnesses of the testator’s choosing;
- the witnesses write out the will and sign it within 10 days of the testator’s statement; and
- the written will is filed with the probate court within six months after the testator’s death.

A testator can modify the terms of an earlier written will (for example, to change the beneficiary of a particular item of personal property) by making an oral will during his or her last illness, but he or she cannot revoke a written will by making an oral will.

A Will Must Be Probated
Ohio law states that a will cannot govern the distribution of the testator’s property unless the will is filed with the probate court. Stated another way, this means that the court must admit a will to probate before it can control the distribution of a testator’s property, so a will left in a drawer at home is not effective. Under the law, anyone knowing of a deceased’s will is required to notify the probate court of its existence and location.

Lost, Damaged or Destroyed Wills
People usually keep wills in safe places. Sometimes these places are so safe that wills cannot be found, or sometimes a will is destroyed or damaged in a fire or flood. If a will cannot be found, or is totally or partially destroyed, copies of the original are available. Attorneys generally keep copies of the wills they have prepared.

When an original will is misplaced or destroyed in some way, a copy can be admitted to probate, provided it can be proven that the lost will was valid and was the last will of the testator, and that the testator did not know the will had been misplaced, damaged, or destroyed.

How Wills Are Revoked
A will can be revoked in a number of ways. The most common way is by making a new, or later, will. One of the standard statements in a will is that the testator revokes all previous wills.

A testator also can revoke a will by purposefully canceling it, tearing it up, obliterating it, or destroying it. The testator must personally take such an action, be present when such an action is taken, or give another person written instructions to take such an action on the testator’s behalf. A will can be revoked by canceling, tearing, destroying, or obliterating only when there is proof of the testator’s actions and intent to revoke the will.

If the testator is competent, the revocation of a prior will is absolute. The best way to explain this concept is by example: Tom writes a will. Later, he writes, “CANCELED,” or words having a similar meaning, on all the pages of the will and through his signature. Tom then makes a second will. Later, he tears up the second will, and makes a third will, which he subsequently obliterates with permanent black marker. Tom then makes a fourth will, which he later burns. Assuming that Tom was competent at all times, and that he clearly took the above actions to revoke the various wills, Tom does not have a will. If Tom dies, none of the wills he made can be revived.

Under Ohio law, a divorce or dissolution can affect the provisions of a will. When a court issues its decree or order in a divorce case, or approves a settlement in dissolution of marriage, the court’s order automatically revokes the provisions in a
will for a former spouse, unless the testator has indicated a clear intent in the will that the former spouse should remain a beneficiary despite the end of the marriage.

Wills may be amended by a **codicil**, a document that meets the same requirements as an original will. That is, the amendment must be in writing, signed by the testator and witnessed by two competent and impartial people. A will cannot be amended by writing changes on it.

**Limitations on Wills; Special Provisions**

The general rule is that a testator can use a will to dispose of his or her property in any way, or to any persons. There are some important exceptions to this general rule. Further, the law makes special provisions for circumstances that are often overlooked by people when they make wills or when circumstances change after they have made their wills.

The law gives a surviving spouse certain choices that prevent total disinheritance of probate assets—that is, assets subject to probate administration. (Certain assets that do not have to be administered through probate court are called **non-probate assets**. For example, assets derived from contractual agreements such as living trusts, insurance policies, payable-on-death accounts, joint and survivorship accounts, pensions, or security accounts with payable-on-death or joint and survivorship provisions, function independently of wills and may not be subject to probate administration. These devices are sometimes called **will substitutes**.)

While a testator can disinherit others in a will, a testator cannot entirely disinherit his or her spouse, or leave only a token inheritance. The surviving spouse can accept the will and take whatever share of the estate the will provides, or reject the will and take whatever share he or she is entitled to under the law. Generally, a surviving spouse is entitled to one-half or one-third of a testator’s net estate, depending on the number of testator’s children who survive the testator. (See the “Statute of Descent and Distribution” section below.)

A surviving spouse and surviving children also are entitled to a living allowance of $40,000 and to live in the family home for one year. (The living allowance is treated as one of the debts of the estate.) If the family home is sold to pay debts, the surviving spouse may be entitled to the fair rental value of the family house.

The surviving spouse also has the right to have two automobiles (or trucks if used for family transportation), provided they were not specifically bequeathed and the combined value of both automobiles is less than $40,000. The automobiles are not subject to probate administration. The surviving spouse is also entitled to claim one watercraft or one outboard motor not specifically given in the will. He or she also has the right to be reimbursed for the payment of the funeral expenses of the deceased spouse.

The surviving spouse may have a **dower** (widow’s or widower’s) interest of one-third of any real property owned by the testator during the marriage for the balance of the surviving spouse’s life. This dower interest also can be claimed by the surviving spouse with regard to real property that was sold or disposed of during the deceased’s life without the spouse’s consent. Today, the possibility of a dower interest is limited because buyers rarely buy real property without requiring the release of the dower interest in the deed.

It should be noted that the surviving spouse is not always entitled to the entire $40,000 living allowance. The probate court is required to make an equitable distribution of the allowance among the surviving spouse and any minor children. Therefore, the surviving spouse receives the entire amount if the children are also the deceased’s children. However, if, for example, there are children of a prior marriage, a portion of the money may go to them or to their surviving parent for their benefit according to the needs of all of them.

The law generally avoids tying up property forever. The **rule against perpetuities** says, in effect, that someone cannot create a trust that
keeps the property from being distributed free and clear for longer than 21 years beyond the end of the lives of people who are living when the trust or will becomes effective.

Let’s assume that Mr. Smith has two children, four grandchildren and a one-year-old great-grandson at the time of his death, and that his will creates a trust that says that the Smith Family Farm must remain in the trust for at least 100 years, to be used only by family members. Under the rule against perpetuities, the property must be distributed not later than 21 years after the death of the last survivor of these descendants, and if the great-grandson is the last survivor of them, the property must be distributed 21 years after his death, regardless of whether he dies at 50 or age 99. Recently, Ohio’s laws have been written to permit gifts of property that can exist in perpetuity (so-called dynasty trusts).

The law has special provisions that automatically change a will in some situations, such as when:
• an additional child, or children, is born after the will was made;
• a person named as a beneficiary in the will dies before the death of the testator, or within 30 days of the testator’s death; or
• the testator is divorced or granted a dissolution of marriage after the will was made.

When children are born to the testator after a will has been made, the general rule is that these children (called afterborn children or pretermitted heirs) are entitled to share in the estate the same as the testator’s other children. The testator, however, is not bound by this general rule, since testators are not required to leave anything to their children. Like other children, afterborn children can be specifically disinherited, or can be treated differently from their siblings. A testator’s directions will be followed by the court if the will clearly shows that afterborn children are not to share in the estate, or are to share in a different way from the children who were alive when the will was made.

Similarly, when an individual named as a beneficiary in a will dies before the testator (called a predeceased beneficiary), the gift is not automatically invalidated (or lapsed) unless the will makes it clear that the beneficiary must survive the testator. Ohio’s “anti-lapse” statute says that, if the will does not specifically state that a gift to a predeceased beneficiary is invalid, then the gift goes to the lineal descendants of the predeceased beneficiary, as long as that beneficiary is a relative of the testator. If the predeceased beneficiary is not related, no gift passes to his or her lineal descendants.

The property of a lapsed gift becomes part of the residuary estate, to be distributed to the (other) residuary beneficiaries — those people who are named to receive the balance of the estate after all debts are paid and specific bequests are distributed.

When an individual named in the will dies within 30 days of the testator, that individual is considered to have died before the testator, unless the testator says otherwise in his or her will.

A will does not take effect until the testator’s death, and thus addresses only property that the testator owned at death. The fact that the testator disposed of some property and acquired other property after the will was made does not necessarily affect the will. A will can still be valid and control distribution of estate assets even though, at death, the testator owned none of the specific property he or she mentioned in the will and owned when the will was made. Of course, if the testator does not own the specifically mentioned property or any interest in it when he or she dies, then a gift of that property would be invalid. For example, if Peter’s will states, “Mary will receive my 1920 Rolls Royce,” and the Rolls Royce was sold before the testator’s death, Mary obviously would not be able to receive that Rolls Royce through Peter’s will.
What Happens When There Is No Will?

Some individuals simply choose not to make a will, while others do not make a will because they might not want to offend their relatives, or because they believe that the distribution required by law is appropriate for their situations. Others may feel wills are important, but never get around to writing them. Some people make wills that dispose of only part of their property, while some wills are invalid in whole or in part. Even when there is a valid will, an individual may choose not to take the share provided in the will.

In any case, when an individual dies owning property not governed by a valid will, Ohio law dictates how his or her property must be distributed.

Statute of Descent and Distribution

The basic provisions governing inheritance of intestate property (or property not governed by a will or will substitutes) are found in a law called the statute of descent and distribution. For the most part, the statute (Ohio Revised Code § 2105.06) favors the nearest relatives surviving the deceased. It provides for distribution of intestate property as follows in the graphic to the right.

Those who are entitled to inherit from a testator by intestacy are called the testator’s heirs. If a testator leaves a will, then the testator will have will beneficiaries as well as heirs; these two groups might or might not be the same people.

Share of Descendants and Next-of-Kin or Heirs

In all of the above cases in which lineal descendants inherit, their respective shares are determined according to their place in the family tree and through the ancestor who “represents” them (this representation is known as per stirpes). For this example, assume Mary and Peter have four children: Peter dies. Three years later, Mary dies without a will (intestate); three of her four children (Abe, Ben and Carol) are alive at her death; a daughter (Diane), who died before Mary, had two children who are alive.

In this instance, the estate would be divided into fourths. Mary’s three surviving children would each take one-fourth and her two grandchildren would share equally in their deceased parent’s (Diane’s) one-fourth. These grandchildren would each get one-eighth of the estate, since their mother (Diane) is said to represent them.

The members of the nearest generation of descendants with a living member inherit equally.

For example, if Mary’s only living relatives were seven grandchildren—Abe had one, Ben had none, Carol had four, and Diane had two—Mary’s estate would be divided into seven equal portions. But if Ben and the seven grandchildren all survived Mary, then Mary’s estate would be divided into four equal portions: one for Ben, one for Abe’s child, one to split four ways among Carol’s children, and one to divide equally between Diane’s two children.

You can see that whether Abe’s child receives one-fourth or one-seventh of Mary’s estate depends on whether his Uncle Ben survives Mary, which might be by as little as 30 days.
<table>
<thead>
<tr>
<th>Situation</th>
<th>Heirs and Distribution</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. No surviving spouse, but a surviving child or children or the lineal</td>
<td>Each living child receives an equal share of the estate and the descendants of a deceased child will divide that deceased child’s share.</td>
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<tr>
<td>descendants of a deceased child.</td>
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<tr>
<td>2. A surviving spouse (who is the natural or adoptive parent of all of</td>
<td>The entire estate goes to the surviving spouse.</td>
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<tr>
<td>the decedent’s children) and one or more children of the decedent or</td>
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<tr>
<td>the lineal descendants of a deceased child.</td>
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<tr>
<td>3. A surviving spouse (who is not the natural or adoptive parent of the</td>
<td>The first $20,000 goes to the surviving spouse plus one-third of the balance of the estate; the remainder goes to the child or the child’s lineal descendants.</td>
</tr>
<tr>
<td>decedent’s child) and one child or the lineal descendants of a deceased</td>
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<tr>
<td>child.</td>
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<tr>
<td>4. A surviving spouse (who is the natural or adoptive parent of one but</td>
<td>The spouse receives $60,000 plus one-third of the balance of the estate and the remainder goes to the children, equally; the lineal descendants of a deceased child divide the deceased child’s share.</td>
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<td>not all of the decedent’s children) and two or more children or the</td>
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<tr>
<td>lineal descendants of any such deceased child.</td>
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<tr>
<td>5. A surviving spouse (who is not the natural or adoptive parent of the</td>
<td>The spouse receives $20,000 plus one-third of the balance of the estate and the remainder to the children equally; the lineal descendants of a deceased child divide the deceased child’s share.</td>
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<td>decedent’s children) and two or more children or the lineal descendants</td>
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<td>of any such deceased child.</td>
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<tr>
<td>6. A surviving spouse, but not surviving children or lineal descendants</td>
<td>The entire estate passes to the surviving spouse.</td>
</tr>
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<td>of a deceased child.</td>
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</tr>
<tr>
<td>7. Surviving parents, but no surviving spouse, children or lineal</td>
<td>The estate goes to the parents in equal shares or the entire estate goes to the surviving parent.</td>
</tr>
<tr>
<td>descendants of a deceased child surviving.</td>
<td></td>
</tr>
<tr>
<td>8. Surviving siblings of the decedent, but no surviving spouse; no</td>
<td>The estate goes to the surviving siblings (whether whole or half blood) with the lineal descendants of a deceased sibling dividing the deceased sibling’s share.</td>
</tr>
<tr>
<td>children nor lineal descendants of a deceased child and no parents</td>
<td></td>
</tr>
<tr>
<td>surviving.</td>
<td>One-half of the estate goes to the paternal grandparents, equally, and one-half goes to the maternal grandparents, equally.</td>
</tr>
<tr>
<td>9. One of more grandparents surviving, but no surviving spouse; no</td>
<td>Estate goes to the next of kin, if living, or to the step-children of the decedent with the lineal descendants of a step-child taking the step-child’s share, or, if none, then “escheat” (pay) to the state.</td>
</tr>
<tr>
<td>child nor the lineal descendants of a deceased child; no parents and no</td>
<td></td>
</tr>
<tr>
<td>siblings surviving.</td>
<td></td>
</tr>
<tr>
<td>10. No surviving spouse, no children or deceased children, no parents,</td>
<td></td>
</tr>
<tr>
<td>no siblings, no grandparents and no lineal descendants of grandparents.</td>
<td></td>
</tr>
</tbody>
</table>
Administration of Estates

The purposes of the administration of estates are to ensure that all of a deceased individual’s property is identified and assembled, that his or her debts are paid, and that the balance of his or her property is distributed to those entitled to it.

Estates Subject to Administration

All estates must be settled according to the standard probate procedures for administering estates, established by Ohio law. However, estates totaling $35,000 or less (or $100,000 or less if everything is going to a surviving spouse) may be relieved from most of the formal steps of administration when the probate court is satisfied that the deceased individual’s debts will be paid and his or her property will be given to those entitled to it. Relief from administration can mean substantial savings in time and court costs. In addition, estate administration can be streamlined when the sole executor and the sole beneficiary of the estate are the same person, regardless of the size of the estate.

Probating the Will

When a person dies leaving a will (i.e., dies testate), the first step in administering the estate is to admit the will to probate. Under this procedure, the will is filed in the probate court. The court then examines the document to determine if it is a valid will. It may admit the will or, if there is some doubt about the validity, the court may order the witnesses to the will to appear and testify about the genuineness of the deceased individual’s signature, or the deceased’s condition at the time the will was signed, etc. If the witnesses cannot be located, their signatures may be validated by other testimony. The court will accept the will, (i.e., admit it to probate) if and when it is satisfied that the will is valid.

Appointing an Executor or Administrator

Once the will is admitted to probate, the court appoints an executor (named in the will) of the estate. The executor is responsible for seeing that the estate is properly settled according to law. If an individual died without a will (or if the will fails to appoint an executor who is able to serve), the court appoints an administrator (whose duties are essentially the same as an executor). Executors and administrators are fiduciaries, meaning that they are authorized to act on behalf of others and are entrusted to properly handle others’ estate assets. Although the probate court is not bound to appoint the person named by the testator, the court will normally appoint that person if the person is qualified to act as executor.

For intestate estates, the court prefers that a relative of the deceased act as administrator. In addition, an administrator must live in the state where the estate is being settled. Residency in the state is usually not technically required for an executor, but the court often prefers it.

Appointment of an executor or administrator is complete when the appointee accepts, acknowledges his or her duties and liabilities and posts a bond for the faithful performance of those duties. The purpose of the bond is to protect the estate’s beneficiaries and creditors against the possibility that the executor or administrator will not honestly administer the estate.

Wills often contain a provision specifically asking the court to dispense with the bond for the named executor, indicating trust in the executor named in the will to faithfully perform the necessary duties. And while the court is not bound by such a request, it will usually grant it. If a bond is required, the premium is paid out of the estate’s assets.

When the appointment is complete, the court will send the executor or administrator a written authorization to act on behalf of the estate. This authorization is called letters testamentary or letters of authority when issued to an executor and letters of administration when issued to an administrator.
When an executor or administrator dies, becomes ill, otherwise is unable to complete his or her duties, or does not properly perform those duties, he or she must be replaced. A successor or replacement executor is often named in a will. If the will does not name a successor, or if individuals named in the will as successors cannot serve or are not suitable to serve as executor, the court will name an individual (called an administrator, W.W.A., or administrator with the will annexed) to perform those duties.

Finding, Assembling and Appraising the Estate Property

The first duties of the executor or administrator are to locate all estate property, take an inventory of the property and, if necessary, have the property appraised or valued by one or more impartial appraisers. Although professional appraisers are not required if the property is easy to value (stocks, bank accounts, etc.), their services are required when the estate includes real estate, jewelry, antiques, etc. When the inventory and appraisal is complete, it is filed with the probate court.

Most deceased’s assets include non-probate assets. These assets include living trusts, insurance policies, joint and survivorship and payable-on-death (POD) accounts, transfer-on-death (TOD) accounts, and deeds and securities or pension plans with named beneficiaries. The proceeds of these assets are part of the gross “estate” for federal and (usually) Ohio estate tax purposes, but generally are not part of the probate “estate” and, therefore, need not be listed on the inventory filed with the court.

The executor or administrator also has other duties. For example, the deceased may have been involved in a lawsuit as a plaintiff or defendant at the time of death, or the deceased (or the estate) may have a legal claim or cause of action against another party. The executor or administrator must see that the pending lawsuit is prosecuted, defended, or settled. Similarly, where the deceased had a claim or cause of action, which was not asserted, or only partially asserted, the executor or administrator must finally assert the claim and, if necessary, file a lawsuit in a timely manner. For example, if the deceased was killed in a traffic accident, the executor or administrator may have to file a lawsuit to collect damages for wrongful death.

Paying Debts, Taxes, Costs and Other Expenses

The executor or administrator must determine what, if any, debts the deceased owed. Creditors have six months after the deceased’s death to present claims against the estate. These claims should be sent to the executor or administrator by certified mail. Any claim not made within six months is barred forever.

Debts of the estate may include debts the deceased incurred before death, or debts incurred by the estate, such as utility bills, real estate taxes and other expenses for maintaining estate assets. Examples of common estate debts are hospital and funeral expenses. Other obligations of the estate occur following death, such as probate court costs, attorney fees, appraiser fees and the compensation the executor or administrator may take for his or her services, and sometimes, depending upon the value of the estate, estate taxes.

 Certain debts have priority. Generally, taxes, funeral expenses, and costs and expenses of administering the estate must be paid first. Usually, debts, costs and expenses will be paid out of cash in the estate. If there is not enough cash, it will be necessary to sell some of the estate property. Personal property will be sold first. If there is not enough personal property, real property (house/land) will be sold. The sale of personal property may be conducted in various ways. The sale might be a public or private sale of individual items, or it might be some form of auction. Unless the deceased authorized the executor to sell assets, the probate court must grant permission to conduct a sale.
Distribution of Estate Assets

When all debts, taxes, costs and expenses have been paid, the balance of the estate must be distributed to the individuals named in the will or, if there is no will, to those identified in the statute of descent and distribution (the heirs). Distribution may be in cash or in kind, if the will authorizes the executor to distribute in kind, or if the administrator of an intestate estate gets court permission to do so. In-kind distribution is the transfer of something in particular to a beneficiary. For example, the will may state that the deceased’s daughter is to receive a wedding ring and a silver tea service. If a sale is not necessary to obtain funds to pay debts, taxes, costs and expenses, or to obtain the necessary cash to pay all the heirs, the executor or administrator may transfer the wedding ring and tea service directly to the daughter. Sometimes a will explicitly authorizes the executor to make distribution in kind. The executor or administrator will usually consult the heirs to determine if they want cash or the particular property.

When authorized by the will or by the probate court, partial distribution of the estate property may be made to one or more heirs before the estate is completely settled and closed. Partial distribution is often made when the property involved is such that it should not go unused until the estate is settled (automobiles are often transferred under a partial distribution because they lose their value quickly and may suffer if not driven). Also, partial distribution is common in large estates, which may remain open for some time. Partial distribution, however, should not be made unless the administrator or executor is sure that enough property will be left in the estate to pay debts, taxes, costs and expenses.

The administrator or executor must notify those who receive partial distribution of estate assets that they might have to return it (or its value) if funds are later needed to satisfy a claim against the estate. For example, creditors have six months to make a claim against an estate. If a partial distribution is made before the six-month deadline and then an unexpected large claim is made against the estate, beneficiaries of the partial distribution may have to return the amount or its value so that the claim can be paid.

Accounting of Estate Assets

The executor or administrator is required to file an account within six months showing the estate assets, income, costs, expenses and distribution. This period is extended to 13 months in certain circumstances, including cases subject to a will contest or other litigation, or if the estate is required to file an Ohio or federal estate tax return. When the probate court approves the final account of an executor or administrator, some courts will explicitly release the executor or administrator from his or her fiduciary duties.

Estate, Health and Financial Planning

Estate Planning

Estate planning is the process of preparing for the disposition of a person’s assets and execution of his or her wishes during life or at death, as well as preparing for alternate decision-makers in the event of one’s incapacity. Wills, trusts, powers of attorney, life insurance policies, pension plans and bank accounts are some tools used in estate planning. The general purposes of estate planning are to:

- transfer an owner’s assets to the people or organizations selected by the owner;
- minimize the effects of taxes; and
- allow the owner to choose an agent or trusted person who will carry out the owner’s plan.

In general, trusts are legal agreements in which the trust maker (called a settlor or grantor) transfers property to himself/herself or to another person (a trustee) who manages the trust for the grantor’s benefit and/or for the benefit of third persons.

A living trust (or inter vivos trust) is created (signed and funded) when the trust maker or grantor is alive. A living trust is the opposite of a
**testamentary trust**, which is a trust created by the grantor’s will.

Living trusts have become popular in recent years because they have many advantages, including:

- avoiding the cost and difficulties of probate administration;
- avoiding the costs and court intrusions of traditional guardianships, if the grantor should become incompetent;
- providing a vehicle for implementing a tax plan to reduce or eliminate estate taxes; and
- ensuring confidentiality.

These advantages can be overstated, however. Estate planning requires individuals to make informed choices. They must investigate the various tools available and understand their effects. For example, while living trusts are very flexible, they are not cure-alls, nor are they applicable in every situation. For example, consider that while there are expenses involved in the probate administration of a deceased’s assets, expenses also are involved in establishing and administering a living or a testamentary trust. In addition, a will and, thus, some probate administration, is necessary for most individuals who have a living trust because some assets are not placed in a living trust. Also, probate administration can be helpful in some estates and guardianships because of the probate court’s supervision and required regular reports. Also, the court can replace fiduciaries that do not do their jobs.

One thing that a revocable living trust cannot do, contrary to some advertising, is to help an individual qualify for public assistance programs, such as Medicaid and Supplemental Security Income (SSI). These programs create special estate-planning considerations for individuals who are trying to provide for themselves as senior citizens, or are trying to provide for someone with a disability. Public assistance programs have strict and complex asset and income requirements. To meet these requirements, individuals sometimes transfer assets to their children or to **irrevocable** trusts so that their children will receive an inheritance. The federal government has responded to this kind of transfer by establishing a period after such a transfer in which an individual is ineligible for public assistance (for example, the current waiting period for Medicaid eligibility is up to five years after a transfer of assets).

On the other hand, government rules make it possible for an individual, with proper planning, to go to a nursing facility without impoverishing his or her spouse. In addition, the state of Ohio has made it possible to create an **irrevocable supplemental services trust** for an individual with mental illness or mental retardation, or other developmental disability. The trust allows certain assets to be sheltered for limited purposes but, upon the death of the beneficiary of the trust, a portion of the assets goes to the state of Ohio for the use of other Ohioans with disabilities.

A revocable living trust (as opposed to an **irrevocable trust**) is not directly relevant to public assistance planning because it can be revoked or canceled. For this reason, the trust assets are considered to belong to the trust owner for public assistance planning purposes. A living trust might, however, be very useful to, say, a mother who wishes to use it as part of a general estate plan, for example, to provide a trust for the care of her disabled son after her death.

Estate planning is a detailed process that must be tailored to the needs of particular individuals. An individual who is contemplating the use of a living trust, or other estate-planning device, should consult an attorney for assistance in this complex area.

### Incapacity and Health Care Planning

While advanced medical techniques have made it possible to prolong the lives of individuals with health conditions, they also raise practical, moral and legal questions. Concern for these life-and-death issues, and the burden and potential liability they place on the family and medical providers, has led to the development of various legal devices. The **health care power of attorney** and the **living will** are among these devices.
• **Durable Power of Attorney**

The word *attorney* simply means representative agent. A *power of attorney* is a document that appoints someone as an agent, either for limited purposes or for very broad, all-inclusive purposes.

Generally, when someone becomes incompetent (for instance, when injury, age or a condition such as Alzheimer’s disease takes away the person’s ability to handle his or her own financial affairs and make medical decisions), any power of attorney that he or she has previously executed becomes null and void.

However, a power of attorney can be drafted in a way that it remains valid if it includes a provision specifically stating that it should not be terminated even after a person (the *principal*) becomes incompetent. Such a provision makes it a durable power of attorney.

• **Health Care Power of Attorney (HCPOA)**

One type of durable power of attorney is called the *health care power of attorney* (HCPOA, also sometimes called a “DPOA”). It permits an agent to make health care decisions if the principal’s physician has determined that he or she is unable to make and communicate his or her own health care decisions. The principal grants this power knowing that at some time in the future he or she may not be able to make such decisions, and gives the agent guidance on what to do.

Unlike a living will, discussed below, the agent’s powers are not limited to the time of the principal’s terminal illness or permanently unconscious state. The agent may be given broad powers over every type of medical or medically related situation or decision (provided that the principal is unable to make and communicate his or her own health care decisions). However, the law imposes certain restrictions. For example, the agent cannot authorize the removal of treatment that the principal has previously authorized unless circumstances have changed substantially. Also, the agent cannot authorize the removal of life-sustaining treatment unless the principal is in a terminal condition or permanently unconscious state.

To be a valid document, the HCPOA must be:
• executed by a competent adult;
• signed and dated by the person granting the power; and
• witnessed by two disinterested and legally competent individuals OR acknowledged before a notary public who will attest the individual appears to be of sound mind and not under or subject to duress, fraud, or undue influence.

• **Living Will**

The *living will* is an individual’s own statement and choice about the specifics and extent of treatment he or she wishes to receive when he or she is in a terminal condition and/or permanently unconscious state and no longer able to make and communicate those decisions. The living will does not appoint another person to make these decisions.

As with the HCPOA, a living will has certain limitations. A living will becomes operative only when:
• the attending physician and a second physician determine that the person (*declarant*) is in a terminal condition or a permanently unconscious state; and
• the attending physician determines the person is not able to make informed decisions regarding treatment, and there is no reasonable possibility that he or she will regain the capacity to make these decisions.

Any competent adult may execute a living will with the same formalities described above for the HCPOA.

A living will may include the declarant’s intent to make an anatomical gift (such as organs or tissues) upon his or her death. In this case, the declarant also should complete a Donor Registry Enrollment Form and send it to the Ohio Bureau of Motor Vehicles so his or her name can be added to Ohio’s official donor registry.

Both the HCPOA and living will documents are also known as *advance directives* because they state an individual’s wishes about medical and
end-of-life treatment before such treatment may be needed. Anyone interested in an HCPOA or a living will should review the forms for each developed by the Ohio State Bar Association with the Ohio State Medical Association, the Ohio Hospital Association, the Ohio Osteopathic Association and the Ohio Hospice & Palliative Care Organization. The forms conform to the requirements of the law and are available from the Ohio Hospice & Palliative Care Organization through its Web site at http://www.ohpco.org/. It is not necessary to use the standard forms. However, for either document to be valid, it must include certain specific language spelled out in the Ohio Revised Code and included in these forms. Physicians and attorneys will have copies of the standard forms, as will many organizations.

A person’s advance directives should be updated every few years, for changes in both the law and in personal circumstances. In December 2004, new standard forms were issued to conform with changes in Ohio law. Documents executed before 2004 are still valid, but those signing since then should be sure to use the current standard forms or check with an attorney to make sure changes in the law are reflected in the documents.

Other, less common, types of advance directives are described below.

• Mental Health Declaration

A Declaration of Mental Health Treatment is a document that allows an individual to state his/her own preferences regarding mental health treatment and to appoint a person to make mental health care decisions when he/she is unable to do so.

A regular HCPOA can address both physical and mental health issues, and still is sufficient for many Ohioans. In comparison to physical health care issues, however, mental health issues can be more complex and their specific treatments (e.g., medications and therapies) generally are not addressed in a general HCPOA. Those who would benefit from having such a document include people who have been diagnosed with mental illness or people who think they might need mental health treatment at some point (for example, those of advanced age or those who have a progressive illness that is likely to involve mental health issues).

The mental health declaration lets health care professionals know the principal’s own preferences regarding mental health treatment. It also allows the agent (or proxy) to advocate for these choices and make other decisions in principal’s best interest if no preference is stated.

• DNR Orders

In medical terminology, “DNR” stands for “do not resuscitate.” A DNR order is a physician order written into a patient’s medical records that says cardiopulmonary resuscitation (CPR) is not to be administered. Doctors are required by their code of ethics to do everything they can to keep a patient alive, unless 1) the patient will not be able to recover any kind of meaningful life, and 2) the patient specifically requests that he or she not be revived in the event of a catastrophic illness.

A person can obtain a DNR order by asking his or her physician to write such an order. If, after consulting with the patient, a physician determines that both of the necessary conditions exist, the physician will write the DNR order into the patient’s medical records. It will go into effect immediately.

A person also can pre-authorize a physician to write a DNR order in the event that he or she becomes terminally ill or permanently unconscious. A person may use the following two documents to authorize and request that his or her physician write a DNR order:
• a living will; or
• a health care power of attorney authorizing an agent to request such action.

It is important to understand, however, that a person’s authorization or request does not constitute an actual DNR order; such an order is actually in place ONLY when a physician has specifically written a DNR order into the patient’s medical records at the time of the patient’s terminal illness or permanent unconsciousness.
Because a living will takes effect only if and when a person is terminally ill or in a permanently unconscious state, a DNR order that is authorized by a living will cannot be issued until the person is determined to be so afflicted in the opinion of two physicians, one of whom must be a specialist. Similarly, a person may give an agent the authority, through an HCPOA, to direct a physician to issue a DNR order, but that authority takes effect only when the patient is unable to communicate his or her own wishes.

Other Duties of the Probate Court

Commitment of the mentally ill and retarded, appointment and supervision of guardians, supervision of adoptions, and the issuance of marriage licenses are among the important duties of the probate court.

Commitment of the Mentally Ill or Retarded

When an individual suffering from mental illness or mental retardation poses a danger to the self or others, or needs special care that he/she refuses or is unable to get, then that individual may be asked to come before the probate court for the purpose of being committed to a hospital or institution for care or treatment. The probate judge may commit such an individual to a public or private hospital or institution only after carefully assessing the evidence of that person’s mental status.

Guardianships

A guardian is an individual appointed by the probate court to be responsible for another person, or for another person’s property, or both. (The individual for whom the guardian is appointed is called the ward.) A guardian will be appointed if the ward is unable to handle his or her affairs. The disability may be due to youth, advanced age, mental condition or physical condition. A guardianship may be voluntary (that is, the guardian is appointed at the ward’s request) or it may be involuntary. A guardian is a fiduciary and must take charge of his or her ward’s property and give a periodic accounting of the ward’s condition and financial affairs to the probate court.

Under the law, the court must take the “least restrictive alternative” in establishing the appropriate care for the ward.

Ohio allows the probate court to appoint limited guardians or conservators. In general, when a person is legally incompetent, but the nature of what he or she owns or his or her personal situation does not require the guardian to perform all of the duties of living, the court can appoint a limited guardian to perform only those functions that are necessary. This might be the case, for example, when a person has only an interest in real estate that needs to be managed, but the cost and mechanics of his or her personal care is being covered by a spouse. In such a case, the court might appoint a limited guardian who is only responsible to take care of the real estate, and does not have to handle other affairs. A family member or friend might be willing to assume this kind of limited duty, but not other duties that a guardian normally would have to perform.

When an individual is mentally capable but physically infirm, the court can appoint a conservator to assist the individual in handling his or her affairs, either temporarily or permanently. Where a conservatorship is established, the judge sets forth the particular duties that the conservator is to perform. Thus, if someone were injured in an automobile accident and were in a full body cast for four months, the court might appoint a conservator to make deposits, sign checks, handle mail, and do other day-to-day things (with input from the injured person) until the cast was removed and the injured person was again able to resume control.

The court also may appoint an interim guardian or an emergency guardian in special situations such as a temporary disability, or until a full hearing can be arranged to determine whether
a full guardianship is necessary. Interim and emergency guardians only serve for short periods.

Adoptions

*Adoption* is the legal method by which a single adult, a husband and wife, or life partners gain full responsibility for rearing and caring for someone else’s minor child. Through adoption, the child legally becomes the child of the adoptive parent or parents following approval by the probate court.

The probate court evaluates the prospective parents (or parent) to determine if the proposed adoption is in the child’s best interest. If so, the probate court approves the adoption. A child of any age up to 18 can be adopted. (Under certain circumstances a disabled adult can be adopted.)

Adoptions occur in various situations. A stepchild may be adopted by his or her stepparent; orphans, abandoned children, children placed for adoption by their parents, and children whose legal relationship with their parents has been ended by a court also may be adopted.

Marriage Licenses

The probate court supervises the issuance of marriage licenses. (*Marriage licenses are examined in more detail in Part X at “The Marriage License.”*) In summary, the probate court will not issue marriage licenses to a prospective married couple if either:

- is underage;
- is under the influence of alcohol or a controlled substance at the time of application; or
- suffers from a communicable form of syphilis.

Blood tests are not required to obtain a marriage license in Ohio. If an applicant is underage, a license can be issued if appropriate parental consent is provided and the court is satisfied that suitable counseling has been received. If a girl is under 16 and pregnant, the juvenile court may grant permission to marry.

Chapter Summary

- The *probate division* (or probate court) of the court of common pleas in each of Ohio’s 88 counties is one of the busiest in the court system.
- *Probate law* covers the proper administration of the estates of individuals who have died—including the payment of taxes and court-approved debts, and the transfer of all probate estate property to the appropriate individuals or entities.
- Probate law also governs the issuance of marriage licenses, adoptions, appointment of guardians to care for children and other persons who cannot care for themselves or their property, and proper care and treatment for the mentally ill, mentally retarded persons, or persons suffering from developmental or physical disabilities.
- Individuals serving in positions of trust, whether they are executors, administrators, guardians, conservators, trustees, attorneys-in-fact, or other persons who act on behalf of third persons, are called *fiduciaries*.
- The current owner of private property can determine who is to be the future owner when the current owner dies. The most common device to transfer ownership upon death is a *will*, or more formally, a *last will and testament*. An individual making a will is called a *testator*.

Continued on page 126
A will cannot govern the distribution of the testator’s property unless it is filed with the probate court.

When an original will is misplaced or destroyed in some way, a copy can be admitted to probate, provided it can be proven that the will is valid and is the last will of the testator, and that the testator did not intentionally damage or destroy it in order to revoke it, or did not know that the will had been misplaced, damaged, or destroyed.

A will can be revoked in a number of ways. The most common way is by making a new, or later, will.

The basic provisions governing inheritance of **intestate property** (or property not governed by a will or will substitutes) are found in a law called the **statute of descent and distribution**. For the most part, the statute favors the nearest relatives surviving the deceased.

Estates are administered through the probate process to ensure that all of a deceased individual’s property is identified and assembled, his or her debts are paid and the balance of his or her property is distributed to those entitled to it.

Once the will is admitted to probate, the court appoints an executor of the estate. An *executor* is someone who is responsible for seeing that the estate is properly settled according to law.

If there is no will, the court appoints an *administrator* to handle the estate’s administration.

Estate executors and administrators must locate and take inventory of all estate property, determine and pay any debts owed by the deceased, pay any estate taxes that are required, and distribute the balance of the estate to individuals named in the will or designated by the statute of descent and distribution. When an estate is closed, the executor or administrator must file an account of assets, income, costs, expenses and distribution with the court.

*Estate planning* is the process of managing a person’s assets and decisions during life or at death. Wills, trusts, powers of attorney, life insurance policies, pension plans and bank accounts are some tools used in estate planning.

Concern for life-and-death issues, and the burden and potential liability they place on the family and medical providers, has led to the development of various legal devices. The *health care power of attorney*, the *living will* and the *mental health declaration* are among these devices.

Commitment of the mentally ill and retarded, appointment and supervision of guardians, supervision of adoptions, and the issuance of marriage licenses are among other important duties of the probate court.
Web Links:

OSBA’s “Law You Can Use” articles:
(go to http://www.ohiobar.org/pub/lycu and search for article by title or by topic)
  “Ask Questions To Decide if a Living Trust is Right for You”
  “Complete Asset List Is Essential”
  “Five Reasons To Plan Your Estate Now”
  “Guardianships Impact Estate Planning”
  “Keep DNR Orders Where Emergency Squads Can Find Them”
  “Know Legal Steps To Take after Someone Dies”
  “Ohioans Can Use Living Will To Express Anatomical Gift Intentions”
  “Ohio’s Income Tax on Trusts Is Here To Stay”
  “Recognized Advance Directive Forms Simplify Health Care Planning”
  “Transfer-on-Death Deed Avoids Probate”
  “What You Should Know about the Declaration of Mental Health Treatment”
  “What You Should Know about Guardianships and Advance Care Planning”
  “What You Should Know about Organ and Tissue Donation”

OSBA’s “LawFacts” pamphlets:
(go to http://www.ohiobar.org/pub/lawfacts/ and search by title)
  “Administering an Estate Without a Will”
  “Financial Powers of Attorney”
  “Guardianships”
  “Living Trusts”
  “Probate”
  “Wills”
  “Living Wills and Health Care Powers of Attorney”
  “DNR Orders”

From Hieros Gamos’s Web site:
http://www.hg.org/estate.html
  “Estate and Trust Law” page

From Cornell Law School Legal Information Institute:
http://www.law.cornell.edu/wex/index.php/Estates_and_Trusts
Part X

family law

“Character is the only secure foundation of the state.”

– Calvin Coolidge

The family is the basic unit that ensures the biological and cultural continuation of society. So that families function as well as possible, the law establishes rights and duties for family members (generally parents and their children) and a method to enforce these rights and duties. For example, the state sets rules for creating marriages and, through a court, the state approves (or grants) a divorce or dissolution of marriage.

The rights and duties of the people involved in the family and the process of enforcing these rights and duties are often grouped together under the term family law.

Marriage

Marriage involves a man and a woman who are responsible for each other’s well-being and the well-being of their children. Because the relationships between spouses and between parents and their children are so important to a healthy society, the state encourages people considering marriage to be cautious and wise.

Pre-Marriage Counseling

Pre-marriage counseling is advisable for all couples regardless of their age or prior marriages. Conferences with an experienced counselor help prepare the couple to manage the problems that arise in any marriage. However, if both of the prospective spouses are 18 or older, pre-marriage counseling is not mandatory. If either of the parties is under 18, Ohio law requires the couple to have pre-marriage counseling.

Couples who belong to a religious organization can arrange counseling with their religious or spiritual leader. (Some religious bodies require pre-marriage counseling.) Pre-marriage counseling is also available from many social agencies and from professional marriage or family counselors. The probate court also might provide information about local sources for pre-marriage counseling.

Marriage as a Three-Way Contract

Marriage is a three-way contract involving the state and the two people who are joined in marriage. The parties’ marriage vows create a binding contract. Under Ohio law, the state is automatically a party to the contract because of the importance of the family, and because the ordinary methods used to enforce contracts do not work with a marriage contract. For example, a court can order payment of child support or grant visitation rights, but the orders likely would be unenforceable without the power of the state. The state’s presence helps protect the interests of the state, society and any “third party beneficiaries,” such as children.

Who May Marry

Under Ohio law, unmarried men 18 or older and unmarried women 16 or older are legally permitted to marry. A person under 18 years of age must obtain the consent of his or her parents, guardian, or custodian. Parental consent is unnecessary in situations where the parent whose consent is required:

• lives in a foreign country;
• has neglected or abandoned the minor who wishes to marry;
• is an inmate in a mental or penal institution; or
• has been deprived of custody of the minor by the court.

In addition, a woman who is under 16 and pregnant may obtain permission to marry from the juvenile court. (Note that the juvenile court is not required to grant permission.)
Someone who already is married cannot legally enter into another marriage. A married person who knowingly enters into another marriage is a bigamist. Bigamy is a crime that automatically makes any later marriage(s) invalid. Even so, Ohio law permits the later spouse to get a court-ordered divorce or annulment, which officially ends a bigamous relationship and helps resolve questions of spousal support, legitimacy of children and child support.

The Marriage License

A marriage cannot occur unless the parties have a license. A couple may apply for a license in the probate court of the county where either party lives, or in the county where the ceremony is to be performed. Before February 2001, Ohio marriage licenses were not issued in fewer than five days from the date of application unless, for good cause, the probate judge waived this “waiting period.” Now, it is no longer necessary for couples to go through a waiting period before obtaining a marriage license.

A blood test is not necessary to obtain a marriage license. However, probate courts do not issue a marriage license to any person who, at the time of the application, is under the influence of alcohol or a drug of abuse, or who is suffering from a communicable form of syphilis. Once issued, a marriage license is valid for 60 days. If the couple does not marry within that time, they must get a new license.

The Marriage Ceremony

The law does not prescribe the actual words of the marriage ceremony. In Ohio, only a person authorized to perform marriage ceremonies can solemnize a marriage. Authorized persons include:
- regular clergy (who are licensed by the secretary of state to solemnize marriages);
- municipal, county and probate court judges;
- mayors; and
- the superintendent of the State School for the Deaf.

Further, a religious society may perform a marriage. The provision allowing a religious society to perform a marriage ceremony recognizes the practice of having couples publicly exchange marriage promises and then proclaim to the congregation that they are wed. The person officiating at a marriage ceremony must sign the marriage certificate and file the certificate with the probate court within 30 days after the ceremony.

Ceremonial Versus Common Law Marriages

Historically, the law has recognized two methods of establishing the marital relationship: ceremonial marriage and common-law marriage. In a ceremonial marriage, the couple obtains a license from the probate court and a person authorized by the state conducts the marriage. Once the ceremony is finished, the authorized person completes the certificate of marriage and files it with the probate court within 30 days.

Common-law marriage, recognized in Ohio until 1991, was established by the conduct of the parties and was not dependent on an official license, ceremony, or certificate. Before 1991, Ohio allowed persons who claimed to have entered into a common-law marriage the opportunity of proving that such a marriage did exist. Once a court—or sometimes an agency—decided that a person claiming marriage had offered sufficient proof, the common-law marriage was established, at least for the purposes of that court or agency.

Couples claiming to have entered into a common-law marriage must prove:
- competence to marry (each party must have been the appropriate age and not married to another);
- cohabitation;
- that they have conducted themselves publicly as a married couple;
- that they have developed a reputation in the community as a married couple; and
• their intent—or their agreement, at some point during their relationship—that they are husband and wife.

Ohio does not now accept proof of common-law marriage in relationships that were entered into in Ohio on or after Oct. 10, 1991. In some circumstances, however, Ohio will accept proof of a common-law marriage if the couple entered into such a relationship in another state that recognized common law marriages at the time the couple committed themselves to one another.

The question of the existence of a common-law marriage usually arises when one of the parties dies and the surviving party claims the rights of a surviving spouse. For example, the surviving party may make a claim for inheritance, Social Security, insurance, or workers’ compensation.

Just as with a ceremonial marriage, a divorce or dissolution is necessary to end a common-law marriage.

Same-Sex Marriage
As of December 2, 2004, Ohio specifically banned same-sex marriages.

Currently, only Vermont recognizes a legal relationship between same-sex persons through its civil union law. It is questionable whether the state of Ohio would recognize the civil unions of same-sex Vermont couples.

Because same-sex couples in Ohio have few or no legal rights through the family law statutes, unmarried couples generally use private contracts or cohabitation agreements to define the rights and obligations each party has to the other.

A cohabitation agreement typically defines each right and obligation, property, support and any other issue an unmarried couple may face while living together and in the event of a dispute or break-up. Such an agreement may address issues such as property ownership division, financial resources, a partner’s death or disability, and even the sharing of household duties and expenses. Because Ohio law does not recognize these contracts, they cannot be enforced in domestic relations courts. However, cohabitation agreements may be enforceable under Ohio’s contract and partnership laws, depending on all the circumstances of the case. At this time, a cohabitation agreement is the best available means for unmarried partners to determine their own legal future and protect their interests.

Family Rights and Obligations

Ohio law establishes a variety of rights and duties for married couples concerning their relations with one another and with their children. Similarly, the law establishes a variety of rights and duties for children concerning their relations with their parents.

Rights and Obligations of a Married Couple
According to Ohio law, married partners are expected to give each other mutual respect, fidelity and support. Each spouse must support himself or herself, the other spouse and any minor children. This support is described in the law as the provision of necessaries. Necessaries generally are defined as food, clothing, shelter and medical care.

Providing support is considered so important that spouses or parents found guilty of neglecting their duties may face civil and criminal liability with stiff penalties. For example, a spouse may be held liable for the enormous medical expenses incurred during a lingering illness of his or her spouse, even though the healthy spouse had no contract with the medical providers.

Married partners are on equal footing with respect to personal and property rights. With certain limited exceptions, each may own and dispose of property as if unmarried. Each has the right to enter into contracts without the other. Neither can be excluded from the family home, except by court order.

Historically, a wife had few rights apart from her husband. When a woman married, most of her
property became her husband’s and she was almost totally under his control. Under older versions of the common law, a husband could, within certain limits, physically assault his wife. Today, physically assaulting a spouse is punishable as a crime (domestic violence).

**Obligations of Parents to Their Children**

Parents are obliged to support their children. The obligation to provide support includes:

- ensuring that the children have food, clothing, shelter and medical care;
- ensuring that they attend school;
- supervising their behavior and using appropriate discipline when necessary to achieve proper conduct; and
- fostering and protecting their physical, mental and moral well-being.

Failure to meet any of these obligations may result in various kinds of criminal and civil liability for the parents.

In a practical sense, parents are obligated to provide adequate support to their children, at least until the children are through high school. The question of what is “adequate support” is answered on an individual basis. “Adequacy” depends upon the parents’ ability and financial resources. Support may be considered to be adequate if the parents are doing the best they can, given their particular circumstances.

The legal obligation to support children applies whether the parents are married to each other, married to a subsequent spouse, or were never married at all, and regardless of whether the parent has custody of the children. Non-support of children is a criminal offense.

The obligation to provide child support may be enforced through a variety of court actions. An action may be brought by the mother of an illegitimate child to force the father to provide support. Other actions may be brought in connection with divorce, dissolution of marriage, annulment, or spousal support lawsuits. In some cases, a welfare agency will file lawsuits. The state of Ohio also helps enforce the support obligations of out-of-state parents.

**Obligations of Children to Their Parents**

Children have certain responsibilities to their parents. Children are obligated to respect their parents and perform, within their abilities, the family duties that are asked of them. They must:

- obey their parents, teachers and others in authority over them;
- apply themselves the best they can to master the instruction and schooling given them; and
- behave according to acceptable standards.

An adult child also is obliged to provide support if a parent is financially unable to support himself or herself, either due to sickness or old age. As with parents’ obligation to support minor children, this obligation is conditioned by the adult child’s ability and financial means. An adult child’s obligation to support a parent does not apply if the parent has abandoned the child or failed in his or her obligation of support to the child.

**Family and Medical Leave**

Just as our society recognizes the obligation of a spouse or parent to provide care in the case of illness of a family member, society also has recognized certain obligations of the whole community to provide help. (For example, see the discussion of the federal Family and Medical Leave Act [FMLA] in Part XI, “Workplace Law.”)

**Minors and Their Rights**

For most purposes, a person is considered an adult at age 18. Persons under 18 are called children, minors, or juveniles. While minors have many personal rights, they do not have all the rights of adults.
The Age of Majority

The age at which a child (minor or juvenile) becomes an adult is known as the age of majority. Under federal law, every person is allowed to vote at age 18. In Ohio, 18 is the age of majority for voting and most other purposes. The major exception to that rule involves liquor control laws. Persons under 21 are not permitted to purchase any alcoholic beverage.

Minors in General

The law often treats minors differently from adults, since minors frequently lack the knowledge, experience and judgment to truly fend for themselves. Some rights and obligations do not apply to minors the same way that they apply to adults. Society does not hold very young children responsible for criminal acts. Courts also treat older children differently from adults for criminal acts in most cases. For example, a person under age 18 is allowed substantially less alcohol concentration than an adult when operating a motor vehicle. (While persons under 21 may not buy any alcohol, they are permitted to consume it for ceremonial purposes within the family.) One rationale for the lower alcohol concentration allowed for minors is that a combination of alcohol and already-reduced judgment due to their age makes juveniles more likely to be involved in accidents.

Apart from the criminal law, minors may be subject to more, and different, controls on their behavior than adults. Minors must have parental permission to do certain things. For example, minors generally need parental permission to marry, or to obtain medical treatment. While minors can own property, it is often necessary that a guardian hold and manage such property. The right of minors to enter into contracts also is limited. (See Part VI, “Contracts,” for a discussion of a minor’s capacity to enter into a contract.)

Minors are barred from certain occupations, and their employment in other occupations is subject to legal limits on child labor. For example, minors may not engage in occupations that are hazardous or detrimental to their health and safety, such as meat packing and slaughtering, mining, and the manufacture of chemicals, explosives, or radioactive material. Certain licenses cannot be granted to minors. For example, to obtain a license to practice law in Ohio, an applicant must be at least 21 years of age. Other licenses, such as a driver’s license, can be granted to minors only under certain conditions. The ability of minors, especially very young children, to act as witnesses in court also is limited. Under the Ohio Rules of Evidence, a child under age 10 cannot be a witness unless the judge determines, after separately questioning him or her, that the child’s testimony is likely to be honest and truthful, and not the result of what someone else may have instructed the child to say.

Parents can be held responsible or liable for up to $10,000 if their children willfully damage property or willfully and maliciously assault another person. Moreover, an adult who signs for a minor’s driver’s license may be held liable for any amount of damage the minor causes in an accident, if the minor is driving without insurance.

Constitutional Rights of Minors

While minors do have rights under the constitution, they are somewhat restricted. For example:

• Minors do not have complete freedom of speech and assembly under the First Amendment to the U.S. Constitution. For instance, the state can limit access to books, magazines, movies and other materials adults can freely obtain, view, or possess. Ohio law places restrictions on matter that is not obscene from an adult viewpoint, but is considered unsuitable for juveniles.

• Minors cannot freely keep and bear arms. Under federal and Ohio law, a minor cannot buy any kind of firearm and a person under 21 cannot buy a handgun. A minor under 16 cannot hunt without an accompanying adult. Except for lawful hunting, no minor of any age can possess a firearm unless it is used for instruction in firearms safety, care, handling, or
marksmanship under competent adult supervision.

• Searches and seizures that would be unconstitutional if they involved an adult may be constitutional when they involve a juvenile. For example, it may be proper, under certain circumstances, to search a school locker. Schools have a duty to take weapons, drugs and other dangerous items away from students.

• A minor accused of juvenile delinquency may be held without bail before trial if the court finds there is a serious risk that the minor may commit an act that would be a crime if committed by an adult. (A minor does not have the right to bail in a juvenile proceeding.)

• Minors have certain other rights that, at least partially, make up for the fact that they don’t have the right to bail. For example, the law favors releasing minors into the care of their parents. In such a case, the minor does not have to stay in jail while awaiting trial, and the minor’s parents do not have to pay bail for the minor’s release. Also, a minor who is held in jail while awaiting trial must be kept separate from adults and must be given a detention hearing within 12 hours of admission or the next court day after admission. Further, a minor who is held after the detention hearing must be kept separate from adults and is entitled to a court hearing within 10 days of the filing of the complaint.

• A minor may lose his or her liberty for actions that would not be criminal if committed by an adult. For example, a minor who engages in sexual relations may be committed to a juvenile institution as an unruly child.

• Finally, a minor does not have the right to a jury trial in juvenile proceedings.

**Contractual Rights of Minors**

Minors do not have full rights to enter into contracts. A minor who enters into a contract with an adult has the option to either honor or cancel the contract before complying with (or performing) the terms of the contract. By complying with the terms, the minor is acting in a way that honors the contract, so the contract will be binding on the minor as well as the adult.

A minor who chooses to cancel a contract must take action to cancel the contract before becoming 18 years of age. However, a minor cannot cancel a contract if the cancellation would cause an unfair result, or allow the minor to benefit from his or her own wrongdoing. For example, a minor cannot purchase a car, wreck it, then cancel the contract and expect not to have to pay for the car.

Finally, in some situations, a minor can enter into a binding contract and not have the right of cancellation. These situations generally involve contracts for necessaries such as food, clothing, shelter and medical care. The minor’s parents may be held liable on contracts for necessaries. Contracts for medical care raise special questions and are addressed below.

**Seeking Medical Aid**

While the general rule is that minors cannot be given medical treatment without consent by a parent, guardian or custodian, there are major exceptions to the rule, such as the following:

• Permission for treatment of a minor need not be obtained in an emergency.

• A minor age 16 or over may voluntarily enter a mental hospital for treatment for mental illness arising from drug abuse.

• A minor of any age can obtain medical treatment for any condition arising from drug abuse or for venereal disease.

• Pregnant minors may have abortions in certain circumstances.

Ohio has a parental notification law covering the rights of unemancipated pregnant minors seeking an abortion. (Unemancipated minors are still under the authority of their parents.) A simplified summary of that law is stated below.

The Ohio parental notification law defines an unemancipated, pregnant minor as a woman under 18 years of age who has not entered the armed services, has not been employed and self-subsisting, or has not been otherwise independent from the care and
control of her parents, guardian, or custodian. Under the law, an unemancipated pregnant minor must notify at least one parent, or her guardian or custodian, of an intention to have an abortion. If the parent, guardian, or custodian consents in writing, the minor may have the abortion. In certain circumstances, the minor may avoid notifying her parents, guardian, or custodian by requesting that notice be given to a sister or brother who is 21 years old, or to a stepparent or grandparent. Notice is not necessary if the minor is found to be mature and well enough informed to intelligently decide for herself whether or not to have an abortion. Further, in certain circumstances (for example, in cases where the minor fears abuse from whoever would normally receive notice), the minor may avoid giving notice to anyone.

Where notice is to be given to a sister, brother, stepparent, or grandparent, or where no notice will be given to anyone, the minor must file an application with the juvenile court. Application forms are available from juvenile courts without charge.

Where notice is to be given to someone other than the parent, guardian or custodian because the minor fears harmful consequences of notifying the parent, guardian or custodian, the application must specify who should receive notice and the child must sign an affidavit stating that the applicant is in fear of physical, sexual, or severe emotional abuse from her parent, guardian, or custodian and that her fear is based on a pattern of physical, sexual, or severe emotional abuse exhibited by the parent, guardian, or custodian.

Similarly, if the minor wishes to avoid any notice at all, the application must be accompanied by an affidavit stating that she is in fear of physical, sexual, or severe emotional abuse from her parent, guardian, or custodian or any other person who would otherwise be entitled to receive notice. The juvenile court must consider any application requesting that notice not be given to the parent, guardian or custodian. The entire process is confidential, and the applicant is not required to pay filing fees or court costs.

The juvenile court will issue an order authorizing an abortion without notice to the parents, guardian, or custodian where: 1) the court finds that the minor is sufficiently mature and well enough informed to intelligently decide to have an abortion without notifying a parent, guardian, or custodian; or 2) the minor’s parents, guardian, or custodian have demonstrated a pattern of physical, sexual, or emotional abuse, and that under the circumstances, notification would not be in the best interest of the minor. If the court does not hold a hearing within five business days after the filing of the application, then it is assumed that the court has consented to the abortion. Further, the court must make its decision immediately after the hearing. If the court does not grant consent it must dismiss the application. The applicant may appeal such a dismissal.

This area of the law is in flux, and federal legislation may be enacted. Because of the confidential relationship between doctor and patient, a doctor does not have to inform the parents that he or she is treating their child. However, the parents are not bound to pay for treatments unless they consent to them.

Finally, there is some case law in Ohio establishing that a minor can consent to any kind of medical treatment as soon as he or she has reached sufficient age and discretion to understand the consequences of consent. This case law applies to “necessary,” as well as elective treatment, such as cosmetic surgery. As a practical matter, doctors seldom treat a minor without parental consent, except in the situations described above.
Juvenile Delinquency, Unruly Children, and Juvenile Traffic Offenders

In Ohio, the juvenile court has jurisdiction over minors who commit offenses that would be crimes if committed by adults, or minors who present behavioral problems. The court also has jurisdiction over abused, neglected and dependent children, and it has a wide range of options in dealing with children. The court usually can tailor its dispositions (sentences, fines, treatment orders, to name a few) to meet the needs of the particular child. In addition, the juvenile court may deal with adults guilty of neglecting, abusing, or contributing to the delinquency or unruliness of minors.

The Juvenile Court

In 1902, Ohio became the fifth state to create a juvenile court. Before the juvenile court existed, children as young as age seven were considered criminally responsible for their actions and, if convicted, were treated as adult offenders. The main emphasis of the juvenile court’s work is providing for the care, protection and mental and physical development of children, as opposed to punishing them. In certain cases, the court is also charged with protecting the public interest and safety, holding the offender accountable for his or her actions, restoring the victim, and rehabilitating the offender. The juvenile court has exclusive jurisdiction over delinquent and unruly children; juvenile traffic offenders; and neglected, dependent and abused children. When a minor is accused of a crime, whether serious or petty, the general rule is that the minor can be tried and dealt with only in the juvenile court. Under certain circumstances involving very serious offenses, however, a minor over age 14 may be transferred to the common pleas court for trial and punishment as an adult.

Adults accused of contributing to the delinquency or neglect of a minor are tried in the juvenile court. Other adult crimes against minors, such as non-support, may be tried in the juvenile court as well as in other courts.

The juvenile court also has the power to determine and provide for custody and care of neglected, dependent, or abused children. This power is subject to the authority of the domestic relations court to determine custody and support questions in divorce and similar cases, and to the authority of the probate court in guardianship and adoption proceedings. The juvenile court also has the power to consent to the marriage of pregnant minors under 16, and to consent to abortions for unemancipated, pregnant minors.

Detention of Juveniles

Minors may be taken into custody for various reasons. For example, they may be taken into custody because:

- they are accused of committing offenses that would be crimes if committed by adults;
- a juvenile court orders them to appear and they fail to do so;
- there is reason to believe they are runaways;
- they are suffering from illness or injury and are not receiving proper care; or
- they are in immediate danger from their surroundings.

After being taken into custody, a minor may be released to his or her parents, guardian, or custodian on their written promise to bring the minor to court when required. If the minor is not brought to the court hearing, the court may issue a warrant compelling the parents, guardian, or custodian to bring the child to court. If it appears that a minor taken into custody should be detained or given shelter care, the minor may be placed temporarily in a detention home, children’s home, juvenile shelter, or other suitable facility, or with a temporary custodian. Detention is not favored under juvenile law. Detention (including shelter care) is used only where:

- it is necessary to protect the person or property of the minor or of others;
• the minor may run away or be removed from the court’s jurisdiction;
• there is no suitable person to supervise and care for the minor; or
• the court determines that detention is in the minor’s best interest.

A minor alleged to be delinquent, unruly, or a juvenile traffic offender may be detained in a jail only if there is no available juvenile detention home or similar facility. In such cases, the minor must be kept in a separate room where he or she cannot come in contact with adult offenders. A neglected or dependent minor who is detained cannot be kept in jail under any circumstances without a specific court order authorizing such detention.

Delinquent Children

A delinquent child is one who commits any act (other than a juvenile traffic offense) that would be a crime under state, municipal, or federal law if committed by an adult, or who fails to obey an order of a juvenile court. For example, a child is charged with delinquency whether the offense in question is murder or merely disorderly conduct.

Juveniles have most of the rights of adults charged with criminal offenses. For example, in delinquency proceedings, a minor has the right to:
• be represented by counsel (and if the minor or the minor’s parents cannot afford an attorney, the state will provide one at no cost to the family);
• have a clear and explicit statement of the offense;
• have the state prove each of the elements of the offense beyond reasonable doubt; and
• have applicable rights explained at significant stages of the proceeding.

A major way in which the law governing children differs from the law governing adults is that minors traditionally have not had the right to jury trial or the right to bail. However, with blended sentencing (discussed below), certain juveniles accused of serious offenses have the right to bail and a jury trial.

A child who the court finds has committed the acts as charged is classified as delinquent. Because juvenile courts seek to rehabilitate children rather than to punish them, judges impose dispositions rather than to hand down sentences in juvenile cases. The seriousness of an offense comes into play when the court imposes its disposition, fine, order for treatment, or other disposition order. For example, a minor who has been classified delinquent for disorderly conduct may only be required to perform community service, whereas the minor who has been classified delinquent for robbery may serve a term in a state-run juvenile facility. Effective in 2004, a juvenile may be sent to a local juvenile detention facility for up to 90 days. If the offense would be a felony if committed by an adult, the juvenile can be sent to a state-run juvenile facility. Where there is a heinous offense (such as murder), the court may transfer the child to the common pleas court to be tried and punished as an adult, provided the child was at least 14 years old when the act occurred.

If a minor is found to be delinquent, the juvenile court has many options in its disposition of the minor. The court may, for example:
• allow the child to stay at home but place the child on probation;
• require restitution to the victim (to make up for the damage, loss or injury);
• send the child to a school, camp, institution or other facility;
• send the child (for certain offenses) to a facility operated by the Ohio Department of Youth Services (ODYS);*
• revoke the child’s driver’s license;
• suspend or revoke the registration of all motor vehicles registered in the child’s name;
• impose a period of electronically monitored detention;
• require that the child attend a drug- or alcohol-abuse program;
• impose a fine plus court costs; and
• order appropriate treatment or education for a child who suffers from physical, psychological, developmental or other problems.
* Note: A child who commits an offense that is a felony of the 3rd, 4th or 5th degree if committed by an adult can be committed to ODYS for a minimum period of 6 months. A child who commits an offense that is a felony of the 1st or 2nd degree of committed by an adult can be committed to ODYS for minimum period of 1 year. The maximum time a juvenile delinquent can be held in an ODYS facility is until his or her 21st birth-day. The juvenile court’s jurisdiction over the person ends when that person turns 21. This is true not only for delinquents, but also for unruly, abused, neglected, and dependent children and juvenile traffic offenders.

Even though trial procedure in juvenile court may be somewhat less formal than in other courts, the power of the court is obvious. The court building is a secure place served by the sheriff and the police. Detention facilities, and some shelter care facilities, are staff secure (meaning a staff member keeps track of who comes and goes) and limit the freedom of their inhabitants. Whatever the court decides to do can dramatically affect the freedom and life of the minor and the minor’s family.

Transfer for Trial as an Adult

The juvenile court may transfer a minor to the common pleas court for trial and punishment as an adult in serious cases and under limited circumstances. (This transfer is often called a bindover because the child is “bound over” to the adult court.) The court has this option when:

1. the minor was 14, 15, 16, or 17 when the offense occurred;
2. the offense would be a felony if committed by an adult;
3. there is probable cause to believe the minor committed the offense; and
4. after full investigation, including mental and physical examinations, the juvenile court finds either of the following:

   1) that the minor will not comply with or benefit from rehabilitation offered by any facility or program in the juvenile system; or
   2) the safety of the community requires that the minor be placed under legal restraint, even after the person turns 21.

As a practical matter, juvenile courts exercise the discretion to transfer juveniles to adult courts only in serious cases where the accused minor has a long history of delinquency. In no case can a minor under age 14 be transferred to adult court. Also, in no case can a minor of any age who is accused of a misdemeanor be transferred to adult court. Once a minor has been bound over to, and convicted in, a common pleas court, he or she will not go through the bindover process again. If later charged with a felony while still a minor, he or she automatically will be treated as an adult and tried in adult court.

In addition to discretionary bindovers, juvenile courts must transfer to adult courts juvenile offenders who are accused of certain serious offenses. This mandatory bindover occurs when:

1. a 16- or 17-year-old child is accused of aggravated murder, murder or attempted murder;
2. a 16- or 17-year-old child, with a prior commitment to ODYS for a serious offense, is accused of another serious offense (including manslaughter, aggravated robbery and rape) or used, displayed, brandished or indicated a firearm in committing the offense;
3. a 14- or 15-year-old child, with a prior commitment to ODYS for a serious offense, is accused of aggravated murder, murder or attempted murder.

A special rule applies to minors who are accused of an offense that would be murder or aggravated murder if committed by an adult. Under the special rule, the court must transfer the minor to the appropriate common pleas court for trial (and possible punishment) as an adult, as long as the court finds, after an appropriate hearing, that there is probable cause to believe the minor committed the offense. This is also true if the minor had been judged a delinquent before for an offense that would have been murder or aggravated murder if committed by an adult.
special rule, the minor’s age is not a factor. The current charge and the past judgment are the issues that matter.

**Blended Sentencing**

For years, when a juvenile court faced a child accused of a very serious offense, it had two choices. If the child was age-eligible, the court could transfer the child to adult court, essentially admitting that the juvenile system could not help the child. Or, it could keep the child in the juvenile system with the knowledge that the offender would have to be released by age 21, even if still dangerous. This often was a quandary for courts, since the future conduct of a 14- or 15-year-old child is difficult to predict. Based on proposals from the Ohio Criminal Sentencing Commission, in 2002 the General Assembly enacted a third option: blended sentencing.

Since 2002, juvenile courts have had the option to give both a juvenile disposition and an adult sentence to certain serious youthful offenders (SYOs). Eligibility for this “blended” juvenile/adult sentence depends upon the age of the offender and the severity of the offense. In imposing a blended sentence, the juvenile court first gives a juvenile disposition (for example, a term in an ODYS facility). The court then gives a sentence as if the offender were before an adult court. However, the court must then suspend the adult sentence. If the offender makes it through the juvenile disposition without serious incident, that is the end of the sentence. However, if the offender commits certain other offenses and engages in certain threatening conduct while under the juvenile term, the court may invoke the adult sentence after a hearing on the new violation.

**Unruly Children**

A minor may be deemed an unruly child for a variety of reasons, including:

- waywardness or persistent disobedience, including running away from home;
- habitual truancy from school;
- conduct that injures or endangers the minor’s, or another’s, health or morals; or
- violating a law that applies only to minors (such as a curfew).

Unruly children are also sometimes referred to as status offenders because of their status as minors.

A child who is judged unruly may be dealt with in a number of ways. For example, the court may use any of the remedies available for neglected, dependent, or abused children. These dispositions include, among others, placement with parents under conditions designed to ensure proper care, supervision and behavior; or placement in the temporary or permanent custody of a children’s services agency or approved private agency; community service work; probation with conditions established by the court; suspension or revocation of the child’s driver’s license and the registration of any vehicle registered in the child’s name.

If the court finds that its original disposition is not effective because the child has not responded to treatment or rehabilitation, the court may use any of the dispositions available for delinquents. Further, if the offense would have been a drug-abuse offense or a “disorderly conduct while intoxicated” offense if it had been committed by an adult, the court may require the child to participate in a drug- or alcohol-abuse counseling program. The court also may suspend or revoke the child’s driver’s license until he or she turns 18, or successfully completes an approved drug- or alcohol-abuse treatment program.

**Juvenile Traffic Offenders**

A juvenile traffic offender is a child who violates any traffic law or regulation of Ohio or any other state. For any moving violation that occurs before the youth’s 18th birthday, the youth is subject to a mandatory minimum driver’s license suspension as follows:

- first moving violation before age 18: zero days to two years;
- second moving violation before age 18: three months to two years;
• third moving violation before age 19: one year to two years.

While a youth may be entitled to driving privileges while serving a driver’s license suspension, these likely will be limited to work and school. In addition to mandatory license suspensions, the court also may impose one of the penalties listed below, which are generally available in all traffic cases:

• imposition of fines generally ranging from $50 to $250 plus court costs;
• suspension or revocation of the child’s driver’s license or the registrations of any motor vehicles that may be registered in the child’s name;
• placement of the child on community control sanctions (such as probation, community service, a drug and alcohol treatment program, a curfew or house arrest);
• requirement that the child make restitution for all or part of the damages caused by the offense; and/or
• placement of the child in the temporary custody of an approved facility, such as a camp or school, for a period of not more than five days, as long as the child was ruled a juvenile traffic offender for committing an offense which, if committed by an adult, would have been “operating a motor vehicle under the influence of alcohol or drugs” or “alcohol and/or drugs.

Neglected, Dependent and Abused Children

Neglected Child

A neglected child is one:
• who has been abandoned;
• who lacks proper care because of the faults or habits of the child’s parents, guardian or custodian;
• whose parents, guardian or custodian neglect or refuse to provide proper or necessary subsistence, education, medical or surgical care or treatment, or other care necessary for the child’s health, morals or well-being;
• whose parents, guardian or custodian neglect or refuse to provide the special care required by the child’s mental condition;
• whose parents, guardian or custodian illegally gave, or attempted to give, custody of the child to another; or
• who suffers physical or mental injury that harms, or threatens to harm, the child’s health or welfare because of the failure of the child’s parents, guardian or custodian to perform their duty according to Ohio law.

When a parent, guardian or custodian fails or refuses to provide adequate medical or surgical care or treatment to a child only because of religious belief, the law that defines a neglected child does not consider this a criminal offense. However, the statute dictates that, in such instances, proper authorities must be notified so the state or political subdivision, if necessary, can ensure that the child is given the required medical or surgical care or treatment despite the parents’, guardian’s or custodian’s religious beliefs.

Dependent Child

The concept of dependency is similar to that of neglect, except that the dependent child’s condition or situation is not, in general, the fault of the parents, guardian or custodian. This kind of dependency should not be confused with “dependents” that are named by parents for tax purposes. A dependent child is one:
• who is homeless, destitute or without proper care or support;
• who lacks proper care or support because of the mental or physical condition of the child’s parents, guardian or custodian;
• whose condition or environment is such that the state must assume the guardianship of the child; or
• who is in danger of being abused or neglected because he or she lives in a household where another household member has abused or neglected a child who lives in the household.
Abused Child

An abused child is one:
• who is the victim of a criminal sexual offense;
• who is endangered as defined in the criminal law;
• who shows evidence of any intentionally caused physical or mental injury, or is the victim of an injury for which there is no reasonable explanation;
• who suffers physical or mental injury harmful or potentially harmful to the child’s health or welfare because of the acts of the parents, guardian or custodian; or
• who is subjected to abuse outside the home.

Offenses that the law considers to be criminal sexual offenses against minors include rape, sexual battery, corruption of a minor and sexual imposition. The person who committed the offense does not have to be convicted before the court can determine that the minor involved in the sexual activity is an abused child; the child can come under the court’s protection as soon as the charge is made.

The definition of child abuse also incorporates the criminal offense of endangering children. Under Ohio law, the offense of child endangerment covers not only physical abuse, but emotional and psychological abuse as well, and may be committed by:
• a parent, guardian, custodian or person standing in place of a parent—such as a teacher, scoutmaster or babysitter—who places a child in imminent danger of serious harm by violating a duty of care, protection or support;
• anyone who inflicts torture or cruelty, or creates an imminent risk of serious harm to the child by administering excessive physical punishment or restraint in a cruel manner or for prolonged periods, or repeatedly administers unwarranted discipline to the child that, if continued, endangers the child’s mental health or development;
• anyone who entices, permits, encourages, compels, employs or allows a minor to participate in any way in the development, advertisement, or presentation of any material or performance that is obscene, sexually oriented or nudity oriented; or
• anyone who allows, encourages or forces a child to solicit for prostitution, or to engage in prostitution.

Child abuse based on the offense of endangering children is normally a misdemeanor. However, endangerment that results in serious physical harm to the child is a felony. The statutory definition of “serious physical harm” includes mental illness as well as serious physical illness or injury. The offense of child endangerment may be tried in any court having jurisdiction, including juvenile court, but felony cases must be tried in common pleas court. Just as in a sexual abuse case, the person who committed an endangerment offense does not have to be convicted for the juvenile court to determine that the minor child involved is an abused child. A child who has been physically disciplined by a parent, guardian or custodian is not considered abused if child-endangering laws do not forbid the method of discipline. For example, spanking a child does not automatically constitute abuse.

The definition of child abuse also addresses the battered-child syndrome. For example, a child may show physical injury or mental injury that appears to have been intentionally inflicted or is not adequately explained by the child, parent, guardian, custodian or others. Doctors, dentists, nurses or other health-care professionals, child-care professionals, and teachers, attorneys and others commonly in contact with children must report suspected cases of child abuse to law enforcement authorities. Further, Ohio law requires anyone who knows that a felony has been committed to report the basic facts to law enforcement authorities. Because child abuse is a felony, anyone who observes a child suffering from serious injury or illness and has substantial reason to suspect child abuse must report the facts to law enforcement authorities.

The court has multiple options in deciding what to do with a child determined to be dependent, neglected, or abused. The options include, among others:
• placing the child under protective supervision;
• committing the child to the temporary custody of an approved public or private agency, either parent, a relative or a probation officer for further court-approved placement;
• granting legal custody of the child to either parent or another person;
• committing the child to the permanent custody of an approved public or private agency;
• placing the child in long-term foster care with an approved public or private agency; or
• placing restrictions on the child, the child’s parents, guardian, custodian or any other person.

Dealing with Adults Contributing to Delinquency or Neglect

Under Ohio law, it is an offense for an adult to contribute to, or encourage in any way, the delinquency, unruliness or neglect of a minor. The juvenile court has jurisdiction to try adults accused of this offense. Typically, “contributing” cases arise when parents fail to take reasonable measures to control their child’s delinquent or unruly behavior, or when an adult has sexual relations with a minor or encourages or aids a minor in having sexual relations. Encouraging a minor to frequent bars, brothels or places where drugs are used also may constitute the offense of contributing. Parents who fail to provide their child with food, clothing, shelter, medical attention and education may be charged with contributing, or with non-support of dependents. The foregoing are only some of the possible ways of contributing to the delinquency or neglect of a minor. While many “contributing” cases are handled in juvenile court, non-support cases may be tried in any court having jurisdiction. Further, some non-support cases are felonies and must be tried in the common pleas court.

Divorce and Related Matters

Society wants to protect the unity of the family. Therefore, the courts are interested in preserving marriages when possible. Courts recognize that sometimes relationships between spouses can deteriorate so much that it is best to allow the orderly and fair termination of the marriage or marital relationship. Under Ohio law, a marriage, or marriage relationship, may end through divorce, dissolution of marriage or annulment.

A legal separation suspends the duties of spouses to each other, but does not end the marriage. In essence, legal separations allow the husband and wife to live apart from one another once the court determines all of the parties’ rights and responsibilities.

Whether a couple seeks a divorce, dissolution of marriage, annulment or legal separation, the domestic relations court terminates the marriage, or marital relationship, and manages the issues of child custody, support, parenting time, spousal support and property division.

Continuing Jurisdiction

In most situations, a case is over once a court makes a decision. In domestic relations cases, the court retains the ability to change orders concerning such matters as custody, parenting time and child support, depending on changes in the family’s circumstances. This is referred to as the court’s continuing jurisdiction. A domestic relations court generally does not, however, retain continuing jurisdiction to alter a property division that it has made.
Conciliation

The law requires the common pleas courts to establish a process for hearing conciliation cases. In counties where a conciliation court exists, either a husband or wife, or both, may file a petition asking the court to help settle marital controversies. While that action is pending, neither spouse may file or proceed with an action for divorce, annulment or legal separation.

In Ohio, a husband or wife may file a legal action asking that both spouses be ordered to engage in a conciliation process in an effort to save the marriage. Spouses do not use this process often, because most people who are interested in saving their marriage use private methods, such as marriage counseling, before coming to the court.

A second type of conciliation proceeding may be started only after the first publication of the notice of a divorce, annulment or legal separation action or 30 days following the service of a summons. A conciliation proceeding also may be started at any time after the filing of a petition for dissolution of a marriage. The court may order conciliation on its own initiative or based on either spouse’s written request (called a motion). The court that processes divorces handles this second type of conciliation. The court’s conciliation order must detail the process and state how expenses will be paid. If children are involved, the court may require family counseling for a reasonable period of time. If there are no children, the conciliation period cannot exceed 90 days.

The court has wide discretion in specifying the details of the conciliation/family counseling process. The conciliator may be a conciliation judge, a public or private marriage counselor, a family service agency, a community health service, a physician, a psychologist or a clergy person. The underlying action for divorce, annulment or legal separation cannot be heard or decided until the conciliation or family counseling has been completed and the results reported to the court.

Mediation

Mediation is a process in which a neutral third party, the mediator, assists the parties in negotiating an agreement on a matter of common interest. Parties sometimes use mediation if they do not agree on parental rights and responsibilities, a specific parenting schedule, the amount of child support, spousal support or property division. If the disputed matters involve parenting issues, the court may order the parties into mediation. Unless otherwise established by local rules, the court’s mediation order should outline the mediation process, the qualifications of the mediator, what must be included in the mediation report, if any, and who must pay for the mediation process. A mediation report consists of a statement as to whether the parties have reached an agreement and, if so, what the agreement is. In general, a mediator cannot be called as a witness or named as a party in the underlying proceeding (the divorce, annulment, etc.). Because mediators cannot make orders, and may only guide parties into settlement, mediation is effective only if the parties can reach agreement on the issues to be mediated.

Divorce

The long-recognized, classic way to end a marriage is through divorce. In Ohio, a divorce may be granted based on any of 11 separate reasons, or grounds. There are grounds for divorce when:

1) either party had a spouse living at the time of the marriage from which the divorce is sought (called bigamy);
2) the other spouse has been willfully or deliberately absent for one year or more;
3) the other spouse commits adultery;
4) the spouses are incompatible, unless one of the spouses denies that this is true (incompatibility is used frequently these days as a final ground for divorce);
People in divorce cases most often use the grounds of incompatibility, extreme cruelty and gross neglect of duty. Extreme cruelty includes both physical and mental cruelty. Gross neglect of duty takes in a wide range of unacceptable conduct by a husband or wife. Typical examples are the failure of a spouse to contribute to support of the family or the failure of a spouse to meet his or her obligations to the family unit. Incompatibility recently has been added as a ground for divorce, but its use is growing among couples that agree the marriage should end, but cannot agree on the terms. Couples who do not wish to make public a more offensive ground for divorce also may use incompatibility.

Dissolution of Marriage

Dissolution is a substantial departure from the traditional concept of divorce. In a dissolution, the parties agree to end the marriage. They also agree, before filing any papers, to property division, payment of debts, allocation of parental rights and responsibilities and child and/or spousal support, and other such matters. In dissolution cases, the parties do not have to allege or prove any grounds for divorce. To obtain the court’s approval for a dissolution, the husband and wife must enter into a separation agreement that both parties sign and that is attached to the request for dissolution.

When the court reviews the separation agreement and the dissolution request, it is concerned that the separation agreement is fair to both parties and that the agreement makes appropriate provisions for any children. If the court approves the separation agreement and the dissolution request, it issues an order dissolving the marriage.

Annulment

While divorce and dissolution end a valid marriage, annulment declares that a marriage was illegal in the first place. In Ohio, there are grounds for annulment when:

1) the party seeking the annulment was under age at the time of the marriage;
2) a former marriage of either party was and still is valid (bigamy);
3) either party was mentally incompetent;
4) the consent of either party to the marriage was obtained by fraud;
5) the consent of either party was obtained by force; and
6) even though the marriage was otherwise valid, the parties never consummated the marriage (engaged in sexual relations as husband and wife).

Bigamy is the only ground that makes the marriage void (invalid from the start). The other grounds must be asserted within a specified time. Further, grounds one, three, four, and five (above) are lost if the parties live together after the party who was underage reaches age 18; the party who was incompetent regains competence; the fraud by which consent was obtained was discovered; or force was used to obtain consent. In an annulment action, just as in a divorce action, the court can award temporary spousal support and can make an order concerning custody, care, maintenance and education of any children. Permanent child custody and support may be granted and an annulment does not affect the legitimacy of children.
**Legal Separation**

When a court grants a legal separation, a couple remains legally married, but most aspects of the marital relationship are terminated. In this action, the court will settle all property rights existing between the couple, address custody issues and may resolve all other issues relating to the marriage, including spousal support and child support issues. If spousal support and child support are granted, the court may enforce the support payment as if it had been granted in a divorce action. The grounds for legal separation are virtually the same as the grounds for divorce with one exception: “Procurement of a divorce outside Ohio,” a ground for divorce, is not a ground for legal separation.

Even if one spouse files for legal separation, the other spouse still may seek a divorce or annulment. Once a legal separation has been granted, there is nothing in the law that prevents either spouse from seeking a divorce or annulment.

**Property Division and Spousal Support**

Ohio statutes define how property is divided when a marriage is terminated. Marital property is property acquired during the marriage, including real estate, personal property or intangible property such as stocks and bonds, bank accounts and retirement plans. Marital property also may include increases in the value of separate property due to either spouse’s work effort, labor or contribution of marital money that helped to increase the property’s value. Separate property is property owned by only one of the spouses, and includes:

- all real, personal and intangible property from an inheritance;
- property owned before the marriage;
- income or appreciation from separate property that did not come from the labor or substantial effort of either party during the marriage;
- a gift after the marriage date that is proved to be made to only one spouse; and
- an award for personal injury, except any part of the award that compensates for lost wages occurring during the marriage, or medical bills from the injury paid with marital funds.

By applying the rules in the statute as well as appropriate case law, the court determines what is and what is not marital property. The marital property is to be divided equally, unless the court explains in writing why an equal division would not be fair. In making the award, the court must apply the eight specific factors listed in the statute and any other factor it finds relevant and equitable. The eight statutory factors are:

- the duration of the marriage;
- the assets and liabilities of husband and wife;
- whether it is appropriate to award the family home (or the right to live there for a certain period of time) to the spouse who will have principal custody of the children;
- whether the property can be easily converted into cash, if necessary (liquidity);
- whether it would destroy the value of a certain type of asset (such as a set of fine china) to divide it;
- the tax consequences of the division;
- the cost of sale of any asset that has to be sold—such as real estate commissions, advertising, etc.; and
- any agreement that the parties might have reached between themselves.

The court also has the authority to make a distributive award from separate property of either party to the other to achieve equity between the parties. When a party has engaged in financial misconduct such as hiding property, dissipating money or funds or disposing of funds fraudulently, the court may make an award out of the separate property of the offending spouse or make a greater award of marital property to compensate the other party.

In determining whether spousal support (formerly called alimony) is appropriate and reasonable, and in determining the amount, terms of payment and duration of spousal support, the court must consider the following factors:

- income and relative earning abilities of the parties;
• ages and physical, mental and emotional conditions of the parties;
• retirement benefits of the parties;
• length of the marriage;
• standard of living established during the marriage;
• extent to which it would be inappropriate for the custodian of a child to seek work outside the home;
• educational background of the parties;
• property and debts of the parties, including any court-ordered payments;
• contribution of each party to the education, training or earning ability of the other;
• time and expense needed for the person seeking spousal support to acquire education, training or work experience;
• lost income production capacity of either party resulting from that party’s marriage responsibilities; or
• tax consequences for each party of an award of spousal support.

The court may also consider any other factor that it finds to be relevant and fair.

**Parental Rights and Responsibilities (Child Custody) and Child Support**

When a couple is married and living together, both share parenting responsibilities equally. In the eyes of the law, both have equal authority to make decisions concerning the care, discipline and support of their children. When the court terminates a marriage, one spouse will have primary responsibility over the children unless a court orders shared parenting. The parent with primary responsibility is called the *residential parent* and the other parent is called the *non-residential parent*. If the couple cannot agree who will be the residential parent or upon a parenting time schedule, the court will decide for them or require them to mediate the issue under the procedures adopted by the court. *(See “Mediation” on page 142.)*

*Shared parenting* involves a plan where the parents both have a role in making decisions for their children. Although the parents sometimes share parenting time equally, most often one parent has physical custody of the children more often than the other, even when the parties have shared parenting. Both parents or either parent may request shared parenting. If only one of the parents wants shared parenting, a good shared parenting plan is difficult to achieve. Although the parties do not have to agree on shared parenting, if the parents cannot cooperate, the courts frequently reject the shared parenting plan and determine childcare arrangements based on the child’s best interests.

When a court decides a custody issue, its primary focus is, “What is in the best interests of the child?” The court must decide whether, under all circumstances, it would be in the child’s best interests to be placed with the father or with the mother; or whether a shared parenting arrangement would be more appropriate. When trying to decide the best interests of a child, the court must consider all relevant factors including the various guidelines specified in state law.

State law instructs the courts to consider, in determining the best interests of a child for custody purposes:

• the parents’ wishes;
• the child’s wishes;
• the child’s interaction with parents, siblings and others who significantly affect the child;
• the child’s adjustment to home, school and community;
• the mental and physical health of all concerned;
• which parent will promote court-ordered time between the child and the other parent;
• whether a parent has made court-ordered support payments;
• whether a parent has been convicted of abuse, neglect or domestic violence;
• whether a parent has purposely denied the other parent court-ordered time with the child; and
• whether a parent has moved or plans to move from the state.

While a child’s wish about custody is one of the factors used to determine the best interests of a child, Ohio law forbids people from trying to get any type of statement from the child setting forth
the child’s wishes and concerns regarding parental rights and responsibilities. If a person does obtain such a statement, the court will not consider it. Nevertheless, a court may interview the child (usually in private) to determine the child’s wishes and concerns about custody. While the court considers the child’s preference, the court determines how the child will be cared for based on what will be best for the child.

When custody is granted to one parent, parenting time (formerly called visitation, a term that now applies to grandparents’ rights) is normally granted to the non-residential parent. Each court is required to adopt standard guidelines to decide parenting time issues, but individual situations (such as one parent who travels for a living) may dictate a non-standard parenting time schedule.

Under Ohio law, a husband and wife are equally charged with providing for their children’s care, welfare and education. The obligation of both parents to support their children normally continues until each child turns 18, or as long as the child attends high school on a full-time basis until the child reaches the age of 19. The obligation can end earlier if the child marries, joins the armed forces or leaves home and becomes self-supporting. It can also be extended in a separation agreement, by court order, or if the child is disabled.

To help courts and parents decide how much support a child needs, the Ohio General Assembly has established the Ohio Child Support Guidelines. Ohio courts use these guidelines, along with other factors spelled out in state law to help establish or modify child support. Under the Ohio Child Support Guidelines, a parent can calculate the amount of child support that he or she should pay, given all the factors the law requires the court to consider, by filling out a child support worksheet. Courts require parents involved in domestic relations matters to complete and file such worksheets. The amount determined by the worksheet is presumed to be correct unless certain limited deviation factors (such as extraordinary medical expenses or support of other children) can be proven, or unless the parents agree to modify the amount based on one of these factors.

**Visitation Rights of Grandparents and Other Persons**

In general, a court will not interfere with an intact family to settle disagreements about the right to see or visit a child. For example, a court will not become involved in a conflict between parents and grandparents (mother, father-in-law, mother-in-law, etc.) if a parent refuses to let a grandparent see the minor grandchildren. However, the court may grant reasonable companionship or visitation with minor children to grandparents, relatives, or other persons if:

- there is a pending divorce, dissolution, legal separation, annulment or child-support proceeding;
- the court has continuing jurisdiction over the proceedings listed above;
- a parent has died and left a minor child;
- an unmarried woman has a minor child; or
- a father, who is not married to his child’s mother, either has acknowledged paternity or has been found to be the father of the child.

In determining whether to grant any of the above requests for companionship or visitation, the court considers all relevant factors. The best interests of the child is the paramount factor, but the court also considers, among other things, blood and social relationships, interactions, geographical location and distance, the character of the requester, the availability of parents and schedules.
Chapter Summary

- Recognizing the importance of the family, the law establishes rights and duties for family members (generally parents and their children) and a way to enforce these rights and duties.

- The rights and duties of the people involved in the family and the process of enforcing these rights and duties are often grouped together under the term family law.

- Marriage is a three-way contract involving the state and the two people who are joined in marriage. A couple’s marriage vows create a binding contract.

- The law states that only males 18 years old and females 16 years old may enter into marriage.

- A marriage cannot be solemnized (that is, completed by means of a marriage ceremony) unless the parties have a license. A license is obtained by applying in the probate court of the county where either party lives, or in the county where the ceremony is to be performed.

- Ohio law establishes a variety of rights and duties for married couples concerning their relations with one another and with their children. Similarly, the law establishes a variety of rights and duties for children concerning their relations with their parents.

- The age at which a child (minor or juvenile) becomes an adult is known as the age of majority. Under federal law, every citizen is allowed to vote at age 18. In Ohio, 18 is the age of majority for voting and most other purposes.

- Under the law, minors are treated differently from adults in many situations, chiefly to protect both minors and society from the minors’ lack of experience, skill and judgment.

- In Ohio, the juvenile court has jurisdiction over minors who commit offenses or present behavioral problems. The court also has jurisdiction over neglected and dependent children, and it has a wide range of options in dealing with children.

- In 1902, Ohio became the fifth state to create a juvenile court. Before the juvenile court existed, children as young as age seven were considered criminally responsible and, if convicted, were treated as adult offenders.

- A delinquent child is one who commits any act (other than a juvenile traffic offense) that would be a crime under state, municipal or federal law if committed by an adult, or who fails to obey an order of a juvenile court.

- The juvenile court may transfer a minor to the common pleas court for trial and punishment as an adult in serious cases and under limited circumstances.

- A juvenile traffic offender is a child who violates any state, municipal or other law or regulation governing motor vehicle use.

- Ohio law defines and addresses matters involving neglected, dependent and has a number of options for dealing with a child determined to be dependent, neglected, or abused.

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Chapter Summary continued

- Under Ohio law, the marriage, or marriage relationship, may be ended through divorce, dissolution of marriage (or dissolution), or annulment. A legal separation suspends the duties of spouses to each other but does not end the marriage.
- The domestic relations court is interested in preserving marriages when possible. When that is not possible, the court is concerned with the orderly and fair termination of the marriage relationship and with the associated questions of parenting time, visitation, child and spousal support and division of property.
- When a couple is married and living together, both partners have equal custody of their children. When the court terminates a marriage, one spouse will have primary responsibility over the children unless a court finds that circumstances are appropriate for the success of shared parenting, which is the favored approach to rearing children.

Web Links:

OSBA’s “Law You Can Use” articles:
(go to http://www.ohiobar.org/pub/lycu and search for article by title or by topic)
- “Adoptions Raise ‘Right to Know’ Questions”
- “At the Crossroads of Grandparent Visitation”
- “Child Support: How Is It Enforced?”
- “Children’s Wishes Are Considered in Custody Matters”
- “Collaborative Family Law Promotes Divorce with Dignity”
- “Commonly Asked Questions about Divorce”
- “Court Considers Many Factors in Determining Spousal Support”
- “Divorce and Dissolution: What’s the Difference?”
- “Divorce Decrees Enforced in Several Ways”
- “Guns at Home Can Make Parents Liable for Child’s Criminal Actions”
- “How Do Courts Determine Child Support?”
- “How Does a Legal Separation Differ from a Divorce or Dissolution?”
- “How To Select and Interview Your Divorce Lawyer”
- “Insurance May Cover Medical Expenses in Adoption Cases”
- “Know What the Law Says about Artificial Reproduction Technology”
- “Law Requires Parental Consent for Treatment of Minors”
- “Marriages Are Annulled in Special Cases”
- “Ohio Law Allows Attorney-Arranged Adoptions”

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Web Links continued

OSBA’s “Law You Can Use” articles:
(go to http://www.ohiobar.org/pub/lycu and search for article by title or by topic)
“Parents May Be Liable for Child’s Actions”
“Parents May Network To Find Child Available for Adoption”
“Pending Divorce Does Not Change Marital Status for Income Tax Filing”
“Probate Court Screens Prospective Parents in Private Adoptions”
“Step-Parent Adoption is Permanent”
“What Birth Parents Should Know about Adoption Process”
“What Rights Do Grandparents Have after Divorce?”
“What You Should Know about Grandparent Adoption in Ohio”
“What Working with your Divorce Lawyer Can Save You Money and Enhance Your Settlement”

OSBA’s “LawFacts” pamphlets:
(go to http://www.ohiobar.org/pub/lawfacts/ and search by title)
“Divorce Mediation”
“Divorce, Dissolution & Separation”
“Ohio’s Marriage Laws”
“Sharing Parental Responsibilities After Separation”

From Nolo.com:
http://www.nolo.com/
Click on “Family Law and Immigration” tab

From Cornell Law School Legal Information Institute:
(Family law topics are alphabetically listed.)
http://www.law.cornell.edu/wex/index.php/Category:Family_Law
Part XI

workplace law

“The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property.”


In modern society, many people spend as much or more time at work than they do at home. Therefore, no legal handbook would be complete without an examination of the laws governing the workplace. This section will examine various aspects of workplace law, including the rights and responsibilities of employers, employees and even job applicants.

The Relationship Between State and Federal Workplace Laws

Employment is regulated to a great extent by both state and federal laws. In many instances, federal laws are limited in the scope of their coverage. Some federal workplace laws may apply to companies of a certain size or dollar volume of business while others are limited to a particular industry. For example, Title VII, a federal statute prohibiting discrimination in employment, applies only to employers with 15 or more employees while the Surface Transportation Assistance Act (STAA) applies to the trucking industry. It is not practical to write about every federal law regulating employment. Please keep in mind that the laws addressed here are not exhaustive.

States have authority to adopt workplace regulations affecting employers of any size, so long as they do not intrude into areas of exclusive federal jurisdiction or conflict with federal laws covering the same subject matter. States may enact laws which provide employees with more rights than federal law gives, but they may not take away federal rights.

State and federal laws interrelate in other ways:

• Preemption: Federal law may preempt states’ attempts to regulate certain conduct. Where preemption exists, states cannot pass any laws that regulate conduct already regulated by federal law. For example, under the federal Employment Retirement Income Security Act (ERISA), states are preempted from regulating pensions.

• Supplementation of coverage: Some federal laws set a floor of protections below which states cannot go, but allow states to provide greater protections. For example, the federal Family and Medical Leave Act requires employers subject to the law to provide 12 weeks of unpaid leave to employees under certain circumstances. State law could require the same employers to provide 12 weeks of paid leave or to provide more than 12 weeks or some other benefit.

• Absence of federal law: States are free to enact laws that regulate an activity otherwise unregulated by any federal law. For example, there are no federal laws that prohibit the dismissal of employees called for jury duty. States can and do step in to protect these employees.
Major Workplace Laws: Statutory and Case (or “Common”) Law

Both state and federal laws regulate the conduct of employers and in so doing give rights and protections to employees. There are two sources for these laws. Some, such as Title VII and the Ohio Civil Rights Act are statutory, that is, laws enacted by the legislature. The second type evolves from case law as decided by the courts. Court-created laws are called common law.

Federal Law

Federal law covers a variety of employment issues, including discrimination and harassment based on age, race, religion, color, sex, national origin, or physical or mental disabilities. Ohio law also addresses civil rights issues that arise in the workplace; some of these are discussed later in this chapter. These laws are intended to prevent discrimination and to make victims of discrimination “whole” (so that, insofar as possible, the victims might regain what they had lost). They are not intended to regulate behavior or to be a civility code for the workplace.

- Title VII of the Civil Rights Act of 1964
  Title VII prohibits employers from discriminating against applicants and employees on the basis of race, color, religion, sex, pregnancy, childbirth or national origin. It also prohibits employers from retaliating against job applicants or employees who assert their rights under the law. Title VII’s prohibition against discrimination applies to all terms, conditions and privileges of employment, including hiring, firing, compensation, benefits, job assignments, shift assignments, promotions and discipline.
  Title VII also prohibits employer practices or qualifications that appear neutral, but disproportionately impact those individuals protected by the law. For example, requiring a high school diploma for a janitorial job may hurt racial minorities or other protected classes. Such a practice is only legal if the employer has a valid reason for using it. That is, a job qualification must be a bona fide occupational qualification (for example, requiring that someone being hired to play a male character in a play actually be male, or hiring only females to conduct body searches on female passengers at the airport).

- Title VII’s Prohibition on Harassment
  Title VII makes it illegal to harass an individual based on race, color, religion, sex, pregnancy, childbirth or national origin. Sexual harassment is any unwelcome, unwanted, and/or uninvited sexual advance, any conduct of a sexual nature, or any conduct based on sex that is severe or pervasive and creates an intimidating, hostile, or offensive working environment. Any such conduct that an employee finds unwelcome has the potential to be sexual harassment. The harasser can be a supervisor, a manager, a co-worker, or even a non-employee who is on the premises with permission. The U.S. Supreme Court ruled in 1998 that Title VII bars sexual harassment between members of the same sex. Harassment based on age is prohibited by the Age Discrimination in Employment Act of 1967, as amended. Harassment based on disability is prohibited by the Americans with Disabilities Act.

- Employers Subject to Title VII
  Title VII applies to:
  - private employers with 15 or more employees;
  - state governments and their political sub-divisions and agencies;
  - the federal government;
  - employment agencies;
  - labor organizations; and
  - joint labor-management committees and other training programs.
The Civil Rights Act of 1964 established the U.S. Equal Employment Opportunity Commission (EEOC) to enforce Title VII and other principal federal statutes prohibiting employment discrimination.

**Americans with Disabilities Act**

The Americans with Disabilities Act (ADA) prohibits most employers from discriminating against a person perceived as disabled or against a person with a *non-disqualifying disability* (a disability that does not affect the person’s qualifications for or ability to perform the job). The ADA prohibits such discrimination in any aspect of employment, including job application, interviewing, testing, hiring, job assignments, evaluations, disciplinary actions, training, promotion, medical exams, layoffs, firing, compensation, leave and benefits. The ADA also requires every covered employer to provide reasonable accommodations to a qualified individual with a disability.

In addition, the ADA prohibits employers from refusing to hire someone or discriminating against someone because that person has a record of having a disability or is related to or associates with someone with a disability.

The ADA protects “qualified individuals with disabilities,” (QUID) that is, people who have disabilities and are qualified for the jobs that they are either seeking or holding and are able to perform it with or without a reasonable accommodation.

The ADA applies to private employers with 15 or more employees, state and local governments and their agencies, employment agencies and labor unions. The ADA does not apply to the federal government and its agencies.

**Age Discrimination in Employment Act**

The Age Discrimination in Employment Act (ADEA) prohibits discrimination against employees who are age 40 or older. It also prohibits employers from retaliating against applicants or employees who assert their rights under the ADEA.

The ADEA’s prohibition against discrimination applies to all terms and conditions of employment, including hiring, firing, compensation, job assignments, shift assignments, discipline and promotions. The ADEA applies to the federal and state governments and its agencies, private employers with 20 or more employees, employment agencies and labor unions. The ADEA does not apply to private employers with fewer than 20 employees.

**Equal Pay Act**

The Equal Pay Act (EPA) requires that employers give men and women equal pay for equal work. To be considered “equal,” a job must require substantially equal skill, effort and responsibility and be performed under similar working conditions. An employer may, however, pay different salaries to a man and a woman for equal work if the difference is based on a bona fide seniority, merit or an incentive system, or if the difference is based on factors other than gender.

All employers must comply with the Equal Pay Act, including all public and private employers (regardless of the number of employees).

**Immigration Reform and Control Act of 1986**

The Immigration Reform and Control Act (IRCA) prohibits employers from discriminating against applicants or employees on the basis of their citizenship or national origin. It prohibits discrimination with regard to the terms, conditions and privileges of employment, including hiring, firing, compensation, benefits, job assignments, shift assignments, harassment, promotions and discipline. The IRCA applies to all persons or entities that hire, recruit or refer employees.

The IRCA also makes it illegal for employers to knowingly hire or continue to employ people who are not authorized to work in the United States. Employers must keep records verifying
that their employees are authorized to work in the United States.

**Uniformed Services Employment and Reemployment Rights Act**

The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits discrimination based on an employee’s or applicant’s past, current or future military obligations. It also requires employers to reinstate employees to their former jobs, upon honorable completion of their military duty in the uniformed services. USERRA applies to all public and private employers.

Uniformed service includes active duty, active duty for training, inactive duty training (such as drills) and initial active duty training, as well as the period an individual is absent from a job for examinations to determine fitness to perform his or her military duty.

USERRA guarantees pension plan benefits that accrued during military service, as well as health benefits for military personnel and their families during military service for up to 18 months.

Separately, the Servicemembers’ Civil Relief Act of 2003 (SCRA) requires a delay of any legal proceeding if military service impairs a military member’s ability to appear in the proceeding.

**Family and Medical Leave Act of 1993**

The Family and Medical Leave Act (FMLA) provides certain employees with up to 12 weeks of unpaid, but job-protected, leave per year. While the FMLA does not require the employer to provide paid leave, it does require the employer to continue group health benefits during the leave.

Employees are entitled to family and medical leave under the FMLA if:

- they have worked for their employer for at least 12 months; and
- they worked at least 1250 hours during the 12 months before the beginning of the leave.

Employees may take an FMLA leave for:

- the birth or care of a newborn, adopted child, or foster child;
- the care of an immediate family member (spouse, child or parent) with a serious health condition; or
- their own serious health condition that prevents them from performing their job.

An employee may be able to take “intermittent” FMLA leave in small blocks of time that are spaced apart. For example, an employee may need to take one week per month of leave time for treatment of an illness. The employee must demonstrate that taking intermittent leave is medically necessary.

Upon an employee’s return from FMLA leave, he or she must return to the same job, or be given an equivalent job. If an employee takes intermittent leave, he or she may be transferred temporarily to a position that better accommodates the need for short blocks of leave time.

The FMLA does not cover “key” employees (top executives, for example) who must be given leave but not reinstatement when it would cause substantial economic harm to the employer. The theory behind this is that key employees are essential to the smooth functioning of the workplace. If key employees take leave anyway, they are still eligible for continuing health benefits. However, the employer is not obligated to take them back or guarantee that a job suited to their experience will be available if they do return.

**Worker Adjustment and Retraining Notification Act**

The Worker Adjustment and Retraining Notification Act (WARN) is a federal statute that requires employers of 100 or more full time employees to provide written notice to employees
subject to a “mass layoff” or plant closing. This notice must be given in writing 60 days before the layoff or closing. The law defines a “mass layoff” as a reduction in force that results in an employment loss at the site of employment of at least 33 percent of the employees during any 30-day period for at least 50 employees. In interpreting the scope of the WARN Act, federal circuit courts have held that it applies to quasi-public employers such as housing authorities as well as private employers.

State Laws

• Employment at Will

In Ohio, an employee is an employee at will unless the employee’s relationship with the employer is governed by a contract or protected by law. Most employee handbooks contain a notice that employment is considered at will.

At will means the employee serves at the will of the employer, and the employer is free to terminate the employee at any time, for no reason or for any lawful reason, with or without notice. It is not necessary for the employer to “have cause” to terminate an at-will employee. The employer has no duty to treat employees fairly, only lawfully.

By the same token, an at-will employee is free to resign at any time, for no reason or for any reason, with or without notice. Employees who do not have a contract with the employer, are not in a union, and/or are not in the classified service of public employment are at-will employees subject to termination at any time, regardless of fairness. For example, an employer can retain a bad employee and/or terminate a good employee, as long as the employer does not use age, race, national origin, physical or mental disability or some other protected status as the reason for the termination.

An employer’s ability to terminate an employee can be restricted through the use of a contract. A contract can be verbal or even implied from the circumstances of the parties. For example, an employer may be bound by promises made to an employee with respect to termination procedures, reasons for termination or length of employment. If the employee reasonably relies upon these promises and is harmed as a result, the employer may be held responsible. Generally, the burden is on the employee to prove he or she is not an employee at will or that an enforceable promise has been made. A written employment contract may make a clearer statement that the employee is not an employee at will.

There are exceptions to employment at will. As mentioned earlier, an employer cannot terminate an employee for any reason prohibited by law, such as on the basis of race, national origin, gender, religion, disability, age or other protected status. There are also laws that prohibit termination based upon retaliation in certain circumstances. For instance, an employer may not retaliate against an employee who exercises his or her legal right to file for workers’ compensation, or to report workplace abuses such as overtime violations, discrimination, or sexual harassment. An employee’s exercise of legal rights is protected conduct, and retaliation is a tangible, adverse employment action an employer might take against an employee for engaging in any form of protected conduct. Whistleblowing, or turning in an employer for breaking the law, describes a certain kind of protected conduct. (Retaliation and protected conduct are discussed more fully in the next section.)

An employer also may not terminate an employee at will when the reason for termination would violate public policy. For example, an employer may not terminate an employee for, among other things, serving on a jury, refusing to break the law, for exercising a legal right to hire an attorney to represent the employee in an employment matter, or for having his or her wages garnished for child support or Chapter 13 bankruptcy payments.

Ohio’s Employment Discrimination Laws

Ohio’s employers, employment agencies, employees and job applicants must comply with all applicable federal laws regarding discrimin-
ation. However, Ohio also addresses some discrimination issues in its state laws. The Ohio Revised Code makes it illegal for employers, labor unions or employment agencies to discriminate against an employee or applicant based on race, color, religion, sex, national origin, non-disqualifying disability, age or ancestry. In fact, it is unlawful, for those reasons, to discriminate against any person directly or indirectly with respect to hiring, tenure, employment terms, conditions or privileges, or by firing any person without just cause.

The law contains a number of provisions designed to prevent such discrimination in employment or union membership. One provision prevents employers from trying to get information about race, color, religion, sex, national origin, handicap, age or ancestry from job applicants, except when such information is related to a legitimate job skill certified in advance by the Ohio Civil Rights Commission. An example of this exception would be a job for which the employer wishes to require a female to monitor a woman’s dressing room at a department store or a male to monitor a men’s locker room at a school.

**Labor Unions**

The labor movement began in the United States in the late 1800s, at the start of the Industrial Revolution. From the beginning, labor unions fought a variety of workplace abuses, such as unsafe working conditions and the use of child labor. Employers fought back, however, and labor conflicts sometimes became violent and even deadly. Unions attempted to give labor a unified voice when addressing issues of pay, length of workday, safety, working conditions and discipline with company owners. Unions also sought legal protection for union members.

**Federal Labor Law**

During World War II, the country needed to set aside its labor differences to work on the war effort. Congress enacted the Railway Labor Act as a result, which created the earliest union organization rights.

- **National Labor Relations Act**

  Congress passed the National Labor Relations Act (NLRA) after World War II to cover private industries other than transportation. The NLRA guarantees workers the right to form unions. It also ensures the right to engage in collective bargaining, or to negotiate as a group with employers about wages, hours and working conditions. It applies to all employers involved in interstate commerce, except airlines, railroads, agriculture and government. The law also excludes supervisory and managerial employees from coverage. Federal employees are covered by the Federal Labor Relations Act (which addresses labor relations in a specialized area).

  The NLRA prohibits employers from interfering with union-organizing efforts. The act also requires employers to negotiate with duly elected union representatives. The act established the National Labor Relations Board (NLRB) to enforce the provisions of the NLRA.

  The NLRA enables employees of individual companies to decide which union or person will negotiate for them. A worker or employer may ask the NLRB to conduct an election among the workers to choose a union representative. The employer must then bargain only with the elected representative.

  The NLRA gives employees the right to:
  - form and join unions;
  - support and assist unions;
  - choose a union to represent them for collective bargaining purposes;
  - engage in group conduct for the purpose of collective bargaining or to help each other regarding workplace issues;
  - strike for better working conditions;
  - refrain from activity on behalf of a union; and
  - take part in grievances, on-the-job protests and picketing.

  The law also defines unfair labor practices and makes the following conduct illegal:
• employer interference, restraint, or coercion directed against union or collective activity;
• employer domination of unions;
• employer discrimination against employees who take part in a union;
• employer retaliation for filing unfair labor practice charges or cooperating with the NLRB;
• employer refusal to bargain in good faith with union representatives; and
• union failure to represent members properly with respect to the bargaining agreement. This claim, known, as the duty of fair representation, must be filed within six months.

Ohio Labor Law

Ohio law mirrors the NLRA in ensuring the right to engage in union activity, but Ohio law deals only with public employees, which would include those who are employed by a state agency, board, or commission, or by a local government. The State Employee Rights Act grants public employees the right to:
• form, join or participate in a union;
• engage in collective bargaining or other mutual aid and protection;
• be represented by an employee organization; and
• bargain collectively with their public employers to determine wages, hours and the terms and conditions of employment.

Ohio law states that neither the employer nor the union can:
• interfere with employee right to join or be represented by a union;
• refuse to negotiate in good faith over wages, hours and the terms and conditions of employment;
• fail to process grievances in a timely manner or to process requests for grievance arbitration;
• lock out employees for the purpose of getting employees to compromise in a labor dispute;
• cause an employee representative to engage in an unfair labor practice; or
• retaliate against an employee exercising his or her rights under a collective bargaining agreement.

Public employees have the right to strike unless their collective bargaining agreement prohibits a strike while the agreement is in force. Certain employees are prohibited by statute from engaging in a work stoppage, including police officers, state hospital employees and public employees engaged in safety and health professions.

Government Employment

Government or public employees are those who work for the federal, state, or local government. Public employees have additional protections in civil service laws as well as the U.S. and Ohio constitutions.

Civil Service Laws

Federal and state civil service laws require that employment decisions are based on merit. Such laws attempt to eliminate political considerations that might be factors in hiring, firing, and other employment decisions. Some jobs, however, are exempt from civil service laws, including high-level policy-making positions. Those without protection, called “unclassified” employees, are those higher-level employees who are appointed by the governor or state agency director and/or whose responsibilities include carrying out the policies of a current political administration. The thinking is that the governor or director, or other officeholder ought to be able to select those high-level employees who will implement their particular policies and terminate those who will not.

Civil service systems include guidelines for recruiting and screening applicants, job classifications based on job duties and protection against arbitrary discipline and discharge. A civil service employee who has completed a probationary period may usually be fired only for cause.
(for a good reason, such as failing to carry out the duties of the job or violating a workplace rule). This differs from employment at will, where an employer may fire an employee for any lawful reason or for no reason.

**State Employment Relations Board**

The State Employment Relations Board (SERB), established by statute in 1983, has the exclusive right to remedy alleged unfair labor practices between Ohio’s public employers and employee’s unions.

Where an employee’s claims are founded on rights created or addressed in a collective bargaining agreement (union contract), the employee may file a grievance seeking a remedy. Employees can challenge a failure to promote, wrongful discharge or retaliation. If a union refuses to pursue a grievance, the employee may have a claim against the union for breach of the duty of fair representation.

**Constitutional Protections**

All public employees in Ohio are protected by the U.S. and Ohio constitutions. Public employees have rights to freedom of speech, association, religion and freedom from unlawful search and seizure. In some cases, a government employee also may have a "property" interest (such as a continuing employment contract or tenure) in his or her position, which the government cannot take away without due process. Due process requires notice to the public employee about any disciplinary action to be taken against him or her and a chance to answer charges before the discipline is administered.

Workplace rules lawfully limit a public employee’s speech or conduct only when the government’s interest in establishing the rules outweighs the interest of the individual. For example, if the speech or conduct disrupts the efficient operation of the government, the employee may lawfully be disciplined.

**Wages and Hours**

Both federal and state laws govern minimum wages and overtime pay for Ohio employees. When federal law does not cover an employee’s claim, state law applies. When both state and federal laws cover a claim, the law with the higher standard controls. For instance, if the state sets a minimum wage that is higher than the federal minimum wage, the state’s minimum wage would control.

**Federal Wage and Hour Laws**

The federal Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, record keeping and child labor standards affecting full-time and part-time workers in the private sector and in federal, state and local governments. The FLSA covers employees who produce, handle or sell goods moved in interstate commerce.

The Wage and Hour Division of the U.S. Department of Labor administers and enforces the FLSA for private, state and local government employees, and most federal employees. Special rules govern the use of compensatory time off in place of overtime pay.

- **Minimum Wage**

Covered, nonexempt workers are entitled to a minimum wage of not less than $5.15 an hour (as of January 2002). Nonexempt employees who work more than 40 hours in a work week are entitled to overtime pay at the rate of one-and-one-half times their regular rates of pay.

Some employees are exempt from coverage under the FLSA even though the law covers their employers. These include salaried executive, administrative, or professional workers; outside sales people; computer specialists who earn at least 6.5 times the minimum wage; apprentices; and miscellaneous workers, such as employees of seasonal recreational businesses, workers on small farms, and newspaper delivery workers.
There are a number of employment practices that FLSA does not regulate. These include:

• vacation, holiday, severance or sick pay;
• meal or rest periods;
• premium pay for weekend or holiday work;
• pay raises or fringe benefits; and
• discharge notices, reasons for discharge, or immediate payment of final wages to terminated employees.

The FLSA does not limit the number of hours in a day or days in a week an employee may be required or scheduled to work, including overtime hours, as long as the employee is at least 16 years old and the employer pays one and one-half times the regular rate.

• Tip Credit

An employer may credit tips employees receive against the employer’s minimum wage obligation. In such cases, the employer’s cash-wage obligation must be at least $2.13 an hour. If an employee’s tips and cash wages do not equal the minimum hourly wage ($5.15), the employer must make up the difference.

• Overtime

An employer must pay a nonexempt employee premium pay for overtime work. Employees covered by the FLSA must receive overtime pay for hours worked in excess of 40 in a single workweek at a rate not less than one-and-one-half times their regular rate of pay. There is no legal limit on the number of hours employees aged 16 and older may work in any workweek. The FLSA does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest. Nor does it require breaks or meal periods.

• Child Labor

The FLSA requires that children must be at least 14 years old before they can work at a “real” job. Those younger than 14 can work around the home, baby-sit on an informal basis and deliver newspapers. Children ages 14 and 15 cannot work in manufacturing, mining, construction or the transportation industries. Further, children under the age of 18 cannot work around machinery, or in certain unsafe jobs. Unsafe jobs include cooking or baking in restaurants and working on ladders or scaffolds. The FLSA limits both the number of hours and the time of day that 14- or 15-year-old children can work. Those children may not work during school hours or more than 31 hours per week during the school year. However, they may work:

• up to three hours on a school day;
• eight hours on a non-school day;
• 18 hours a week while in school; and
• up to 40 hours in a week when school is not in session.

Children ages 14 and 15 may not work before 7 a.m. or after 7 p.m., except between June 1 and Labor Day, when they may work until 9 p.m.

Ohio Wage and Hour Laws

The Wage and Hour Bureau of the Ohio Department of Commerce administers and enforces Ohio’s minimum wage, child labor and prevailing wage laws. When the FLSA does not cover a matter, then state law applies. When the FLSA sets a higher standard than the state, the FLSA controls. Likewise, if a state sets a higher standard than federal law, the state law controls.

• Ohio Minimum Wage

Ohio sets a separate minimum wage rate for employees. Ohio employers must pay a minimum wage of $6.85 per hour, which will be increased by the rate of inflation beginning in 2008. Almost every Ohio employer is covered by the Ohio minimum wage law, but some employees are not entitled to it. The law also has new record-keeping requirements for employers. Employees covered by only the Ohio minimum wage and not the federal minimum wage are entitled to the Ohio minimum wage. Employees covered by both the Ohio and federal minimum wages are generally entitled to the higher of the two minimum wages.

• Prevailing Wage Law

Ohio’s prevailing wage law applies to construction projects undertaken by certain public authorities and requires that the public authorities
pay the locally prevailing rate of wages to workers on the project. The Director of the Ohio Department of Commerce determines Ohio’s prevailing wage rate.

### Workplace Safety

Federal and state laws protect the safety and health of workers while on the job. They also exist to ensure that no job causes long-term health or safety complications.

**Occupational Safety and Health Act**

The Occupational Safety and Health Act (OSHA) is a federal law designed to ensure, to the extent possible, safe and healthful working conditions for all employees. The act applies to almost all private-sector employees and federal workers except military personnel. (State employees are covered by PERRP, as explained below.)

The Act requires employers to:

- provide a workplace that is free of known hazards that are likely to (or do) subject employees to death or serious physical harm;
- comply with the safety and health standards adopted by OSHA; and
- maintain a log and summary of all occupational injuries and illnesses.

The Act protects a worker who refuses to perform a job that is likely to cause imminent death or serious injury. An employer may not discipline an employee who, in good faith, refuses to work if:

- a reasonable person in the employee’s position would also conclude that there is a real, immediate danger of death or serious injury;
- there is insufficient time to eliminate the danger through regular OSHA channels; and
- the employer does not respond to the employee’s requests to fix the problem.

The Act also protects a worker from retaliation for reporting unsafe conditions.

### Surface Transportation Assistance Act

The Surface Transportation Assistance Act (STAA) is a federal law that says an employer may not fire or discipline an employee for refusing to operate a commercial motor vehicle (CMV) if the employee reasonably believes that, by operating the vehicle, he or she would violate a federal regulation, standard, or order regarding commercial motor vehicle safety or health.

The regulations, which are issued by the Department of Transportation, require:

- specific marking of cargo containing hazardous materials;
- hazmat training for employees;
- marking of vehicles with identifying information; and
- limits on the number of hours a driver may work.

### Ohio Workplace Safety Laws

The Public Employment Risk Reduction Program (PERRP) ensures that public employees in Ohio are provided with a safe and healthful working environment. The law does not cover peace officers, firefighters, and correctional officers in county or municipal correctional institutions.

Ohio law is similar to OSHA in that it allows a public employee, acting in good faith, to refuse to work in conditions presenting imminent danger when the conditions do not normally exist for that particular occupation. While Ohio’s private sector employers are subject to federal OSHA regulations, Ohio’s PERRP covers public employees (that is, those who work for state or local governments, and thus, are not covered by OSHA).

A public employer cannot discriminate against a public employee for a good-faith refusal to perform assigned tasks if:

- the employee has asked the public employer to correct the hazardous conditions;
- the conditions remain uncorrected;
• there is insufficient time to eliminate the danger by resorting to the enforcement methods provided under the law; and
• a reasonable person in the employee’s position would also conclude that there is a real, immediate danger of death or serious injury.

Ohio’s Case Law Prohibiting Sexual Harassment

Sexual harassment on the job is prohibited by both state and federal statues. It is also dealt with in case law, and an employee may bring such a claim to court as a common law tort. In Ohio, an employer has a duty to provide employees with a safe working environment. In 1991, the Ohio Supreme Court broadly interpreted this duty to require an employer to prevent employees from intentionally harming others or creating an unreasonable risk of bodily harm. An employer that knows or has reason to know that an employee poses a risk may be liable for failing to take appropriate action to prevent the harm.

This duty extends to an employer’s obligation to prevent sexual harassment. If there is evidence that an employer knew or should have known that an employee had a past history of sexually harassing behavior, the employer may be liable to an employee who brings a claim of workplace sexual harassment.

Workers’ Compensation

Workers’ compensation laws provide money to pay for medical expenses and replace lost income due to on-the-job injuries and illnesses. The employee is not required to prove that the injuries were caused by some negligence of the employer in order to recover under workers’ compensation laws. Employers are liable even if they are not at fault.

Under Ohio’s workers’ compensation law, participating employers pay workers’ compensation premiums into a state fund. The Ohio Bureau of Workers’ Compensation (OBWC) administers the fund, and an employee who is injured in the course of his or her employment may apply for and receive benefits out of the fund. The employee may not make a direct claim against his or her employer except in the case of intentional torts, discussed below. In other words, employers who comply with Ohio’s workers’ compensation laws generally cannot be sued in court for negligence.

Employers may be held responsible if they do not comply with Ohio’s workers’ compensation law. If an employer does not pay into workers’ compensation and his employee is injured, the employee’s claim will be covered by the OBWC as though the employer had maintained coverage. Then the Ohio Attorney General’s Office will pursue a claim against the non-complying employer for the dollar-for-dollar cost of the claim. The employer does not enjoy the immunity against a negligence claim that would exist if the employer had complied with the law. Employers also may be liable even if they do comply with the law, but have injured an employee by committing an intentional tort. An employer commits an intentional tort against an employee when it requires the employee to work under dangerous conditions, knowing the employee will suffer injury or death or there is substantial certainty that the employee will suffer injury or death.

In general, an “injury” for workers’ compensation purposes includes any injury received in the course of, and arising out of, the injured employees’ employment. However, the workers’ compensation statute specifically provides that “injury” does not include:

• psychiatric conditions, unless the condition has arisen from an injury or occupational disease;
• injury or disability caused primarily by the natural deterioration of tissue, organ or other part of the body; and
• an injury or disability incurred when an employee was participating voluntarily in an employer-sponsored recreation or fitness activity, provided that the employee signed a
waiver of compensation for injuries sustained in such activities.

Workers’ compensation may not cover an employee’s injury, even though the injury may have occurred on the employer’s premises, if it arose from the following situations or conditions:
• intentionally self-inflicted injuries;
• intoxication (however, the employer bears the burden of proving that the intoxication was the proximate cause or substantial contributing factor of the injury); and
• horseplay and fighting (injuries sustained as a result of horseplay or fighting will not be compensated if the injured employee instigated or participated in horseplay or instigated the fight).

An occupational disease is defined under workers’ compensation law as a disease contracted in the course of employment, when the nature of the employment puts an employee at risk of contracting the disease to a greater degree and in a different manner than would be true of a member of the general public. A common occupational disease, for example, is carpal tunnel syndrome, caused by overuse of the hands in a job that requires extensive manipulative use of the hands.

Pension and Welfare Laws Affecting Employment

Federal and state laws protect the money people invest in public and private retirement plans.

Employee Retirement Income Security Act of 1974

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for pension plans in private industry. ERISA does not require any employer to establish a pension plan. It only requires that those who establish plans must meet certain minimum standards. The law generally does not specify how much money a participant must be paid as a benefit.

The ERISA:
• requires a plan to provide participants with information about the plan, including important information about the plan features and funding;
• sets minimum standards for participation, vesting, benefit accrual and funding;
• requires accountability of the “plan fiduciaries” who exercise discretionary authority or control over a plan’s management or assets;
• gives participants the right to sue for benefits and breaches of fiduciary duty; and
• guarantees payment of certain benefits, if a defined benefit plan is terminated, through the Federal Pension Benefit Guaranty Corporation.

Social Security

The federal Social Security program allows workers and employers to contribute a part of their earnings to provide financial protection for themselves and their families if certain events, such as retirement and disability, occur. Each worker pays Social Security taxes and earns the right to receive Social Security benefits without regard to need. Though the Social Security program is often thought of as a retirement program, nearly 40 percent of current Social Security beneficiaries are non-retirees.

Social Security taxes and benefit levels are related to an individual’s total earnings during working years. As people earn more money and pay more in Social Security taxes, they gain the right to higher benefits. To be eligible for any retirement benefits, workers must have accumulated “enough” work credits. Work credits are measured in quarters worked; the number of credits needed to draw benefits depends upon the worker’s age when applying for the benefits. Full Social Security retirement benefits are currently paid at age 65. By 2027, full benefits will be paid at age 67.
If an individual is receiving retirement benefits, some members of his or her family can receive benefits as well. They include:

- a spouse age 62 or older, unless the spouse is covered by a separate plan (such as the State Teachers Retirement System plan or the Public Employees Retirement System plan);
- a spouse age 62, if he or she is taking care of a child who is under age 16 or disabled;
- a former spouse age 62 or older, unless covered under a separate plan;
- children up to age 18;
- children age 18-19, if they are full-time students through grade 12; and
- children over age 18, if they are disabled.

Social Security also pays disability and survivors’ benefits. Children under 18 may qualify for benefits based on their mothers’ or fathers’ work if either parent is deceased, retired or disabled. The child may be a natural child, stepchild, adopted child, or, under certain conditions, a grandchild. To qualify, a child must be:

- under age 18 (or under 19, if still in high school) or disabled before age 22 and unable to work because of the disability; and
- unmarried.

Survivors’ benefits are paid to eligible members of a worker’s family, including:

- a widow or widower age 60 or older;
- a widow or widower who is disabled at 50 years of age or older, unless covered under a separate plan;
- a divorced spouse, who may qualify on the same basis as a widow or widower if the marriage lasted 10 years or more, unless covered under a separate plan; or
- a dependent parent 62 or older.

Disability benefits are paid to workers who have a physical or mental impairment that is expected to keep them from working for a year or more or a disability that is expected to result in death. Social Security does not pay for partial disability. A spouse and children may qualify for benefits on a disabled worker’s earnings record the same way as with retired workers.

For people who have not earned enough work credits under Social Security to qualify for benefits, or whose Social Security benefits are very low, Supplemental Security Income (SSI) payments may be available. The program makes monthly payments to people who have limited income and resources if they are 65 or older or if they are blind or have another physical or mental disability. Children as well as adults can get benefits because of disability. When deciding if a child is disabled, Social Security looks at how his or her disability affects everyday life. People eligible for SSI receive a monthly benefit, Medicaid, and food stamps.

Privacy On and Off the Job

Computers and other Electronics

Employees are generally entitled to a “reasonable expectation of privacy” and to be free from wrongful intrusion into their private activities. An example of a legitimate purpose for intruding into private activities would be searching a prison guard to ensure nothing is smuggled to prisoners. If a legitimate business purpose exists and employees receive clear notice that they are subject to monitoring, surveillance, inspections, searches and testing necessary to enforce company rules and policies regarding their conduct and performance, employers can substantially diminish an employee’s privacy rights. For example, in some cases, employers may record their employees’ telephone conversations as long as they first let them know of this intention.

Employers also have the right to monitor and control employees’ use of the Internet, e-mail, or Web sites. Because employers must comply with federal and state workplace regulations and have duties to protect their employees from certain actions, including sexual harassment, they can prohibit an employee’s use of the Internet and e-mail to access or distribute unacceptable content.
Employers usually have policies that inform their employees about what activities are permitted and prohibited. Regardless, employees should not expect privacy when using the Internet or e-mail at work. (Editor’s Note: A discussion of electronic monitoring of employees [via e-mail, the Internet, etc.] is found in Part XIII, “Cyberlaw.”)

An employer’s right to monitor employee conduct off the job and to make decisions based on that conduct is limited. Employees of government and public entities have a constitutional right to privacy. This protects employees from most employer monitoring of or inquiry about off-the-job conduct.

In the private sector, it is generally illegal for an employer to intrude unreasonably into the seclusion of an employee, including places an employee has a reasonable expectation of privacy (the home, for instance), unless there is a legitimate business reason to intrude and the behavior being monitored is related to the employee’s job. An employer is never allowed to physically enter an employee’s home without consent, even when searching for allegedly stolen employer property.

Employee Testing

Pre-employment tests (skills tests, aptitude tests, psychological tests, personality tests, honesty tests, medical tests or drug tests) can be used in Ohio, but must comport with the Americans with Disabilities Act (ADA). To be legal, the tests must accurately measure an individual’s skills and not his or her disabilities.

Workplace tests of employees already on the job must be relatively non-invasive and designed to predict a worker’s actual ability to do the job. More comprehensive or intrusive tests may violate worker privacy rights, particularly if the tests aren’t closely related to the particular job. Generally, courts decide whether a test is legal on a case-by-case basis.

Medical Exams and Medical Records

To avoid violating the ADA, employers should not conduct any medical exam or ask an applicant to provide a medical history before making a job offer. Once the employer decides to offer the applicant a job, the employer can make the offer conditional on the applicant passing a medical exam. Any medical exam an employer may require should be required for all entering employees who are doing the same job, and, to satisfy the ADA, the results of the medical exam must remain private. Once on the job, an employee can be required to have a medical examination to determine his or her “fitness for duty” in any job requiring special physical skills. For example, positions that have certain unique physical requirements, such as firefighting, may require employees to submit to medical examinations.

Other laws prohibit health care providers from revealing patient medical information. Employers who obtain medical records from health care providers must also safeguard those records from disclosure to others.

Drug Tests

The federal and state courts continue shaping laws regarding drug use in the workplace and the practice of testing employees for drugs. The Drug-Free Workplace Act, a federal law passed in 1988, requires that workplaces receiving federal grants or contracts must remain drug free to receive federal funding. It does not require testing or monitoring of workers; neither does it generally prohibit employers from testing employees.

In general, employers have the right to test new job applicants for the presence of drugs in their systems as long as:
• the applicant knows that such testing will be part of the screening process for new employees;
• the employer has already offered the applicant the job;
• all applicants for the same job are tested similarly; and
• the tests are administered by a state-certified laboratory.

Most companies intending to conduct drug testing on job candidates provide information on
company job applications explaining that they will be asking applicants to submit to such testing.

In Ohio, the laws on drug testing depend on whether an employee works in the private or public sector or is a member of a union. Public and private employers are prohibited from unlawfully discriminating against employees. Therefore, all employers should ensure that any drug testing is conducted on some basis other than age, disability, sex, race, national origin, ancestry, or religion. Public employers must also ensure that drug testing complies with the Fourth Amendment to the U.S. Constitution. Thus, in the absence of special circumstances, a public employer must have a reasonable suspicion of drug abuse based on specific grounds in order to conduct the drug test. An exception arises when the public employee works in a position that affects public safety or security. In this case, the government can perform drug testing under less rigid standards of selection.

Regarding private sector employees, drug testing must be administered on a non-discriminatory basis. Ohio law prohibits employers from requiring applicants or employees to pay the cost of the drug testing and limits what medical records related to the drug testing the employer may release. Employers subject to U.S. Department of Transportation regulations may require drug testing of employees and specific methods of testing.

Regarding employees who are members of a union, the National Labor Relations Board has ruled that an employer must first bargain with the union before implementing an employee drug testing program, since drug testing is a mandatory subject of bargaining. Therefore, testing must comply with the terms established in the collective bargaining agreement.

Lie Detector Tests
The federal Employee Polygraph Protection Act generally prohibits private employers from requiring their workers to submit to lie detector tests. However, the law permits testing by businesses that provide armored car services or guard services, or that manufacture, distribute or dispense pharmaceuticals. The law also allows employers in those industries to administer polygraph tests to any workers accused of theft or embezzlement, under certain prescribed conditions.

Whistleblowing and Retaliation

Employer Retaliation
Many federal laws which regulate employment contain specific provisions protecting employees from retaliation for a protected activity. Employees can sue for economic, emotional and punitive damages if their employer subjects them to an adverse employment action for engaging in protected activities.

Employees engage in protected activities when, reasonably and in good faith, they assert their individual employment rights, such as those under OSHA, STAA, Title VII and the ADA.

Examples of protected activity include:
• asking for overtime pay;
• filing a complaint with the Department of Labor;
• reporting sexual harassment;
• serving in the armed forces or reserve;
• consulting or retaining an attorney; or
• applying for medical benefits or leave.

Generally, an employee engages in protected conduct any time he or she exercises an individual right or does something recognized by law as having public importance.

Whistleblowing in Ohio
Ohio has a general “catch-all” whistleblower law. Ohio’s whistleblower statute was passed to protect the right of employees to report violations of the law by employers or fellow employees. The protection is available only if the employee strictly follows the law’s provisions.
To be protected when reporting a violation, the employee must:
• be sure that the alleged violation of a state, local or federal statute, ordinance or regulation is one that the employer has authority to correct;
• reasonably believe that the violation is a criminal offense likely to cause physical harm or is a hazard to public health or safety;
• tell a supervisor or other responsible officer about the violation; and
• file a written report with the supervisor or officer that provides enough detail to identify and describe the violation.

If the employer fails, within 24 hours of the complaint, to notify the employee about good faith efforts to correct the violation, then the employee may report the violation to outside authorities.

The law also protects employees who report co-workers’ violations of local, state or federal statute, ordinance or regulation, or any work rule or company policy that is a hazard or a crime.

When the Job Ends

Unemployment Compensation
Ohio’s unemployment system is an insurance program that helps unemployed workers who are out of work through no fault of their own (for example, due to a layoff). Unemployment benefits are paid out of employer taxes.

An individual may qualify for regular unemployment compensation if he or she worked long enough in covered employment. Most employers are required to pay contributions for unemployment insurance. Work for such an employer is covered employment. Work for a nonprofit or government agency also is covered employment, even though the employer does not pay regular contributions, but instead reimburses the cost of unemployment benefits paid to its former workers. In addition, the individual must have lost a job through no fault of his or her own and must be available for work, able to work, and actively seeking work. If the applicant quit a job when he or she could have remained employed, then that individual caused the unemployment and is not eligible for compensation.

An individual who is discharged or fired from a job may not be eligible for benefits if the employer can show the discharge was for just cause. For example, if an employee violated established company rules, neglected the responsibilities of the job, disregarded the employer’s interests, or performed the work carelessly, he or she may not be eligible to collect unemployment compensation. However, if the worker was fired for refusing to perform duties that endangered his or her health or violated accepted legal standards, that worker may be eligible to collect unemployment compensation on the basis that he or she was not discharged for just cause. If the employer did not follow its own established policy and procedures in terminating an employee or failed to explain job duties, the employee may be eligible for unemployment benefits. The Ohio Department of Jobs and Family Services determines who will receive unemployment benefits.

To be eligible for unemployment compensation an applicant must:
• be unemployed at the time of filing;
• have at least 20 qualifying weeks of covered employment in the base period (first four of the last five completed calendar quarters immediately before the first day of an applicant’s benefit year [a 52-consecutive-week period]); and
• have earned, at the time of the discharge, a certain qualifying average weekly wage (this amount changes each year due to cost of living increases).

Severance Pay
Severance pay is a payment or benefit provided by employers to terminated employees. An employer has no obligation to provide severance pay. The only benefit that employers must, by law, provide is unemployment compensation. However, an employer may be obligated to pay severance because of an employment contract...
or a promise made to an employee or because the employer has a severance plan. If an employer does create a severance plan, the employees covered by the plan’s terms are entitled to plan benefits when the event that triggers benefits occurs. However, an employer may create, modify or abolish a severance plan as it sees fit. Most employers do not have severance plans. Because a severance package is a type of contract, there may be terms and conditions set forth in it. For example, most severance agreements require a promise by the employee not to sue the employer as a condition of getting the severance payment. For employees over 50 years of age, such a release must comport with the Older Workers’ Benefit Protection Act (see page 167) in order for the promise not to sue to be effective against a federal age discrimination claim. The parties must agree to comply with these terms and conditions. If an employee asks for a better package, he or she will be deemed to have “rejected” the employer’s offer by making a counteroffer, which the employer can accept or reject. By making a counteroffer, the employee runs the risk of losing the guaranteed offer.

**Vacation Pay**

Often, at the time employment is terminated, the employee has accrued unused vacation time. The issue arises as to whether or not employees are entitled to be paid for those unused days. In Ohio, there is no law to regulate vacation pay. The employee’s right to collect pay for unused vacation days is governed by the employer’s policies and is considered to be a matter of contract.

However, courts have ruled that, if the employer’s policy does not prohibit accruing vacation time, accrued employee vacation time becomes an entitlement and an employer must pay a discharged employee for any unused vacation time. Courts have viewed vacation pay as a deferred payment of an earned benefit.

If, however, the terms of employment expressly limit the employee’s right to accrue vacation wages, or to be compensated for unused vacation time upon termination of employment, then the employer does not need to pay. The employer’s policies governing vacation time are most often included in the employees’ handbook.

**Covenants Not To Compete**

A covenant not to compete or non-compete agreement, as it is more often called, prohibits a former employee from working for a competitor or soliciting customers for a certain period of time after the employment ends. Although these agreements are commonly used for service professionals and commercial salespeople, they are not limited to any particular types of work. Ohio courts enforce non-compete agreements to the extent necessary to protect the employer’s legitimate business interest. An employer can require at-will employees to sign a non-compete agreement in Ohio after their employment has already begun. Continued employment is enough of a benefit to the employee to make the agreement binding. Also, many employers condition severance packages or enhanced severance packages on the employee’s signing of a non-compete agreement.

Non-compete agreements typically preclude or severely limit employment in the same industry, in a defined geographic area, with a competitor or with a client, for a prescribed length of time. These agreements are valid and enforceable if the restrictions are reasonable and:

- are no greater than required for the protection of the employer’s legitimate business interest;
- do not impose undue hardship on the employee; and
- do not harm the public.

Nine factors are considered to determine if a non-compete agreement is reasonable:

- the extent of time and geographic limitations;
- whether the employee represents the sole contact with the employer’s customers;
- whether the employee possesses confidential information or trade secrets;
- whether the agreement merely seeks to eliminate competition that would be unfair
to the employer or seeks to eliminate ordinary competition;
• whether the agreement seeks to stifle the inherent skill and experience of the employee;
• whether the benefit to the employer is disproportional to the detriment to the employee;
• whether the agreement operates as a bar to the employee’s sole means of support;
• whether the employee’s talent that the employer seeks to restrict was actually developed during the period of employment; and
• whether the forbidden employment is merely incidental to the main employment.

Unreasonable agreements will not be set aside, but will be enforced only to the extent necessary to protect the employer’s legitimate interests. For example, a court may change an agreement and reduce the number of years an employer can prohibit competition (say, from five years to two years) if the employer cannot prove such competition will hurt it after two years.

Older Workers’ Benefit Protection Act of 1990

The Older Workers Benefit Protection Act (OWBPA) was passed by Congress to protect the rights and benefits of older workers (workers age 40 and over). Under that statute, an employer may obtain a waiver of a departing employee’s right to sue the company in exchange for money or some other consideration to which the employee agrees and is not otherwise entitled. The OWBPA creates a series of prerequisites for the employer to follow in order for an employee’s waiver to be effective against a claim that the Age Discrimination in Employment Act has been violated. These prerequisites are as follows:

• the waiver must be part of a written agreement;
• the agreement must be clearly written;
• the waiver must expressly refer to claims under the ADEA;
• the waiver must not include future rights or claims;
• the employee must receive something in addition to anything to which he/she is already entitled;
• the agreement must inform the employee to consult with a lawyer;
• the employee must be given 21 days to consider the agreement (or 45 days if it is a termination program offered to a group); and
• the agreement must provide a period of at least seven days during which the employee may revoke the agreement and must specify in writing as to when the revocation can be made.

These prerequisites are not required in waivers signed by departing or former employees who are under the age of 40. Further, even in employees over the age of 40, these pre-requisites are not required when waiving rights under Ohio law or for any protected characteristic other than age.

The Consolidated Omnibus Budget Reconciliation Act of 1985

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) requires employers with 20 or more employees to allow employees and their dependents to keep their group health coverage for up to 18 months after they lose their jobs or have their work hours reduced. However, employees can be required to pay the full premium cost.
Chapter Summary

• Employment is regulated by state and federal laws that interrelate in a variety of ways.
• In Ohio, employees are employees at will unless their employment relationships are
governed by contract or protected by law. Employees at will serve at the will of their
employers, and may be terminated at any time, for no reason or for any lawful reason,
with or without notice. By the same token, at-will employees are free to quit their jobs
at any time, for no reason or for any reason, with or without notice.
• The law protects employees from retaliation for engaging in protected activities such as
asking for overtime pay, filing a complaint with the Department of Labor, reporting
sexual harassment, serving in the armed forces or reserve, and applying for medical
benefits or leave.
• Ohioans must comply with applicable federal laws regarding discrimination on the
basis of race, color, religion, sex, national origin, handicap, age or ancestry. These
include Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act
(ADA), the Age Discrimination in Employment Act (ADEA), the Equal Pay Act, the
Immigration Reform and Control Act (IRCA), the Uniformed Services Employment
and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act
(FMLA). Ohioans also must comply with their own state laws prohibiting
discrimination based on race, color, religion, sex, national origin, handicap, age or
ancestry that are set forth in the Ohio Revised Code.
• Laborers are guaranteed the right to form unions and to negotiate as a group with
employers about wages, hours and working conditions through the National Labor
Relations Act (NLRA) and the Federal Labor Relations Act. Ohio law mirrors federal
law by ensuring the right to engage in union activity, but addresses only the activity of
public employees.
• Civil service laws as well as the U.S. and Ohio constitutions cover Ohio employees
who work for the federal, state or local government.
• The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, record
keeping and child labor standards affecting full-time and part-time workers in the
private sector and in federal, state and local governments.
• The Wage and Hour Bureau of the Ohio Department of Commerce administers and
enforces Ohio’s minimum wage, child labor and prevailing wage laws. Also, Ohio has
its own prevailing wage law (Ohio Revised Code, Section 4115) that applies
specifically to construction projects.
• Federal and state laws, including the federal Occupational Safety and Health Act
(OSHA) and the Ohio Public Employment Risk Reduction Program (PERRP) exist to
ensure the safety and health of workers while doing their jobs and to ensure that no job
causes long-term health or safety complications.

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Chapter Summary continued

• Workers’ compensation laws provide money to pay for medical expenses and replace lost income due to on-the-job injuries and illnesses.
• The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for pension plans in private industry.
• The Social Security program allows workers and employers to contribute a part of their earnings to provide protection for themselves and their families upon retirement, disability or if certain other events occur.
• Employees are generally entitled to a “reasonable expectation” of privacy. Laws affecting workplace privacy include the Americans with Disabilities Act (ADA), the Drug-Free Workplace Act and the Federal Employee Polygraph Protection Act.
• Ohio’s unemployment system is an insurance program, funded through employer taxes, that helps unemployed workers who are out of a job through no fault of their own.
• Severance pay is a payment or benefit provided by employers may provide to terminated employees, and the Consolidated Omnibus Budget Reconciliation Act (COBRA) allows qualifying employees to keep their group health coverage for up to 18 months after they lose their jobs or have their work hours reduced.

Web Links:

From the OSBA:

OSBA’s “Law You Can Use” articles:
(go to http://www.ohiobar.org/pub/lycu and search for article by title or topic)

“Are Noncompetition Agreements Enforceable in Ohio?”
“Civil Rights Commission Investigates Discrimination Cases”
“Employers Have ‘Qualified Privilege’ when Conveying Information about Employees”
“Employers Should Know Extent of Responsibility for Employees’ Injuries”
“Family and Medical Leave: Rights and Responsibilities”
“Immigrants Must Be Authorized to Work in the U.S.”
“Know Your Rights When Faced with Layoff”
“Law Protects Employees from Employer Retaliation”
“Members of the Military Have Civilian Job Protections”
“Understand Employment Rights of Non-Citizens”
“Understanding Recent Changes in Overtime Exemptions”
“What You Should Know about Unemployment Compensation”
“Workers’ Compensation: When Is An Injury or Disease Covered?”

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Web Links: continued

OSBA’s Legal Basics for Small Business:
http://www.ohiobar.org/pub/?articleid=86
Includes a variety of employment-related articles

From other sources:
http://www.myemploymentlawyer.com
Answers to employment law questions from a community of employment lawyers

http://www.nolo.com/
Information about employee rights (click on “rights and disputes” tab and choose “employee rights”)

http://www.dol.gov/
U.S. Department of Labor Web site
(includes information about a wide variety of employment topics)

http://www.workplacefairness.org/
The Workplace Fairness Web site
Offers information, education and assistance to workers

http://www.eeoc.gov/
The U.S. Equal Employment Opportunity Commission Web site

http://crc.ohio.gov/employment.htm
Ohio Civil Rights Commission Web site – employment discrimination

Ohio Department of Commerce Wage and Hour Bureau Web site

http://www.com.state.oh.us/
Ohio Department of Commerce Web site

http://www.ssa.gov/
U.S. Social Security Administration Web site

http://jfs.ohio.gov
Ohio Department of Jobs and Family Services Web site – unemployment information

http://www.ohiobwc.com
Ohio Bureau of Workers’ Compensation Web site

http://das.ohio.gov/
Ohio Department of Administrative Services Web site – information for state employees
“All who have meditated on the art of governing mankind have been convinced that the fate of empires depends on the education of youth.”

– Aristotle

Public Education In Ohio

Tuition and Residency

In Ohio, a child may attend school in the school district in which his or her parent lives. The parent is not responsible for paying tuition (though the parent may be responsible for other school-related fees). “Parent” refers to either parent, unless the parents are separated or divorced, in which case, “parent” refers to the residential parent who has legal custody of the child. A child who does not live with parents can attend a public school without paying tuition if:

• the child is in the legal or permanent custody of a government agency or a person other than the child’s natural or adoptive parent;
• the child resides in a “home” for children within the school district;
• the child receives special education.

If the parents’ residential district participates in open enrollment, they may send their child to a contiguous school district without tuition payment as long as the contiguous district also has an open enrollment policy. Each district determines its own policy and must make the policy available to district residents upon request.

In 2004, Ohio adopted a rule to allow grandparents to get physical custody of and control over their grandchildren. This rule entitles grandchildren to attend school near the grandparent’s home without paying tuition and without requiring a legal change in custody. Instead, the child’s parent, guardian or custodian completes a power of attorney document that allows the child to attend school in the grandparent’s school district. If the child’s parent cannot be located, the grandparent can create a child caretaker authorization affidavit to provide the same benefit. Whether parents who simply prefer the grandparents’ school district and do not wish to pay tuition can use this law has yet to be tested.

In addition, students may attend school without paying tuition under certain circumstances, as follows:

• All individuals who are at least 18 years of age, who have not received a diploma, who live apart from their parents, and who support themselves, may attend school in the district in which they live.
• Any children under age 18 who are married may attend school in the district in which they live.
• Any child who lives with another adult while the parent(s) are in the military may attend school in the caretaker adult’s district as long as the child’s parent(s) intend to return to that district when the military tour ends.
• Any child under age 22 who moves outside the home district after a parent’s death may attend school in the district he or she attended before the parent’s death for the rest of the current school year.
• Any child under age 22 whose parents are building a new home may attend school in the new school district for up to 90 days without paying tuition as long as the parents give the superintendent of the new district a sworn statement indicating the location of the new home, their intent to live in it, and written confirmation by the builder that the house is being built.
• Any child whose parents have contracted to buy a home in a new school district may attend school in that district for up to 90 days if the parents provide a sworn statement indicating the location of the home, their intent to live there, and confirmation by the real estate officer or bank officer that the parents are in the process of buying the home.
A child who, with the parent, is under the care of a shelter for domestic violence may attend school in the district in which the shelter is located.

Any child whose parent has moved out of the district after the child’s senior year of high school has started may complete the senior year within that district, as long as the board of education consents.

States require payment from one district to another if one district is providing education to students under a consortium. A consortium consists of various districts that have legally banded together to provide educational services at a central location. Many consortiums are formed to provide services to special education students who require specialized services too costly to provide in each different district. Also, vocational schools may be open to students in a number of districts. While tuition is required in all of these instances, the sending school district, rather than the parent, pays the tuition.

Rarely, a district may send a special education child to another district, a private school or a residential placement for educational services. Most of these placements are made through special education procedures or by court order, and the sending district pays tuition to the receiving school(s) for these students.

Finally, a district’s board of education may allow students who live with their parents in another district to pay tuition to attend its schools. Each district that accepts tuition-paying students does so under its own plan and with its own requirements.

Custody

Only a parent or guardian may control educational decisions for a child under the age of 18. Ohio recognizes natural or adoptive parents as the rightful decision-makers for their minor children unless the state has revoked parental rights through very specific court proceedings. However, courts may become involved in determining who will make decisions for a minor child in several situations, including when parents divorce or die, or when a child is removed from the parents’ custody.

Compulsory attendance

Ohio mandates compulsory education for all children living in Ohio who are between six and 18 years of age. Attendance is required until the student meets the state’s minimum standard and receives a diploma.

Valid Medical Excuse

Children who have a physical or mental disability and a valid excuse may be excused from compulsory school attendance. A valid excuse can be written by a certified licensed physician or clinical psychologist, or by a school psychologist. A properly excused child may be entitled to have the school district provide home instruction if the child will be out of school for a lengthy period of time.

The home instruction program should meet the child’s individual needs and be taught by a teacher qualified in the required subject areas. Home instruction should continue until the student is medically able to return to school.

Home Schooling

Parents may wish, for a variety of reasons, to educate their children at home. This is known as home schooling. A parent who wishes to home school a child must apply to the county or state superintendent. In the application, the parent must agree to educate the child in all areas prescribed by state standards, and must provide details about how this will be done, who will teach, and what textbook, courses or teaching materials will be used. Also, the parent must provide assurance that the child will receive a minimum of 900 hours of home education for the school year. The parent must be a high school graduate, but need not be a certified teacher to home school his or her own child.

At the end of the school year, the parent must send an academic assessment report to the superintendent. The report should include the
results of a nationally normed, standardized achievement test that was administered to the child by a certified teacher or someone acceptable to the superintendent and the parent. If the child’s composite achievement test score is at or above the 25th percentile, then the child’s performance level will be considered reasonably proficient. The parent also must submit a written narrative, prepared by a certified teacher or someone acceptable to both the superintendent and the parent. The narrative must state that samples of the child’s work have been reviewed and indicate that the child’s academic work matches his/her abilities.

**Age / Schooling Certificate**

A student may be excused from compulsory school attendance if the student must work to help a parent or legal guardian. In order to be excused, a student must submit an application to the district superintendent for an *age or schooling certificate*. This certificate allows the student to work if that student has attended school within the district for the past two years and has diligently attempted to complete the necessary course work.

To be eligible for an age or schooling certificate, the student may not be addicted to drugs or alcohol, and must demonstrate that the student’s home conditions are such that the student’s financial support is necessary. Also, the student must be employed where children are lawfully allowed to work and the employer must provide the school district superintendent with written confirmation of the employment offer. If the student stops working for any reason whatsoever, the employer must notify the superintendent within 48 hours.

While excusing a student from compulsory school attendance, an age or schooling certificate does not necessarily excuse the student from all educational programming requirements. A student of 14 or more years of age must continue in a part-time educational program through night or day courses offered by the district, if available, or outside the district if necessary. A child of 16 or more years of age may have this requirement specifically waived by the district’s superintendent.

**Truancy**

Truancy is considered a major juvenile offense that subjects the parents to court action. According to Ohio law, parents must make sure their children are not truant from school.

A child who is absent 10 or more consecutive days without a valid excuse is considered truant and subject to the juvenile legal system. The juvenile legal system may impose penalties on either the parent, the child or both. However, a school district may choose to notify the parent and student before referring the student to juvenile court. The district also may require the parents and the student to appear at school. If the parents and student do not respond to the school’s summons, the school may refer the case to the court as well as to the registrar of the Ohio Bureau of Motor Vehicles (BMV).

If the case is referred to the BMV, the BMV registrar may suspend the student’s driver’s license permanently until the student reaches the age of 18 or satisfies the BMV that he or she is attending school.

**Alternatives to Public Education**

**Voucher Programs**

Voucher programs, also known as scholarship programs, were established by the state for students who live in a public school district that has been classified as “needing improvement” and has been placed under a federal court order requiring the state superintendent to manage the district. Students may use these scholarships to help pay tuition costs for private schooling. Currently, only six states have instituted voucher programs. While Ohio is included among these six states, Cleveland is the only city in the state to have a voucher program.
Voucher programs give priority to low-income families who cannot afford to pay private school tuition costs or move to another school district. To receive scholarships, which may cover up to 90 percent of private school tuition, students must apply. Students who receive scholarships may choose to attend any private or public school that has applied to participate in the voucher program. However, any student who wishes to attend a participating private school still must apply for admission and be accepted to that school. Students who choose to stay in a school found to be in need of improvement can apply for grants so they can receive help from tutors.

To participate in the voucher program, a private school must be located within the boundaries of the failing school district. Another public school district also may apply to participate if it is located next to the failing school district.

The Cleveland voucher program is available for students in kindergarten through third grade. Students who receive scholarships will continue to receive scholarship money each year through tenth grade. At the time this book was printed, a statewide voucher program had been proposed, but not enacted.

Charter schools

A charter school is a nonsectarian public school that is frequently established to meet students’ various learning styles. Agencies established by the Ohio legislature supervise Ohio’s charter schools. Charter schools may be started only in school districts the state has determined to be “challenged school districts” and in Ohio’s major urban districts. However, a student need not live within a “challenged” district to attend a charter school.

Like traditional public schools, charter schools have open enrollment policies and must follow federal and state laws prohibiting discrimination based on race, disability, gender, national origin, or religion. Charter schools do not require parents to pay tuition, and are exempt from state statutes that do not specifically apply to them. Therefore, they have more autonomy than traditional public schools.

There are two major types of charter schools: facility-based schools and Internet schools. A facility-based school is housed in a building and runs much like an ordinary public school, but with fewer students than a regular public school. The small size allows students to receive more attention.

An Internet- or computer-based school that allows students to work at home and get their assignments primarily through the Internet can serve students anywhere within the State of Ohio. Each Internet school provides students with computer systems at no cost to parents.

Facility-based and Internet schools also may specify that they will work with at-risk students, gifted students, or that they will work only with an all-female or all-male student body. All students may attend these specially designated schools, even if they do not fall into a particular category.

A school must enroll at least 25 students in order to qualify as a charter school (whether it is a facility-based or an Internet school), and it must may serve only as many students as its charter application allows. A charter school that receives too many applications must institute a lottery process so that each child who applies is given an equal opportunity for admission. Returning students and their siblings receive admission preference. Each charter school establishes its own admission policy within its charter’s guidelines.

Like all public schools, students in charter schools must take state tests to determine if they have made adequate yearly progress. If students do not perform adequately, Ohio will classify the school as not having met the standard for adequate yearly progress and may sanction the school. Charter schools must meet state requirements as well as the federal requirements of the No Child Left Behind Act and the Individuals with Disabilities Education Act. (See an explanation of these acts later in this chapter.)
Ohio School Funding & Management

Both traditional public schools and charter schools are funded on a per-pupil basis by the state according to certain formulas. Local school districts also receive funding through local property taxes. These taxes may not be passed on to charter schools. Public schools, both traditional and charter schools, are eligible for grant programs through state, federal and private foundations. Public schools must adhere to federal and state regulations regarding school districts’ operation and management, and are governed by local, elected, boards of education. All students residing within the boundaries of a school district are eligible for enrollment and cannot be denied an education unless expelled.

Private schools are funded through tuition costs, fundraising, donations, and private grants. They also receive money from state grants and by meeting certain federal and state requirements. Because private schools are subject to fewer state and federal regulations than public schools, their administrators can create specialized programs, alter the curriculum of instruction, and hire a teacher who holds a bachelor’s degree, but not necessarily a teaching degree. Private schools can set admission standards and may refuse admission to any student for non-discriminatory reasons. Private school students must, however, take the Ohio Graduation Test or meet a state-approved alternative requirement.

Parochial schools are private schools that incorporate religious education into their curriculum. Students who enroll in parochial schools are not required to belong to any particular religious organization, but they are expected to participate in the school’s religious classes and services.

Student Rights

First Amendment Rights

Students do not lose their First Amendment right to freedom of speech when they enter school, but public, private and parochial schools may limit students’ rights to express opinions when the expressions are vulgar or offensive, or interfere with the educational instruction of other students. Also, school administrators may censor student expressions in speech and in writing if they are produced as part of a school activity or curriculum (such as an article for a school newspaper), and if there is a legitimate reason for doing so (for example, if school officials determine that the subject matter is inappropriate). A school official may not, however, censor only one side of a debated issue.

School officials may exercise censorship control over the speech and written materials of organizations, including religious and political organizations, that are not affiliated with the school, but only if the materials cause a disruption and interfere with the education and environment of the school. School administrators also may ban the distribution of materials that are vulgar, offensive, or coercive, and they may limit when and where these materials are distributed.

The First Amendment requires public schools to remain neutral with respect to religion. Teachers and administrators may not force students to pray, read religious text for which there is no approved educational purpose, or lead students in prayer. However, public school students do have a right to voluntarily pray before, during, or after school, and schools may not ban religious clothing. If a public school allows
student-run clubs to meet outside of class time, a student-formed religious club also must be permitted to meet. Public schools also may implement a moment of silence, but may not require students to pray. In addition, courts have ruled that reciting the Pledge of Allegiance must be a voluntary act, and it is a violation of First Amendment rights for schools to require students to recite the pledge.

Regulations on dress and hairstyles have caused students to voice concerns over their rights to freedom of speech as guaranteed by the First Amendment. Courts, however, generally have upheld any school dress regulation as long as the adopted codes are specific, do not discriminate and have some basis, such as to promote appropriate behavior and avoid unruly conduct. Hair codes are more difficult to enforce, but may be permitted when implemented for safety or other legitimate reasons. Each state follows its own regulations on hair and dress code enforcement.

Student rights also include the freedom of association. This is the right to form clubs and groups and to meet during non-instructional time without school administration interference. If a school allows any student-initiated groups to form, administrators may not discriminate against and prohibit the formation of a particular student-run group. Schools officials and staff members also may not lead, participate in, or control these groups.

Students attending public schools generally have fewer limitations placed upon their freedom of speech than do students attending private or parochial schools. Because the First Amendment right of free speech is protected by the federal government, which funds and regulates public schools, it has greater control over public schools regarding First Amendment rights than over private and parochial schools that receive little or no federal funding.

**Student Discipline**

In Ohio, school officials generally may discipline a student for conduct that disrupts the school day or endangers the health or welfare of the student or others. Typically, a local school district will, through its Board of Education, circulate a student code of conduct. A school official typically determines consequences for unacceptable behavior. These may vary greatly and include warnings, corporal punishment (with limitations), detention, in-school suspensions, Saturday school, out-of-school suspensions and expulsions.

Some school disciplinary codes include broad prohibitions against “willful misconduct,” “disobedience” and “intentional disruption.” Increasingly, schools are using these more general prohibitions to impose discipline for actions that occur outside school.

Out-of-school suspensions and expulsions are the most severe of the possible consequences. For out-of-school suspensions lasting up to and including 10 days, the student must receive oral or written notice of the charges. If the student denies the charges, school administrators must provide an explanation and evidence and offer the student a chance to present his/her side of the story at an informal hearing. Frequently, the notice and hearing will take place at the same time in the disciplinarian’s office. If a student poses a risk or ongoing threat, the student may be immediately removed from the school, even though notice and the chance to explain must be given before consequences are determined. If a student is suspended for 10 or fewer days, the school need not give the student an opportunity to retain legal counsel, cross-examine witnesses, or call his/her own witnesses. However, parents who disagree with a suspension of 10 or fewer days may appeal the decision to the school’s superintendent according to the district’s policies.

In Ohio, any out-of-school suspension of more than 10 days is considered an expulsion. Students who face being excluded from school for longer than 10 days have certain rights. For example, the school must provide a written notice of the intent to expel to the student’s parents (or to the student, if 18 years of age). This initial notice must outline the infraction and set a date for a hearing not
longer than 10 days after the student’s removal from school, to be conducted by the superintendent or representative. The student must be allowed to hear evidence against him/her, present his/her own evidence, and bring legal counsel. The hearing must be recorded to create a permanent, verbatim transcript of the proceeding.

If, at the hearing, it is decided that the student should be expelled, the district must send a second notice to the student outlining the length of the expulsion and his/her right to appeal to the Board of Education and state court. In Ohio, a student generally may be expelled for no more than 80 school days (which may extend into the next school year). For specific infractions, including drug or weapon offenses, a student over age 16 may be permanently expelled. A student, unless disabled, is not eligible to receive educational services from the expelling school; nor does the student have a chance to make up missed work. Nevertheless, the student may apply to receive educational services from another public or private school in the state during the period of the expulsion. The other school may, but is not obligated to, accept the student into regular classes or provide educational services until the student fully serves the expulsion term. However, any grade or credit earned at the other school during the time of the expulsion will not be applied to the student’s record in the expelling school. Due to state and local school boards’ zero tolerance policies, expulsions occur more frequently than in the past. Under the zero tolerance policy, anyone bringing drugs, firearms, knives, or other weapons to school may be expelled. School districts may decide to include medicines or pocket knives in this list.

These general provisions are modified for students that have been identified as or suspected of having a disability. For such a student, educational services must be continued, according to the Individualized Education Plan (IEP), during periods of discipline beyond 10 days. If the student’s conduct: 1) was caused by, or was directly and substantially related to, the disability; or 2) was the direct result of the school’s failure to implement the IEP, then the behavior is considered a “manifestation” of the disability. Schools now may remove a student with disabilities who possesses drugs or weapons in school, or inflicts serious bodily injury on another person, even if the infraction is a manifestation of a disability, for up to 45 days. If the disabled student is removed from school, the district must continue to educate the student in an interim alternative educational setting. (See sections later in this chapter for a more detailed explanation of discipline provisions as they apply to children with special needs.)

**Student Right to Privacy**

Increasingly, school districts are turning to traditional law enforcement techniques to secure their buildings and prevent drug or weapon use on school grounds. In Ohio, only law enforcement officials may carry guns onto school grounds. Also, no person may enter a school building with a concealed weapon, even if certified to carry a concealed weapon. Schools may use metal detectors to help ensure student safety.

Similarly, locker searches conducted by school officials are permitted in emergency situations. A district’s board of education may authorize random locker searches, as long as notice is posted in a conspicuous location. School boards also may specifically grant school administrators the authority to search a locker when there is reasonable suspicion that the locker contains evidence of violations of law or school rules.

Searches of other personal property or persons are more strongly regulated, although they do not require a warrant. A school administrator may search a student or a student’s belongings if there is good reason to believe an inappropriate item will be found. School officials must be especially careful about justifying a search of a student’s person, and about conducting the search so that it is limited in scope and not overly intrusive.

**Harassment**

*Harassment* refers to severe, pervasive, or objectively offensive conduct based upon a
student’s actual or perceived race, color, national origin, gender, disability, sexual orientation, religion, or other identifying characteristic. Harassment includes physical, emotional, and/or sexual conduct that causes harm to the targeted student, often affecting a child’s performance in educational or social activities. Bullying (using power inappropriately to intimidate or harm another) also may affect a student’s school performance, but is not necessarily related to the target’s race or other identifying characteristic.

Federal laws prohibit particular types of harassment, but no comprehensive law addresses all forms of harassment in schools. At this time, there is no law specifically prohibiting bullying, though most schools prohibit all forms of harassment, bullying, hazing, and other behavior that interferes with learning. Also, the No Child Left Behind Act of 2001 requires school districts receiving federal money to provide a plan for making classroom environments conducive to learning and schools safe and drug free.

In Ohio, schools and teachers who are acting appropriately and seeking to help students develop their skills are protected from liability (civil or criminal responsibility) for ordinary school situations. Typically, schools and teachers are held liable for only the most severe cases of intentional misconduct. However, Ohio students must be supervised, and schools and their teachers may be held liable for foreseeable injuries if supervision is inadequate. Also, schools must respond to code of conduct violations and respond in a timely manner to harassment complaints.

Child Abuse Reporting Obligations

Ohio has laws aimed at protecting children from abuse and neglect. Child abuse is actual, deliberate physical or mental injury or death or the threat of injury to a child’s health or welfare. Abuse includes inappropriate sexual behavior. The definition of child neglect is broader and includes situations where parents refuse to provide proper or necessary subsistence, education, or either physical or mental health care.

Under Ohio law, mandatory reporters must immediately report child abuse or neglect to local law enforcement or human services agencies. Mandatory reporters include teachers and other authorized school employees, counselors, health care professionals, child care workers, attorneys, priests and others who work closely with children or are charged with protecting children. Mandatory reporters must report any known or suspected abuse or neglect and cannot be sued for following through on this obligation. If they fail to report known abuse or neglect, they may face both criminal and civil liability.

Other community members are not required to report abuse or neglect, but they may choose to contact law enforcement or human services agencies with good faith reports of possible abuse or neglect.

Special Education

General Provisions

In general, the federal Individuals with Disabilities Education Act (IDEA) was passed to ensure that: 1) all children with disabilities a free, appropriate public education that meets their unique needs and prepares them for employment and independent living; 2) the rights of children with disabilities and parents of such children are protected; and 3) states and localities receive support in educating disabled students. Also, the Act provides for assistance to states in developing early intervention services and educational assessment tools.

Early Intervention Programs

IDEA provides for early intervention services for children from birth until age three if they: 1) are experiencing a developmental delay in one or more areas or 2) have a diagnosed physical or mental condition that is likely to result in developmental delay. Developmental delay is a delay in one or more areas of development (cognitive; physical, including vision, hearing and nutrition;
communication; social or emotional; and/or adaptive behavior).

In Ohio, the Ohio Department of Health (ODH) provides early intervention services under the “Help Me Grow” (HMG) system. The ODH makes IDEA funds available to county Family and Children First Councils (FCFC), which administer Ohio’s early intervention programs. These funds may be used to maintain a system of services for eligible infants and toddlers, provide direct services for eligible children if not already provided by other public agencies or private sources, and to expand services for eligible children.

The state of Ohio, through its local agencies, must identify and evaluate all eligible infants and toddlers at no cost to the family. Children from birth to three years who are referred for services must receive a developmental screening within 45 days of referral, and eligibility must be determined within 45 days following the screening by a Developmental Evaluation Team, which includes the parents and at least two qualified personnel from two different disciplines.

Eligible children must be provided many services at no cost. In certain circumstances based on need, specialized services such as counseling, nursing, health services, therapy, and transportation also may be paid for through IDEA funds. Within 45 days of eligibility determination, an Individualized Family Service Plan (IFSP) is prepared. The IFSP identifies the services to be provided to an eligible child and includes a summary of the child’s development, the family’s resources and concerns about the child, outcomes to be achieved, and a list of resources. Specific services must be identified and provided, if possible, in the child’s natural environment. Individualized Family Service Plans must be reviewed 120 days after services begin, and at least once a year afterwards.

In addition, a licensed professional (in nursing, social work, early childhood education or a related discipline) with a minimum of two years’ experience working with children age birth to five must coordinate the delivery of services to the child with a variety of agencies. This service coordinator also helps the child to transition to preschool or to the local school district.

**Early Intervention Procedural Safeguards**

Parents whose child is receiving early intervention services must be notified regularly of certain procedural rights such as the right to receive written notice before any change of service and the right to administrative review of complaints. Parents must give written consent before their child can receive any evaluation or services. For more information on Ohio’s Early Intervention Program (age 0-3), visit the Ohio Department of Health’s Web site at http://www.odh.state.oh.us/ODHPrograms/EI/earlyint1.htm.

**Child Identification Requirements**

Each state must have a program to identify, locate and evaluate children requiring special education and related services. The program must include highly mobile children with disabilities, such as migrant and homeless children, and those who continue to advance in school, but need special education.

Ohio’s state rules make each school district responsible for identifying, locating and evaluating all children below age 22 living within the school district who need special education and related services.

**Free Appropriate Public Education**

The IDEA also requires school districts to provide all eligible students with a Free Appropriate Public Education (FAPE). Free Appropriate Public Education is special education and related services that: 1) have been provided at public expense, under public supervision and direction, and without charge; 2) meet the standards of the state’s educational agency; 3) include an appropriate preschool, elementary or secondary school education in the state involved; and 4) meet the IEP requirements. Each school district
must adopt and implement written procedures ensuring FAPE to all children with disabilities, aged three through 21 years.

Evaluations and Re-evaluations of Students with Special Needs

Under IDEA, school districts must conduct evaluations and reevaluations to determine initial and ongoing eligibility for special education and related services. Before conducting such an evaluation, a district must get consent from parents or legal guardians, and must explain, in writing, the district’s proposed evaluation procedures.

Following an initial evaluation to determine the educational needs of a child with a disability, the district must re-evaluate the child at least once every three years, or at the request of a parent or teacher, or if conditions warrant a re-evaluation. However, re-evaluations may not require new assessments in all educational areas. The IEP team may waive additional testing of the student if it finds that existing evaluation data is sufficient. A re-evaluation is required before a district can determine that a student no longer qualifies as a student with a disability.

The district must test all suspected areas of disability and educational need, and may not use only one procedure as the sole criterion for determining eligibility or an appropriate program for a student. When evaluating a student, the district also must consider information provided by the parents and professionals working with the child. Parents who disagree with the results of the district’s evaluation can request an Independent Educational Evaluation (IEE) at public expense.

Role of the Individualized Education Plan (IEP) and the IEP Team

The IEP is the written plan of specific special education and related services designed to meet the unique educational needs of a child with a disability. Each child with a disability should have an IEP in effect on the first day of school each year, and it must be implemented as written. The IEP is a working document, generally reviewed and revised at least once a year. It is put together by the IEP team, which must include the child’s parents; at least one of the child’s regular education teachers (if the child participates in the general curriculum); at least one of the child’s special education teachers; a qualified district representative who can provide resources and help implement a curriculum for the child; someone who can interpret evaluation results and implications for instruction; and the child, if appropriate.

At a minimum, according to Ohio law, an IEP should outline:
- the child’s present levels of performance;
- short-term goals and instructional objectives;
- measurements, criteria, and a schedule for evaluation;
- a statement outlining the specific special education services to be provided and the extent to which the child will participate in regular education programs,
- when services will start and how long they will last;
- how services will be delivered; and
- any modifications or additions to the proposed program to fit the particular needs of the child.

When putting together a plan, the IEP team must review special factors and other considerations, including the need to address behavior, English proficiency, visual impairments, communication, assistive technology devices and services, physical education services, extended school-year services, transition services to students age 16 or over, and state- or district-wide assessment requirements.

Resolving Disagreements Concerning Special Needs Children

Disagreements between parents and the school district regarding a child’s special education services may be resolved informally by bringing an expert, advocate, or attorney to an IEP meeting, or discussing the matter with the school’s special education coordinator. If informal methods are ineffective, the Ohio Department of
Education (ODE) provides a free mediation service to resolve special education disputes. Also, parents may file a written complaint with the ODE. Finally, if those resolution methods do not work, parents or districts may file a request for an impartial due process hearing.

For additional information concerning all aspects of special education in Ohio, visit ODE’s Web site at: http://www.ode.state.oh.us/.

Identification of Gifted and Talented Students

Ohio recognizes the specific challenges and benefits of instructing gifted and/or talented children. All Ohio school districts must have a plan or local board policy, approved by the ODE and distributed to all parents, to identify gifted and talented children in their schools. This identification must be based on tests and check-lists that appear on an approved list prepared by ODE and assessments must be available on a regular basis. In their screening assessments, districts must include children who are culturally and linguistically diverse, come from low socio-economic backgrounds, and children with special needs.

In Ohio, children may be identified as gifted in four different categories: superior cognitive ability, specific academic ability in a field (including math, language arts, science, or social studies), creative thinking ability, and visual/performing arts ability. Each field has its own criteria, which must typically be met on a measurement within the preceding two years for the assessment to be valid.

During the identification process, parents must be notified about assessment results and about whether the child has been identified as gifted and/or talented. Parents also may submit assessments performed outside the district by trained personnel for consideration. A parent who disagrees with the district’s determination may appeal according to school board policy.

While Ohio schools must have a plan for identifying gifted and talented students, they do not have to provide special services for these students. For complete information concerning Ohio’s gifted and talented programming, visit the ODE Web site at: www.ode.state.oh.us/.

Federal Legislation and Education

A number of federal acts or amendments affect any U.S. educational programs. Many of these acts or amendments apply to all schools in the state that receive federal funds, including all public schools and most private schools. Religious schools, however, may not be subject to some of the requirements of the federal acts or amendments listed below.

Title IX

Established to promote gender equality in schools, Title IX of the Educational Amendments of 1972 prohibits any federally funded educational programs or activity from discriminating based upon sex. Title IX extends to all areas of public schooling and protects all students and employees of educational institutions that receive federal funds.

Each school must have a Title IX Coordinator who works with the Office of Civil Rights within the U.S. Department of Education to enforce Title IX policies. The Office of Civil Rights protects the anonymity of anyone who files a complaint, and the institution that is the subject of the complaint must not retaliate against someone who complains. Any school that does not comply with Title IX may have to pay money, including any attorney fees, to the person who brought the complaint. Also, violations of Title IX may jeopardize the school’s federal funding.
Section 504 of the Rehabilitation Act of 1973 / Americans with Disabilities Act

Section 504 of the Rehabilitation Act of 1973

The Rehabilitation Act of 1973 made it unlawful to discriminate against individuals with disabilities in activities funded by federal subsidies or grants. Section 504 of the Act covers all public or private programs or activities that receive federal assistance, and therefore includes all public elementary and secondary schools and most colleges and universities. According to Section 504, schools may not discriminate against students with disabilities and must provide such students with reasonable accommodations and, in some cases, services. Section 504 protects individuals with impairments that substantially limit a major life activity, such as learning. Unlike IDEA, which covers students in public schools until age 22, Section 504 covers all individuals no matter the age. For example, college students are covered, as are employees if they work for a company that receives federal funds.

Section 504 requires that knowledgeable people from a variety of sources determine students’ eligibility. Eligible students are entitled to a Section 504 plan to address their educational needs. Students may receive their services in the regular classroom or a special education room, based on individual needs. Schools must re-evaluate students periodically or before a significant placement change is made. Although a plan must be developed to outline services under Section 504, it is not as detailed as an IEP written under IDEA, and does not address implementation accountability. Also, parents of children under age 18 may help develop the plan, but do not have the procedural safeguards provided in IDEA to help them enforce the plan. There is a free appropriate education requirement under Section 504, but it is not as encompassing as the requirement under IDEA. All students who are classified under IDEA are also covered by nondiscrimination under Section 504. Because the eligibility definition under Section 504 is broader, however, not all students on 504 plans may be covered under IDEA.

Americans With Disabilities Act of 1990 (ADA)

In 1990, Congress enacted the American with Disabilities Act (ADA), a civil rights statute extending the concepts of Section 504 to: 1) employers with 15 or more employees; 2) all activities of state and local governments, including employment and education; and 3) all places that offer goods and services to the public. The Act requires public places to make reasonable modifications to policies, practices, and buildings unless those modifications would fundamentally alter the nature of the services or be an undue burden.

The regulations of the ADA parallel Section 504 regulations. While most schools provide Section 504 plans rather than ADA plans, school districts must have an ADA policy and make it available upon request to parents. Neither Section 504 nor the ADA covers active alcohol or drug users.

No Child Left Behind

The aim of the federal No Child Left Behind Act of 2001 was to improve schools nationwide by addressing standards and accountability, providing more choices for parents, increasing local control and flexibility, and using teaching methods that scientific research supports.

No Child Left Behind requires schools to implement a statewide accountability system to ensure continual and substantial academic improvement for all students. This accountability system (Adequate Yearly Progress, or AYP), seeks to narrow the achievement gaps among students by requiring schools and districts to
report achievement ratings of state-developed annual goals to the state. The achievement ratings, gathered through the use of a statewide assessment, determine how well schools are performing.

The statewide assessments are based upon annual measurable goals for reading and mathematics. The state determines what percentage of students must test as proficient on these assessments for a school or district to be “adequately progressing.” Also, 95 percent of all students must participate in the statewide assessment based upon these annual objectives for a school to meet AYP. Elementary and middle schools also must maintain a certain attendance level, and secondary schools must maintain a certain graduation rate. A school district that does not have the necessary percentage of proficient students still may meet the AYP standard if it has reduced the number of non-proficient students by at least 10 percent from the previous year’s report.

If a school and/or district fails to meet the state’s AYP standard, the state will apply sanctions (such as requiring implementation of a school improvement plan) to bring about improvement. If a school fails to meet the AYP standard for two years in a row, the school will earn “School Improvement Status.” Students enrolled in such a school can choose to enroll in another of the district’s schools that is not under “improvement” status. This is known as school choice. Schools that continue to fail to make AYP will receive supplemental services from the state and other arrangements may be made for the school’s management. For example, such a school may be closed and reopened as a charter school, or school staff may be replaced.

In response to the No Child Left Behind Act, Ohio has restructured its assessment methods to enhance student learning and instruction. Proficiency testing will be phased out as new assessments (such as the Readiness Assessment-Literacy test in kindergarten and the Ohio Graduation Test (OGT) for 10th grade students) are implemented.

Family Educational Rights and Privacy Act / Student Records

The federal Family Educational Rights and Privacy Act (FERPA) protects the confidentiality of educational records maintained by any educational institution receiving federal funds (or by someone acting for the institution). FERPA provides parents and eligible students (those beyond age 18 or in a post-secondary program) certain rights regarding records, files, documents, or other materials containing personal information about the student. Some information (such as name, address, phone, degree, etc., as might be found in a directory) can be disclosed without the student’s consent, but affected parents and students must be notified first.

There are some exceptions to the general rule that the school cannot disclose information without parent consent. For example, the school may release educational records to other school officials who have a legitimate educational interest in the information, or information may be shared in an emergency to protect the health or safety of the student or others. Each school must comply with FERPA and notify parents and eligible students annually of their rights. For more information about FERPA, visit the U.S. Department of Education’s Web site at: http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html.
Chapter Summary

- A child may attend a public school without tuition payment if his or her parent lives in that school district. There are also other circumstances in which a child can attend a public school without tuition, such as when a child lives with someone other than a parent or receives special education.
- Ohio mandates compulsory education for all children living in Ohio who are between six and 18 years of age. Attendance is required until the student meets the state’s minimum standard and receives a diploma. However, this requirement may be waived or modified if a child has a valid medical excuse, the parents decide to educate the child at home, or the child is eligible for an age or schooling certificate.
- According to Ohio law, parents are responsible for making sure their children are not truant from school.
- There are several state-approved alternatives to public education. In certain situations and through a “voucher” program, public funds may be available for students to attend private schools. Also, the Ohio legislature has established agencies to supervise charter schools in Ohio; these schools have more autonomy than traditional public schools.
- Traditional public schools and charter schools are funded on a per-pupil basis by the state according to certain formulas, and local school districts also receive funding through local property taxes. Private or parochial schools are funded through tuition costs, fundraising, donations and private grants, and (if they meet federal and state requirements) state grants.
- Students do not lose their First Amendment rights when they enter school, but public, private and parochial schools may limit students’ rights to express opinions when the expressions are vulgar or offensive, or when the interfere with the educational instruction of other students.
- In Ohio, school officials generally may discipline a student for conduct that disrupts the school day or endangers the health or welfare of the student or others.
- Students have some limited privacy rights. Schools may use metal detectors and, in emergency situations, locker searches. In some cases, a school administrator may search a student or a student’s belongings if there is good reason to believe an inappropriate item will be found.
- The No Child Left Behind Act of 2001 requires school districts receiving federal funds to provide a plan for making classroom environments conducive to learning and schools safe and drug free. While federal laws prohibit particular types of harassment, however, no comprehensive law addresses all forms of harassment in schools.
- Under Ohio law, mandatory reporters must immediately report child abuse or neglect to local law enforcement or human services agencies. Mandatory reporters include teachers and other authorized school employees.
- The Individuals with Disabilities Education Act (IDEA) provides for free and appropriate public education, including early intervention services, for children with special needs. The Ohio Department of Health (ODH) also provides early intervention services through its “Help Me Grow” program.
- Each state must have a program to identify, locate and evaluate children requiring special education and related services.
- Under the IDEA, school districts must determine initial and ongoing eligibility for special education and related services by conducting evaluations.

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Chapter Summary  continued

- The Individualized Education Plan (IEP) is the written plan of specific special education and related services designed to meet the educational needs of a child with a disability.
- All Ohio school districts must have a plan or local board policy to identify gifted and talented children in their schools, although they are not required to provide special services for these students.
- Title IX of the Educational Amendments of 1972 prohibits any federally funded educational program or activity from discriminating based upon sex.
- Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 make it unlawful to discriminate against individuals with disabilities in activities of the federal government and in all places that offer goods and services to the public.
- The No Child Left Behind Act of 2001 requires public schools to implement, at the state level, an accountability system that will ensure continual and substantial academic improvement for all students.
- The federal Family Educational Rights and Privacy Act (FERPA) protects the confidentiality of educational records maintained by any educational institution that receives federal funds. With some exceptions, the general rule is that a school cannot disclose information about a student without parental consent.

Web Links:

OSBA’s “Law You Can Use” articles:
(go to http://www.ohiobar.org/pub/lycu and search for article by title or by topic)

- “No Child Left Behind Act’ Aims To Foster School Accountability”
- “Circumstances Say Whether Minors Are ‘Emancipated’”
- “Grandparents Can Get Authority To Make School Decisions for Grandchildren”
- “Mediation Program Helps Prevent Truancy in Ohio”
- “Ohio Law Says Where Students Can Attend School Tuition-Free”
- “Ohio To Ensure ‘No Child Left Behind’”
- “Parents Must Take Responsibility for Truant Students”
- “Public Schools May Test Students for Drugs under Certain Circumstances”
- “Schools Must Follow Procedures To Suspend or Expel Students”
- “What You Should Know about Home Instruction”
- “What You Should Know about Home Schooling”

U.S. Department of Education’s Web site:
http://www.ed.gov/index.jhtml

Ohio Department of Education’s Web site:
http://www.ode.state.oh.us/
Part XIII

cyberlaw

“Laws too gentle are seldom obeyed; too severe, seldom executed.”

– Benjamin Franklin

Cyberlaw refers to the rules and regulations established by Congress, legislatures, courts, and international conventions to govern, prevent and resolve disputes that arise from the use of computers and the Internet.

Privacy of Online Communications

Before the advent of the Internet, there were fairly simple dividing lines between what information was widespread (reported in the media), what information was publicly available, but required effort to obtain (public records) and what information was private (more or less everything else). These dividing lines were presumed when most of our current public-records laws were enacted—before the Internet era.

How has the Internet blurred the dividing lines between public and private information? First, all sorts of “public” information, previously available only in hard copy to those who visited a courthouse file room or a county recorder’s office, is finding its way onto the Web. Social Security numbers, signature specimens, detailed personal financial information, mothers’ maiden names and credit card numbers are now available online to anyone in the world. Currently, there are few restrictions regarding the type of information courts and government agencies can place online. In addition, individuals who previously used letters and telephone calls to communicate now use the Internet for their personal communications. As a result, these private communications have a greater potential to become public even if the individuals who are communicating do not intend to make their communications public.

E-Mail

E-mail communications, like regular mail communications, are meant to be private. There are federal laws that prohibit the interception and disclosure of e-mail communications. For example, the Electronic Communications Privacy Act makes it a federal crime in many cases to intercept electronic communications, including e-mail, voicemail and FAX transmissions that have been sent by other people. However, individuals should not send e-mail messages expecting that they will remain private, nor should they assume that the laws would be enforced against anyone who discloses the messages. A single e-mail message may travel through many computers, even computers outside of the United States, before arriving at an intended recipient’s computer. As the message travels, copies may be made at each of these intermediate computers. An individual’s message may be shared with others accidentally, even with others outside the United States.

To enhance the privacy of e-mail communications, individuals can encrypt messages before sending them. Encryption software used for e-mail messages typically scrambles the message content so that only the intended recipient can read the message. Some e-mail programs include tools to encrypt messages before they are sent. If an individual’s e-mail program does not support encryption, he or she may use a separate program to encrypt messages before sending them.

Another common practice is to add a confidentiality notice to the message. Most confidentiality notices state that the message is intended only for the person to whom it is addressed and may contain confidential information. The notice also prohibits the dissemination or distribution of the message to other parties. Although such a notice does not ensure that a message will remain private, it may
stop the recipient from revealing the contents of the message to others.

When an individual deletes an e-mail message appearing on his or her computer screen, typically only the copy of the e-mail being viewed is deleted. The default settings of many e-mail programs do not remove the message from the user’s computer even though an individual’s e-mail program says the message has been deleted. Many e-mail programs only move the selected message to a “deleted items” or “trash” folder. These folders of deleted messages may be accessed and viewed at any time as though the messages were never deleted. When a message is finally deleted from the Deleted Items or Trash folder, it is no longer accessible through the e-mail program; however, inexpensive “undelete” software and/or more sophisticated forensic analysis software often can recover the deleted message from a user’s hard drive.

In addition, copies of the e-mail message may remain at one or more other computers through which the message has traveled on its way to the recipient’s computer. Further, the sender and recipient of the e-mail message may have sent a copy of the message to many other recipients. Backup copies of the message also may have been created at each of the computers through which the message traveled. As a result, copies of the deleted e-mail message still may exist on a remote server, tape backup, or someone else’s computer years after it was deleted from the user’s computer.

So, although a privacy notice may be honored by a recipient, an e-mail sender should be aware that such notices cannot guarantee that an e-mail message will remain private.

**Chat Rooms**

Individuals participating in chat rooms assume the risk for their activities. It is a common practice for an individual to hide his or her identity while online. Many Internet service providers (ISPs) are willing to maintain the confidentiality of their members’ identities. When a person believes his or her real identity is protected, that person may share thoughts and comments more freely, even thoughts and comments that others find offensive, objectionable, or defamatory.

Some ISPs have service agreements that attempt to regulate their members’ actions in chat rooms, as well as with other electronic communications. However, ISPs are not always willing, or even legally obligated, to resolve a complaint by one member against another member. An individual who believes another Internet user has harmed him or her should consult an Internet law attorney to get help understanding his or her rights.

**Web Tracking**

Inexpensive telecommunications, such as the Internet, combined with inexpensive computing power, makes it easier to gather detailed information about individuals. On the private side, Web advertisers use cookies to track people’s Internet use, maintaining data files on millions of consumers with hundreds of data fields per consumer. (Cookies are files stored on a hard drive that a Web site server gives to a browser the first time the user visits the site and that are updated with each return visit.)

Recent federal legislation permits banks and financial institutions to sell to third parties, such as marketing agencies, all the information they have about their customers (on- or off-line), except for customers who specifically opt out. Under the 1999 Gramm-Leach-Bliley Act, financial institutions are required to notify their customers about their privacy policies and practices and to notify them of their right to opt out of the sharing of protected information with non-affiliated entities, except in limited cases. Since the Federal Trade Commission has recommended that no new privacy legislation regarding the Internet be introduced for the time being, it is unlikely that Internet privacy issues will be addressed in the near future. Also, post-September 11 legislation gives law enforcement personnel far more power to monitor and intercept information sent via the Internet.

In the near future, all cell phones should be able to transmit information about the location of
cell phone users whenever they are switched on. (The Federal Communications Commission required this “enhanced 9-1-1” service, but the requirement that mobile phones transmit location information was never limited to 9-1-1 calls.) This location data could allow companies to match the Web-browsing habits of targeted individuals with the driving habits of those same individuals in order to decide where to locate a new bridal shop or toy store. Or, a Web-enabled cell phone might beep with a special offer as a driver nears a certain restaurant. Such uses of location data may be commercially reasonable, but unprotected location data also could be sold to third parties. Therefore, cell phone users should be aware that their movements can be monitored when using a cell phone and may not remain private.

**Cyberspace On The Job**

Many employers provide employees with the equipment necessary to access the Internet and the Web to fulfill their job responsibilities. Therefore, an employer has the right to monitor and control the use of the equipment and an employee’s activities on the Web. Furthermore, employers must comply with federal and state workplace regulations. Employers have a duty to protect their employees from certain actions and can be liable to their employees for failure to take precautions. For example, employers have a duty to protect employees from sexual harassment. Consequently, they can prohibit an employee’s use of the Internet or Web sites to access or distribute unacceptable content.

Many employers have an Internet-use policy to inform their employees about what activities are permitted and what activities are prohibited. Most employers allow their employees to access the Internet for personal use as long as the use does not affect the employees’ job performance, consume significant resources, or interfere with other employees’ activities. Many employers do not regularly monitor their employees’ Internet use, but will inform their employees that messages and communications may be viewed publicly and inadvertently disclosed. Therefore, employees should not expect privacy when using the Internet at work. Employees should check with their employers to determine whether an Internet-use policy applies to their activities at work.

**Children’s Online Privacy**

Congress enacted the Children’s Online Privacy Protection Act (COPPA) in 1998 to regulate the online sharing of information by children. The law requires Web site operators to obtain verifiable parental consent before collecting, using, or disclosing to third parties information from children under 13.

The law covers information such as full names, addresses, telephone numbers, or any other contact or identifying information. Web site operators must provide e-mail notice to parents of their use of such data. Parents may allow operators to use the data, but also can limit a Web site from disclosing the information to third parties. Parents also may review the data submitted by their children and bar further collection and use of the data.

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**What individuals can do to protect their privacy when using the Internet:**

- Don’t click on links in e-mails to log into your bank, credit card, utilities or other important accounts. Instead, independently open your browser to log into these accounts.
- Create a password known only to you and avoid using personal information, such as your address or birthday, when creating it; change your password often and don’t share it.
- If you are not willing to use different passwords for each different Web site, at least use a different password for financially related accounts than you use for general Web sites.

*Continued on page 189*
What individuals can do to protect their privacy when using the Internet: (continued)

• If you cannot memorize all of your different passwords, at least store any written lists of passwords in a secure location.
• If you store lists of all your on-line accounts and passwords in a computer file such as a Word document, make sure this file is password protected.
• Unless you are using an encryption program with e-mail, be mindful that your e-mail messages could be intercepted and exploited by a third party without your knowledge.
• Whenever a financial institution sends you a disclosure document, read the fine print, find out how to opt out of information sharing, and opt out.
• Install an Internet firewall program and/or a firewall router to prevent unauthorized access to your computer and unauthorized transmissions from your computer.
• Use updated anti-virus software.
• Use updated spyware detection software.
• Use a browser that allows you to turn off cookies except for specific Web sites of your choosing.
• When giving information that will end up in a public record, provide only the minimum necessary, and if the information is for a court proceeding, consider asking for a protective order to restrict the scope of the disclosure.
• Review your credit reports once a year. You are entitled to receive one free credit file disclosure every 12 months from Equifax, Experian and TransUnion. (see AnnualCreditReport.com for details).
• Write to your legislators and express your opinion regarding what types of privacy should be protected by new legislation.

Using Online Information

Intellectual property laws protect those who create property that comes from the work of the mind, such as an invention, a program, a method, a painting, or a trade secret. Creators of certain types of intellectual property may protect their interests, for example, by registering a copyright or trademark, or by applying for a patent.

When using online information, it is important to understand that certain material is protected by intellectual property laws just as any hardcopy book or recording is protected. Therefore, it is important for those who use online information to understand how to appropriately use this information.

Intellectual Property and “Fair Use”

Individuals are free to view online content made available on an Internet Web page, although they may not be free to download, copy, print, or save this information. Some Web site operators will tell individuals what they can and cannot do with the information that is available from a particular site. In some cases, individuals may be asked to review a document while online and agree to the terms of use before viewing the information. In general, individuals must obtain permission from the copyright owner to use this information. If, however, an individual intends to use the information in a way that falls within a fair use exception, then that individual is not required to get the copyright owner’s permission. Courts consider the following factors in determining whether a use is a fair use:

• the purpose and character of the use;
• the nature of the work;
• the amount of the work involved; and
• the effect of the activity on the market for the original work.
The doctrine of fair use typically permits reproduction for scholarship and research (among other certain restricted uses), i.e., where society believes making information publicly available and useable increases its general welfare. For example, copying a page from an encyclopedia at the public library for personal use is probably a fair use. However, an individual is likely to run into trouble if he or she makes multiple copies and uses those copies for trade or business. This is why it is prudent to ask permission before using such information in any commercial setting. Unfortunately, deciding what is a fair use is often difficult, and may require the advice of an intellectual property (“copyright”) lawyer.

Authors are free to upload their original material (add it to an existing Web site). For example, an individual who has snapped some family photographs is free to post those photographs at his or her own Web site. An individual who does not know or is uncertain who owns the material to be uploaded, or whether the proposed use of the material falls within a fair use exception, should contact an intellectual property law attorney. The attorney can advise that individual about his or her rights to upload the material in question.

Cybersquatting

Cybersquatters, also known as cyberpirates, are people who or companies that register trademarks as Internet addresses in bad faith for an improper purpose. Cybersquatters generally register Internet addresses so they can sell them back to a “squatted” company or business at excessive prices (sort of an Internet blackmail) or to tarnish or disparage another company’s brand. Cyberpirates also do the same thing with names of sports and entertainment celebrities.

According to Congress, the unauthorized registration and use of trademarks as Internet addresses have:

- resulted in consumer fraud and confusion;
- impaired electronic commerce; and
- deprived trademark owners of goodwill and revenues.

To remedy these problems, Congress enacted the Anti-Cybersquatting Consumer Protection Act.

The Act allows trademark owners to file a civil action against a person who had bad faith intent to profit from registering the trademark as an Internet address. Additionally, trademark owners can sue for statutory damages in the amount of $1,000 to $100,000 per Internet address and have the Internet address canceled or transferred to them if bad faith intent is proven.

In addition to the Act, trademark owners may use the Uniform Domain-Name Dispute Resolution Policy (UDRP) adopted in 1999 by the Internet Corporation for Assigned Names and Numbers (ICANN). According to the UDRP, an administrative panel must resolve Internet address disputes. Panel members consider factors such as whether the Internet address is confusingly similar or identical to the trademark, and if the Internet address was registered in bad faith. Unlike the Act, legal remedies under the UDRP do not include allowing trademark owners to sue for damages, though they do include canceling or transferring the Internet address.

Online Transactions

Increasingly, consumers are using the Internet for their personal transactions. They may buy gifts, clothes, books, insurance policies, or even cars online. Online transactions differ from “in person” transactions in several respects. For example, online transactions are commonly made between people who live in different states, or even different countries. Also, the customary signature used for face-to-face transactions has given way to other methods of “sealing the deal.” Consequently, it has been necessary for states and the federal government to develop new laws to govern online transactions.

State and federal laws govern online transactions in Ohio and elsewhere in the United States. Usually, the vendor defines the terms of the contract. The terms may be in a written agreement or implied by conduct such as exchanging
e-mail messages. Simple actions such as completing an online order form at a Web site and providing a credit card number to pay for an item may result in the formation of a contract. The contract is formed when the Web site accepts the order. Many Web vendors use clickwrap agreements that require a customer to review the terms of the agreement and select an option to agree or disagree before proceeding with the transaction.

Sales transactions, even those transactions completed online, are usually governed by state law. If two parties to a transaction are from different states, the question arises as to which state’s law should apply to the transaction. Many clickwrap agreements include “choice of law” provisions that determine which state’s law applies to the transaction. Usually, the vendor’s state law applies because the vendor is providing the clickwrap agreement. If the parties in a dispute have not agreed on a choice of law, the court will review the facts and circumstances of the transaction and select which state’s law to apply before proceeding with the dispute.

Federal laws also may apply to certain online transactions. Some online vendors, such as banks, are subject to federal as well as state regulations. The court will determine whether state or federal law applies to a certain issue in a dispute that involves an online transaction. (For a discussion of court jurisdiction as it relates to online activity, see “Personal Jurisdiction in Cyberspace” below.)

Digital Signatures

It is no longer necessary for an individual to physically place a signature on a piece of paper in order to enter into a contract. Instead, an individual may agree to buy insurance, sign a lease, arrange for utility service, or take out a loan by providing a digital, or electronic, signature online.

Digital signature laws are now in effect at both the state and federal levels. On the federal level, the Electronic Signatures in Global and National Commerce Act (E-SIGN), enacted in October 2001, is significant because it means that digital signatures are now valid for commercial transactions throughout the United States and for all international commercial transactions based on U.S. law. Although E-SIGN does not mandate the use of digital signatures, it does give them the same legal effect as manual signatures. Further, it specifically invalidates state laws requiring paper signatures, as well as state-level digital signature laws and court decisions with conflicting provisions. It also permits businesses to require digital signatures of their customers as a condition of doing business.

E-SIGN does have some limits. It applies only to commercial transactions. It does not apply to:

• wills and trusts;
• family law matters such as marriages, adoptions or divorces;
• court documents; or
• notices of termination of various sorts such as evictions, utility cutoffs, product recalls and insurance cancellations.

Although E-SIGN applies to the Uniform Commercial Code provisions for contracts and sales and written waivers, it does not apply to commercial paper, bank deposits and collections, letters of credit, warehouse receipts, investment securities, or transactions involving a security interest.

E-SIGN also provides a way for parties to choose not to use electronic contracts. Online companies must indicate whether paper contracts are available. They also must inform customers that, even if they have given their consent to use electronic documents, they can change their minds and request paper agreements instead. The notice must explain what fees or penalties might apply, if the company has to use paper agreements for transactions. The notice also must indicate whether the consumer’s consent applies only to the particular transaction at hand or whether the business has to get consent to use e-signatures for each transaction.
Ohio’s Electronic Transactions Law

Ohio enacted the Uniform Electronic Transactions Act in 2000. The law is similar to E-SIGN and supports the use of electronic commerce. It makes the electronic record of a transaction equivalent to a paper record and gives electronic signatures the same legal effect as manual signatures. This means that a contract formed through the use of an electronic record can be enforced. However, electronic records and signatures cannot be used when creating or executing wills and trusts.

The law applies only to transactions parties have agreed to conduct by electronic means. No one is forced to conduct electronic transactions; parties to a transaction must be given the opportunity to opt out.

The law also permits state agencies to use electronic records and signatures in performing their duties, but bars their use by the General Assembly, legislative agencies, and the Supreme Court of Ohio and other Ohio courts.

Personal Jurisdiction in Cyberspace

Jurisdiction refers to the court that will hear a dispute arising in the online environment. Jurisdiction in Cyberspace has become an increasingly important subject for both businesses and consumers. Businesses need to know what laws to obey, while consumers who make online purchases may not have an adequate remedy if they must pursue claims in foreign jurisdiction.

By its very nature, the Internet permeates the world. It has been observed that events on the ‘Net happen everywhere, but nowhere in particular. Local activity such as typing on a computer keyboard, then clicking a mouse, can literally have global effects. When disputes arise, where should Internet-related litigation between residents of different states and countries be heard?

Some jurisdictional disputes involve Web sites. A claim might arise in connection with the content of a particular Web site operated by an owner in one state that infringes on the protected rights—such as trademarks or trade names—of someone in another state. For example, let’s say a California company starts a new business and registers a domain name, such as “PAYMYBILLS,” that is similar to an existing Ohio company’s name, “PAYMYBILL.” If confusion arises among Internet users, causing the Ohio company to sustain damages, should the dispute be resolved in Ohio or California?

Another interesting example of a challenging factual scenario would be one of an Ohio resident who uses a computer system in California to post content on a Web site that a North Carolina resident claims is defamatory. Should the dispute be resolved in Ohio, California or North Carolina?

Or, what if you purchase over the Internet defective goods or products supplied by a company located in the United Kingdom? Where should that dispute be heard? Can you sue here, or must you travel to the foreign country? If the latter, you may not have meaningful recourse due to time and expense considerations.

There are no clear and easy answers to these questions. These are the types of issues that courts have grappled with recently with the increasing popularity of the Internet.

While early court decisions were inconsistent, the recent trend has been to return to the traditional tests for the assertion of personal jurisdiction that require a defendant to purposefully avail himself of the benefits of the foreign state before he can be subjected to suit there. So, it would be proper for a state to exercise jurisdiction over a non-resident if that person is “doing business” there, and deriving revenues and profits as a benefit.

Another trend in U.S. courts is that Internet usage is viewed on a sliding scale. If you merely advertise products or events to consumers in other states on a passive Web site, you will likely not be subjected to a lawsuit in the other states if there is a problem. For example, if a jazz club advertises on the Web its upcoming schedule of events, but the site does not permit you to order tickets, it would fall into the “passive” category.

On the other hand, if you advertise a product on a Web site that is active, permitting customers
in other states to order products, those states likely possess jurisdiction. A good example of an active site might be Amazon.com®, where you can shop online and make purchases using a credit card.

If the Web site falls somewhere between the two extremes, it is anyone’s guess as to the appropriate court for the dispute resolution. In such cases, courts will often look at whether or not the defendant targeted the impact in the other state, as opposed to unintended consequences that might occur there.

In all jurisdictional disputes, facts are very important and will be carefully examined by the court to insure that fair play and substantial justice are being observed. If that is the case, then the out-of-state defendant’s constitutional rights are protected, and subjecting that defendant to the jurisdiction of a foreign state is both fair and foreseeable.

**Liability for Online Conduct**

The Internet has greatly increased the amount of information, even seemingly private information, that is available to the average person. This easy access to information solves some problems and creates others. Gossip you pass to a neighbor might be considered libelous or even slanderous if shared in a chat room. Persons intent on causing trouble for a company can do so through the Internet with relative anonymity. The potential for copyright infringement is significant. While existing laws generally can be applied to these Internet-related situations, legal issues arise that are unique to online conduct. Therefore, laws governing online conduct are developing as use of the Internet grows.

**Defamation**

An individual’s communications in chat rooms and elsewhere on the Internet are subject to the laws of defamation. The laws of defamation include the law of libel, which applies to written statements, and the law of slander, which applies to spoken statements. A defamatory statement is a substantially false statement that causes damage to the reputation of another person or entity such as a corporation. (*See Part V, “Torts,” for more information.*)

Ordinarily, the law of libel rather than the law of slander governs defamatory statements transmitted through the Internet because the statements are written. Although statements made in a chat room are written and, therefore, subject to the law of libel, they are transitory and spontaneous and, therefore, very similar to spoken words. Consequently, the law of slander also may apply. In a defamation lawsuit, the court will decide which laws apply.

Regardless of whether the law of libel or slander applies, these laws have not been changed for electronic communications. Therefore, if an electronic communication includes a defamatory statement about another individual, the writer may be held liable for defamation.

Electronic communications are subject to other laws as well. For example, individuals may be liable for violating trade secret laws if they communicate their employer’s proprietary information to others outside of the company without permission. They also may be liable for violation of state and federal laws if their electronic communications relate to or support illegal activities.

**“Cybersmear” Attacks**

The Internet epitomizes the notion of a double-edged sword: it enables businesses to reach prospective customers and investors around the world, while at the same time equipping disgruntled employees, underhanded competitors and others with a convenient medium for airing venomous complaints that sometimes warrant retaliation. While it is fairly simple for companies to choose a legal response to such cybersmear attacks (such as defamation, interference with business relations, and misappropriation of trade secrets), the task of tracking down the often-faceless defendants can prove daunting. What,
then, is the best tactic for identifying anonymous online critics? Although a cybersmear on any company’s reputation can be made with relative or total anonymity, victims need not despair. A number of companies have succeeded in identifying anonymous culprits in “John Doe” suits designed expressly for that purpose.

Before filing suit on any substantive claims, the plaintiff must file a John Doe suit, naming the unknown poster as a “John Doe” defendant, and then subpoena the Doe’s identification from ISPs suspected of hosting the Doe’s postings. In some cases, John Doe subpoenas yield swift results. In others, however, the unmasking is not so easy. The vast majority of ISPs do not review their bulletin boards for obscene or profane material because federal law generally protects ISPs from content liability (see below). In addition, they are sometimes reluctant to play the “middle man” in John Doe suits.

The occasional reluctance of ISPs in responding to subpoenas is not the only bump in the John Doe road, however, as defendants frequently assert a right of privacy in their online anonymity. Ever-advancing technology is helping cyber-smearyers achieve almost indecipherable anonymity as the number of online encryption-for-hire services continues to grow.

The law in this area is evolving. Inevitably, the courts will be obliged to decide whether to establish new rules to streamline the now arduous John Doe identification process.

**Internet Service Provider Liability for Online Conduct**

If a subscriber to a particular Internet Service Provider (ISP) disseminates another’s copyrighted material or posts a defamatory statement, should that individual’s ISP be liable for the online conduct of its customer? Internet Service Providers argue that, because they are channels for sending information (like telephone companies), they should not be held liable for a subscriber’s online conduct.

Under the Digital Millennium Copyright Act (DMCA), ISPs can avoid liability for their subscribers’ posting of another’s copyrighted material if:

- they did not obtain any financial benefit from the copyright infringement;
- they did not have actual knowledge that the subscriber was transmitting copyrighted material; and
- after learning of the infringement, they acted quickly to remove the copyrighted material or disable access to it.

Under the law, ISPs must designate an agent to receive notices from wronged copyright holders and register the agent’s name and address with the U.S. Copyright Office. They also must develop a policy of terminating subscribers who repeatedly infringe others’ copyrights.

Under the Communications Decency Act (CDA), ISPs cannot be held responsible for the statements or comments of their subscribers. Under the CDA, it is the subscribers who are considered the “publishers” or “speakers” of any statements or comments they may post on the Internet through an ISP, so it is only the subscribers who can be held liable for any improper conduct.

For example, America Online® (AOL®) avoided liability under the CDA after it posted a defamatory story about Sidney Blumenthal, an assistant to former President Clinton. Matt Drudge, the online gossip columnist who writes the Drudge Report, posted a story alleging that Blumenthal had a history of spousal abuse. America Online ran the story after paying Drudge $3,000 per month for the right to post his column. After having received a letter from Blumenthal, Drudge and AOL retracted the story and issued a correction; however, Blumenthal sued Drudge and AOL for defamation. The court dismissed AOL from the lawsuit, ruling that the CDA shielded AOL from liability, even though AOL had paid Drudge for the right to post the story.
Chapter Summary

- Cyberlaw relies on common law and case law principles to resolve controversies that arise from computer activities. However, new laws are enacted when established law cannot provide a general solution.
- Contract law governs online transactions. Usually, the vendor defines the terms of the contract. The terms may be in a written agreement or implied by conduct such as exchanging e-mail messages.
- Sales transactions, even those transactions completed online, are usually governed by state law.
- Digital signature laws are now in effect at both the state and federal levels. The federal version, the Electronic Signatures in Global and National Commerce Act (E-SIGN), took effect October 2001.
- Individuals are always free to view online content, although they may not be free to download, copy, print, or save this information. Some Web site operators will tell an individual what he or she can do and cannot do with the information that is available from a particular site.
- Cybersquatters, also known as cyberpirates, are people who or companies that register trademarks as domain names in bad faith for an improper purpose.
- The advent of the Internet has blurred the lines between what is public and private information. Currently, there are few restrictions regarding the type of information courts and government agencies can place online.
- E-mail communications, like regular mail communications, are meant to be private. There are federal laws that prohibit the interception and disclosure of e-mail communications.
- Individuals participating in chat rooms assume the risk for their activities.
- Inexpensive telecommunications, such as the Internet, combined with inexpensive computing power, makes it relatively easy to gather detailed information about individuals. Web advertisers use cookies to track people’s Internet use, maintaining data files on millions of consumers with hundreds of data fields per consumer.
- Congress enacted the Children’s Online Privacy Protection Act (COPPA) in 1998 to regulate the online sharing of information by children.
- Many employers provide employees with the equipment necessary to access the Internet and the Web to fulfill their job responsibilities. Therefore, an employer has the right to monitor and control the use of the equipment and an employee’s activities on the Web.
- An individual’s communications in chat rooms and elsewhere on the Internet are subject to the laws of defamation.
- The Internet enables businesses to reach prospective customers and investors around the world, while equipping disgruntled employees, underhanded competitors and others with a convenient medium for airing complaints that sometimes warrant retaliation.
- Laws governing online conduct are developing as use of the Internet grows.
Web Links:

From the OSBA:
OSBA’s “LawFacts” pamphlets:
(go to http://www.ohiobar.org/pub/lawfacts/ and search by topic)
“Online Law”

OSBA’s “Law You Can Use” articles:
(go to http://www.ohiobar.org/pub/lycu and search for article by title or by topic)
“Consumers Should Exercise Care When Purchasing Health Products Online”
“Digital Signatures: Might You Sign a Contract without Realizing It?”
“Fair Use’ Doctrine Permits Limited Copying of Copyrighted Material”
“FTC Enforces ‘Consumer Protection’ Laws”
“Prepare to ‘Face the Music’ When Downloading from Internet”
“What You Should Know about On-line Shopping”

From other sources:
http://www.ftc.gov/bcp/edcams/kidzprivacy/
Children’s privacy and the Internet

Digital Millennium Copyright Act

http://www.copyright.gov/
U.S. Copyright Office

http://www.gseis.ucla.edu/iclp/bib.html
UCLA Online Institute for Cyberspace Law and Policy

http://www.ag.state.oh.us/
Search: Computer Crimes Task Force
Lawyers are officers of the courts and their services are essential to the effective operation of the legal system. Lawyers work under solemn duties of trust and responsibility to their clients. The purpose of this section is to discuss the profession of law, to describe the requirements for becoming a lawyer and to outline the standards of conduct lawyers must follow. The section also provides information about legal fees, bar associations and other professional organizations, and information on finding a lawyer.

The Legal Profession

Lawyers are members of a learned profession. Admission to the profession (or the bar) requires an undergraduate degree and specialized higher education.

What Is a Lawyer?

A lawyer, also known as an attorney-at-law or attorney or counselor, is someone licensed to manage the legal affairs of another person, to give legal advice, to help resolve disputes and, when necessary, to plead cases in court. The lawyer occupies a position of special trust in society. Clients regularly entrust their most important business and personal affairs and even their freedom to their lawyers. The lawyer has a confidential and individual relationship with each client. Within this relationship, the lawyer must always place the client’s interests above any of his or her own personal and professional interests.

A Lawyer’s Education

The Ohio Supreme Court controls the practice of law in Ohio, including the development and oversight of admission standards. Before being admitted to the practice of law in Ohio, an individual must, among other things, successfully complete both undergraduate and graduate-level studies.

Ohio’s educational requirements are similar to those of most states. According to the Ohio Supreme Court’s Rules for the Government of the Bar, a candidate for admission to the bar must earn a bachelor’s degree from a properly accredited college or university before being admitted to law school. The candidate must then earn a law degree from a law school approved by the American Bar Association (ABA).

There is no set curriculum for pre-law students; a bachelor’s degree in any field of study is acceptable. However, since words are the tools of the legal profession, expertise in their proper and effective use is a highly desirable attribute for a lawyer. A lawyer should be able to read quickly, write clearly and speak persuasively. A major or minor in English in undergraduate school is one way to prepare for the study of law. Other disciplines—philosophy, history, economics, journalism, political science, or business administration—also provide excellent pre-law studies. A background in science or engineering is an asset for certain specific areas of practice, such as patent law, construction law, environmental law, or computer law. Justice Felix Frankfurter (who served on the Supreme Court of the United States from 1939 to 1962) once advised a young candidate to prepare for the study of law by becoming well read and familiar with all the arts and sciences—in short, a cultured person. This advice is still sound.

The basic curriculum of an accredited law school complies with the requirements of various accrediting agencies. Approximately one-half of the courses taken by law students are required; the remaining courses are electives. The required courses cover the substance, theory and philosophy of the law, as well as its practice and
procedure. Emphasis is placed on developing and research, writing and speaking. The work is demanding. The average course load is 14 hours per semester, and at least two or three hours of concentrated study is required to prepare for every hour spent in class. To earn a law degree, a candidate usually must spend three years as a full-time student or four years as a part-time student.

A legal education does not end when a lawyer receives a law degree; it is a life-long proposition. Some lawyers obtain additional degrees in legal specialities. All lawyers must read the voluminous literature of the profession, engage in private study and attend regular continuing legal education seminars to learn about changes in the law and to improve their legal skills. In fact, the Ohio Supreme Court requires lawyers to attend 24 hours of continuing legal education (CLE) programs every two years to retain their licenses, including specific courses in legal ethics, substance abuse and professionalism.

Admission to the Bar

An undergraduate degree, admission to law school and a law degree are only some of the necessary steps an individual must take to become a licensed lawyer in Ohio. The prospective lawyer also must undergo a background investigation, successfully complete a comprehensive examination on the law (the bar exam), and, finally, take an oath of office.

A basic investigation of a candidate’s character and fitness to practice is completed while a candidate is in law school. Normally, this investigation is completed during the first year of law school and a report is forwarded to the Supreme Court of Ohio. When a candidate is ready to graduate from law school, an updated report is submitted to the Supreme Court of Ohio. The Court must approve a candidate’s character and fitness to practice law before he or she can take the bar examination. A candidate’s character and fitness are not taken lightly. The Supreme Court of Ohio, as part of its Summary of Character and Fitness Process, outlines a number of reasons a candidate may be not be approved.

The bar examination is a comprehensive test of legal knowledge and judgment that a candidate must pass in order to practice law in the state. One portion of the test, called the multi-state exam, consists of multiple-choice questions on general legal principles. Those questions are developed at the national level and used by many states as part of their bar examinations. In a second, Ohio-only portion of the exam, the Supreme Court of Ohio specifies the subject matter and number of questions posed on each area of law. Bar examiners (experienced lawyers appointed by the Supreme Court) prepare the questions and determine how the answers are to be scored. The questions are changed for each examination (two tests are held each year). On average, four out of five candidates pass the exam, although this varies from year to year.

The Court notifies all candidates of their individual bar exam grades. Successful candidates must take an oath of office, which is normally administered to all successful candidates together by a member of the Supreme Court of Ohio at a formal swearing-in ceremony in Columbus. The oath of office is not a hollow formality; rather, it distills the essence of lawyers’ duties concerning justice, the law and the courts, clients and the public. The oath reads:

I, (name), hereby (swear or affirm) that I will support the Constitution and the laws of the United States and the Constitution and the laws of Ohio, and I will abide by the Code of Professional Responsibility.

In my capacity as an attorney and officer of the Court, I will conduct myself with dignity and civility and show respect toward judges, court staff, clients, fellow professionals, and all other persons.

I will honestly, faithfully, and competently discharge the duties of an attorney-at-law. (So help me God.)

When the candidate completes the oath, he or she is officially an attorney authorized to practice in all Ohio courts.
Admission to Other Jurisdictions

Admission to practice in Ohio does not authorize a lawyer to practice before the federal courts, although generally, a lawyer must be admitted to practice in a state before he or she is eligible for admission to federal practice. Separate applications for admission to practice are required for each federal district court, each circuit court of appeals and the Supreme Court of the United States. Normally, admission to the federal system is by application and does not require an examination, although some federal courts do have admission examinations. For example, the District Court for the Southern District of Ohio requires lawyers to pass an admission examination covering federal practice and procedure.

Similarly, admission to practice in Ohio does not automatically authorize a lawyer to practice in another state. Different states have different requirements for lawyers who are already admitted to practice in another state. In many states, a lawyer who is in good standing in Ohio may be admitted to practice without taking that state’s bar exam. Also, most states will admit an attorney from another state by courtesy or pro hac vice for the purpose of participating in a single case. For example, an Ohio attorney representing an Ohio resident who was injured in an accident in Michigan may represent the client in a Michigan court providing that the attorney has sought and received admission by the Michigan court for that case.

When they become effective in 2007, the Rules of Professional Conduct will permit lawyers in good standing in other U.S. jurisdictions to provide legal services on a temporary basis in Ohio under certain circumstances.

Legal Ethics and Discipline

All attorneys are bound by a strict code of ethics. In Ohio, the code of ethics is presently called the Code of Professional Responsibility. Judges are also bound by an additional set of rules called the Code of Judicial Conduct. The discipline (punishment) for a lawyer’s violation of the Code of Professional Responsibility may range from a public reprimand to permanent disbarment. Judges may be disciplined and removed from office for violation of either the Code of Professional Responsibility or the Code of Judicial Conduct.

At this printing, the Supreme Court of Ohio has adopted The Rules of Professional Conduct. The rules are generally modeled on the Model Rules of Professional Conduct as promulgated by the American Bar Association. The new rules are effective February 1, 2007, and will change the information about professional responsibility that follows. To learn about these changes, go to the Supreme Court of Ohio’s Web site at http://www.sconet.state.oh.us and click on “Code of Professional Responsibility.”

The Code of Professional Responsibility

All states have codes of conduct for lawyers that are similar in most important respects. The Ohio Code is based on the Model Code of Professional Responsibility developed by the American Bar Association.

Ohio’s Code of Professional Responsibility is a list of principles organized into canons (general rules or standards of behavior) of ethics, ethical considerations and disciplinary rules. These disciplinary rules state the minimum standards of conduct that every lawyer must follow. The Code is summarized below:

• A lawyer must help to maintain the integrity and competence of the legal profession.
• A lawyer may advertise, but the advertisements must not be misleading in any way.

Also, there are restrictions on how clients may be obtained. For example, lawyers may not seek prospective clients by telemarketing or face-to-face solicitation.
• A lawyer’s fees must be reasonable. After full disclosure to the client, lawyers may divide fees between or among themselves as long as the total fee is reasonable and either: 1) the fee is divided based on the proportion of work performed; or 2) the lawyers enter a written agreement with the client stating that each of them will assume full responsibility for the representation.

• A lawyer should not bring an action, conduct a defense, take a position or otherwise take action for the purpose of harassing or maliciously injuring any person. Similarly, a lawyer should not present a claim or defense that cannot be justified under existing law, unless the lawyer can support the claim or defense with a good-faith argument that current law should be extended, modified or reversed.

• Once a lawyer has accepted employment, generally speaking, that lawyer cannot withdraw from a case without the client’s consent (or a court’s consent, or in some instances, the consent of both the client and the court). A lawyer who withdraws must protect the client’s interests. For example, the lawyer must return all of the client’s property, give the client copies of all important papers, refund any unearned portion of prepaid fees and inform the client of important dates and required actions.

• A lawyer cannot assist in the unauthorized practice of law, divide a legal fee with a non-lawyer or form a partnership with a non-lawyer where any of the activities of the partnership would constitute the practice of law.

• A lawyer must preserve the confidence and secrets of clients. A lawyer must avoid conduct—professional or personal—that conflicts with the interests of any client or tends in any way to interfere with the lawyer’s ability to exercise independent professional judgment on the client’s behalf. One lawyer (and, in general, one law firm) cannot represent multiple clients who have conflicting interests. (In certain cases, a lawyer may represent multiple clients, but only if it is obvious that he or she can adequately represent the interest of each and if each client consents to the representation after the lawyer has completely explained the possible effect of such representation on the exercise of his or her independent professional judgment on behalf of each.)

• A lawyer cannot accept any case that is beyond the lawyer’s competence and ability. Further, it is improper for a lawyer to attempt to handle any matter without adequate preparation. A lawyer must not neglect legal matters entrusted to him or her, nor try to limit his or her liability for malpractice.

• A lawyer is required to represent clients zealously, but always within the bounds of the law. A lawyer should not:
  o communicate directly with opposing parties who have legal counsel, but rather should contact the opposing parties through their attorneys;
  o give legal advice to an opposing party;
  o threaten criminal prosecution only to obtain an advantage in a civil matter; or
  o advise a client to ignore a court ruling (a lawyer may in good faith appeal or challenge the validity of a court’s ruling).

In representing a client in a proceeding, a lawyer cannot:
  o cite false authority;
  o assert personal knowledge about the facts of a case, unless the lawyer is a witness (in general, a lawyer cannot testify as a witness and be a lawyer in the same proceeding);
  o give a personal opinion about the justice of the case, the credibility of a witness, the probable guilt of a party or the guilt or innocence of someone accused of a crime, except in the course and within the scope of permitted argument;
  o fail to abide by known local practices without notifying opposing counsel; or
  o intentionally or persistently violate an established rule of procedure or rule of evidence.

• A lawyer is bound to help improve the legal system and the administration of justice.
• A lawyer must keep a client’s funds in a trust account (an account, or accounts, completely separate from the lawyer’s regular business or personal accounts) and never commingle (combine) a client’s funds with the lawyer’s regular business funds or personal funds. A lawyer must promptly and strictly account for funds and property.
• Finally, a lawyer must avoid even the appearance of impropriety.

The Code of Judicial Conduct
As lawyers, judges are bound by the Code of Professional Responsibility, as well as the Code of Judicial Conduct. The canons (general rules or standards of behavior) of the Code of Judicial Conduct specifically apply to judges and magistrates. According to the canons, judges and magistrates must:
• uphold the integrity and independence of the judiciary;
• avoid even the appearance of impropriety in all activities (judicial, professional and personal);
• perform all judicial duties diligently and impartially;
• engage in outside activities only as long as they do not cast doubt on the judge’s impartiality and provided the judge regulates the activities to minimize any risk of conflict with judicial duties;
• file all financial disclosure statements required by law and report compensation received for any quasi-judicial or extra-judicial activities; and
• refrain from political activity inappropriate for a person holding judicial office.

Discipline for Professional Misconduct
Herbert Harley, founder of the American Judicature Society, once said that in disciplinary matters the legal profession could “afford to be drastic but not sentimental.” The Code of Professional Responsibility reflects this view. The Code of Professional Responsibility is rigorously enforced. In no other profession is discipline for misconduct as certain or as severe as it is in the legal profession. A client, or any interested person, may complain about the conduct (actions or inactions) of an attorney or judge by filing a grievance with either the Supreme Court of Ohio’s Disciplinary Counsel or a certified grievance committee of a local bar association or the Ohio State Bar Association.

The Disciplinary Counsel is a permanent entity established by the Supreme Court of Ohio that has jurisdiction to investigate and prosecute professional misconduct by attorneys and judges. The Disciplinary Counsel investigates allegations of misconduct and prosecutes formal complaints of misconduct before the Board of Commissioners on Grievance and Discipline and before the Supreme Court of Ohio.

A certified grievance committee is an organized committee of a local bar association, or of the Ohio State Bar Association, that meets certain standards established by the Supreme Court of Ohio and has been certified (authorized) by the Supreme Court to act in disciplinary matters. Generally, the certified grievance committee of a local bar association will consider grievances against lawyers who practice in that locale. The Ohio State Bar Association’s certified grievance committee accepts complaints from all areas of the state, but generally limits its activities to cases involving alleged judicial misconduct. In general, bar association certified grievance committees serve the same function and have the same investigative and prosecutorial powers as the Office of the Disciplinary Counsel.

The grievance process begins with the filing of a written grievance with a disciplinary agency in which the complainant provides specific information regarding the alleged misconduct. At this preliminary stage of the process, the fact that a grievance has been filed remains confidential. The disciplinary agency will begin an investigation.

In a great many cases, preliminary investigation by a disciplinary agency finds that a grievance does not involve alleged unethical
conduct, but rather a dispute over the unfavorable outcome of a legal matter, the amount of an attorney’s fee or poor lawyer/client communications. Such problems are troublesome for all concerned, and many bar associations have special programs to help resolve these kinds of disputes. If, however, the conduct complained of does not involve an ethical issue, it cannot be addressed through the disciplinary process and will be dismissed for that reason.

When a grievance does allege a violation of one or more ethical rules, the responding disciplinary agency will go forward with its investigation in order to determine if there is probable cause to believe that a lawyer or judge has engaged in misconduct. At the conclusion of that investigation, the disciplinary agency will take one of the following two actions:

- If it finds probable cause to believe that a violation has occurred, it will file a formal complaint against the offending lawyer or judge with the Board of Commissioners on Grievances and Discipline.
- If it finds insufficient cause to believe a violation has occurred, it will notify both the complainant and the lawyer or judge involved that the grievance has been dismissed. (If a bar association grievance committee dismisses a grievance, the complainant has the right to appeal the committee’s decision to the Board of Commissioners.)

If probable cause is found and a formal complaint is filed, a three-member panel of the Board of Commissioners conducts its own probable cause review. If this panel does not agree that there is probable cause to proceed, it can dismiss the grievance. If the panel finds probable cause to proceed, it certifies the complaint and schedules a formal evidentiary hearing. It is at this point that the existence and nature of the complaint become matters of public record.

A formal disciplinary hearing at which the accused lawyer or judge appears before the Board of Commissioners (basically the “trial” on the grievance) is then scheduled. If the Board finds that the subject attorney or judge has committed professional misconduct, the Board files a report with the Supreme Court of Ohio. The report states the basis of the Board’s decision and also states the recommendation for discipline. The Court reviews the Board’s findings and imposes the discipline it believes to be proper under the circumstances.

There are special procedures for dealing with grievances against attorneys and judges who suffer from mental illness.

In Ohio, there are four basic types of discipline, which are (in descending order of severity):

- **Disbarment** – a permanent revocation of the right to practice law without any possibility of reinstatement.
- **Indefinite suspension** – suspension of the right to practice law for an unstated period of time. Reinstatement is a possibility, but not a certainty. A reinstatement application cannot be filed for two years after the indefinite suspension begins.
- **Definite suspension** – suspension of the right to practice for a specified time, ranging from six months to two years.
- **Public reprimand** – a public censure for the conduct involved.

Probation for a definite time is often required if the discipline is a definite suspension. Further, many attorneys charged with misconduct choose to resign their right to practice law rather than face discipline. Reinstatement is not possible after resignation, regardless of the reason for the resignation.

All disbarments, suspensions, reprimands, resignations and reinstatements are published in the official reports of the Supreme Court of Ohio that appear in the Ohio State Bar Association Report (a weekly magazine published by the Ohio State Bar Association) and the publication of the appropriate local bar association. To learn about the status of a particular Ohio lawyer, visit the Supreme Court of Ohio’s Web site at http://www.sconet.state.oh.us/, click on Attorney Directory, and type in the name of the lawyer in question.
While the disciplinary systems of other states and the federal courts are in many ways similar to the Ohio system, many other states have centralized procedures that do not permit bar associations, or committees of bar associations, to prosecute disciplinary actions. Further, the types of discipline imposed in other states may differ from the discipline imposed in Ohio. For example, in most states disbarment is not the permanent loss of the right to practice law. In most states, a lawyer who is disbarred has a possibility of reinstatement, generally after five years. In Ohio, a lawyer who is disbarred or has resigned has permanently lost the right to practice law in Ohio without any opportunity for reinstatement. Some jurisdictions also levy fines for misconduct.

Lawyers in Ohio and in the United States are subject to active discipline, and have a duty to police the legal profession through the disciplinary system and, thus, to protect the public.

**Discipline for Judges**

Discipline for judges is similar to discipline for lawyers. Any person may file a grievance with the Disciplinary Counsel or with a certified grievance committee. The grievances are processed in basically the same way as grievances against lawyers, although there are special procedures for dealing with grievances against justices of the Supreme Court of Ohio.

**Compensation for Clients’ Losses**

When an attorney is guilty of either malpractice or professional misconduct, that attorney’s client may suffer legal damages (lose money, property, or a particular right, etc.). An attorney is required to use, at least, the degree of care exercised by other members of the legal profession in any given matter. If the attorney is negligent and a client suffers loss as a result, the attorney may be liable for monetary damages in an action for malpractice. (See Part V, “Torts,” at “Typical Negligence Cases.”) It should be noted that malpractice itself is usually not a violation of the Code of Professional Responsibility, although a violation of the Code may amount to malpractice in a particular case. Further, repeated neglect or incompetence may be grounds for discipline.

In addition, a client who has suffered a loss caused by the dishonest conduct of any attorney acting in his or her professional capacity may seek reimbursement from the Client Security Fund of Ohio, which was established by the Supreme Court of Ohio in October 1985. Eligibility requirements and reimbursement limitations are stated in the Supreme Court of Ohio’s Rules for the Government of the Bar. Application forms and general information are available from the Client Security Fund of Ohio, located in Columbus, or through the Supreme Court of Ohio’s Web site at http://www.sconet.state.oh.us/client_security/. The Client Security Fund is financed solely by attorney registration fees from all lawyers licensed to practice in Ohio.

**When and How to Locate an Attorney**

Individuals who need legal advice are often faced with a series of questions, such as: Do I really need an attorney in this situation? How do I find an attorney who is familiar with this kind of problem? What do attorneys charge? The following sections address these questions.

**When to See an Attorney**

It is clear that an attorney is needed when an individual is arrested or charged with a serious crime, or when someone is served with a formal complaint naming him or her as a defendant in a lawsuit. At other times, the need for legal assistance may be just as important but less obvious. The best time to consult a lawyer is before a problem occurs. A lawyer should be consulted whenever someone has reason to believe that an act, omission, or course of conduct may have a significant impact (good or bad) on an individual’s (or his or her family’s) property, finances, rights, freedom, obligations, or liabilities.
There are many more opportunities to avoid legal difficulties than there are to solve actual legal difficulties. For example, a lawyer may be able to write an agreement defining rights and obligations, or clarifying important issues between parties. A lawyer also may see obvious legal problems in a “wonderful deal,” or may be able to negotiate a compromise in a matter that might otherwise result in litigation. Early consultation with a lawyer may avoid the necessity of filing or defending a lawsuit, or may maximize the effectiveness of a claim or defense.

While it is impossible to develop an all-inclusive list of the situations in which a lawyer should be consulted, the following list provides some guidance. In general, you should consult a lawyer as soon as possible if you:

• receive notice of a lawsuit, or know a lawsuit is a distinct possibility;
• are arrested or cited for an offense where charges involve the possibility of jail time or a substantial fine;
• are involved in an accident where there are personal injuries or property damage;
• seek to have another party perform according to the terms of a contract, or are being pressed by the other party to do something you do not believe is required;
• believe you have been treated unfairly in a business transaction and the other party shows reluctance to make the transaction “right”;
• try to collect a debt that another individual is reluctant to pay;
• are being dunned (persistently pursued or threatened) for a debt you question or do not believe you owe;
• wish to file for bankruptcy, trusteeship or a wage-earner plan, or make an arrangement with your creditors;
• need an opinion on title of real estate;
• are buying or selling real estate;
• are about to enter a written or verbal agreement that may have consequences—good or bad—with respect to your actual or prospective property, finances, rights or obligations;
• are involved in any problem concerning taxes;
• are about to begin any venture that may be significantly regulated by the government;
• are organizing, dissolving, buying or selling a business;
• are organizing or dissolving a partnership or corporation;
• do not have a will and are married, or even if unmarried, you own or may acquire a significant amount of any kind of property;
• want to plan your estate;
• are involved in settling an estate for someone who has died;
• want to adopt a child;
• are involved in a guardianship; or
• are involved or may become involved in a divorce or similar proceeding.

Choosing an Attorney

Traditionally, suitable lawyers have been found through word-of-mouth referrals. People talk with relatives, friends, neighbors or business acquaintances who have used attorneys and ask them about the possibility of using their attorneys for help in finding other attorneys.

Another way to find a lawyer is through the use of a lawyer-referral service. These services are generally operated by local bar associations. Attorneys taking part in referral programs represent a cross-section of types of practice; a person who contacts such a service is referred to a lawyer whose practice fits his or her needs. The referral program usually sets initial consultation costs. After a person’s first consultation, the employment and fee arrangements will be between the client and the attorney.

Other methods of finding an attorney include using telephone directories, published lists of lawyers (law lists) and information from advertisements. The “yellow pages” of telephone directories contain listings for many attorneys in a particular geographic area; the “white pages” usually list both an attorney’s office and home phone numbers. Some attorneys will advertise in the yellow pages, giving basic information about their practice. Similar information can be gleaned from advertisements in the newspaper, the radio
or television. Not all attorneys advertise. The fact that one attorney advertises, while another does not, has no bearing on either's competence or suitability.

A number of published “law lists,” including the Martindale-Hubbell Law Directory, may be available through the public library. The Martindale-Hubbell Law Directory lists attorneys in the United States by state and city, as well as some attorneys in foreign countries. It also provides law firm information.

If an individual has a legal problem but cannot afford to pay an attorney, he or she should contact a legal aid society or legal aid clinic. Legal aid societies, legal aid clinics, law school legal clinics and similar entities operate for the specific purpose of providing legal advice and assistance to individuals who cannot afford to pay for legal services. The Ohio State Legal Services Association was founded by members of the Ohio State Bar Association. (See “The Ohio State Bar Association and Affiliated Organizations” section below.) A legal aid society (or an Ohio Public Defender’s office, or an attorney in private practice) may be contacted by the court to handle a case for someone who is accused of a serious criminal offense. Such an individual has a right to an attorney, even if he or she cannot afford one.

How Lawyers Charge for Their Services

Lawyers earn a living by charging fees that are based chiefly on the amount of time they devote in service to their clients’ causes. The hourly rate a lawyer charges is governed largely by the economics of the practice of law.

Determining the Amount of a Legal Fee

Abraham Lincoln summed up the economic realities of the practice of law when he said, “A lawyer’s time and advice are his stock in trade.” Lawyers have only their time, learning, experience and skill to offer their clients, and their livelihood depends on the compensation they receive for the time, learning, experience and skill they use on behalf of their clients. The rate charged depends primarily on the lawyer’s expenses, the nature of the problem, the demands on the lawyer’s time and the lawyer’s relative standing, experience and ability. In general, time is the basic unit for determining a legal fee. Lawyers keep careful records of the time they spend on any given matter, and fees are normally calculated by multiplying the number of hours spent by the lawyer’s hourly rate. Some lawyers charge a flat fee for particular types of routine services—such as preparation of a will or deed—but even a flat fee is based on the time it takes the lawyer to complete the particular service in normal circumstances. In certain types of cases, lawyers may use contingent fees. (See “Some Typical Fee Arrangements” on page 206.)

When establishing an hourly rate, a lawyer factors in office operating expenses. A lawyer’s office expenses and overhead, including such items as personnel costs, rent, office furniture, equipment and maintenance, may consume 40 percent or more of the income from client fees. Other expenses include dues for professional organizations, the cost of continuing legal education programs required to learn about changes in the law and insurance, including malpractice insurance.

The relative standing and ability of a lawyer and the demands on the lawyer’s time also affect the lawyer’s rate. A lawyer who has gained recognition for ability and experience is in demand and generally will charge a higher rate, although the greater the attorney’s experience, the less time likely will be needed to complete the work.

The nature of the legal question at the core of a particular case also affects rates. Legal questions that are new or complex, or both, generally will increase the time that must be spent. Such legal questions may require an enormous expenditure of time for legal and non-legal investigation, research and analysis.
Normally, a lawyer will set an hourly rate for most matters. Under some circumstances, the lawyer may vary the rate. The impact that representing a particular client might have upon the lawyer’s practice may be a reason to vary the rate. This is especially true if representing a particular client requires the lawyer to turn down other prospective clients. For example, a long trial would require the lawyer to decline representing other—perhaps many other—clients. On the other hand, a lawyer might reduce the rate if there is a continuing relationship with a particular client who might regularly give the lawyer similar legal questions that can be addressed in a standard fashion.

Rates are also affected by the responsibility a particular lawyer assumes in a legal practice (a partner charges more than an associate); the relative benefit of the lawyer’s service to the client; and the certainty, or uncertainty, of actually being paid by the client.

Remember that, unlike people in other occupations, a lawyer cannot simply charge what the market will bear. The Code of Professional Responsibility requires that fees be reasonable and gives the factors lawyers must use to determine a reasonable fee. Many of those factors are discussed above. An attorney who charges an unreasonably high fee, or charges for services that were not performed, is subject to discipline for professional misconduct. Further, a court must approve some attorney fees before they can be paid. For example, the probate court must approve attorney fees in estate administration cases, and the common pleas court must approve attorney fees in certain domestic relations matters.

**Some Typical Fee Arrangements**

The most common type of fee arrangement is the *time charge*. In this arrangement, the hourly rate is multiplied by the number of hours spent on the matter to arrive at a fee. Another common fee arrangement is the *flat fee*, where the total fee charged for a case is determined before work starts. Generally, a flat fee would be charged for a routine service such as preparing a standard will or handling a real estate closing.

A *contingent fee* is an arrangement that sets the attorney fee as a particular percentage of any money that is recovered in the case. The fee is contingent (dependent) upon a recovery being obtained; if there is no recovery, there is no attorney’s fee, although the client still may be liable for expenses. Without contingent fees, persons of modest means could not seek redress for injuries, because they could not afford to pay a lawyer for the time that would have to be spent. Because of their general social value, contingent fees are allowed in certain cases, despite the general rule that lawyers cannot stir up litigation or buy an interest in an actual or prospective lawsuit.

Usually, contingent fee contracts set the attorney fee as a percentage of any recovery made in the case. Such contracts are risky for attorneys because they do not get paid if no recovery is made in the case. Because of this inherent risk, the percentage may range from 25 percent to 50 percent of the amount of the recovery, with 33 and one-third percent being the most common percentage. The percentage may vary depending on how far the case proceeds in the courts. For example, a settlement before trial may call for a lower percentage fee, while a recovery after a completed trial may call for a higher percentage. When discussing a contingent fee arrangement with an attorney, the client should ask how the expenses of the litigation are to be handled. For example, are the expenses taken from the gross settlement or from the client’s portion? These are negotiable items.

Clients who need regular legal services often make regular monthly or annual payments to ensure that the lawyer’s services will be available as needed. Such payments are called *retainers* because they maintain the lawyer’s services on a continuing or standby basis. This fee is considered earned upon receipt because it buys only the lawyer’s availability. Also, in some matters a client may be asked to make an advance payment toward the lawyer’s fee, and this advance payment
is also called a *retainer*. The fee for services subsequently rendered by the lawyer to a client who has made such an advance payment is credited against the retainer. As fees are paid against this retainer, the client may be asked to make additional payments to be added to the retainer.

Lawyers sometimes offer *pro bono* legal services, that is, volunteer their time and expertise to individuals or organizations who could not otherwise afford a lawyer and who would otherwise be denied equal access to the law. According to the Ohio Legal Assistance Foundation, more than 75 percent of the civil legal problems of Ohio’s poor receive no attention. Consequently, attorneys throughout Ohio provide many hours of civil legal services to assist low-income citizens in matters such as landlord/tenant disputes, wills, consumer problems and personal injury. Lawyers also provide *pro bono* services to individuals or organizations involved in disputes concerning social justice issues that have wide implications beyond their individual situations. Lawyers providing *pro bono* work operate out of an ethical obligation to do so. The *Code of Professional Responsibility* states that every lawyer should find time to help serve the disadvantaged and further calls on the legal profession to institute additional programs to provide legal services.

**Discussing Fees with Your Lawyer**

The best time to discuss fees is during the first meeting with a lawyer. If your lawyer does not mention fees, you should ask your lawyer to explain his or her fee policy and contract. Specifically, ask your lawyer whether he or she charges a flat fee, an hourly rate, or works on a contingent fee basis. Ask the lawyer to state the amount of the flat fee or hourly rate or, where applicable, the specific terms of the contingent fee contract. Further, ask the lawyer to estimate how much time your particular legal issue is likely to require. (Sometimes it is not possible for a lawyer to make such estimates. However, a lawyer should be able to outline the steps that he or she intends to take.) Finally, ask your lawyer about how fees and expenses are to be paid. Many lawyers accept credit cards or will make arrangements for deferred or installment payments.

Ask your lawyer any questions you may have about the agreement, the services provided, or the fee arrangement. The agreement (contract) should clearly state the lawyer’s obligations and your obligations. The lawyer’s invoice should itemize each service performed on your behalf and the time it took to complete it. Remember that much of what lawyers do for their clients is done when the clients are not present. For instance, the proper preparation of a four-page contract may take many hours of careful deliberation, writing and rewriting. Similarly, advice that takes only minutes to give may have required days of concentrated research and analysis by the lawyer. If you are not sure a charge is justified, talk with your lawyer. From both a business and a professional point of view, it is to your lawyer’s advantage for you to be content that the fee (the amount of the invoice) is fair and that the services provided were satisfactory.

**Bar Associations and Related Organizations**

The bar association movement began in the 1870s as a concentrated effort by lawyers to improve the image and standing of the legal profession. Today, more than 25,000 Ohio lawyers are members of the Ohio State Bar Association, which is one of the largest voluntary bar associations in the United States.

**Historical Perspective**

Before the Revolutionary War, most lawyers were well educated, competent and esteemed by the public. With the Revolution, the bar in the United States began a long period of professional decline, and by the end of the Civil War the system of professional legal education had broken down and standards for admission to practice were nearly non-existent.
By the 1870s, the situation had become critical. The honest and competent members of the profession realized that there were many unscrupulous and incompetently practitioners, and that little was being done to control or discipline these individuals. It was clear that some standards of competence and honesty had to be established for the profession. These concerns spurred the formation of voluntary bar associations across the United States.

Leading the way was the Association of the Bar of the City of New York. It was formed in 1870, primarily to rid the city of the notorious Tweed ring, many of whose key members were lawyers (including William Marcy “Boss” Tweed himself). The New York City Bar’s long-term purpose was to reverse the process of professional erosion by upgrading standards for legal education, admission, and conduct, and by providing an effective system for disciplining lawyers.

New York City was not unique in its problems with the bench, the bar and political corruption; these problems existed everywhere in the 1870s. The example provided by the New York City bar in attacking these problems motivated responsible lawyers in other states to organize to accomplish the same purposes.

Local, and then state bar associations sprang into existence across the country. Ohio helped lead this charge with the formation of the Cincinnati Bar Association in 1872 and the Cuyahoga County Bar Association in 1873. The American Bar Association was formed in 1878, partly to encourage the organization of state bar associations. Twenty-five state bar associations were formed from 1878 to 1888. Again, Ohio remained on the cutting edge with the formation of the Ohio State Bar Association in 1880.

Despite the movement’s success, professional progress was neither quick nor easy. Nevertheless, despite setbacks, the bar associations never lost sight of their mission. Today, the legal profession holds its members to exceptionally high standards of legal education, professional competence, conduct and discipline. Moreover, the organized bar scrupulously maintains those high standards and is constantly seeking to improve them.

The Ohio State Bar Association and Affiliated Organizations

Bar associations are not maintained for lawyers alone, but also for the benefit of the public. For its members, the Ohio State Bar Association has committees and sections concerned with improving justice and the administration of justice in all areas of the law. For example, committees and sections regularly review the developments in their areas of the law and recommend specific actions to improve the law and the public’s understanding of the law. The Ohio State Bar Association also conducts its own regional and statewide meetings. While these meetings concern some association business, much of the time at the meetings is spent on presentations designed to keep lawyers informed about developments in the law.

The Ohio State Bar Association’s Continuing Legal Education Institute is one of the leading providers of approved continuing legal education (CLE) programs in the state, and continues to offer a wide variety of CLE programs in a variety of formats, including live and online seminars, video replays and live satellite broadcasts. Programs cover a broad range of topics in almost every area of legal practice.

The Association also sponsors or directly administers a number of important programs that benefit the public either directly or indirectly. These programs currently include, for example: evaluation of judicial candidates for the Ohio Supreme Court; an active legislative program designed to improve justice and its administration; specialization programs that allow lawyers and paralegals to become certified in certain areas of the law; and public information services through a pamphlet series, a weekly legal information column, a statewide essay contest for high school students, a “legal minute” television segment, publications such as this book and legal resources for journalists and small business owners and a
Web site that contains a wide variety of materials for members of the general public.

The organizations affiliated with the Association also provide services to the public and the profession. A partner in this publication is the Ohio State Bar Foundation, an independent, 501(c)3 corporation whose membership of attorneys and judges is dedicated to the mission of promoting public understanding of the law and improvements in the justice system throughout Ohio.

In all of its initiatives, the Foundation strives to be a catalyst, convener and collaborator for change that furthers its mission for the benefit of Ohioans. Founded in 1951, the Foundation has fulfilled its charitable and educational roles in a variety of ways:

• awarding more than $2 million in grants since 1991 to nonprofit organizations, government agencies and bar associations for projects that further the Foundation’s mission;
• recognizing outstanding attorneys and law-related organizations across Ohio for their service to their communities and to the legal profession;
• providing programs that directly impact jury management, court news coverage and online access to hundreds of informational resources, as well as programs that encourage family discussions on advance directives, help children learn about the courts, mentor troubled youth and guide new and struggling nonprofit organizations; and
• supporting ongoing efforts to bring courts and communities together to improve the access and experience of the public with their local courts and to address the role of courts as community institutions.

Other organizations affiliated with the Ohio State Bar Association are listed below.

• The Ohio Bar Liability Insurance Company (OBLIC) is an independent, for-profit corporation affiliated with the Ohio State Bar Association. Established by members of the Ohio State Bar Association, it ensures that lawyers have access to professional liability insurance at reasonable rates.
• The Ohio State Bar Association Insurance Agency is an independent, for-profit corporation affiliated with the Ohio State Bar Association. It offers all types of group and individual insurance coverage to Association members.
• The Ohio State Legal Services Association (OSLSA) is an independent, non-profit corporation affiliated with the Ohio State Bar Association. It was established by the Ohio State Bar Association to provide civil legal services to people who could not afford such services. Currently the OSLSA offers two basic services. First, it provides free legal representation to indigent persons in civil matters in 30 counties in southeastern and central Ohio. Those services are delivered through nine offices spread throughout the region. Second, it provides assistance to the other legal services programs in Ohio through a state support center located in Columbus. For more information, visit the OSLSA Web site at http://www.oslsa.org.
• The Ohio Center for Law-Related Education (OCLRE) is an independent, non-profit, non-partisan organization affiliated with the Ohio State Bar Association. It was established by the Ohio State Bar Association, the Attorney General of the State of Ohio and the American Civil Liberties Union of Ohio Foundation to develop an active law-related education program through the partnership of educators, the legal community, government officials and civic leaders. Among other activities, OCLRE conducts the statewide Ohio Mock Trial Program, We the People…The Citizen and the Constitution, Middle School Mock Trial, We the People…Project Citizen, Youth for Justice, the Ohio Government in Action program, the Law and Citizenship Summer Camp and Academies program, an annual Law and Citizenship Conference for teachers and a new Foundations of Democracy program for lower grades based on four fundamental concepts of democracy:
authority, privacy, responsibility and justice. The Center also offers to OCLRE members free use of its lending library. OCLRE is now jointly sponsored by the Ohio State Bar Association, the Supreme Court of Ohio, the Attorney General of the State of Ohio and the American Civil Liberties Union of Ohio Foundation.

• **The Ohio Lawyer’s Assistance Program, Inc. (OLAP)** is an independent, non-profit corporation affiliated with and established by the Ohio State Bar Association. It is a voluntary program available to help lawyers, judges and law students who suffer from alcohol and drug abuse/dependency, and/or mental health issues, by providing assessments, referring them to treatment and providing continuing support. The person seeking assistance does so confidentially.

• **Other Bar Associations**
  In addition to the Ohio State Bar Association, local bar associations are active in each of Ohio’s 88 counties. Some of Ohio’s metropolitan bar associations are among the largest in the nation.

  The American Bar Association operates at the national level in many of the same areas of activity as the Ohio State Bar Association and local associations.

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**Chapter Summary**

- Lawyers are officers of the courts and their services are vital to the effective operation of the legal system. They work under solemn duties of trust and responsibility to their clients.
- A lawyer, also known as an attorney-at-law or attorney or counselor, is someone licensed to manage the legal affairs of another person, to give legal advice and to plead cases in court.
- Before being admitted to the practice of law in Ohio, an individual must, among other things, successfully complete approximately seven years of higher education.
- A lawyer’s education does not end with the receipt of a law degree; it’s a life-long proposition.
- An undergraduate degree, admission to law school and a law degree are only some of the necessary steps an individual must take to become a licensed lawyer in Ohio. A prospective lawyer also must undergo a background investigation, successful completion of a comprehensive examination on the law, and must take an oath of office.
- All attorneys are bound by a strict code of ethics. In Ohio, the code of ethics is called the *Code of Professional Responsibility*. Judges are also bound by another set of rules called the *Code of Judicial Conduct*. A disciplinary process ensures that practicing attorneys and judges abide by these codes.
- An attorney is needed, usually without question, when an individual is arrested and charged with a serious crime, or when someone is named as a defendant in a lawsuit. At other times, the need for legal assistance is often just as important but less obvious. The best time to consult a lawyer is before an actual problem occurs.

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Chapter Summary  

- A lawyer’s livelihood depends on the compensation received for the time, learning, experience, and skill used on clients’ behalf. The rate charged depends primarily on the lawyer’s expenses, the nature of the problem involved, the demands on the lawyer’s time and the lawyer’s relative standing, experience and ability.
- The most common type of fee arrangement is a time charge, where an hourly rate is multiplied by the hours spent on particular legal matter. Flat fees and contingent fees are also commonly used.
- Lawyers sometimes offer pro bono legal services, that is, volunteer their time and expertise to individuals or organizations who could not otherwise afford a lawyer and who would otherwise be denied equal access to the law.
- The bar association movement began in the 1870s as a concentrated effort by lawyers to improve the image and standing of the legal profession. Today, more than 25,000 Ohio lawyers and nearly 4,000 law students and legal assistants are members of the Ohio State Bar Association, one of the largest voluntary bar associations in the United States.
- Local bar associations are active in each of Ohio’s 88 counties.

Web Links:

**OSBA’s “Law You Can Use” articles:**
(go to http://www.ohiobar.org/pub/lycu and search for article by title or topic)

- “Attorney Ethics Judged by State’s Supreme Court”
- “How Do I Choose Representation in My Personal Injury Case?”
- “How To Get the Most from an Attorney/Client Relationship”
- “Legal Aid Societies Help Poor Clients”
- “Ohio Code of Professional Responsibility Governs Attorneys’ Actions”
- “Ohio Supreme Court Regulates Lawyer Advertising”
- “Paralegals Aid Attorneys and Clients”
- “What Happens When a Lawyer’s Practice Closes?”
- “What You Should Know about Attorney Fees”
- “What You Should Know about the Value of ‘Free’ Legal Information”
- “Why Hire a Lawyer?”

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Web Links continued

OSBA’s “LawFacts” pamphlets:
(go to http://www.ohiobar.org/pub/lawfacts/ and search by title or topic)
  “Attorneys”
  “Certified Attorney Specialists”
  “Lawyer Ethics and Discipline”

Other resources from the OSBA:
http://www.ohiobar.org/pub/links.asp
  Link to local bar associations in Ohio, law schools and universities,
  and federal and miscellaneous selected legal resources

http://www.ohiobar.org/pub/?articleid=72
  Lawyer referral services

http://www.ohiobar.org/pub/?articleid=85
  Attorney licensing

http://www.ohiobar.org/pub/?articleid=57
  Specialization program (Certified Attorney Specialists)

http://www.ohiobar.org/pub/?articleid=84
  Filing a complaint

From State of Ohio Web site:
http://www.sconet.state.oh.us/Rules/govbar/
  Rules for the Government of the Bar of Ohio

From the American Bar Association:
http://www.abalawinfo.org/
  Legal information on a variety of topics
ABSTRACT OF TITLE—A chronological summary of all official records and recorded documents affecting the ownership of (title to) a parcel of real property. See real property, title examination.

ABUSE OF PROCESS—The improper use of court process (orders of a court such as a subpoena or summons). See citation, summons, subpoena, service of process, warrant.

ABUSED CHILD—Under Ohio law, a minor (usually defined in the law as a person who is under the age of 18 or a physically or mentally challenged person under the age of 21) who has been purposely injured or endangered may be considered an abused child. The abuse can be physical, emotional, or sexual. See child endangerment, neglected child.

ACCELERATION OF PAYMENTS—The provision in an installment contract under which all unpaid installments are immediately due and payable upon the debtor’s default (failure to make a payment). Consumer transactions are governed by a variety of laws, including the Retail Installment Sales Act and the Fair Debt Collection Act, which may affect retailers’ rights and obligations in collecting consumer debt.

ACCEPTANCE—In contract law, the acceptance of an offer, consisting of some outward expression of agreement. Acceptance is one of the three basic requirements for a valid contract; the others are an offer and consideration. See contract.

ACCIDENT REPORT—The written report of a traffic accident. Aside from whatever report may be filed with the police, so long as both drivers are insured, Ohio’s Financial Responsibility Law no longer requires the drivers to file a report with the Bureau of Motor Vehicles (BMV). However, if a driver believes that the other driver is not insured, he or she has six months following the accident within which to file a report with the BMV (Form 3303), stating that belief. Thereafter, the BMV will investigate the insurance status of the second driver. Forms for this report may be obtained from, and filed with, any law enforcement agency. See financial responsibility law.

ACCRETION—1) In real property, the increase or decrease in the acreage of a parcel of land caused, for example, by the action of water depositing soil on the property or eroding soil away and resulting in the transfer of land ownership. 2) In probate, the law by which beneficiaries of a deceased person get an increased portion of the estate because another beneficiary dies before the will takes effect, or rejects the gift. 3) In trusts, the increase in benefits as a result of an unexpected event. See estate, probate, real property, trust.

ACTUS REUS—Literally, “guilty act.” Generally, no crime occurs unless a guilty act (the actus reus) is done with a guilty mind (the mens rea). See culpable mental state, mens rea.

ADEQUATE YEARLY PROGRESS (AYP)—A school accountability system under the No Child Left Behind Act that seeks to narrow the achievement gaps among students by requiring schools and districts to report achievement ratings of state-developed annual goals to the state.

ADMINISTRATOR—In probate law, a person appointed by the probate court to settle the estate of a person who has died. His or her duties are essentially the same as those of an executor. Administrators are appointed when there is no will, or when there is a will but the previously appointed executor has died, resigned, or has been removed by the court. See executor, probate, will.

ADMINISTRATIVE LAW—Written rules adopted by various government agencies (such as the governmental bodies of a city, county, state or federal government) under limited authority granted by legislative bodies. Administrative laws have to do with rules, regulations, applications, licenses, permits, available information, hearings, appeals and decision-making. Examples of administrative agencies authorized to create administrative law are the Federal Aviation Administration (the FAA) and the Ohio Liquor Control Commission. Administrative rules differ from agency to agency and are not usually found in the statutes, but only in those regulations themselves. A member of the public must exhaust all administrative remedies (must take every step, including appeals within the agency and its system) before challenging an administrative ruling in court. See appeal, zoning.

ADULT—For most purposes under Ohio law, a person age 18 or older.

ADVANCE DIRECTIVE—A document that conveys an individual’s wishes about medical or end-of-life treatment before such treatment may be needed. Examples include the living will, the durable power of attorney for health care and the “Do Not Resuscitate” (DNR) order. See Do Not Resuscitate (DNR) order, durable power of attorney for health care, living will.
ADVERSARY SYSTEM—An approach to law in which a trial is viewed as a contest between opponents, each of whom has the burden of establishing his or her own case. The adversary system is a major element of the Anglo-American legal system. See burden of proof, evidence.

ADVERSE POSSESSION—The transfer of title of real property from its original owner to one who, although not an owner, actually occupies the property (that is, possesses it adversely to the owner) continuously for 21 years, provided the occupation is obvious and the owner does nothing significant to assert his or her rights during that time. In the same way, adverse, regular and long-term use of another’s property—short of occupation—may give rise to the user’s right to continue to use the property, by operation of the doctrine of prescription. In lay terms, adverse possession is similar to “squatter’s rights.” See real property, rule against perpetuities.

AFFIRMATIVE DEFENSE—1) In criminal law, a defense the facts of which are peculiarly within the knowledge of the accused. Statutes designate certain defenses affirmative defenses. 2) In civil law, a legal defense to the claim of the plaintiff. For example, assumption of risk may be an affirmative defense in a negligence case, and fraud by the plaintiff may be a defense in a case for breach of contract. In both criminal and civil cases, these defenses are called affirmative because the defendant must take the initiative to prove them: the defendant has the burden of going forward with the evidence and the burden of proof by a preponderance of the evidence. See burden of proof, evidence, degree of proof.

AGE CERTIFICATE—Allows a student to work if that student has attended school within his/her school district for the past two years and has diligently attempted to complete the necessary course work. Also known as a schooling certificate.

AGENT—One who acts for another. In employment law, an agent is similar to employee for employer liability purposes (the rule of respondeat superior, “The master must answer”). “Agent” is also used to describe someone who is named to act for another through a power of attorney, or in real estate or insurance matters. See respondeat superior, attorney-in-fact.

ALIBI—Literally, in another place. As used by a person accused or suspected of a crime, evidence that he or she was not present when the crime was committed. See affirmative defense, evidence.

ALIMONY—See spousal support.

ANNUAL PERCENTAGE RATE (APR)—The cost of credit expressed as a yearly percentage rate. The APR of a particular contract is derived by a formula that relates the finance charge (the actual dollar amount that credit will cost a buyer) to the amount financed (the actual dollar amount of credit provided to, or on behalf of, a buyer). The APR, finance charge, and amount financed must be disclosed in most consumer transactions by authority of the Federal Truth in Lending Law.

ANNULMENT—A legal declaration that a marriage is void, that is, to declare that the parties were never validly married. A marriage may be annulled (among other reasons) because a party was underage or mentally incompetent, or because consent to the marriage was obtained by fraud or force. In an annulment proceeding, the court can determine support and allocate parental rights and responsibilities (child custody), as in a divorce case. Annulment does not affect the legitimacy of children.

ANSWER—In civil law, an official document filed with the court in which the defendant responds to the plaintiff’s complaint by admitting or denying the plaintiff’s allegations. See pleading.

APPEAL—A procedure in which a party to a legal proceeding asks a higher court to reverse or modify the judgment or other final order of a lower court or of an administrative agency. Appeals generally must be made on the ground that the lower court misinterpreted or misapplied the law, rather than on the ground that the lower court made an incorrect finding of fact. See court of appeals, harmless error, plain error.

APPELLANT—The party who appeals the judgment or final order of a court or administrative body.

APPELLEE—The party against whom an appeal is taken.

ARBITRATION—A dispute resolution process in which evidence is presented to one or more neutral third parties (the arbitrator[s]) instead of being handled in the judicial system by a judge or a judge and jury. The arbitration may be agreed to by the parties, ordered by a court, required by a provision in a contract for settling disputes, or provided for under statute. See dispute resolution.

ARRAIGNMENT—In criminal procedure, the process of bringing the accused into open court, informing the accused of the charge, advising the accused about his or her rights, taking the accused’s plea to the charge, and setting bail if bail is appropriate. If the charge is a felony, the arraignment is usually a separate proceeding before trial. If the charge is a misdemeanor, the arraignment is usually the initial step in the trial itself. See bail, charge, felony, misdemeanor.

ARREST—The process of placing a person in legal custody or otherwise legally restricting a person’s freedom. Usually an
arrest involves a person accused of a criminal offense, but
other persons also may be arrested: a material witness; the
reputed father of an illegitimate child to further a lawsuit
against him for child support; and a person charged with
contempt of court.

ASSAULT—The criminal act of threatening or actually
inflicting physical injury. See battery.

ASSUMPTION OF RISK—In tort law, one of the defenses to
a lawsuit based on negligence. The defendant must prove that
the plaintiff knew of the high risk involved in encountering the
condition that was the cause of the injury, and went ahead
anyway. In Ohio, this defense has been merged with the
defense of comparative negligence, in most circumstances. See
comparative negligence, contributory negligence, negligence.

ATTORNEY-IN-FACT—Someone specifically named by a
person in a written power of attorney to act for that person in
the conduct of his or her business. Also referred to as an agent. See
agent, fiduciary, power of attorney.

BAIL—1) The pretrial release of an accused provided the
court is satisfied that the accused will attend all court hearings.
Where the accused is charged with a felony, bail may include
conditions such as restrictions on travel and an order to stay
away from the victim. 2) The deposit of money or property
with the court, or the promise to pay or forfeit money to the
court, designed to guarantee that the accused will appear at
court for all proceedings. See bail bond, bail schedule, cash
bond, personal recognizance.

BAIL BOND—A type of insurance policy that helps to ensure
an accused will appear at court for all proceedings. The bail
bond is posted with the court by a professional bail bondsman,
who promises to forfeit a specified sum of money if the
accused (the person giving bond) fails to appear in court as
required. Payment of the cost of the bond is similar to the
payment of an insurance premium. Usually, the cost of a bail
bond is 10 percent of the face amount of the bond. None of the
cost is refundable even if the accused appears as required.

BAIL SCHEDULE—A list of misdemeanor offenses and the
dollar amount of the bail for each offense. Every court is
required to publish a bail schedule covering all misdemeanor
offenses.

BAILIFF—A court official who acts as an aide to the judge.
Generally, the bailiff’s duties include opening and closing
each session of court and maintaining administrative control of
the courtroom and the jury. The bailiff’s duties also may
include escorting accused persons to and from court, calling
and swearing in witnesses, and other matters.

BALLOON NOTE—A promissory note requiring repayment
in a series of small installments and a final, large installment
(balloon payment) for the remaining balance. Ohio permits
balloon notes in consumer transactions only if the note
specifically allows the buyer to refinance the balance due on
the final installment at the same, or better, terms as the small
installments.

BANKRUPTCY—A legal process designed to help consumers
and businesses eliminate (“discharge”) their debts or pay their
debts in an orderly way under the protection of the U.S.
Bankruptcy Court. There are four types of bankruptcy, named
for the chapters in the Bankruptcy Code that describes them:
Chapter 7, Chapter 11, Chapter 12, and Chapter 13. The type
best suited for a business or individual depends on the nature
of the debts and the nature and value of assets.

BATTERY—The unlawful touching of another, as for
example in the crime of sexual battery. See assault. Under the
Ohio statutes, assault combines the elements of traditional
assault and traditional battery.

BEQUEST—A gift of personal property made in a will. See
personal property, will.

BEYOND A REASONABLE DOUBT—The highest degree
of proof: proof of such character that an ordinary person would
be willing to rely and act upon it in the most important of his
or her own affairs. In a criminal case, it is necessary for the
prosecution to prove each element of the crime charged
beyond a reasonable doubt—that is, so that the jury is firmly
convinced of the defendant’s guilt. If the jury believes that the
defendant probably is guilty, but they have a reasonable (not
merely speculative) doubt about it, they must find the
defendant not guilty. See crime, degree of proof, evidence.

BIGAMY—Having more than one wife or more than one
husband at the same time. A married person who knowingly
enters into another marriage is a bigamist. Bigamy is a crime
that automatically makes any later marriage(s) invalid. Ohio
law permits the injured party to get a divorce or annulment,
which confirms the invalidity of the marriage and helps to
resolve questions of property or support. See annulment,
divorce.

BILL OF INFORMATION. See information.

BINDOVER—To hold for trial or for further inquiry. For
example, after a preliminary hearing in a felony case
establishes probable cause to believe that the accused
committed the crime charged, the municipal court or county court binds over the accused for indictment by a grand jury. Also, the transfer of a child from juvenile court to a common pleas court for trial and punishment as an adult in serious cases and under limited circumstances is often called a bindover.

**BLENDED SENTENCE**—A sentence imposed by a juvenile court that blends a juvenile disposition and an adult sentence for certain serious youthful offenders (SYOs). In imposing a blended sentence, the juvenile court first gives a juvenile disposition (for example, a term in an Ohio Department of Youth Services facility). The court then gives a sentence as if the offender were before an adult court, and then must suspend the adult sentence. If the offender completes the juvenile disposition without serious incident, that is the end of the sentence. However, if the offender commits certain other offenses and engages in certain threatening conduct during the juvenile term, the court may invoke the adult sentence after a hearing on the new violation. See serious youthful offender.

**BREACH**—Breach is the violation of a duty and must be shown to have occurred for a tort suit to be successful. In contract law, a material breach is the failure of a party to perform one side of a contract that is serious enough to excuse the other party from performing his or her part of the contract.

**BROWSER**—A computer program that allows the viewing of World Wide Web pages.

**BURDEN OF PROOF**—The duty to establish a claim or defense. The burden of proof is on the party asserting the claim or defense. This requirement is a hallmark of the adversary system. If a complaining party fails to meet the burden of proof the complaining party must lose the case, at least as to that particular claim. If a defendant fails to meet the burden of proof as to a particular defense the defendant will not be relieved of liability by that defense, although he or she may win the case for another reason. See adversary system, degree of proof.

**CERTAINTY**—In contract law, the requirement that the parties have a reasonably certain expectation concerning what they are to do, when they are to do it, and awareness of the consideration given by each party. Without such reasonable certainty, the contract will not be enforceable.

**CHALLENGE**—1) A request that a prospective juror be dismissed. 2) The right to make such a request. See challenge for cause, peremptory challenge, voir dire.

**CHALLENGE FOR CAUSE**—The right to have a prospective juror dismissed for any one of a number of good, specific reasons, such as friendship with one of the parties or an inability to follow and understand the proceedings. There is no limit to the number of prospective jurors who may be challenged for cause. See voir dire, peremptory challenge.

**CHANGE OF VENUE**—In criminal law, a change (from one county to another) in the place where the trial is held, in order to secure a fair trial. See venue.

**CHARGE**—1) The judge’s instructions to the jury on its duties, the law involved in the case, and how the law must be applied. The charge is given just before the jury retires to consider its verdict. 2) The accusation in a criminal case.

**CHILD ABUSE**—See abused child.

**CHILD CARETAKER AUTHORIZATION AFFIDAVIT**—A document that allows grandparents to exercise parental authority over a grandchild who lives with them, including the ability to enroll the child in school, obtain school information, and consent to school-related matters.

**CHILD ENDANGERMENT**—An act or omission that exposes a child to psychological, emotional or physical abuse. Child abuse based on the offense of child endangerment is normally a misdemeanor, but endangerment that results in mental illness or serious physical illness or injury is a felony. See abused child, neglected child.

**CHILD NEGLECT**—See neglected child.

**CHILD SUPPORT**—Money or property that the court orders a party to pay to care for his or her children in a lawsuit for divorce, dissolution of marriage, annulment, or legal separation. The Ohio Child Support Guidelines provide a starting point for the calculation of child support; the actual support may vary from the guidelines if special circumstances are proved. Child support differs from spousal support (formerly called alimony), which is the support of a former wife or husband. See spousal support.
CIRCUMSTANTIAL EVIDENCE—Indirect evidence, that is, evidence that does not directly prove a fact, but from which the fact can be inferred. See evidence, direct evidence, Rules of Evidence.

CITATION—A form of combined complaint and summons that may be used in minor criminal cases. It informs the defendant of the violation, and when and where he or she must appear in court. A traffic ticket is a form of citation. See summons.

CITIZEN’S ARREST—The arrest of an accused without a warrant by any person, upon probable cause to believe that a felony has been committed and that the person detained committed it. In Ohio, a citizen’s arrest is the only power of arrest conferred on the general public. Law enforcement officers have the same powers of arrest without a warrant as any citizen. Law enforcement officers have the additional power to arrest without a warrant for misdemeanors, and to execute arrest warrants issued for any offense.

CIVIL ACTION—1) A lawsuit based on a private wrong (such as a tort). 2) A lawsuit to enforce rights through remedies of a private nature. All legal proceedings that are not criminal actions are civil actions. See tort.

CIVIL RULES—See Rules of Practice and Procedure.

CIVIL SERVICE LAWS—Federal and state civil service laws requiring that employment decisions be based on merit, not political considerations. After completing a probationary period, a civil-service protected employee usually cannot be fired except for a good reason (cause). Some jobs, including high-level policy-making positions, are exempt from civil service laws. Those “unclassified employees” not protected by the civil service laws are higher-level employees who are appointed by the governor or state agency director and/or whose responsibilities include carrying out the policies of a current political administration.

CLEAR AND CONVINCING EVIDENCE—An intermediate degree of proof in a legal proceeding. Clear and convincing evidence is a lesser degree of proof than beyond a reasonable doubt, but a higher degree of proof than preponderance of the evidence. Clear and convincing evidence is required in a civil action to establish the right to an extraordinary remedy, such as an injunction. See beyond a reasonable doubt, degree of proof, evidence, extraordinary writ, preponderance of the evidence, writ.

CLOSING—The final step in the sale and purchase of real estate, in which a deed of title, financing documents, title insurance policies, and remaining funds due are exchanged. See deed, real property, title.

CODICIL—An amendment to or addition to a will. A codicil must be executed with the same formalities as the will itself, that is, it must be in writing, dated, signed at the end by the maker (the testator), and acknowledged before at least two witnesses who must also sign the codicil. See will.

COGNITV NOTE—A promissory note (a written promise to pay money) in which the maker acknowledges a debt with the understanding that, if the debt is not repaid, a court may order a judgment against the maker without the usual notice or hearing. Cognitv notes are prohibited in consumer transactions in Ohio. See promissory note.

COLLECTIVE BARGAINING—Negotiations between an employer and a labor union regarding wages, benefits, hours, and working conditions.

COMMERCIAL PAPER—A written document (such as a check or a promissory note) evidencing an obligation of one party to pay another.

COMMON LAW—The body of principles, rules, and forms of procedure that is based on case law, that is, on the written opinions of judges in deciding specific cases. Common law is different from statutory law, which is created by a legislative body. See stare decisis.

COMMON PLEAS COURT—In Ohio, the trial court of countywide venue and jurisdiction to decide all levels of civil and criminal cases.

COMMUNITY CONTROL SANCTIONS—While often called “probation,” community control sanctions cover a wide variety of residential, non-residential, and financial options that judges use in criminal sentencing, including traditional probation supervision and numerous other restrictions administered by the local court. Community control is used for felons when a prison term is not imposed. It is imposed on misdemeanants when a jail term is not warranted. Residential community control sanctions include community-based correctional facilities, halfway houses, and others. Non-residential options include community supervision, drug and alcohol treatment, house arrest, electronic monitoring, community service, and the like. Financial sanctions include fines, restitution, and various reimbursements. Persons facing mandatory prison terms (e.g., for murder, high level sex and drug offenses, felonies committed with firearms, certain repeat offenders, etc.) or mandatory jail terms (e.g., for driving under the influence of alcohol or drugs) are not eligible for community control, other than financial sanctions. See sentence.

COMPARATIVE NEGLIGENCE—In Ohio, the law providing that: 1) where a plaintiff’s own negligence is more
than 50 percent responsible for his or her injury or loss, the plaintiff cannot recover damages from the defendant; and 2) where the plaintiff’s own negligence is 50 percent or less responsible for his or her injury or loss, the amount of damages that the plaintiff can recover from the defendant will be reduced in proportion to the plaintiff’s negligence. See assumption of risk, contributory negligence, negligence, tort.

COMPETENCE—Generally, the legal ability to act. For example, a contract is not enforceable if one of the parties was not competent (in reasonable possession of his or her wits). See contract, guardian, probate division, will.

COMPETENCE TO STAND TRIAL—In criminal law, a requirement for prosecution. No defendant may be brought to trial if he or she is incapable of understanding the nature of the criminal case and proceedings or of assisting in his or her own defense. In such a case, the court may order treatment and the probate court may issue civil commitment orders. If the accused is restored to competence, the criminal trial may proceed. See competence, crime, criminal insanity.

COMPLAINT—1) In civil procedure, a pleading that is a written statement of the facts on which the plaintiff’s cause of action is based. See pleading. All civil actions are begun by the filing of a complaint. 2) In criminal procedure, a statement of the facts that constitutes the offense charged, and is one type of formal accusation of a criminal offense. Criminal actions may be begun by the filing of a complaint or a bill of information, or by an arrest or an indictment.

CONDOMINIUM—1) A hybrid form of individual and group ownership of real property in which the owner has title to space in a multi-unit building or group of buildings, and also (in common with the owners of the other condominium units) the common areas of the project, such as driveways and recreation and landscaped areas, which are managed by a homeowners’ or tenants’ association. 2) Real property so owned. See real property, tenancy in common, title.

CONSIDERATION—In contract law, the valuable right, benefit, thing, or promise that each party gives in return for the promise of the other party to the contract. An offer, an acceptance and consideration are the three basic requirements for a valid contract. See contract.

CONSORTIUM—With respect to education law, a consortium consists of various districts that have legally banded together to provide educational services at a central location.

CONSTITUTION—The written document that is the fundamental law of a nation or a state. The United States Constitution is the fundamental law of the nation. It outlines the federal government’s structure and powers and establishes basic law in the United States. Similarly, the Ohio Constitution establishes basic law for the people of Ohio. Should a conflict arise between the state and federal constitutions, the U.S. Constitution takes precedence.

CONTINUANCE—A postponement of a legal proceeding. In general, continuances are granted only for good cause, such as the illness of counsel or a party, or the unavailability of a witness.

CONTINGENCY—A legally binding agreement between parties who promise to perform stated duties. The basic requirements for a contract are mutual agreement, usually made through a process of offer and acceptance, and consideration, or one of its substitutes. In addition, the parties must be 18 years of age, and otherwise mentally competent, the terms of the agreement must be defined in enough detail that a court (and the parties) can determine their obligations, and the subject matter of the agreement must not be illegal. The offer and acceptance show the agreement of the parties; the consideration is some benefit flowing to each party sufficient to justify the promises. It is not necessary that the parties use any particular words or any particular form of agreement. Commonly used words and phrases are sufficient if they, in fact, make an agreement. The terms “express contract” and “implied contract” refer to nothing more than the formality or informality of the method used to create the contract. Further, contracts may be written or oral. Some contracts must be in writing to be enforceable. See offer, acceptance, consideration, unjust enrichment, statute of frauds.

CONTRIBUTORY NEGLIGENCE—The law providing that, where a plaintiff’s own negligence contributed to cause his or
COPYRIGHT—A right that protects the particular fixed expression of an original work of authorship. It protects, for example, an artist’s specific painting of a sunset scene rather than the broad concept of sunset scenes. A copyright gives its owner the exclusive right to reproduce, modify, distribute, perform or display the copyrighted work and to authorize others to do the same. This right exists from the moment the work is created and is fixed on some type of tangible media, such as paper, film, tape, computer disk, etc. No further action is required to obtain a copyright. See fair use, intellectual property.

COSIGNER—One who signs a promissory note to guarantee its payment by the principal (primary) maker of the note. If the principal maker defaults (fails to make the required payments), the cosigner is responsible for the debt. See promissory note.

COUNTERCLAIM—1) A claim by a defendant against a plaintiff in a civil lawsuit. 2) A pleading asserting such a claim. See pleading.

COUNTEROFFER—In contract law, an offer made in response to a previous offer. See contract, offer.

COUNTY COURT—In Ohio, a lower trial court that operates only in the areas of a county not included in the territory of a municipal court. County courts have exclusive, original jurisdiction in civil actions for the recovery of sums not exceeding $500, and original jurisdiction where the amount in controversy does not exceed $15,000 (including public nuisance cases, collections and evictions, among other things). In criminal cases, county courts have jurisdiction to try misdemeanors and traffic offenses, and to hold preliminary hearings in felony cases. County courts also can hear actions concerning the issuance and enforcement of both temporary protection and anti-stalking orders in domestic violence cases. Judges of county courts can perform marriages statewide, as well.

COURT—1) An institution for resolving legal disputes. 2) A formal term for the judge or judges of a court as when, during a trial, an attorney addresses the judge with the phrase, “May it please the court.” 3) An imprecise way of referring to the judge or judges. For example, “The court, on its own motion, declared a mistrial,” means that the judge stopped the trial on his or her own, without a motion or request from a party.

COURT OF APPEALS—In Ohio, an intermediate court having jurisdiction to hear appeals from the judgments and other final orders of common pleas courts, municipal courts and county courts, and the power to reverse or modify such judgments or orders, or to remand cases back to the lower courts for further proceedings. The court of appeals has similar powers as to appeals from the decisions of administrative agencies. Applications for extraordinary writs must be made (in all but habeas corpus cases) first in the court of appeals, rather than in a trial court. An appeal from the decision of a court of appeals may be taken to the Supreme Court of Ohio. The federal court system also has courts of appeals. The
decisions of a federal court of appeals may be appealed to the
United States Supreme Court. See appeal, judgment,
administrative law, extraordinary writ.

COURT OF CLAIMS—1) In Ohio, a special court with
jurisdiction over civil lawsuits brought against the state or its
agencies, and over all victim of crime claims. 2) The United
States Court of Claims, a federal court having jurisdiction to
try certain civil claims against the United States. See sovereign
immunity, victim of crime claim.

COURT REPORTER—A court official responsible for the
accurate recording of court proceedings and the transcription
of such recordings into typewritten or printed form. Court
reporters record proceedings through the use of shorthand,
stenotype, voice recording, videotape, and other means. The
court reporter is also a notary public.

COVENANTS, CONDITIONS AND RESTRICTIONS (CC &Rs)—Certain restrictions on how real estate may be used.
Covenants, conditions and restrictions in a private purchase
contract may, for example, dictate how a home in a
subdivision or condominium may be built, designed or used;
they may set forth conditions on such things as lot size,
arithmetic design or vehicle parking. When a property is
sold, these restrictions are passed on to the new owners of
the property; buyers must be notified about any CC&Rs before
sale.

COVENANT NOT TO COMPETE / NON-COMPETE
AGREEMENT—An agreement that prohibits a former
employee from working for a competitor or soliciting
customers for a certain period of time after the employment
ends.

CRIME—An offense against the public, as well as (usually)
against an individual victim. Criminal law spells out rules of
conduct and provides sanctions for breaking those rules. In
Ohio, all crimes are defined either by state statute or municipal
ordinance, and they must each: 1) prohibit a specific act or
course of conduct, or impose a specific duty; and 2) provide a
criminal penalty for doing the prohibited act or conduct, or
failing to meet the required duty. There is a great variety of
criminal penalties, some of which are fines, imprisonment,
and, in capital offenses, death. See ordinance, statute.

CRIMINAL ACTION—A court proceeding involving a crime
(a public wrong), in which the state or one of its municipalities
is the complaining party.

CRIMINAL INSANITY—An affirmative defense to a crime.
To establish this defense under Ohio practice, it must be
shown that the defendant, because of a severe mental illness or
defect, did not know what he or she was doing was wrong.

Persons found not guilty by reason of insanity are committed
to mental institutions for treatment, and released when their
sanity is restored. See affirmative defense, competence to
stand trial, crime, mens rea.

CRIMINAL RULES—See Rules of Practice and Procedure.

CROSS-EXAMINATION—The questioning (examination) of
a witness during a legal proceeding, conducted by the
opposing party. Generally, cross-examination takes place after
direct examination by the party who called the witness.
Leading questions may be asked on cross-examination. See
direct examination, leading question.

CULPABLE MENTAL STATE—Synonymous with mens rea
(guilty mind). Generally, a crime requires that a guilty act or
omission (the actus reus) be committed with the required
degree of guilty mind. Therefore, Ohio law provides that
certain acts are crimes only if done with a particular state of
mind, and that a certain sort of criminal act is more or less
serious depending on the perpetrator’s state of mind at the
time. For example, consider the killing of one person by
another person. That conduct may be 1) no crime (if done in
self-defense), 2) a serious crime if done negligently (negligent
homicide) and 3) the most serious sort of crime if done
purposefully (murder). The four culpable (blameworthy) states
of mind recognized by Ohio law—in ascending order of
severity—are negligence, recklessness, knowledge and
purpose. In order to convict the accused, the prosecutor must
prove beyond a reasonable doubt that, when he or she did the
unlawful act charged, the accused did so with the state of mind
required for the commission of that particular crime. A very
few acts (strict liability offenses) are criminal, however they
are done. See beyond a reasonable doubt, crime, murder, strict
liability.

CYBERLAW—A term that refers to the rules and regulations
established by Congress, legislatures, courts, and international
conventions to govern, prevent and resolve disputes that arise
from the use of computers and the Internet.

CYBERPIRATE—Also known as a cybersquatter. See
cybersquatting.

CYBERSQUATTING—In cyberlaw, buying a domain name
reflecting the name of a business or famous person so that the
name can be sold back to the business or celebrity for a profit.
The Anti-Cybersquating Consumer Protection Act of 1999
authorizes a cybersquatting victim to file a federal lawsuit to
regain a domain name or sue for monetary compensation.
Victims of cybersquatting can also use the provisions of the
Uniform Domain Name Dispute Resolution Policy adopted by
ICANN, an international organization that administers domain
names. Through this policy, disputes are resolved through
arbitration rather than litigation. Cybersquatters are also known as cyberpirates.

D

DAMAGES—Money awarded as compensation for loss or injury to person, property, or rights, caused by the improper act or omission of another. Punitive damages also may be awarded both to punish outrageous conduct and to warn other members of the community not to follow that example.

DAMNUM ABSQUE INJURIA—Literally, “a wrong without injury.” The rule that, when a wrongful act or omission of a potential defendant has caused no harm to person, property or rights, there is no cause of action (there is no claim that the law recognizes). The courts will not hear a case in which the wrongful act or omission of the potential defendant did not cause any harm to person, property, or rights. See de minimus non curat lex.

DECLARATION OF MENTAL HEALTH TREATMENT—A document that allows an individual to state his/her own preferences regarding mental health treatment and to appoint a person to make mental health care decisions when he/she is unable to do so.

DEED—A document that transfers ownership of real property. See mortgage, real property.

DEEP LINK—In cyberlaw, a link from one Web site to another that bypasses the second Web site’s home page and takes the user directly to an internal page on the site. For example, a deep link from the OSBA Web site takes the user directly to the portion of the Environmental Protection Agency’s site that affects Ohioans: (http://www.epa.gov/region5/) rather than to its home page (http://www.epa.gov/).

DEFAMATION—A public, derogatory and knowingly false statement about another’s character, morals, abilities, business practices, or financial status. Libel and slander are two kinds of defamation. See libel and slander.

DEFAULT—1) In civil procedure, a failure to file a pleading (generally, an answer) within the time allowed, or a failure to appear in court when required. Except in certain instances, final judgment may be entered without a trial against a party in default. 2) In contract law, the failure to abide by the terms of a contract (often the failure to pay a debt, or the failure to pay a debt on time). See judgment, pleadings.

DEFENDANT—The party against whom a civil action or criminal action is brought.

DEFINITIVE SENTENCE—A prison or jail sentence for a specific time (say, two years), currently used for misdemeanors and most felonies in Ohio. It is sometimes also referred to as a “determinate” or “flat time” sentence. This differs from an “indefinite sentence.” See indefinite sentence.

DEGREE OF PROOF—The level of persuasiveness by which a case or defense must be established. The degree of proof required to establish guilt in a criminal case is beyond a reasonable doubt. The degree of proof necessary to permit an extraordinary remedy in a civil case is clear and convincing evidence (extraordinary remedies include most remedies other than money damages—an injunction, for example). The degree of proof required to prevail in other civil cases or to establish an affirmative defense in a criminal case is preponderance of the evidence. A lesser degree of proof, required to make a valid arrest or to hold a criminal accused for trial, is probable cause. Degree of proof does not mean the sheer amount of evidence but the believability and reliability of the evidence. The testimony of one reliable and believable witness may be more persuasive than the testimony of 10 unreliable witnesses. See beyond a reasonable doubt, clear and convincing evidence, preponderance of the evidence, probable cause.

DELINQUENT CHILD—A delinquent child is one who commits any act (other than a juvenile traffic offense) that would be a crime under state, municipal, or federal law if committed by an adult, or who fails to obey an order of a juvenile court. For example, a child is charged with delinquency whether the offense in question is murder or merely disorderly conduct. See crime, juvenile division.

DE MINIMUS NON CURAT LEX—Literally, “The law does not cure trifles.” The rule that a minimal or trifling injury to a person, property, or rights does not justify the time and trouble of a lawsuit, and that the courts will refuse to hear such a suit. See damnum absque injuria.

DEPENDENT CHILD—A child who is homeless, destitute, or without proper care or support; who lacks proper care or support because of the mental or physical condition of the child’s parents, guardian or custodian; whose condition or environment warrants the state becoming the child’s guardian; or who is in danger of being abused or neglected by a household member who has abused or neglected a child who lives in the household. The dependent child’s condition or situation is not, generally, the fault of the parents, guardian, or custodian. This kind of dependency should not be confused
with “dependents” that are named by parents for tax purposes. See juvenile division, neglected child.

DEPOSITION—A type of discovery in which the sworn testimony of a party, a witness, a medical expert, or any other person who has information that may be useful in a case is given in a legal proceeding that occurs outside of court but with court authority. See discovery.

DESIGN AND DISTRIBUTION—See statute of descent and distribution.

DEVELOPMENTAL DELAY—A delay in one or more areas of development (cognitive; physical, including vision, hearing and nutrition; communication; social or emotional; and/or adaptive behavior).

DIRECT EVIDENCE—Evidence that was seen, touched or heard by a witness directly. For example, a witness who sees rain coming down has direct evidence that it is raining. Also, a written document introduced in a trial is direct evidence of its own contents. See evidence, circumstantial evidence, Rules of Evidence.

DIRECT EXAMINATION—The questioning (examination) of a witness in a legal proceeding by the party who called the witness to testify. Leading questions are prohibited on direct examination except when the court rules that the witness is hostile to the party that called him or her. See cross-examination, hostile witness.

DISBARMENT—The revocation (taking away) of an attorney’s license to practice law as punishment for certain wrongful acts. In Ohio, unlike some other states, disbarment is for life; there is no possibility of reinstatement. Because of its authority to regulate the practice of law in this state, the Supreme Court of Ohio is in charge of such professional discipline.

DISCHARGE OF DEBTS—See bankruptcy.

DISCOVERY—Any of various pretrial procedures by which a party to a case may learn about information or evidence in the possession of another party, a witness, or other person. The purposes of discovery are to prevent unfairness (including unfairness resulting from surprise during a trial), to make it easier to prepare an effective lawsuit, and to help narrow the questions to be tried in the case. Discovery is more limited in criminal than in civil cases. See deposition, evidence, interrogatory.

DISPOSITION—A final court determination regarding a lawsuit or a criminal charge.

DISPUTE RESOLUTION—A means for resolving disputes that exists outside the state and federal judicial systems. Common dispute resolution techniques include negotiation, arbitration, mediation, the mini-trial and summary jury trial, and private judge trials. Generally, these methods are faster, less expensive and less adversarial than a court trial. See arbitration, mediation.

DISSOLUTION OF MARRIAGE—The legal termination of a marriage by the joint request of the husband and wife. In dissolution, unlike divorce, no grounds for the termination must be proved. The parties must agree about the distribution of property, support, the custody of children (if any) and all other issues, and describe those agreements in a document (a separation agreement) submitted for the court’s consideration and approval. Dissolution of marriage is sometimes called “no-fault divorce.” See divorce, separation agreement.

DIVORCE—The legal termination of a marriage when the complaining party establishes any one of the reasons (grounds) for divorce recognized in Ohio. Among the grounds commonly used are extreme cruelty, gross neglect of duty and incompatibility. Divorce is an adversary proceeding, unlike dissolution of marriage, which is not an adversary proceeding. See adversary system, child support, dissolution of marriage, spousal support.

DOMAIN—Computers that share a common part of an Internet address are said to be in the same domain. The last part of an Internet address, following the “dot,” identifies the domain. Common current domains are .com, .org, and .net.

DOMESTIC RELATIONS DIVISION—In Ohio, a division of the common pleas court that deals with divorce, dissolution of marriage, annulment, legal separation, and related questions of property division, spousal support, child custody, and child support.

DO NOT RESUSCITATE (DNR) ORDER—Under its DNR Comfort Care Protocol, the Ohio Department of Health has established two DNR order forms. When completed by a doctor (or certified nurse practitioner or clinical nurse specialist), these DNR orders allow patients to choose the extent of the treatment they wish to receive at the end of life. A patient with a DNR Comfort Care-Arrest Order will receive all appropriate medical treatment, including resuscitation, until the patient has a cardiac or pulmonary arrest, at which point only comfort care will be provided. By requesting a DNR Comfort Care Order (DNR-CC), a patient rejects other resuscitative measures such as drugs to correct abnormal heart rhythms. With this order, comfort care or other requested treatment would be provided at a point even before the heart or breathing stops. Comfort care involves keeping the patient
comfortable with pain medication and providing bereavement care. See living will, durable power of attorney for health care.

DOUBLE JEOPARDY—Properly, once in jeopardy, but also called former jeopardy. Both the U. S. and Ohio constitutions provide that no person can be placed in jeopardy (that is, tried) more than once for the same crime. With some exceptions, then, the state has only one chance to prove an accused guilty. In general, an accused is in jeopardy at the point in a trial when the jury is impaneled and sworn or, in a case tried without a jury, when the presentation of evidence begins. See constitution, impanel.

DOUBLE TAXATION—In corporate law, the application of two layers of taxation: a corporation is subject to corporate income tax on its profits, and its shareholders are taxed at ordinary income rates on any dividends paid by the corporation out of the same profits. Also known as dual taxation.

DOWER INTEREST—The right of a surviving spouse to a one-third interest (for his or her life) in real property owned by the deceased spouse. This is seldom an issue in Ohio today because buyers rarely acquire real property without obtaining a release of dower rights. See real property.

DUAL AGENCY—In property law, dual agency refers to the representation of both the buyer and the seller by a real estate agent.

DUAL TAXATION—See double taxation.

DUE PROCESS OF LAW—The 14th Amendment to the United States Constitution provides that no person may be deprived of life, liberty, or property without due process of law. That is, rights, obligations, and liabilities must be determined through a rational legal procedure that is intended, and used, to insure fundamental fairness. In the context of criminal law, this means that an accused person may not be arbitrarily fined, jailed or otherwise punished. Guilt or innocence must be determined fairly, impartially and in a timely manner, and the accused must have the opportunity to face his or her accusers and to offer a defense. See constitution.

DURABLE POWER OF ATTORNEY FOR HEALTH CARE—A legal document (also called a “health care power of attorney” or “DPOA”) that authorizes another person (called an attorney-in-fact) to make health care decisions for the maker of the power of attorney when the maker is not competent to make such decisions. See attorney-in-fact, competence, Do Not Resuscitate order, fiduciary, living will.

DYNASTY TRUST—A form of trust that can hold property forever (in perpetuity). See rule against perpetuities.

E

EARNED CREDIT—In Ohio criminal law, the reduction of an inmate’s sentence by one day (the earned credit) for each month the inmate participates in meaningful school, work, training, or treatment programs. This is the only type of time off for good behavior still available to inmates.

EASEMENT—A right of access across, or a limited right to use, real property. A common type of easement gives a utility company access to property for the purpose of installing and maintaining its lines and equipment. An easement is usually granted in writing by deed or similar document and “runs with the land,” meaning it remains valid even though the property involved is rented, mortgaged, sold or transferred through a succession of owners. See deed, prescription, real property.

ELECTRONIC FUND TRANSFER—Any transfer of funds that is initiated by electronic means, such as an electronic terminal, telephone, computer, automatic teller machine (ATM) or magnetic tape.

ELECTRONIC SIGNATURE—A paperless way to enter into an electronic contract. To sign a contract electronically, a person may be asked to type his or her name into a box, paste a scanned version of his or her signature into a box, click an I Accept button, or use a key to encrypt (scramble) information that uniquely identifies the signer using a method called Public Key Infrastructure (PKI). According to the Electronic Signatures in Global and International Commerce Act (E-SIGN)—effective October 1, 2000—electronic signatures are as binding as those on paper. Also in 2000, Ohio enacted the Uniform Electronic Transactions Act, which is similar to E-SIGN; it makes the electronic record of a transaction equivalent to a paper record and gives electronic signatures the same legal effect as manual signatures. The electronic signature is also called a digital signature, but it is becoming standard to save the term digital signature for cryptographic signature methods such as PKI and to use electronic signature for any of the paperless signature methods.

EMANCIPATION—The act or process of releasing a person from the parental control, care and custody of his or her parent(s). In general, emancipation occurs automatically when a person reaches age 18, the age of majority for most purposes, or upon graduation from high school if a child turns 18 during his or her last year of high school. However, a person may be emancipated before he or she attains the age of 18 if the child gets married or joins the military service. Ohio law does not provide a way for someone under the age of 18 to petition a
court to “become emancipated.” Even if a court relieves parents of financial responsibility for a minor child, the child is not emancipated and the parents still may be held responsible for the child’s actions.

EMINENT DOMAIN—The power of a government to take (to appropriate) private property for public use. Under the constitutions of Ohio and the United States, private property cannot be taken for public purposes unless the owner of the property receives just compensation.

EMPLOYMENT AT WILL—The doctrine that an employee serves at the will of the employer, and that the employer is free to terminate the employee at any time, for no reason or for any lawful reason. (At the same time, an at-will employee is free to quit at any time, for any reason or no reason, with or without notice.) The employer has no duty to treat employees fairly, only lawfully. An employment contract, whether written or merely implied, can restrict the employer’s freedom to discharge an employee. Also, for reasons of public policy, employers may not terminate an employee on the basis of race, national origin, gender, religion, disability or age. Nor can an employer fire an employee in retaliation after the employee has exercised his or her legal right to, say, file a workers’ compensation claim or whistle-blowing. An employee’s exercise of such legal rights is protected conduct. Further, an employer may not terminate an employee for serving on a jury or for refusing to break the law. See contract, whistle-blower.

ENDORSMENT—The procedure for transferring a negotiable instrument. A check, for example, is customarily endorsed by signing it on the back in the area reserved for signatures. An endorsement may be unconditional or qualified. The signature of the endorser is a type of unqualified endorsement, and makes the instrument payable to bearer, that is, payable to the person who has it at the time it is negotiated. Endorsements to pay to the order of a named person, or to deposit the instrument in a bank account, are qualified endorsements. See negotiable instrument.

ENTRAPMENT—An affirmative defense to a criminal charge. The defense is established if the defendant proves that the offense was incited or induced by law enforcement officers, and that the accused would not have been inclined to commit the offense without that incitement or inducement. See affirmative defense, charge.

EQUAL PROTECTION OF THE LAWS—The 14th Amendment to the United States Constitution provides that persons are entitled to equal protection of the laws. Generally, that means that persons similarly situated must be treated equally, without discrimination on some improper basis. For example, the law can provide that all people over age 62 get a public pension, but not that only white males (or black females) over age 62 get a public pension. Similarly, the law can require that all citizens pay income taxes, but not that only residents of Alabama and Ohio pay income taxes. In the context of criminal law, equal protection means that the law must be the same for all, regardless of (for example) rank, status, creed, color, or political persuasion. See constitution.

ESCHEAT TO THE STATE—The reversion to the state of title to property. This can occur when an owner dies with no legal heirs or when a corporate owner is dissolved while holding legal title to the property. See statute of descent and distribution.

ESCROW—An arrangement by which the parties to a contract agree that a neutral third person will hold money, property, or documents, and distribute these items at certain times or upon the happening of a certain event. Escrow is often used in real estate transactions. All or part of the purchase money is deposited with an escrow agent pending the time when the seller is prepared to convey good title to the buyer. Financial institutions are often used as escrow agents. See contract, title.

ESTATE—A generic term meaning all the property owned by a person, including real property, personal property of any kind, and property rights. See personal property, real property.

EVIICTION—A lawsuit to remove a tenant from rental property. The technical term for eviction in Ohio is forcible entry and detainer.

EVIDENCE—Anything that can be presented in a legal proceeding to prove a fact, or disprove an alleged fact. Some of the more important classes of evidence are: 1) testimony; 2) tangible evidence (things); 3) documentary evidence (information shown in letters, memoranda, or other writings); and 4) demonstrative evidence (evidence that shows how an event happened, relationship, or cause and effect). See circumstantial evidence, direct evidence, prima facie, Rules of Evidence, testimony.

EXECUTOR—In probate law, a person nominated in a will to settle the estate of the person making the will, and appointed by the probate court for that purpose. See administrator, will. 

EXEMPT EMPLOYEE—See civil service laws.
EX POST FACTO—Literally, “after the fact.” Ex post facto laws—prohibited by the constitution of the United States—are laws enacted after an act was done that: 1) impose a criminal penalty for the act where none previously existed; 2) impose a higher penalty than that previously applicable; or 3) eliminate a defense available at the time the act was done. The Ohio Constitution prohibits the enforcement of retroactive laws, whether criminal or civil, but gives effect to laws that establish a remedy or advantage not available when the act was done—that is, laws which put a person in a better place than he or she would have been under the law in effect when the act was done. See constitution.

EXTRADITION—1) The formal process in which one state may surrender to a second state a person accused of committing a crime in that second state. Extradition is used only in felony cases and in cases involving the failure to support children. 2) A similar surrender, used between nations that are parties to an extradition treaty.

EXTRAORDINARY WRIT—Any of five special types of lawsuit. See habeas corpus, mandamus, procedendo, prohibition, quo warranto, writ.

FAIR USE—In intellectual property law, fair use is something that is permitted by law that would otherwise constitute copyright infringement. Reproducing, distributing, displaying or performing a copyrighted work may, in limited circumstances, be found to be a fair use. For example, if a page from an encyclopedia is copied at the public library for personal use, it is probably a fair use. Some of the factors in determining whether a use is a fair use are: the purpose and character of the use; the nature of the work; the amount of the work involved; the effect of the activity on the market for the original work; and whether the original work is published or unpublished. See copyright, intellectual property.

FALSE ARREST—An arrest (a deprivation of a person’s liberty, or detention) without legal justification. False arrest can be the basis of a tort lawsuit where the plaintiff was detained by the defendant when the defendant knew, or should have known, that the detention was illegal. False imprisonment is synonymous with false arrest. See tort.

FALSE IMPRISONMENT—See false arrest.

FEE—1) In general, payment for services rendered, such as the charge made by an attorney for work done for a client. 2) In real property law, fee often means the highest, most complete form of ownership. See fee simple.

FEE SIMPLE—Absolute ownership of real property. See real property.

FELONY—A serious crime carrying a potential penalty of imprisonment for more than one year, or death. Aggravated murder is the most serious felony; some of the others are murder, drug trafficking, kidnapping, rape and robbery. See crime, misdemeanor, murder.

FIDUCIARY—A person or institution serving in a position of trust, charged with acting for the benefit of a third person and not for the fiduciary’s own gain. Administrators, attorneys-in-fact, conservators, executors, guardians, and trustees (among others) are fiduciaries.

FINANCE CHARGE—See annual percentage rate (APR).

FINANCIAL RESPONSIBILITY LAW—A “financial responsibility” law requires you to prove your financial ability to pay for damages if you are involved in an accident. In Ohio, the law requires a person registering a vehicle (applying for license plates) and a person operating a motor vehicle to show proof of financial responsibility. Maintaining an automobile insurance policy is the most common way to comply with a financial responsibility law. A person stopped by police for a traffic violation or a person involved in an auto accident must show proof that he or she is able to pay damages caused by the operation of a motor vehicle. Failure to demonstrate the required level of financial responsibility at the time of an accident or traffic violation can result in suspension of your driver’s license or revocation of your vehicle registration. See accident report.

FIREWALL—A computer or computer software system that prevents unauthorized Internet users from accessing private information (as on a company’s local network or Intranet). All messages going into or out of the intranet pass through the firewall, which examines the messages and blocks those that do not meet certain security standards.

FIXTURE—In real property law, any item that normally would be personal property but, because it is attached to real property so securely that it cannot be removed without damage, is considered part of the real property. A house or barn is a fixture. Equipment necessary for the proper use of real property (such as heating or plumbing equipment) may be considered fixtures. See mixed property, real property, trade fixture.

FORCIBLE ENTRY AND DETAINER—See eviction.

FORECLOSURE—A type of lawsuit to enforce payment of a debt by the sale of property the debtor has pledged to the
creditor as security for the debt. See mortgage, lien, marshaling of liens, priority of liens.

FREE AND APPROPRIATE PUBLIC EDUCATION (FAPE)—Special education and related services that: 1) have been provided at public expense, under public supervision and direction, and without charge; 2) include an appropriate preschool, elementary or secondary school education in the state involved; and meet individual education plan (IEP) requirements. Each school district must adopt and implement written procedures ensuring FAPE to all children with disabilities, aged three through 21 years.

G

GARNISHMENT—A type of lawsuit to enforce payment of a money judgment, in which the judgment debtor’s property being held by a third person is paid into court to satisfy the debt. Common types are garnishment of unpaid wages and garnishment of bank accounts. See judgment debtor.

GRAND JURY—See jury.

GRANTOR—The party, sometimes called the seller or giver, who transfers ownership of (title to) real property to another, referred to as the buyer, grantee, recipient or donee, by means of a deed. Grantor also may refer to the maker of a trust who transfers property to himself/herself or to another person (a trustee). See deed, real property, trust.

GUARDIAN—A person legally charged with the care of another. Parents are the natural guardians of their minor children. The probate court may appoint guardians to care for minors or persons who cannot care for themselves because of physical limitations, mental illness, mental deficiency, age, or other causes. The person for whom a guardian is appointed is called a ward. A guardian may be appointed by the court to be a guardian of the person, or as a guardian of the property, or as guardian of both the person and property of the ward. A limited guardian may be appointed to handle only certain particular affairs that the ward cannot do alone; a conservator may be appointed to assist a person mentally competent but physically infirm. The court also may appoint an interim guardian or an emergency guardian for short periods in special situations such as when there is a temporary disability, or until a full hearing can be arranged to determine if a full guardianship is necessary. See fiduciary, probate division, ward.

GUARDIAN AD LITEM—A guardian “at law” who is appointed by the court for the specific purpose of protecting the interests of a minor during the course of legal proceedings. See guardian, next friend.

H

HABEAS CORPUS—An extraordinary writ designed to test the legality of any kind of detention. This writ may be initiated in the court of appeals, the Supreme Court of Ohio or in a common pleas court. It is most often used in criminal cases, but also may be used to test the legality of a person’s continued confinement in a mental hospital. Habeas corpus cannot be used as a substitute for appeal. A post-conviction relief proceeding is used instead of habeas corpus in some cases in Ohio. See extraordinary writ, writ.

HARMLESS ERROR—In appellate practice, an error committed by a trial court that was not prejudicial to the rights of the appellant (the party who brought the appeal)—that is, the error did not affect the outcome of the trial. An appellant must show prejudicial error in order to win an appeal; harmless error is not enough. See appeal, court of appeals, prejudicial error.

HEARSAY—Testimony concerning matters not within the personal knowledge of the witness; in essence, second-hand testimony. With certain exceptions, under the rules of evidence, hearsay cannot be allowed or admitted for consideration in a trial. For example, the State will not be allowed to prove that Mary committed a crime by having Susan testify: “I heard John say that Mary did it.” See evidence, rules of evidence.

HOLDER IN DUE COURSE—In commercial law, a person who, in good faith, gives value for a negotiable instrument, without notice of any reason that the instrument should not be honored (paid) when presented for payment. The holder in due course doctrine gives some assurance to parties not involved in an original transaction that the commercial paper (or negotiable instrument) is valid, moves freely and is honored (paid) by the business and banking worlds. In most consumer transactions, the traditional concept of holder in due course has been modified. Under the consumer laws, a buyer can take all appropriate legal actions against any person or entity to which the seller has transferred the buyer’s contract or note. See negotiable instrument.

HOME SCHOOLING—An exception to the compulsory attendance laws that allows parents or other qualified persons to provide school-aged children with educational programming in the home setting.
HOME SOLICITATION SALE—A type of sale concluded at the buyer’s home following a personal solicitation by the seller. Home solicitation sales are regulated by statute in Ohio. Home solicitation sales do not include sales under $25; sales by licensed brokers or dealers of real estate, insurance, stocks, bonds, cars or automotive services; or sales at auctions.

HOMESTEAD EXEMPTION—An Ohio law that allows debtors to keep certain property free of the claims of their creditors. The homestead exemption allows a debtor to protect most or all of the equity in his or her home.

HOSTILE WITNESS—A witness whose interests or attitude can be shown to be adverse to the party calling the witness to testify at a trial or other legal proceeding. Although normally a witness cannot be cross-examined by the party that calls him or her, a party can cross-examine his or her own witness if the court declares that the witness is hostile. See cross-examination, direct examination, leading question.

HUNG JURY—A jury that cannot agree on a final verdict. In criminal cases in Ohio, all members of the jury must agree on a verdict; one dissenting vote is enough to deadlock the jury. In civil cases, three-fourths of the jury must agree on a verdict, so a civil case with eight jurors can be deadlocked by three dissenting votes. If the judge is convinced that the jury will not be able to reach a verdict, the judge will declare a mistrial. The case may have to be retried at a later date to a new jury unless the prosecutor decides to dismiss it. See mistrial.

IMPANEL—To seat, or complete, a jury. When the voir dire (questioning of jurors) is finished and both sides have exercised their challenges for cause and peremptory challenges, the jury is impaneled. The jurors are then sworn (given an oath to do their duty) and the trial is ready to proceed with the introduction of evidence. See voir dire, challenge.

INDEFINITE SENTENCE—A sentence containing a minimum and a maximum prison or jail terms (say, 18 to 36 months). Typically, the offender must serve the minimum time and must be released at the maximum time. In the period between the minimum and maximum, the offender may be released administratively (usually by a parole board). Thus, the exact time is indefinite when the sentence is imposed. Ohio law has not used indefinite sentences for misdemeanants since 1974 and for most felons since 1996. An indefinite sentence is sometimes also called an indeterminate sentence.

INDEPENDENT CONTRACTOR—One who performs some act on behalf of another in carrying out a contract. The question of whether a person is an agent or employee on the one hand, or an independent contractor on the other, is often an issue when someone claims that the principal (the person who hires the worker) is liable for some negligence or other wrongful conduct by the worker. Generally, a worker is considered an independent contractor when the principal exercises significant control only over what work is done, and minimal control over how the work is done. See agent, contract, negligence, respondeat superior.

INDETERMINATE SENTENCE—See definite sentence.

INDICTMENT—A formal accusation made by a grand jury, charging a named person with a specific crime. In serious offenses, an accused is entitled to indictment by a grand jury under both the United States and Ohio constitutions. See jury, information.

INDIVIDUALIZED EDUCATION PLAN (IEP)—Written plan developed by a team of parents, educators and others of specific special education and related services designed to meet the unique needs of a child with a disability. Each child with a disability is to have an IEP in effect at the beginning of each school year, and it must be implemented as written. However, it is a working document and is generally reviewed and revised at least once per year.

INFORMATION, BILL OF INFORMATION—A formal written accusation made by a prosecuting attorney charging a named person with a specific crime. An information can be used instead of an indictment by a grand jury except to charge offenses carrying a potential penalty of death or life imprisonment, but it cannot be used in any case unless the accused waives indictment.

INITIAL APPEARANCE—The first appearance of an accused before a municipal (or county) court judge or magistrate, during which the Rules of Criminal Procedure require the judge or magistrate to inform the accused of his or her constitutional rights (particularly the right to remain silent and the right to be represented by counsel) and to set bail for the accused if bail has not already been set. When a person is arrested without a warrant, the initial appearance must be held without unnecessary delay, that is, the accused must be brought before a judge or magistrate at the first reasonable opportunity—within hours or a few days at most after arrest. In misdemeanor cases, a defendant might decide to plead guilty and be sentenced during the initial appearance. In felony cases, the defendant is not permitted to make a plea at the initial appearance because the municipal/county court does not have jurisdiction to decide felonies. A defendant who cannot afford bail is generally incarcerated until his or her trial.
INJUNCTION—A court order commanding a specific person to do—or not do—a particular act under pain of punishment for contempt of court. An injunction is an extraordinary remedy requiring clear and convincing evidence, and is generally restricted to cases in which money damages would be an inadequate remedy. See clear and convincing evidence, contempt of court.

INSANITY—See competence, criminal insanity.

INTANGIBLE PERSONAL PROPERTY—See personal property.

INTELLECTUAL PROPERTY—Intellectual property laws protect those who create property that comes from the work of the mind, such as an invention, a program, a method, a painting, or a trade secret. Creators of certain types of intellectual property may protect their interests, for example, by registering a copyright or trademark, or by applying for a patent. See copyright, patent, trademark, trade name, service mark.

INTERFERENCE WITH CONTRACT—A person, not a party to a contract, who improperly interferes with performance of the contract. Such interference is the basis for a tort lawsuit for damages. See contract, tort.

INTERNET—Worldwide collection of computer networks that communicate with each other.

INTERNET SERVICE PROVIDER (ISP)—A business that provides access to the Internet and may also provide services such as e-mail and newsgroups.

INTERROGATORY—A type of discovery in civil cases in which one party submits written questions to another party and the recipient must provide written answers within a certain time. See discovery.

INTESTATE—1) A person who dies without a valid will. 2) The status of having died without a will. 3) Property that is not governed by a will. Intestate property is distributed according to the statute of descent and distribution. See statute of descent and distribution, testate, will.

INVASION OF PRIVACY—A cause of action based on the defendant’s unwarranted and gross interference with the plaintiff’s solitude or personal life. See cause of action, tort.

INVITEE—A person who lawfully enters the land, premises, or private property of another upon the express or implied invitation of the owner or person in charge. In tort law, the scope of a landowner’s duty to shield another person from unreasonable risk may vary with the legal status (invitee, licensee, trespasser) of the person who enters the property. Also, the scope of the duty toward an invitee may vary according to whether the landowner’s invitation is for business or personal reasons. See licensee, trespasser, tort.

JAIL TIME CREDIT—Credit given for the time served in a local jail by a person before he or she is sentenced for a crime. For example, offenders are incarcerated in local jails: 1) after arrest; 2) while awaiting bail; 3) while awaiting a hearing or trial; 4) while awaiting a physical or mental examination; and 5) while awaiting transportation after conviction. Many offenders have already served time before they technically begin their sentences. In general, offenders are entitled to have their sentences reduced by all the time they have been incarcerated.

JOINT AND SEVERAL—Together and separately. The phrase normally refers to the liability of two or more persons with respect to a single transaction. For example, when two people are jointly and severally liable on a debt, the creditor may collect the entire debt from either person, or may collect any part of the debt from each.

JOINT AND SURVIVOR—See joint tenancy.

JOINT TENANCY—A type of ownership in which two or more persons own an undivided fractional interest in property; that is, instead of owning some designated part of the property, each owns a designated percentage of all the property. Both tenancy in common and survivorship tenancy are forms of joint tenancy. Unlike that of some other states, Ohio’s law does not provide that property owned jointly automatically passes to the survivor or survivors upon the death of one of the owners, so a right of survivorship must be specifically described in the document that creates it—for example, a deed granting real property to the new owners jointly, with right of survivorship. A survivorship feature is common in joint bank accounts. See partition, tenancy in common.

JUDGE—The presiding officer of a court. In a trial court, the judge’s chief duties are to supervise the conduct of the trial and to rule on all questions of law. See court.

JUDGMENT—A final order of a trial court that puts into effect the court’s decision in the case. Judgment should be distinguished from verdict. A verdict is a finding of fact by a jury. The court must implement the verdict by issuing an appropriate order, or judgment. In a criminal case, the sentence is part of the judgment.
JUDGMENT CREDITOR—In civil practice, the party in whose favor a money judgment is entered by a court.

JUDGMENT DEBTOR—In civil practice, the party against whom a money judgment is entered by a court.

JUDGMENT JOURNAL ENTRY—A document stating the final decision of the court—in civil cases, judgment for a particular party and the terms of that judgment (for example, an amount of money damages to be paid), and in criminal cases, imposing sentence upon the defendant. The filing of either judgment entry begins the running of the time within which an appeal must be taken. See appeal, judgment.

JUDGMENT LIEN—A lien filed by a creditor that attaches to property of a judgment debtor (a debtor who has been ordered by the court to satisfy a debt to the creditor). When a money judgment is entered by a common pleas court, a lien automatically attaches to all real property of the judgment debtor in the county where the court is located. The lien does not attach to property in another county until the judgment is filed with the clerk of the common pleas court in that county. All money judgments of a municipal court or county court must be filed with the clerk of the common pleas court in order to have a judgment lien on real property of the judgment debtor. See lien, foreclosure.

JUDICIAL RELEASE—A release from prison granted by a sentencing judge. Generally, the judge can modify an eligible offender’s sentence by granting judicial release (formerly known as shock probation), and by allowing the offender to be placed in a boot camp treatment or furlough program. The law prevents the Parole Board from releasing people from non-life sentences committed after July 1996, and ultimate control over each offender’s actual sentence is now left to the sentencing judge.

JURISPRUDENCE—The philosophy of law, or the science of classifying law and legal principles.

JURY—A group of citizens, selected and sworn to make a factual determination in a legal proceeding. A grand (large) jury’s function is to review alleged offenses presented to it and determine whether there is probable cause to believe that a crime was committed, and that the accused person committed the crime. A petit (small) jury’s duties are to decide the factual questions in a trial and to render a verdict on those questions. In Ohio, grand juries consist of nine jurors and up to five alternates. Petit juries consist of 12 jurors in felony cases and eight jurors in misdemeanor cases. In civil cases, petit juries consist of eight jurors, or of whatever lesser number the parties may agree. All jurors are chosen at random. Petit jurors are screened through voir dire before being allowed to sit on the jury. See voir dire, felony, misdemeanor, no bill, probable cause, true bill, verdict.

JUVENILE—In Ohio, any person under age 18. Juvenile is synonymous with minor and child for most purposes.

JUVENILE COURT—See juvenile division.

JUVENILE DELINQUENT—A minor who has committed any act (other than a juvenile traffic offense) that would be a crime if committed by an adult.

JUVENILE DIVISION—In Ohio, a division of the common pleas court with exclusive jurisdiction to deal with juveniles who are unruly, abused, neglected, or dependent, and juvenile traffic offenders. The juvenile division also has concurrent jurisdiction to try adults charged with contributing to the delinquency of, or abuse or neglect of, juveniles. Juveniles charged with criminal offenses and retained for trial by the juvenile division (juvenile court) are not subject to adult penalties if found guilty, but may be dealt with according to a wide range of treatment options available to the juvenile judge. Under certain circumstances, juveniles who are accused of serious crimes may be bound over (transferred) to the court of common pleas for trial and punishment as adults. Also, where the parents involved have never been married to each other, the juvenile division has jurisdiction to determine matters concerning parentage and child support. See abused child, child support, delinquent child, dependent child, neglected child, unruly child.
LANDLORD—A real property owner who grants the use of the property to another, called the tenant, by means of a lease or through a tenancy at will, in return for the payment of money or something else of value. See lease, real property, tenancy at will.

LEADING QUESTION—A question phrased so that it suggests the answer. In general, leading questions are prohibited on direct examination but are permitted on cross-examination. A direct question to a witness might be phrased, “What did you do then?” The same question would be leading if it were phrased, “You ran away then, didn’t you?” See cross-examination, direct examination, hostile witness, Rules of Evidence.

LEASE—A document that is both a contract and a conveyance of an interest in property, the interest being the right to occupy and use the property for a stated period of time, or term. The landowner is the lessee and the person taking possession of the property is the tenant. The term of a lease may be short or long (leases of 99 years or more are sometimes used). Leases may provide for their own renewal. Historically, leases were used only to rent real property. Increasingly they are used to rent personal property, especially expensive farm machinery, motor vehicles, industrial machines and business equipment.

LEGAL SEPARATION—A legal procedure providing for a husband and wife to live apart from each other, without ending the marriage. The court determines the continuing rights and responsibilities of the husband and wife with regard to property and their obligations to their children, if any. See dissolution of marriage, divorce, domestic relations division.

LEGAL TENDER—Any form of money that the law requires a creditor to accept as payment of a debt.

LEMON LAW—The popular name for laws giving rights to purchasers of new automobiles concerning repairs, defects, replacement, and similar matters.

LENDER—A private, public or institutional entity that makes funds available to others to borrow.

LIBEL—Written defamation (untrue statements made in writing about another that damage his/her reputation). Spoken defamation is slander. See defamation.

LICENSEE—In general, any person holding a license, such as a driver’s license. In real property and tort law, a licensee is someone who has permission to use property for his or her own benefit. In tort law, a person’s status as a licensee may affect the duty of the property owner to protect the person from unreasonable risks. While a license to use property may amount to an interest in that property, it is not an interest that can be conveyed by deed, or left to one’s heirs by will. Therefore, in disputes over property, the question sometimes arises whether a person’s interest is an easement (which can be deeded or willed) or only a license. See deed, easement, invitee, real property, tort, trespasser, will.

LIEN—Any of a variety of charges or encumbrances on property imposed to secure the payment of a debt or the performance of some act. Liens are enforced by foreclosure proceedings. Liens can be imposed on real property or personal property. Some of the more common real property liens result from judgments, mortgages, property bonds, and unpaid taxes. Some of the more common personal property liens result from security interests, attachment, and the furnishing of labor or materials in work on another’s property. See foreclosure, judgment, judgment lien, marshaling of liens, mechanic’s lien, mortgage, personal property, priority of liens, real property, security interest, tax lien.

LIFE ESTATE—A type of ownership in which property is granted to a person (called the life tenant) only for his or her lifetime. When the life tenant dies, the property passes to a named person, called a remainderman, or reverts to the original owner or that owner’s heirs. Since a life estate always carries a remainder interest with it, a life tenant must not destroy or waste the property to the disadvantage of the remainderman. A life tenant can sell or mortgage his or her life interest, but the interest sold or mortgaged is limited to the lifetime of the seller or mortgagee. See mortgage.

LIFE TENANT—See life estate.

LIMITED LIABILITY COMPANY (LLC)—Ohio’s newest form of business entity, an unincorporated company whose owners are identified as members. Members of an LLC have limited liability for the company’s acts, debts and obligations; they may choose to be taxed as a partnership, so that LLC income and losses are taxed to members on their personal income tax returns. The LLC offers more flexibility in its structure of ownership and management than an S-corporation. A disadvantage is that employment taxes apply to all LLC distributive shares of member-employees. See corporation, S-corporation.

LIMITED PARTNERSHIP—See partnership.
LIVING TRUST—A trust established during the maker’s (the grantor’s or settlor’s) lifetime (as opposed to a testamentary trust, which is created by the maker’s will). See trust.

LIVING WILL—A formal, written statement by a person (the principal) identifying the kind and extent of medical treatment to be given to the principal when he or she is in a terminal condition and/or permanently unconscious state and no longer able to make and communicate decisions about medical care. A living will does not appoint another person to make these decisions. Rather, a durable power for health care appoints another person (an attorney-in-fact) to make such decisions. See attorney-in-fact, fiduciary, durable power of attorney for health care.

MALICIOUS PROSECUTION—A cause of action based on the defendant’s having the plaintiff prosecuted for a criminal offense, knowing there is no probable cause to do so. See crime, tort.

MALPRACTICE—A tort arising from the failure of a professional person, such as a doctor or lawyer, to follow the reasonable standards of the profession. For example, in representing his or her clients a lawyer must do not merely what a reasonably careful person would do, but what a person trained and skilled in the law would do. When a client is injured as a result of that negligence, the lawyer may be liable to pay damages. See damages, negligence, tort.

MANDAMUS—An extraordinary writ used to compel a public official to do his or her duty in a particular matter. The duty involved must be clearly defined by statute, ordinance, or case law. See extraordinary writ, writ.

MANDATORY REPORTERS—Those who are bound by Ohio law to immediately report known or suspected child abuse or neglect to local law enforcement or human services agencies. They cannot be sued for following through on this obligation, but they may face both criminal and civil liability if they fail to report known abuse or neglect. Mandatory reporters include teachers and other authorized school employees, counselors, health care professionals, child care workers, attorneys, priests and others who work closely with children or are charged with protecting children.

MANSLAUGHTER—The unlawful killing of another, short of murder. Ohio law recognizes two types of manslaughter: voluntary and involuntary. Voluntary manslaughter is knowingly killing another while under extreme emotional stress brought on by sufficient provocation to incite the use of deadly force; involuntary manslaughter is the killing of another (even accidentally) as the result of the offender’s committing, or attempting to commit, a felony or misdemeanor. See felony, misdemeanor, murder.

MARKETABLE TITLE—Title to a parcel or piece of real property that is sufficiently free from defects to be relied upon when buying and selling property. For the most part, the standards of marketability are prescribed by statute in Ohio. Generally, a title will not be classed as marketable if the ownership of record is questionable, or if the exact boundaries of the property cannot be determined or are in dispute. See real property, title.

MARSHALING OF LIENS—Part of a foreclosure action. The process of locating all potential lienholders, notifying them of the foreclosure and determining the validity of liens and the priority of all valid liens. The result of the marshaling of liens is to foreclose all outstanding liens within the same suit, thereby avoiding a series of foreclosures and forced sales. When one lienholder sues to foreclose his, her, or its lien, it is necessary to marshal all liens to: 1) give all lienholders a fair chance to collect at least some of their debts; 2) avoid multiple sales of the property; and 3) help obtain the best price for the property under the circumstances. See foreclosure, lien, priority of liens.

MATERIALMAN’S LIEN—See mechanic’s lien.

MAYORS’ COURT(S)—In Ohio, a lower trial court in which the mayor of a city or village (although not a lawyer) may sit as judge. Mayors’ courts are the trial courts with the most limited authority. Mayors must take training and become qualified to hear cases; even then, they can hear only “guilty” and “no contest” pleas. Mayors’ courts have no civil jurisdiction. Their criminal jurisdiction is limited to minor, non-jury cases arising under the ordinances of their own city or village, and moving traffic violations under state law occurring on state highways within the municipal boundaries.

MECHANIC’S LIEN—In Ohio, a statutory lien imposed on real property to secure payment to a person who furnishes labor or material to build or repair that property. In a typical case, a landowner who has paid the contractor for building a house finds that the contractor has not paid some or all of his or her subcontractors, laborers, or suppliers. All of those persons can perfect liens on the landowner’s property to secure payment of the money due them. The landowner can protect himself or herself through procedures that enable the owner to determine the identity of potential lienholders and either pay them directly or assure that they are paid.

MEDIATION—The attempt to settle a legal dispute through the active participation of a neutral third party (the mediator)
who assists those in conflict to negotiate a resolution. Because no agreement can be resolved without the agreement of all the parties, mediation does not always result in a settlement. On the other hand, no settlement unacceptable to a party can be imposed during mediation. See dispute resolution.

MENS REA—Literally, guilty mind. Generally, no crime occurs unless a guilty act (actus reus) is done with a guilty mind (mens rea). In Ohio, four degrees, or types, of guilty mind are defined. See culpable mental state.

MINOR—For most purposes in Ohio, anyone under age 18. Minor is synonymous with juvenile and child for most purposes.

MIRANDA WARNINGS—The requirement, called the Miranda rule, set by the U.S. Supreme Court in Miranda v. Arizona (1966), that a person suspected of committing a crime and taken into custody by law enforcement officers may not be interrogated until he or she has been advised of the right to remain silent, the right to legal counsel and the right to have counsel paid at state expense if necessary, and also has been warned that anything the suspect says can be used against him or her in further legal proceedings.

MISDEMEANOR—A crime that generally carries a local jail term of six months or less (but can be up to one year for repeat drunken driving). Typically, a fine is imposed instead of or in addition to jail time. Probation supervision, community service, restitution, and other local sanctions are common. Misdemeanors—which include a great variety of offenses from littering and speeding to drunken driving (the first three times) and simple assault (with minimal harm)—are generally less serious offenses than felonies. Misdemeanants are not eligible for prison terms. See crime, felony.

MISTRIAL—The suspension of a trial by the court (the judge) because of some act or event that seriously compromises the fairness of the proceeding and that cannot be corrected. The judge usually declares a mistrial due to a mistake or misconduct that jeopardizes a party’s right to a fair trial, or due to the inability of a jury to agree on a verdict (hung jury). If a mistrial has been declared in a civil case, the case will be set for a new trial. If a mistrial is declared in a criminal case, there may be a retrial, a plea bargain or a dismissal of the charges. See crime, hung jury.

MIXED PROPERTY—In the law of property, fixtures such as crops and minerals having some characteristics of both real and personal property. See fixture, personal property, property, real property.

MIXED-USE COMMERCIAL PROJECT—A development that is designed to mix two or more uses of land (for example, a retail shopping center that offers office space for dentists, etc.).

MORTGAGE—1) A transaction in which a debtor grants a creditor a lien (called a mortgage or mortgage lien) on the debtor’s property in order to secure payment of the debt. 2) A conveyance of title to property (called a mortgage or mortgage deed) given to ensure payment of debt. See evidence, lien, real property, security interest.

MOTION—1) A written request asking the court to take some action (for example, to dismiss a complaint). 2) An oral request made at a trial or hearing asking the court to take some action (for example, to rule on the admissibility of evidence).

MUNICIPAL COURT—In Ohio, a lower trial court with jurisdiction in a variety of minor civil matters and which can try lawsuits involving not more than $15,000. In criminal cases, municipal courts have jurisdiction to try misdemeanors, and to hold preliminary hearings in felonies. The territorial jurisdiction of a municipal court is established by statute to include a city, or a group of cities, or one or more cities plus unincorporated areas in the county, or an entire county. See county court, felony, jurisdiction, misdemeanor, preliminary hearing.

MURDER—The unlawful, purposeful killing of a person. The most serious form of murder is aggravated murder, of which there are two kinds: premeditated murder and felony murder. Premeditated murder is the purposeful killing of another with prior calculation and design. Felony murder is purposely killing another while committing or attempting to commit—or fleeing immediately after committing or attempting to commit—the crime of kidnapping, rape, arson, robbery, burglary, or escape. The death penalty may be inflicted for aggravated murder. See culpable mental state, felony.

MUTUALITY OF OBLIGATION—In contract law, an element needed to establish consideration in certain types of contracts. For example, if the promise of each party is the consideration for the promise of the other, but one of the parties is not bound (or is not equally bound) by his or her promise, the obligation of the contract is one-sided—that is, it lacks mutuality. In such a case, there is insufficient consideration to make a binding contract. See consideration, contract.

NECESSARIES—In contract law, necessaries are generally defined as food, clothing, shelter and medical care. While a minor is not competent to enter into a contract, a person who,

NECESSARIES—In contract law, necessaries are generally defined as food, clothing, shelter and medical care. While a minor is not competent to enter into a contract, a person who,
in good faith, provides necessaries to a minor may be able to enforce the contract for the necessaries.

NEGLIGENT CHILD—A child who is endangered by an act or omission of a parent, guardian or custodian. See abused child, child endangerment.

NEGLIGENCE—In tort law, the failure to exercise due (or reasonable) care, including the failure to protect another or the property of another from an unreasonable risk of harm. In general, carelessness is a synonym of negligence. See tort.

NEGLIGENCE PER SE—Literally, "negligence in and of itself." In Ohio, the violation of any specific safety statute, such as a traffic law, is negligence per se. Therefore, in a civil lawsuit arising out of a traffic accident, for example, the plaintiff can prove that the defendant was negligent merely by showing that he or she broke the law governing traffic lights; the plaintiff is not required to show what negligent act or omission of the defendant (inattention, drunkenness, speeding, or whatever) caused the defendant to run the red light. See evidence, tort.

NEGOTIABLE INSTRUMENT—In commercial law, a document is a negotiable instrument if it: 1) is signed by the maker or person on whose account it is drawn; 2) contains an unconditional promise or order to pay a specific sum of money; 3) is payable either on demand or at a definite time; and 4) is payable either to the order of a particular person or to the bearer. Common types of negotiable instruments are checks, drafts, bills of exchange, certificates of deposit, and promissory notes. A negotiable instrument (also called commercial paper) is a substitute for cash, and is used in commerce because it can be more convenient and secure than cash. See promissory note.

NEXT FRIEND—A legally competent adult who brings a lawsuit on behalf of a minor. For example, a child injured in an auto accident may have a legal claim against the negligent driver. Because a minor cannot bring a lawsuit, the lawsuit would be brought in the child's name by the child's next friend, usually a parent. See competence, guardian ad litem.

NO BILL—1) A phrase endorsed on an indictment which evidences that a grand jury has refused to issue an indictment because probable cause was not shown that: (a) an offense was committed; or (b) the accused committed the offense. 2) A rejected indictment. See jury, indictment, true bill.

NO-FAULT DIVORCE—A term used to describe a type of divorce in which proof of the traditional grounds for divorce is not required. Dissolution of marriage is Ohio's version of no-fault divorce. See dissolution of marriage.

NOLLE PROSEQUI—Literally, "It will not be pursued." A document filed by the prosecuting attorney that dismisses a criminal case. Unless the offender has been in jeopardy, a nolle prosequi does not prevent the state from retrying the case, but it ends most cases. In courthouse slang, the phrase is usually shortened to nolly pross or nolly, and is used both as a noun and a verb. See double jeopardy.

NON-EXEMPT EMPLOYEE—See civil service laws.

NONPROFIT CORPORATION—A legal structure that is not formed for its members' financial gain or profit, but for the benefit of an organization's members or for a public purpose. The net earnings of a nonprofit corporation are not distributed to its board members, directors, officers or other private persons. A nonprofit must follow the specific guidelines set forth in Section501(c) of the Internal Revenue Code of 1986 to obtain an exemption from federal and state income taxes.

NUISANCE—A condition upon a parcel of real property that improperly interferes with the use or enjoyment by other persons of their real property. A public nuisance is one that adversely and unreasonably affects a community's safety, health, morals, convenience or comfort and may be treated as a criminal offense, such as the maintenance of a brothel or crack house. A private nuisance interferes with an individual's right to use and enjoy property, such as an incessantly barking dog or unsanitary, noxious, or unsightly property. A private nuisance may prompt a civil lawsuit. See real property.

NUNCAPATIVE WILL—See will.

OBJECT—The act of taking exception to some evidence, statement, conduct, proceeding, or event believed to be improper. If an appropriate objection is made at trial, the court will sustain it and take whatever corrective measures are necessary. If an objection is made to something that is not improper, the court will overrule it.

OFFER—In contract law, an offer is the outward expression of a willingness to enter into an agreement. An offer may be verbal, written or even implied from conduct. An offer is one of the three basic requirements for a valid contract; the others are acceptance and consideration. See contract.

OPENING STATEMENT—A statement, made by a party's attorney in a trial or other legal proceeding, that outlines what the party expects to prove and how the party intends to prove it. In a jury trial, opening statements are made immediately after the jury is impaneled and sworn.
ORDINANCE—A written law enacted by the legislative body of a village or city. See statute.

P

PARENTING TIME—Formerly, visitation. When a court terminates a marriage involving a minor child or children and declares one parent the residential parent, the non-residential parent is almost always granted parenting time with his or her child or children. Courts refer to standard guidelines in allocating parenting time, but these may be modified when special circumstances are shown. See dissolution of marriage, divorce, residential parent.

PARTITION—The division of real or personal property interests between or among co-owners (people who own the entire, undivided property together) so that each co-owner becomes the sole owner of a portion of the property. See joint tenancy, personal property, real property, tenancy in common.

PARTNERSHIP—A form of business organization similar to a sole proprietorship, except that two or more persons own and operate the business. The partners pay the partnership taxes themselves and are personally liable for business obligations. Ohio recognizes two forms of partnership: 1) In a general partnership, the partners share equally in the right and responsibility to manage the business; any partner can bind the entire group to a legal obligation; and each partner is responsible for all of the business’s debts and obligations. 2) In a limited partnership, the limited partners have no say in managing the business and are not liable for its debts, but are liable for the tax on their share of the partnership income. Every limited partnership must have at least one general partner, who manages the partnership and is liable for its debts. See limited liability company.

PATENT—A patent is a grant given to an inventor by the U.S. Patent and Trademark Office (PTO). The PTO issues the grant after considering and approving the inventor’s patent application. A patent grants the right to exclude others, for a period of up to 20 years, from making, using, offering to sell, selling or importing an invention. The United States issues three kinds of patents: 1) utility patents (for new processes, machines, articles of manufacture or compositions of matter, or improvements to such processes or articles); 2) design patents (to protect the aesthetic or ornamental external appearance of articles of manufacture); 3) plant patents (for the invention or discovery and asexual reproduction of any new variety of plant, including trees, shrubs and flowers—except for tuber-propagated plants and those found in an uncultivated state). See copyright, intellectual property, trademark, trade name.

PAYABLE-ON-DEATH (POD) ACCOUNT—An account (such as a bank account) owned by one person with the agreement that, upon the accountholder’s death, the account shall be the property of a named second person. This is not the same thing as a joint account or joint and survivorship account; in a POD account the named second person has no ownership interest until after the accountholder’s death. See joint tenancy, transfer-on-death (TOD) deed.

PAYDAY LENDERS—Money lenders that make small, short-term, high-rate loans, called payday loans, cash advance loans, post-dated check loans or deferred deposit check loans. Such a loan is typically secured by a personal check, and includes a fee; this type of credit is very expensive. The federal Truth in Lending Act requires payday lenders to disclose the cost of payday loans; borrowers must receive, in writing, the dollar amount of the finance charge and the annual percentage rate. Ohio law allows these check-cashing businesses to make loans, but imposes certain restrictions.

PENITENTIARY—In Ohio, any of several institutions for the imprisonment of persons convicted of a felony. The historic distinction between “penitentiary” and “reformatory” no longer exists, except in the names of certain institutions. While offenders are segregated by gender and, to a certain extent, age, programming and supervision are about the same whether a prison is called a penitentiary or a reformatory.

PEREMPTORY CHALLENGE—The right to have a prospective juror dismissed from a jury without stating a reason. During voir dire—after all challenges for cause have been exhausted and the jury is tentatively complete—each party may exercise peremptory challenges, one at a time, and in turn. In criminal cases, the number of peremptory challenges allowed each party is six in capital offense cases, four in all other felony cases, and three in misdemeanor cases. During voir dire, any party may exercise peremptory challenges, one at a time, and in turn. In criminal cases, the number of peremptory challenges allowed each party is six in capital offense cases, four in all other felony cases, and three in misdemeanor cases. In civil cases, each party is allowed three peremptory challenges. See challenge, voir dire.

PERSONAL PROPERTY—Property other than land or interests in land. Tangible personal property includes things having a physical existence that can be transported, seen and touched, such as an automobile, a television, clothing, furniture, or tools. Intangible personal property includes things capable of being owned, but which have no physical existence, such as stock in a corporation or a right to take legal action. See property, mixed property.

PERSONAL RECOGNIZANCE—A type of bail consisting simply of an accused’s written promise to appear in court when required. Generally, when there is no good reason to believe an accused will not appear when required, the accused may be released on personal recognizance. See bail.
PER STIRPES—Literally, “by roots” or by representation. The term is commonly used in wills and trusts to describe one method for the distribution of property when a beneficiary dies before the person whose estate is being divided. The members of the nearest generation of descendants with a living member inherit equally. Example: If Mary leaves $200,000 to her daughter, Carol, and Carol dies before Mary dies, then the $200,000 that Carol would have inherited will be divided equally among Carol’s children. See trust, will.

PETIT JURY—See jury.

PLAIN ERROR—An error committed during a trial or other legal proceeding that is so extremely prejudicial to the rights of a party that it can serve as the basis of a reversal by an appellate court even though no party objected when the error was made. (Normally, errors not brought to the attention of the trial court at the time of trial are not considered on appeal). See court of appeals, evidence, objection.

PLAINTIFF—The complaining party in a civil action.

PLANNED UNIT DEVELOPMENT (PUD)—A housing development in which a homeowners’ association administers common property owned and shared by all dwelling owners in the project. Dwellings are often clustered to allow for more common space, and special zoning is required for this kind of development. See condominium.

PLAT—A map of subdivided land, showing the various lots, the portions of the land dedicated for roads and other public uses, and the easements for utilities and other features.

PLEA—In criminal law, any of four formal responses an accused may give to a criminal accusation. The four pleas are: 1) not guilty, which is a denial of the charges; 2) not guilty by reason of insanity, which asserts the defense of criminal insanity (this plea may be joined with a plea of not guilty); 3) no contest, which denies guilt but admits the facts on which the charge is based (this often is used when the accused fears a guilty plea may be used against him or her in a later civil suit); and 4) guilty, which is an admission that the accused committed the crime charged. See charge, criminal insanity.

PLEA BARGAINING—In criminal law, pretrial negotiations between the defense and prosecution. If a plea bargain is made, the accused normally will be permitted to plead guilty to a lesser offense than was originally charged, or to plead guilty to a principal offense and have other charges dismissed. The accused may be willing to plead guilty to a lesser offense (or to a reduced number of offenses) because he or she has some doubt about the chance of winning at trial and is hoping to secure a lesser sentence because, by pleading guilty, he or she has saved the State the time, expense and uncertainty of a trial. The prosecution may accept a plea bargain if it has some doubt that it can obtain a conviction on the offense charged, or if it believes that it is more economically feasible and in the interest of justice to accept the plea. The underlying basis for a negotiated plea must be stated in open court. See crime, charge.

PLEADING—1) In civil practice, any of various written documents designed to identify the questions to be tried in a lawsuit. 2) The process of preparing and filing such documents. In Ohio, the most basic pleadings are the statement of the plaintiff’s claim, called the complaint, and the response, called the answer, of the party against whom the claim is made. A complaint filed by a defendant as part of the defendant’s response to the plaintiff’s complaint is called a counterclaim. The plaintiff may respond to the defendant’s counterclaim with a reply. Sometimes a plaintiff or defendant may have a claim, supplementary or subordinate to the main lawsuit, against a co-plaintiff or a co-defendant; this claim is stated in a cross-claim. A response to a cross-claim is an answer. A defendant may file a complaint against a person who is not a party to the original lawsuit and who is or may be liable to the defendant if the defendant is found liable to the plaintiff. That pleading is called a third-party complaint. Also, when a defendant has filed a counterclaim against the plaintiff the plaintiff may file a third-party complaint against a person who is or may be liable to the plaintiff if the plaintiff is found liable to the defendant.

POST-CONVICTION RELIEF PROCEEDING—A type of proceeding in criminal matters designed as a partial substitute for habeas corpus, in which the court reviews claims of a convicted offender that his or her constitutional rights were violated. See habeas corpus.

POWER OF ATTORNEY—A document by which a person (called the principal) authorizes another person to act on the principal’s behalf, either for limited or for broad purposes. The person receiving the power of attorney is called an attorney-in-fact. With a general power of attorney the attorney-in-fact can conduct all business or sign any document for the appointee; with a special power of attorney the attorney-in-fact can sign documents or act in relation only to matters specified in the written power of attorney itself. See attorney-in-fact, durable power of attorney for health care, fiduciary.

PRECEDENT—1) The reported decision of an appeals court establishing a legal rule that is binding on lower courts in future cases involving the same legal question. The doctrine that a lower court must follow a precedent is called stare decisis. 2) Before, as in the term condition precedent, which means, for example, that a certain event (a condition) must occur before (precedent to) a party is required to perform under a contract. See contract, court of appeals, stare decisis.
PREDECEASED BENEFICIARY—A person, named as a beneficiary in a will, who dies before the death of the maker of the will (the testator). The gift is not automatically invalidated unless the will makes clear that the beneficiary must survive the testator in order to inherit. Instead, the gift goes to the beneficiary's lineal descendents if the beneficiary is a relative of the testator. If the beneficiary is not a relative of the testator, or the will makes clear that the gift lapses unless the beneficiary survives the testator, the gift becomes part of the residuary estate. See residuary estate, will.

PREJUDICIAL ERROR—See plain error, harmless error, court of appeals.

PRELIMINARY HEARING—A type of proceeding held when a person is arrested for a felony. The purpose of the hearing is to determine whether there is probable cause to believe that a crime has been committed, and that the accused committed it. If the answer to both questions is yes and the crime appears to be a felony, the accused will be bound over (transferred) to the grand jury for possible indictment. In Ohio, municipal courts and county courts have preliminary hearing jurisdiction. See bindover, jury.

PREPONDERANCE OF THE EVIDENCE—In a legal proceeding, a measure or degree of proof less than beyond a reasonable doubt and clear and convincing evidence, but greater than probable cause. A fact is proven by a preponderance of the evidence if the evidence favoring something is more weighty and believable—even if only by a tiny fraction—than the evidence against it. Preponderance of the evidence is the degree of proof required to prevail in most civil actions and to establish an affirmative defense in a criminal case. See degree of proof, evidence.

PRESCRIPTION—See adverse possession, easement.

PRE-SENTENCE REPORT—A report ordered by a judge in a criminal case for the purpose of giving the judge basic information about the history, character, and condition of the offender. The contents of the report assist the judge in determining the proper sentence. The report assists the judge in determining, among other things, the need for incarceration, the length of incarceration, the need for treatment, and whether local sanctions, such as probation, are appropriate. In Ohio, pre-sentence reports are required in felony cases in which community control sanctions, such as probation, may be granted, and optional in other cases. A victim impact statement is an analogous report concerned with the effects of the offense upon the victim. See felony, community control sanctions.

PRETERMITTED HEIR—A person born after his or her parent has made a will. In general, such a person (also called an afterborn child or an omitted heir) is entitled to share in the estate in the same way as the testator’s other children. However, if the will clearly shows that afterborn children are to be treated differently from children alive at the time the will was made, the court will follow the testator’s direction. See will.

PREVAILING WAGE LAWS—In Ohio, laws that apply to construction projects undertaken by public authorities, and that require that public authorities pay the prevailing rate (the going rate) of wages to workers on the project.

PRE-TRIAL CONFERENCE—A meeting of the parties, their attorneys, and the judge held before the trial. The purpose of the meeting is to agree on stipulations, questions to be tried, and other matters so that the trial proceeds smoothly and quickly. A pre-trial conference also may be a forum for settlement negotiations.

PRIMA FACIE—Literally, “on its face.” Evidence is said to be prima facie when, standing alone, it amounts to the degree of proof required to make a particular finding. In a criminal case when the prosecution rests after completing the introduction of its evidence, the state’s case is said to be prima facie if the evidence so far introduced is sufficient to convict. See evidence.

PRIORITY OF LIENS—The order in which liens on property are honored and paid. The general rule is first in time, first in priority, although certain liens, such as liens for unpaid taxes, may have priority regardless of when they attached to the property. Typically, questions of priority arise in foreclosure actions. When the property is sold, the first mortgagee or lienholder will be paid first and, if any money is left over, the second mortgagee or lienholder will be paid, and so on in descending order of priority. See foreclosure, liens, marshaling of liens, mortgage.

PROBABLE CAUSE—A measure or degree of proof that is less than preponderance of the evidence, and is the lowest degree of proof normally used in a legal proceeding. Proof amounting to probable cause exists where there is good reason to believe, based on specific evidence, that a specific allegation or accusation is true. It is the degree of proof required to: 1) sustain an arrest; 2) bind over an accused to a grand jury following a preliminary hearing; 3) return an indictment; or 4) issue a search warrant. See arrest, bindover, evidence, degree of proof, indictment, warrant.

PROBATE—1) The administration of an estate under the supervision of the probate court. 2) The filing and acceptance of a will with the probate court before the actual administration of the estate. 3) Assets administered through the probate court. See estate, probate division, will.
PROBATE COURT—See probate division.

PROBATE DIVISION—A division of the common pleas court, concerned with wills and the administration of estates, adoptions, guardianships, commitment of mentally ill or retarded persons, supervision of fiduciaries and the issuance of marriage licenses. See estate, fiduciary, guardian, will.

PROBATION—See community control sanctions.

PRO BONO—In the legal arena, legal services that are donated to individuals or organizations that could not otherwise afford them and who would otherwise be denied equal access to the law.

PROCEDENDO—An extraordinary writ, designed to compel a court to proceed in a particular case. See extraordinary writ, prohibition, writ.

PROCEEDING IN AID OF EXECUTION—In general, any of various proceedings designed to help a judgment creditor enforce (collect) a judgment granted to the creditor by the court. The usual proceedings in aid of execution are debtor’s examinations and garnishments. In a debtor’s examination, the judgment debtor is questioned under oath about the nature, extent, and location of his or her property. See discovery, garnishment, judgment.

PRO HAC VICE—“For this occasion.” Most states will admit an attorney from another state by courtesy for a particular occasion (pro hac vice) for the purpose of participating in a single case, even though the attorney is not specifically licensed to practice law in that state. However, the attorney must receive admission by the other state’s court to participate in the case.

PROHIBITION—An extraordinary writ, designed to prevent a court from proceeding in a particular case. See extraordinary writ, procedendo, writ.

PROMISSORY ESTOPPEL—Even though the promise to make a gift cannot usually be enforced, such a promise may be enforced if the beneficiary of the gift takes some concrete action in reliance on the promise. Thus, if a person promises to make a donation to a college and the college, relying on the promised donation, constructs a building, the promise likely will be enforceable even though the college gave nothing in exchange for the pledge. This is sometimes called promissory estoppel, because the person who made the promise is “stopped” from claiming that there was no consideration for the promise.

PROMISSORY NOTE—A written promise to pay a specified sum of money to a named person. If the note meets the four requirements for negotiability, it is a negotiable instrument. See cognovit note, negotiable instrument.

PROPERTY—Anything capable of being owned. The main classifications of property are real property and personal property. See fixture, mixed property, personal property, real property.

PROSECUTING ATTORNEY—In Ohio, an elected county official who is the attorney for local government agencies in governmental matters and who prosecutes criminal cases brought in common pleas court. In other states, the counterpart of the prosecuting attorney might be called the district attorney or state’s attorney. The prosecuting attorney’s counterpart in the federal system is the United States Attorney.

PROTECTED CONDUCT—See employment at will.

PROXIMATE CAUSE—1) A principal element of liability in tort cases. Unless the plaintiff can prove that the wrongful conduct of the defendant was the proximate cause of the plaintiff’s injury, the defendant cannot be held liable. It is not enough that the defendant did something wrong which eventually or indirectly led to the injury; in order to be the proximate cause of injury an act or omission must, in a natural and continuous sequence, directly produce the injury, and it must be shown that the harm would not have occurred but for the defendant’s act or omission. 2) Similarly, in criminal law the defendant’s act must have been the proximate cause of the death of the victim in order to prove murder or manslaughter. See manslaughter, murder, tort.

QUASI-CONTRACT—See unjust enrichment.

QUITCLAIM DEED—A deed in which the person making the deed (the grantor) transfers whatever interest he or she may have in the real property described in the deed, without giving a guarantee that the grantor has any interest in the property. That is, the grantor quits whatever claim he or she has, if any. This type of deed is often used to correct errors in deeds of record, or to clear up questionable title to real property. See real property, title, warranty deed.

QUO WARRANTO—A type of extraordinary writ used to test a person’s right to hold a particular public office, or to challenge certain undertakings by private corporations. See extraordinary writ, writ.
REAL PROPERTY—Land, fixtures, and any interest in land or fixtures. See fixture, mixed property, property.

REASONABLE DOUBT—See beyond a reasonable doubt.

RECESSION—The cancellation of a contract. See contract.

REFERENDUM—The process by which the public votes upon the repeal or approval of an existing or proposed statute or state constitutional provision. Many states, including Ohio, provide that a referendum will be placed on the ballot if its supporters file a petition containing a required number of voter signatures. See constitution, statute.

REFORMATORY—In Ohio, an institution for the imprisonment of persons convicted of felony offenses, now generally synonymous with the term penitentiary. The term reformatory should not be confused with the term sometimes used in other states to designate juvenile correction facilities. See felony, penitentiary.

REMAINDER INTEREST—The right to receive title to real property upon the death of the life tenant. A remainder interest can be bought and sold, but its sale does not affect the interest of the life tenant during his or her lifetime. See life estate, real property, title.

REMAINDERMAN—A person who owns a remainder interest.

RESIDENTIAL PARENT—The parent with primary responsibility for a child after the court terminates a marriage. The other parent is called the non-residential parent. These terms are not used if the court orders shared parenting. See dissolution of marriage, divorce, domestic relations division, shared parenting.

RESIDUARY ESTATE—All of what is left of an estate once the deceased person’s debts and costs of administration have been paid and all specific bequests have been distributed. See bequest, estate, will.

RES IPSA LOQUITUR—Literally, “A thing speaks for itself.” In tort law, the rule that permits a jury to find a defendant negligent even without specific evidence about the defendant’s acts and omissions. The rule is used in cases where the cause of the plaintiff’s injury is entirely under the defendant’s control, and the injury could have been caused only by negligence. For example, if a surgical tool is left in a patient after an operation, the jury will be permitted to infer that the person in charge of the operation was negligent. See evidence, negligence, tort.

RESPONDEAT SUPERIOR—Literally, “The superior [master] must answer.” In tort law, the rule which holds that a principal or employer is responsible automatically for the acts and omissions of his or her employees or agents, when those acts are done within the scope of their duties as employees or agents. See agent, independent contractor, tort.

RESTRATN ON ALIENATION—In real property and probate law, limitations on the ability to sell, mortgage, or rent real property. In general, the law does not permit grantors to keep future owners from selling, leasing, mortgaging or otherwise doing what they like with the property. When fee simple title to property is granted any attempted restraint on alienation is void (of no effect). See fee simple, real property, rule against perpetuities, title.

RETAIL INSTALLMENT SALE—A type of sale of goods at retail where payment is made in a series of installments. Retail installment sales are regulated by statute (written law) in Ohio.

RETAINER—An advance payment to an attorney for services to be performed, intended to insure both that the lawyer will represent the client and that the lawyer will be paid at least that amount. Clients who need regular legal services often make periodic payments (retainers) to ensure that the lawyer’s services will be available whenever needed.

RETAIATION—See employment at will.

REVOLVING CHARGE ACCOUNT—A type of credit sales arrangement regulated by statute (written law) in Ohio. Most credit card accounts are revolving charge accounts.

RULE—1) A written regulation adopted by a government agency to carry out specific authority granted the agency by a legislative body. When properly adopted, and within the limits of the authority granted by the legislative body, a rule has the force of law. 2) A legal doctrine (for example, respondeat superior or the rule against perpetuities). See administrative law, Rules of Practice and Procedure.

RULE AGAINST PERPETUITIES—In real property and probate law, a doctrine designed to encourage free transfer of property by limiting the period of time a property owner can delay a change of ownership. A person who conveys land can control to whom and how its ownership is to be transferred in the future, but only for the period of the life or lives of beneficiaries alive at the time of the original grant, plus 21 years. See dynasty trust, real property, restraint on alienation.
RULES OF EVIDENCE—The common law, statutory, and procedural-rule guidelines governing the introduction and use of evidence. The primary purposes of the rules are to promote the orderly presentation of evidence and to insure that evidence is excluded from consideration if by its nature, or its manner of presentation, it is unreliable or unfair. The Ohio Rules of Evidence are established by the Supreme Court of Ohio, as are other rules of practice and procedure. See evidence, Rules of Practice and Procedure.

RULES OF PRACTICE AND PROCEDURE—Rules established by the Supreme Court of Ohio governing practice and procedure in all courts of the state. In addition to rules of evidence, there are separate sets of rules governing civil, criminal, traffic, juvenile and appellate cases. See Supreme Court.

RULES OF SUPERINTENDENCE—Rules established by the Supreme Court of Ohio as part of its duty to oversee the operation of all courts in the state. In general, the rules are designed to promote efficiency in the administration of justice. See Rules of Practice and Procedure.

S

S-CORPORATION —A corporation that has chosen to be treated under Subchapter S of the Internal Revenue Code. This allows the corporation to be treated like a partnership for taxation purposes while maintaining the protections of a corporate structure, and may provide the benefit of passing losses (particularly in the early development of the business) to the stockholders. However, S-corporations are rigidly structured and there are restrictions on who can be a shareholder. Corporations and other entities generally cannot own S-corporation stock. See corporation, limited liability company, partnership.

SCHOOL CHOICE—Students who are enrolled in a school that has failed to meet the state’s “adequate yearly progress (AYP)” standard for two consecutive years can choose to enroll in another of the district’s schools that is not under “school improvement status.”

SCHOOLING CERTIFICATE—See age certificate.

SEARCH AND SEIZURE—The process of searching for and seizing evidence in a criminal action. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. A general rule (subject to many exceptions) is that a search is unreasonable unless it is made: 1) with the authority of a search warrant; 2) in connection with a lawful arrest; or 3) with the permission of the person whose property is searched. See constitution, search warrant.

SEARCH WARRANT—A warrant (order of a court) commanding a law enforcement officer to conduct a search and seizure. Under the Fourth Amendment to the United States Constitution, a search warrant may be issued only when there is probable cause to believe that the search will uncover particular evidence of a crime, and must specifically describe the place to be searched and the things to be seized. See probable cause, search and seizure.

SECURITY INTEREST—A lien (charge) on personal property, acquired by a security agreement, to ensure repayment of a loan or other debt. In Ohio, security agreements and security interests are governed by the Uniform Commercial Code. A security agreement is similar to a chattel mortgage (a generally outmoded written document which made a chattel, or tangible personal asset, security for a loan of a certain amount). Security agreements must be filed with a specific public agency (e.g. a state’s Secretary of State) to protect buyers of the personal property and lenders making loans secured by the property. It is common for the seller to take a security interest in installment sales of consumer goods, particularly expensive items such as automobiles and appliances. See foreclosure, personal property, Uniform Commercial Code (UCC).

SELF-INCRIMINATION—The act of acknowledging one’s guilt during a criminal investigation or prosecution. The term is also used to describe the making of any guilty or damaging statement. Compulsory self-incrimination is prohibited by the Fifth Amendment to the United States Constitution; a person may not be tortured, abused, frightened or tricked into confessing to a crime or making an incriminating statement. For the same reason, at trial an accused person cannot be required to testify (be a witness).

SENTENCE—The judgment in a criminal case. The sentence follows a guilty plea, a jury verdict finding the accused guilty, or, where a jury is waived, a judge’s (or panel of judges”) finding that the accused is guilty. In most felony cases in Ohio, the court will impose a definite sentence of imprisonment (from six months to life, depending on the nature of the crime and, sometimes, the surrounding circumstances), and may include a fine and other sanctions. Also, the sentence for a felony often includes post-release sanctions, meaning that a convict released from prison will be monitored to some extent for up to five additional years. In a misdemeanor case (except minor misdemeanor cases, where jail is never an option) the sentence may include a definite jail term of up to six months, a fine of up to $1,000, or both. In felony and misdemeanor cases, the sentence may also include some form of community control sanctions (formerly,
probation). Until 1996, persons sent to prison were given indeterminate sentences (say, from two to five years); since 1996, most prison-bound felons serve a definite sentence (imprisonment for a fixed time). See community control sanctions, felony, misdemeanor.

SEPARATION AGREEMENT—A contract entered into between a husband and wife in connection with a divorce or dissolution of marriage. Typically, the agreement covers such things as child custody, child support, parenting time, division of property, and spousal support. Generally, these agreements are made a part of a court order granting a divorce. A separation agreement that has been approved by the court is required for dissolution of marriage. See dissolution of marriage, divorce.

SEQUESTER—To keep separate or apart. In some criminal cases members of the jury may be sequestered (prevented from having contact with their families, the news media or the general public, except under supervision) by being lodged in a hotel during the trial. That is to make sure that the jury makes its decision based only on the evidence presented in court. Also, a witness who has not already testified may be sequestered (or excluded from the courtroom) to prevent him or her from hearing the testimony of another witness. That is done to prevent the excluded witness from being influenced by the testimony of the previous witness.

SERIOUS YOUTHFUL OFFENDER (SYO)—A person under age 18 who has committed a serious criminal offense may be eligible for a “blended” sentence that combines a juvenile disposition and an adult sentence depending upon the youth’s age and the severity of the offense. See blended sentence.

SERVICE MARK—When a word, phrase, logo, symbol, or other device is used by a business to identify services, it is referred to as a service mark. See intellectual property, trademark.

SERVICE OF PROCESS—Notification of a person that he or she has been named a party to a lawsuit or has been accused of an offense. Process itself consists of a summons, citation, or warrant, to which a copy of the complaint or other pleading is attached. Service may be by: 1) personal delivery to the person to be notified; 2) delivery to the person’s home; 3) certified mail to the person; and, in limited situations, 4) by ordinary mail or by publication in a newspaper. See citation, pleading, summons, warrant.

SEVERANCE PAY—A payment or benefit provided by some employers to terminated employees. No law compels employers to provide severance pay, although the employer may be legally obligated to do so if it was promised in a contract or employees’ handbook. If an employer does create a severance plan, the employees covered by the plan’s terms are entitled to plan benefits when the event that triggers benefits occurs. However, an employer may create, modify or abolish a severance plan as it sees fit. Because a severance package is a type of contract, there may be terms and conditions set forth in it. For example, most severance agreements require a promise by the employee not to sue the employer as a condition of getting the severance payment.

SEXUAL HARASSMENT—In the workplace, any unwelcome, unwanted and/or uninvited sexual advance, any conduct of a sexual nature, or any conduct based on sex that is severe or pervasive and creates an intimidating, hostile, or offensive working environment. Any such conduct that an employee finds unwelcome has the potential to be sexual harassment. The harasser can be the victim’s supervisor or manager, a co-worker, or even a non-employee who is on the premises with permission. Sexual harassment is illegal under federal and Ohio law and is also the basis of a cause of action in tort. See cause of action, employment at will, tort.

SHARE—A portion of ownership interest in a corporation, represented by a certificate stating the number of shares of an issue of the corporation’s stock. The corporation sells shares in the company to raise capital. See corporation.

SHARED PARENTING—A court-approved plan under which both parents agree as part of a divorce or dissolution of marriage that their child or children will live with each parent at specific times. Shared parenting requires the cooperation of both parents on child-rearing matters; a court will not agree to a shared parenting arrangement unless satisfied that the parents can so cooperate. Shared parenting is also known as joint custody. See dissolution of marriage, divorce, residential parent.

SHOCK PAROLE—See judicial release.

SHOCK PROBATION—See judicial release.

SLANDER—Spoken defamation. Written defamation is libel. See defamation.

SMALL CLAIMS COURT—See small claims division.

SMALL CLAIMS DIVISION—A division of every municipal court and county court in Ohio. The small claims division (court) has jurisdiction over most suits that seek only monetary damages of not more than $3,000. In small claims proceedings (cases), the parties generally do not have lawyers, and the court costs are lower than in regular municipal court or county court cases. Small claims division hearings (trials) use simplified and less formal procedures and are conducted by a
municipal court judge, a county court judge, or a referee (a qualified attorney appointed by the court). See county court, jurisdiction, municipal court.

SOLE PROPRIETORSHIP—The simplest form of business organization, combining ownership and management in one person. A sole proprietorship has no existence separate from its owner (such as a corporation does), so income is taxed on the owner’s personal return and, because the owner is personally liable for the debts and obligations of the business, his or her personal assets (such as a home) are not protected from creditors of the business. See corporation, partnership.

SOVEREIGN IMMUNITY—The doctrine that a government or governmental agency cannot be sued in its own court without its consent. In Ohio, the doctrine has been revoked in most situations. Most claims against state entities (for example, state departments, boards, and commissions) may be brought in the court of claims. Further, recent statutory changes and court decisions allow many types of claims against governmental entities smaller than the state (for example, cities, counties, and park districts). See court of claims.

SPOUSAL SUPPORT—Money or property which the court orders one party to pay for the support of the other party in a lawsuit for divorce, dissolution of marriage, or legal separation. Formerly called alimony. See dissolution of marriage, divorce, legal separation.

STARE DECISIS—Literally, “to stand on decisions.” The rule that the decision of a court, once made, will not be discarded lightly, but will be used as precedent for determining similar cases in the future. This rule is a foundation for the development of the common law. See common law, court of appeals, precedent.

STATUTE—In general, a written law adopted by any legislative body, such as the United States Congress or the Ohio General Assembly. See ordinance.

STATUTE OF DESCENT AND DISTRIBUTION—In Ohio, a statute that determines how the property of a deceased person (the decedent) is to be distributed where the decedent did not have a will. In general, the statute favors the nearest relatives surviving the deceased. Priority is given to the decedent’s surviving spouse, children, and the children’s descendants; then the decedent’s parents; then the decedent’s brothers and sisters; then grandparents; then any kin. If there is no surviving kin, the decedent’s property passes, or escheats, to the state. See escheat to the state.

STRICT LIABILITY—1) In tort law, liability imposed without any showing of negligence or other wrongful conduct. Strict civil liability is usually imposed for injuries caused by some particularly dangerous substance or agency (such as explosives or poisons) under the control of the defendant. Strict liability also applies in product liability cases, where the product was defective and the product was designed, manufactured or sold by the defendant. In such a case, the plaintiff must prove that the product was defective but not that the defendant failed to be reasonably careful in, say, manufacturing it. 2) In criminal law, strict liability is imposed for acts and omissions (dealing
with food, drugs and sanitation, for example) where the act or omission is the crime; the culpable mental state (if any) of the defendant doesn’t matter. See *actus reus*, culpable mental state, *mens rea*, negligence, tort.

**SUBCHAPTER S-CORPORATION**—See S-Corporation.

**SUBPOENA**—Literally, “under punishment.” An order issued by a court to a witness, commanding the witness to appear and testify under threat of punishment for contempt of court. A *subpoena duces tecum* (literally, “bring with thee, under punishment”) is a subpoena commanding a witness to bring specified books, papers, or other tangible evidence to a hearing or trial. See contempt of court.

**SUMMARY JUDGMENT**—In civil practice, a judgment granted solely on the basis of the pleadings and certain supporting evidentiary documents. The court grants summary judgment where the pleadings and documents show that a trial is not necessary because it is clear the requesting party will win the case. See pleading.

**SUMMONS**—1) In civil practice, an order of the court issued to a defendant commanding the defendant to appear and answer the complaint, or risk having default judgment entered against him or her. 2) In criminal practice, an order similar to that issued to a defendant in a civil action, except that the punishment for failure to appear and answer the charge is arrest and incarceration. See service of process.

**SUPPLEMENTAL SERVICES TRUST**—A trust for individuals with mental illness or mental retardation, or other developmental disability, that allows certain assets to be sheltered for limited purposes, while a portion of the assets goes to the State of Ohio for the use of other Ohioans with disabilities upon the death of the beneficiary of the trust. See trust.

**SUPREME COURT**—An appellate court of last resort. The Supreme Court of Ohio is the highest court in Ohio, and the United States Supreme Court is the highest court in the nation. In New York, however, the court called the *supreme court* is a trial court with jurisdiction similar to Ohio’s court of common pleas. See disbarment, Rules of Evidence, Rules of Practice and Procedure, Rules of Superintendence.

**SURVIVORSHIP TENANCY**—See joint tenancy.

**TANGIBLE PERSONAL PROPERTY**—See personal property, security interest.

**TAX-EXEMPT ORGANIZATION**—A nonprofit organization (NPO) formed to carry out a charitable, educational, religious or similar purpose. Such an NPO doesn’t pay federal or state corporate income taxes on profits it makes from activities related to the purpose of the organization. This is because the taxing authorities believe that the public derives such great benefit from the activities of these corporations that the tax laws should not prejudice their work. For the same reason, gifts to many NPOs—called 501(c)(3) corporations—are tax-deductible to the givers. See corporation.

**TAX LIEN**—A tax lien attaches to property at the beginning of each tax year, even though the actual amount of the property taxes has not been determined and the taxes are not yet due. A tax lien is like a mortgage lien, but it exists automatically, because all property owners have a duty to pay real estate taxes to the community. To ensure that those taxes are paid, the community automatically has the protection of this lien on the property. If taxes are not paid for a long enough period of time, the community—that is, county authorities—can have the property sold in order to pay off the tax debt. See lien, mortgage.

**TENDER**—An offer of money to satisfy a debt.

**TEN PERCENT BOND**—A type of bail for an accused’s appearance in a criminal case. A 10 percent bond is posted by depositing 10 percent of the face amount of the bond with the clerk of court. If the accused appears as required, all but 10 percent of the deposit is refunded. For example, if bail is $500, a 10 percent bond may be posted by depositing $50 with the clerk. If the accused appears as required, $45 will be refunded. In many courts, a credit card may be used to make the deposit. See bail.

**TENANCY AT WILL**—A tenancy (the right to possess and use a premises or real property) in which a landlord rents the tenant the premises or real property on a day-to-day, or week-to-week, basis. A tenancy at will may be terminated by either the landlord or the tenant at any time. See lease.

**TENANCY BY THE ENTIRETIES**—A type of joint ownership of real property by a husband and wife. Each owns the entire property, as contrasted with a tenancy in common or joint tenancy. (Tenants in common and joint tenants each own an undivided fractional interest of the property.) In Ohio, tenancy by the entireties was established by statute from 1972 to 1984. Although estates of tenancy by the entireties can no longer be created in Ohio, those interests established when the statute was in effect are still valid. In Ohio, tenancy by the entireties has been replaced by a statutory joint tenancy with right of survivorship. See joint tenancy, tenancy in common.
TENANCY IN COMMON—A type of joint ownership of real property in which each owner has an undivided fractional interest in the entire property. The interest may vary depending on how the property was granted; for example, one tenant in common may own an undivided one-half and two other tenants in common each may own an undivided one-fourth share. Regardless of the size of an individual’s share, each tenant in common enjoys full ownership of his or her share, and can sell, mortgage, use or dispose of it as a full owner. If the amount of each share is not specified, each tenant in common owns an equal undivided fractional share. When one tenant in common dies, his or her share passes to his or her heirs or to the person(s) named in the tenant’s will. By contrast, where there is a joint tenancy with right of survivorship under the Ohio statute (or under traditional tenancy by the entireties), the deceased’s share passes to the surviving tenant or tenants. Property owned in common may be divided in a partition action. A partition action is a lawsuit in which the property is sold and the proceeds divided, or, rarely, physically divided and parcelled out. See joint tenancy, partition, tenancy by the entireties.

TENANT—1) A person who occupies rental property. 2) The owner of certain types of interest in real estate, such as a life tenant or a tenant in common. See landlord, life estate, real property, tenancy in common.

TESTAMENTARY TRUST—A trust created by the terms of a will, and which comes into being only after the will takes effect—that is, after the trust’s creator dies. See trust, will.

TESTATE—1) The status of having died with a will. A person who has died with a will has died testate. 2) Property that is governed by a will is testate property. See intestate, will.

TESTATOR—The person who makes a will. See codicil, will.

TESTIMONY—Oral evidence given by a witness. See evidence.

TIME OFF FOR GOOD BEHAVIOR—See earned credit.

TITLE—1) Ownership. 2) A document evidencing ownership, such as the title to a motor vehicle. See evidence, fee, title examination.

TITLE EXAMINATION—The process of examining the public records of deeds, mortgages, liens, court proceedings, taxes and assessments, and other records to determine the status of the ownership of (title to) real property. See abstract of title, real property.

TORRENS SYSTEM—A land registry system operating in a few Ohio counties that requires a court proceeding (a land registration suit) to establish the status of the title. Registered land is often described as “Torrenized” land. Once the status of the title is determined, a certificate of registration is filed and all mortgages, liens, subsequent transactions and other claims are noted on the certificate. The original goal of the Torrens system of land registry was to compile all records relating to a parcel on a single certificate in order to simplify record-keeping. In actual practice, however, land registration has turned out to be more complex, and registration has, therefore, become unpopular.

TORT—A private wrong as distinguished from a crime (which is a wrong against the public generally); a violation of a legal responsibility when that violation directly causes injury or loss to a person’s body, property or rights. Four things together make a tort, and a tort lawsuit will succeed only if the plaintiff proves all four: 1) the defendant owed a legal duty to the plaintiff; 2) the defendant violated (or breached) that duty; 3) the plaintiff suffered an injury or other loss; and 4) the defendant’s breach of duty directly and proximately caused the plaintiff’s loss. Certain cases of workplace injury—arising out of certain dangerous conditions known to the employer—are called intentional torts and may form the basis of a tort claim even though injury lawsuits against employers are generally prohibited by the law that provides workers’ compensation to injured employees. See proximate cause.

TRADE FIXTURE—Movable personal property such as a showcase, shelving, or other equipment used in a business. Because trade fixtures—although physically attached or fastened to a business premises—can be removed without substantial harm to the real estate, they are not considered to be part of the real estate. See fixture, real property.

TRADEMARK—A trademark is a word or words, an emblem, logo, symbol, slogan or other device that identifies goods or services from a single source. See intellectual property, trade name.

TRADE NAME—A trade name is used to identify a business. If someone registers a trade name with a secretary of state, that company can do business under that name within that state, assuming the use of that name does not infringe another’s trade name, trademark or service mark. A trade name does not guarantee that the name can be used on either goods or services. See intellectual property, trademark, service mark.

TRANSFER-ON-DEATH (TOD) ACCOUNT—See payable-on-death (POD) account, transfer-on-death (TOD) deed.

TRANSFER-ON-DEATH (TOD) DEED—A deed that transfers ownership of real property to a person named in the deed upon the death of the owner of the property. This is not a
joint-and-survivor deed because the recipient had no ownership interest in the property until the death of the owner.

TRESPASS—1) A civil wrong (tort) based on the unexcused intrusion on, or improper use of, property belonging to another. Both real property and personal property may be the subject of trespass, although the term usually refers to an intrusion on real property. Conversion is a type of trespass to personal property occurring when one person improperly assumes control of another’s property for his or her own use or benefit (e.g., stealing a watch and pawning it). 2) A criminal offense in Ohio based on the unexcused intrusion on real property of another. See conversion, personal property, real property, tort.

TRESPASSER—In criminal and tort law, a person who comes upon the land or premises of another without permission. See trespass.

TRUE BILL—1) A phrase endorsed on an indictment which shows that a grand jury has found probable cause to believe that the crime stated in the indictment was committed and that the accused committed it. 2) An accepted or issued indictment. See jury, indictment, no bill.

TRUST—A legal device permitting the owner of real property or personal property to give the property to a trustee (a fiduciary), to hold and manage for a beneficiary. The beneficiary can be a third person or the person who created the trust. The person who creates a trust is called a maker, a settlor or a grantor. Trusts may be put into operation during the maker’s life (a “living trust” or inter vivos trust) or only after the maker’s death (a testamentary trust). A trust may be revocable (meaning it can be canceled or amended by the grantor during his or her lifetime), or it may be irrevocable (meaning that, once it is created, it cannot be canceled or changed). See fiduciary, personal property, real property.

TRUSTEE—The administrator of a trust. See fiduciary.

UNEMPLOYMENT COMPENSATION—Compensation paid at regular intervals, usually by a state agency, to an unemployed worker who meets certain statutory requirements. Ohio’s unemployment compensation system is an insurance program that helps unemployed workers who are out of work through no fault of their own (for example, due to a layoff), and are available for work, able to work and actively seeking work. Unemployment benefits are paid out of employer taxes.

UNFAIR COMPETITION—The use of unfair, deceitful, or fraudulent methods to gain a business advantage.

UNIFORM COMMERCIAL CODE (UCC)—A model set of statutes governing various business transactions, developed by the Commissioners on Uniform State Laws. The UCC has been adopted in Ohio and a number of other states. More than any other activity, commerce cuts across state lines; the chief value of the UCC is that it provides uniformity in interstate business transactions.

UNJUST ENRICHMENT—A benefit obtained unjustly, especially as the result of an accidental event or the innocent mistake of another. In order to prevent unjust enrichment, the law infers a contract-like relationship among the parties although no contract technically exists, and uses this inferred (or quasi) contract to prevent one party from taking unfair advantage of the other.

UNRULY CHILD—Under Ohio law, a minor who is: 1) habitually truant from school; 2) persistently disobedient (including behavior such as running away from home; 3) who acts in a way that injures or endangers another’s (or his or her own) health or morals; or who violates a law that applies only to minors (such as a curfew). Unruly children are sometimes referred to as status offenders because of their status as minors. The juvenile division of the common pleas court may deal with an unruly child by using any of the remedies available for neglected, dependent or abused children and, if necessary, the dispositions available for delinquents. See abused child, dependent child, delinquent child, juvenile division, neglected child.

UNSECURED APPEARANCE BOND—A type of bail consisting of the accused’s written promise to appear in court, coupled with the accused’s unsecured promise to pay a specified sum of money if the accused fails to appear as required. Generally, an unsecured appearance bond is used when there is little reason to believe that an accused will not appear as required. It is an alternative to personal recognizance.

USURY—The practice of charging excessive interest. In Ohio, the collection of usurious interest is prohibited.

VARIANCE—In property law, a “special case” exception to a zoning ordinance that may be granted by a government body such as a zoning board, planning commission or city council. A variance is granted when the government body agrees that
applying a particular zoning regulation to a specific property is unreasonable.

VENUE—The place where a trial is held. In general, venue follows jurisdiction. In a criminal case, venue may be changed if necessary to secure a fair trial for the accused. See jurisdiction.

VERDICT—The factual decision by a jury in a trial. In a criminal case, a verdict might be guilty, not guilty, or not guilty by reason of insanity. In a civil case, the verdict might be stated as a finding for the plaintiff (or defendant). In a suit for money, a verdict for the plaintiff (or the defendant, if the defendant has filed a counterclaim) will state a sum of money. When a jury retires to consider its decision, the court will furnish it with forms for all possible verdicts in the case. A verdict has no effect until it is formalized by a judgment entry. See judgment, judgment journal entry.

VICTIM IMPACT STATEMENT—A report used by judges in sentencing offenders convicted of felonies. The report is generally prepared by the court’s probation officer and provides the judge with information about the economic, physical, and psychological damage the victim suffered as a result of the offender’s crime. The victim impact statement is similar to the pre-sentence report but is concerned with the victim rather than the offender. See pre-sentence report.

VICTIM OF CRIME CLAIM—A claim for compensation by a person who has suffered physical injury as the result of a crime committed in Ohio. Compensation includes the reimbursement of out-of-pocket expenses, lost wages, and medical expenses resulting from the crime, so long as those losses are not covered by other sources. (In certain situations, a resident of Ohio who is injured in a crime while outside of Ohio may file a victim of crime claim in Ohio.) Property loss and pain and suffering are not compensable. The dependents of a person who dies as a result of a crime may also make claims for the economic support the victim would have provided them. The maximum aggregate award for any one victim, or for all the dependents of one victim, is $50,000. Dependents of a victim must share an award. Victim of crime claims may be filed with the court of claims or the clerk of the common pleas court of each county. See common pleas court, crime, court of claims.

VOIR DIRE—Literally, “to see, to say.” In legal procedure, the process of questioning prospective jurors to determine their fitness to hear and decide a particular case. See challenge, impanel.

WARD—1) A person in the custody or under the protection of a guardian because of youth or some mental or physical disability. 2) A person committed to a public or private institution for the care of children or of other persons in need of care. See fiduciary, guardian, probate division.

WARRANT—In general, authority or a document granting some specific authority. An arrest warrant authorizes and commands the arrest of a specific person. A search warrant authorizes and commands the search of particular premises for specific evidence or contraband. Arrest and search warrants must be issued by or under the supervision of a court, and may be issued only on probable cause. See probable cause.

WARRANTY DEED—A type of deed in which the maker guarantees that the title to the real property, or interest being conveyed, is good. A warranty deed is the most common form of deed. See quitclaim deed, real property.

WHISTLEBLOWER—In employment or workplace law, an employee who tells public authorities (such as a prosecuting attorney or a regulatory agency) that his or her employer is breaking the law. See employment at will.

WILL—A document in which a person (the testator) directs how his or her property is to be distributed upon his or her death. To be competent to make a valid will, a person must be an adult. Further, the person must be sufficiently aware to know: 1) the nature and extent of his or her property; and 2) the identity of those who are the natural objects of his or her generosity (that is, his or her family and friends) even though these need not be made beneficiaries. The will must be in writing, signed at the end by the testator, and acknowledged in the presence of at least two witnesses, who also must sign. An oral will, called a nuncupative will, is valid only for personal property and provided: 1) it is made when the testator is dying and knows he is dying; and 2) it is made to at least two competent witnesses who 3) reduce it to writing within ten days thereafter and 4) file it with the probate court within six months. See bequest, codicil, personal property.

WILL SUBSTITUTE—A device (for example, a trust) used instead of a will to transfer property upon death. See trust, will.
WORKERS’ COMPENSATION—A program that provides replacement income and medical expenses to employees who are injured or become ill in the course and scope of their employment. Financial benefits may also extend to the workers’ dependents and to the survivors of workers who are killed on the job. The employee is not required to prove that the injuries were caused by employer negligence to recover under workers’ compensation laws. Employers are liable even if they are not at fault. Under Ohio’s workers’ compensation law, participating employers pay workers’ compensation premiums into a state fund, administered by the Ohio Bureau of Workers’ Compensation (OBWC), to provide benefits for workers who are injured or become ill in the course and scope of their employment. Employers who comply with Ohio’s workers’ compensation laws generally cannot be sued in court for negligence. However, certain cases of workplace injury—arising out of certain dangerous conditions known to the employer—are called intentional torts and may form the basis of a tort claim even though injury lawsuits against employers are generally prohibited by the law that provides workers’ compensation to injured employees. See tort.

WRIT—1) An order of a court directing that a person or entity undertake a particular course of action or refrain from taking a particular course of action. 2) The application for such an order. For example, often the phrase habeas corpus is used to mean both the application to the court and the court’s order issuing the writ. See extraordinary writ.

ZONING—A plan or system adopted and administered by local government in which various geographic areas (zones) are restricted to certain uses and development—for example, to industrial, commercial, public, agricultural, single-family residential, or multi-unit residential purposes. See administrative law.
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Every citizen should have some basic knowledge of the law and the legal system under which he or she lives and works. This book was designed to provide some of that basic knowledge, and we hope you have found it both interesting and informative. We welcome your suggestions for improving it, and your comments or criticisms. Please send suggestions, comments, and criticisms to: Editor, The Law and You, P.O. Box 16562, Columbus, OH 43216-6562.