



11th Hour CLE

2018 Video Replay Series

Session 3

Friday, December 28, 2018





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December 28, 2018

9 a.m.	Foreclosure Law William L. Purtell, Esq., <i>Lerner Sampson & Rothfuss, LPA</i>	TAB A
10 a.m.	Ohio vs. Kentucky Workers' Compensation Justin L. Lawrence, Esq., <i>Lawrence & Assoc., LLC</i>	TAB B
11 a.m.	Break	
11:15 a.m.	Advising Small Businesses Thomas L. Cuni, Esq., <i>Cuni Ferguson & Levay Co., LPA</i>	TAB C
12:15 p.m.	Adjourn	

TAB A



BILL PURTELL

Bill Purtell is an associate in the Special Cases department at Lerner, Sampson & Rothfuss. Mr. Purtell received his B.A. in History from Thomas More College and his J.D. from the University of Cincinnati. He specializes in mortgage foreclosure and secured collections, helping financial clients avoid the many hazards and pitfalls of state law collections. He is admitted to practice in both Ohio and Kentucky, and has served on committees regarding the Fair Debt Collections Practices Act, the Servicemember's Civil Relief Act, and the Rules of Professional Conduct.

The savvy Collections practitioner focuses on how a debt is collected, instead of simply how much. The merits of a collections case are often irrelevant when you are being confronted with the myriad of restrictions and requirements to stay on the proper side of the law and the ethical rules. With the proper tools in place, a casual or general practitioner can avoid having that hundred dollar case turn into a thousand dollar liability. This presentation will eschew traditional collections law, and instead look at the periphery of laws surrounding a typical collections case.

Foreclosure 101

Cincinnati Bar Association
August 2018



LERNER SAMPSON & ROTHFUSS

1

What is a Foreclosure?

- Foreclosure: “To shut out, to bar, to destroy an equity of redemption. In common usage, refers to enforcement of lien, trust deed, or mortgage in any method provided by law”. *Black’s Law Dictionary* 646 (6th ed. 1990).
- Equity of Redemption: “The right of the mortgagor of property to redeem the same (i.e., save from foreclosure) after it has been forfeited, at law, by a breach of the condition of the mortgage.” *Id* at 541.

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How Do You Foreclose?

- **Strict Foreclosure**
 - Lender immediately owns your home upon default
- **Statutory Foreclosure (Non-Judicial)**
 - Rules-based process designed to auction the property upon default.
- **Judicial Foreclosure**
 - A lawsuit in equity brought in a Court of competent jurisdiction to prove a default and seek a public sale of the property.

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Judicial & Non-Judicial States



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Who Makes the Rules?

- State legislatures design their own foreclosure processes.
- California: Homeowner's Bill of Rights
- Texas: HELOC restrictions
- Georgia: Super Tuesday auctions
- Michigan: Extended Redemption Rights
- Pennsylvania: Pre-foreclosure notices

5

Foreclosures in Ohio & Kentucky

- All Ohio & Kentucky foreclosures are judicial.
- Foreclosure sales are controlled by statute.



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Foreclosure Overview

- Pre-Foreclosure
- Foreclosure Litigation
- Foreclosure Sale

7

Pre-Foreclosure Considerations: Alternatives to foreclosure

- CFPB Requirement to Solicit Loss Mitigation
 - 12 CFR 1024.39
- Forbearance Agreements
- Repayment Plans
- Private Short Sales
- Loan Modifications
- Loan Reinstatement
- Deed-in-Lieu of Foreclosure



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Pre-Foreclosure Considerations:

Notice of acceleration

- What is Acceleration?
 - Making the entire balance due immediately instead of in monthly payments
- Is it required?
 - Contractual terms
 - HUD regulations
 - State Statutes (*not* required in Ohio or Kentucky)
- Is it Jurisdictional?
 - Contractual requirements can be waived. Statutory or Regulatory requirements are stricter.

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Pre-Foreclosure Considerations:

Referrals to counsel

- Is foreclosure appropriate?
 - What type of default exists?
 - What are the recovery prospects?
 - Statute of Limitation issues?



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Statute of Limitations

- Could run on either the Mortgage or the Note. Governed by real estate law, contract law, or U.C.C. provisions.
- *Bartram v. U.S. Bank, N.A.*, 2016 Fla. LEXIS 2424, 41 Fla. L. Weekly S 493 (Florida, 2016)
 - "Absent a contrary provision in the residential note and mortgage, dismissal of the foreclosure action against the mortgagor has the effect of returning the parties to their pre-foreclosure complaint status, where the mortgage remains an installment loan and the mortgagor has the right to continue to make installment payments without being obligated to pay the entire amount due under the note and mortgage." *6,
- Each missed installment creates a separate event upon which acceleration can be based.
- Contrast against *Deutsche Bank Nat'l Trust Co. v. Holden*, 147 Ohio St. 3d 85, 2016-Ohio-4603, 60 N.E.3d 1243 (Ohio 2016); *Bank of N.Y. Mellon v. Walker*, 2017-Ohio-535 (8th District, 2017).

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Pre-Foreclosure Considerations: Referrals to counsel

- Cannot file foreclosure until 120 days after date of default
 - 12 CFR 1024.41(f)
- Referral can happen before 120 days.
 - Incurs fees and costs, which could be added to the loan balance.
 - The ideal referral should contain copies of necessary documents (the note, mortgage, assignments, and loan modifications) and additional documents (payment histories, acceleration notice, and title insurance).

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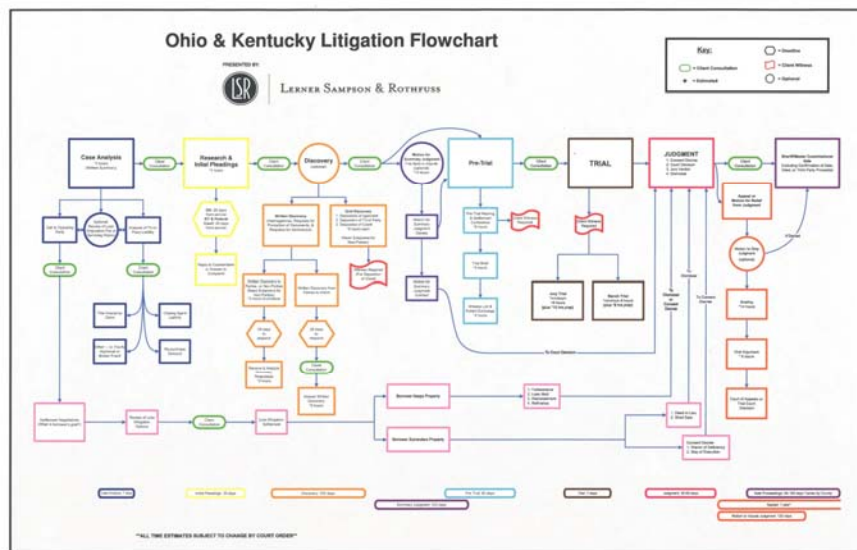
Foreclosure Litigation

- The Complaint
- Service & Motions
- Judgment



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How Hard Could It Be?



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Foreclosure Litigation: Obtaining a Title Exam

- ORC 2329.191 or KRS 426.006
 - Identifying necessary parties to the case.
 - Includes title holders, spouses of title holders, non-discharged obligors, lien holders, mortgage holders, fixture filing holders, county treasurers, and other tax lien holders.
 - We find these parties through a comprehensive search of land records, state court records, and bankruptcy court records.



A title examiner

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Foreclosure Litigation: Naming the Right Parties

- Interpreting liens is both art and science
- Expired judgment liens
 - ORC 2329.07 and KRS 413.090
- Variant names
- Attachment to vested interests
 - Life estates, dower, remainder interests, etc.
- Violation of statutory pre-requisites
 - KRS 426.030 and ORC 1311.06

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Foreclosure Litigation: Drafting the Complaint

- The parts of a complaint.
 - A case caption.
 - Statement of Facts
 - Causes of action (demand for judgment on the note and foreclosure of the mortgage).
 - Prayer for relief
 - Rule 11 Considerations



Preparing a Complaint (circa. 1975)

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Foreclosure Litigation: Filing the Complaint

- Jurisdiction and Venue is always in the court where the property is located.
 - OH Civ.R. 3(B)(5), KRS 452.400, 15 U.S.C. 1692i
- *Lis pendens* arises upon filing of the complaint (ORC 2703.26) or recording a notice in the county records (KRS 382.440).
- Plaintiff must have standing to sue at the time the action is filed. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, *Acuff v. Wells Fargo Bank, N.A.*, 460 S.W.3d 335 (Ky. Ct. App. 2014)

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Foreclosure Litigation: Service

- Clerk issues a summons & complaint to all parties.
- Personal or residential service is often the fastest.
- Certified mail service is the least expensive.
- Constructive Service/Publication is a last resort (expensive and delays the case 3-7 weeks).



An example of Sheriff Service

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Foreclosure Litigation: Motions for Default Judgment

- If a defendant fails to file an answer or motion in response to the complaint within 20/28 days of service, the defendant is deemed to be in “default.”
- A defendant who defaults is deemed to have admitted the allegations in the complaint. In these cases, a motion for default judgment can be filed and judgment is routinely entered in a quick fashion.
- Most commonly, these types of defendants are mortgagors or junior lien holders who do not want to spend money to defend the action.

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Foreclosure Litigation: Motions for Summary Judgment

- If a defendant contests the foreclosure, a trial is typically unnecessary. So long as no “genuine issue of material fact” exists in the case, the lender can file a motion for summary judgment.
- This motion asks the court to review the facts and applicable law, and then grant judgment against the answering defendant without a trial.
- Most commonly, these types of defendants are the mortgagors and obligors.

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Foreclosure Litigation: Mediation & Arbitration

- Mediations.
 - A receding trend in Ohio & Kentucky.
 - Courts previously used “inherent authority” to control their docket as a means of requiring mediation. Ohio adopting a statute permitting required mediation.
 - Mediation is not a defense to foreclosure or a stay of proceeding. However, some judges will enter orders staying the case while mediation is pending.
 - Mediation programs have lost funding and were supplanted by federal loss mitigation requirements under 12 CFR 1024.41.
- Arbitration
 - Generally used only for counterclaims outside of the contractual relationship.
 - Plaintiff/lender already chose state court as the forum.

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Foreclosure Litigation: Judgment and Decree of Foreclosure

- A proposed judgment entry is typically prepared by the lender's lawyer.
- A proper judgment entry includes:
 - Recital of pleadings.
 - A finding that service was proper.
 - A finding of default against any non-answering parties or judgment against answering parties contesting the right to foreclose.
 - A finding as to the amount due on the Note.
 - A finding that the mortgage is good and valid lien on the property.
 - A finding that the mortgage conditions were broken and foreclosure is permissible.
 - A finding is made on the priority of the various liens.
 - Cancellation of the equity of redemption (separate from the statutory right of redemption).
 - An order of sale and distribution of proceeds.

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Foreclosure Litigation: Consent Judgment

- Consent entry.
 - Defendants who consent to the demands of the complaint require no dispositive motion.
 - Most commonly used when settling claims with a homeowner.
 - Also used when circulating the Judgment to other lienholders who have filed an answer.



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Foreclosure Litigation : Final and Appealable Judgments

- The Court must rule on all dispositive motions properly filed. The time for this depends on the schedule of the Judge.
- A proper judgment will resolve all counterclaims of the borrowers, as well as any priority disputes, title curative matters, etc.
- Civil Rule 54(B) Certification



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Foreclosure Litigation: Local Rules and Judgments

- County specific requirements must be met.
 - All county specific requirements must be satisfied before the court will grant judgment.
 - These requirements differ from county to county, and sometimes even from judge to judge within the county.
 - Specialized requirements include certifications of counsel, particular form affidavits, and completed checklists.

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Foreclosure Sale

- Sheriff/Master Commissioner
- Private Selling Officer
- Confirmation of sale
- Eviction



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Foreclosure Sale: Ordering the Sale

- Ohio – Precipe for Order of Sale
 - Designation of selling offer
 - Separate action which can be up to five years after judgment (ORC 2329.07)
- Kentucky – Judgment and Order of Sale
 - Referral to the Master Commissioner
 - Automatically set at time of judgment.

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Appraisals for Sale (O.R.C. 2329.17)

- Sheriff will always hire the appraisers, no matter which selling officer conducts the sale
- After 21 days, taxable value of the property will be used in lieu of the appraisal
- No payment to appraisers if deadline is missed

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Private Selling Officers (R.C. 2329.152)

- O.R.C. 2329.01(B)(2) now includes definition for "Private Selling Officer"
- "Private selling officer" means a resident of Ohio licensed as both an auctioneer under Chapter 4707 of the Revised Code and as a real estate broker or real estate salesperson under Chapter 4735 of the Revised Code.

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Online Auctions – R.C. 2329.153

- Ohio is to have a unified website for all online sales by the local sheriffs. Five years after implementation all sales will be online.
- PSO to use its own website.
- Bidding open for 7 days before the sale
- Allows postponement of sales for up to 180 days without Court order.
- Allows cancellation of sales without Court order.

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Foreclosure Sale: Advertising

- Advertising the sale.
 - Once a sale date is provided, the sale must be advertised in two ways:
 - The selling officer must be advertised in a local county newspaper once per week for 3 weeks immediately prior to the sale.
 - Lender's counsel sends notice of sale to all defendants. (this varies by County in Kentucky)

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Foreclosure Sale: Postponement/Cancelling

- Postponement
 - Temporary change of the sale date. Uses the same precipe as the original sale.
 - Limits placed on amount of postponement allowed
- Cancelling the sale.
 - The sale may be cancelled upon motion by any party and in the discretion of the court. Cancels the precipe upon which the sale was ordered.
 - A small minority of Judges are refusing to pull sales due to charge-offs.

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Foreclosure Sale: Sheriff/Master sale

- Conducting the sale.
 - On the day and at the time of sale, the property is auctioned by the county Sheriff/Master.
 - Any person over the age of 18 may bid, including the mortgagor unless a contrary order exists.
 - The opening bid in Ohio is always set at two-thirds of the property's appraised value. Kentucky has no minimum bid, but redemption rights are terminated if the property sells for at least two-thirds of the appraised value.



A real sale in McCracken County

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Foreclosure Sale:

Return On Order Of Sale

- After the auction is complete, whether or not the property sells, the selling officer prepares a “return/report on order of sale” for filing in the court. This provides the court with the official sale results.

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Foreclosure Sale:

Confirmation of sale (ORC 2329.31)

- This is a court order finding that:
 - the sale was properly conducted
 - vests equitable title in the purchaser at sale
 - orders the sheriff/master to prepare a deed to the successful purchaser (legal title)
 - terminates the mortgagor’s statutory right of redemption
 - orders payment of the bid
 - outlines who receives the money generated by the sale
 - identifies any deficiency judgment
 - cancels all liens of record that were named in the foreclosure or were filed after *lis pendens*.

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Foreclosure Sale: Confirmation of sale

- Statutory Right of Redemption
 - Ohio: Allows the debtor to redeem the property by depositing the amount of the judgment under which the sale occurred plus all costs, including poundage, and interest at the rate of 8% per annum on the purchase money from the day of sale to the time of deposit.
 - Kentucky: If the property sells for less than two-thirds of its appraised value, the borrower has six months from the date of sale to purchase the winning bid and redeem the property. During this redemption period the property can be sold subject to the borrower's rights. An eviction can be brought any time before the redemption is tendered.

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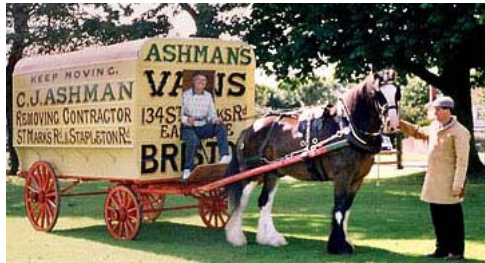
Foreclosure Sale: Deed

- The foreclosure deed is routinely prepared by the lender's counsel to help expedite the process. Regardless of who prepares the deed, though, no warranty of title is given to the purchaser at auction. The deed vests legal title.
- The Selling Officer will always execute the deed, no matter who drafted it.
- Time limits exist on the recording of the deed.

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Foreclosure Sale

- Sheriff/Master sale
- Confirmation of sale
- **Eviction**



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Foreclosure Sale: Eviction

- Two types of eviction procedures exist:
 - If the occupants were parties to the foreclosure, the foreclosure court will issue a “writ of possession” entitling the holder to have the sheriff set the occupant out.
 - Alternatively, a forcible entry and detainer complaint is filed, judgment is taken, and a writ of possession is issued.
 - Ohio and Kentucky foreclosures generally cancel a lease by operation of law.

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And Life Goes On....



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Foreclosure 101

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A BRIEF OVERVIEW OF JUDICIAL FORECLOSURES

- I. Pre-Acceleration
- II. Demand/Acceleration
- III. Referral to outside counsel
- IV. Filing of Complaint for Foreclosure
- V. Service of Process
- VI. Motion for Judgment/Decree of Foreclosure
- VII. Order of Sale
- VIII. Foreclosure Sale
- IX. Confirmation of Sale
- X. Deed to Purchaser

I. Pre-Acceleration

This is the point when the loan first becomes delinquent. Loss mitigation is required to be attempted under CFR 1024.39 before the foreclosure may commence. Inquiries are made into the reasons for the default and workout packages are normally sent to the borrower. This is the best time to cure a defaulted loan.

II. Demand/Acceleration

Acceleration is the legal term for making the entire balance of the debt immediately due and payable instead of separate monthly payments. A demand letter gives notice that a borrower has 30 days to cure his default or else face acceleration. A demand is required by FHA and VA regulations, as well as by most standard Fannie Mae or Freddie Mac mortgages. Some States require that a demand to be sent, or require certain terms to be included in the demand. In those cases, the law trumps the terms of the note or mortgage. Other States do not regulate demand letters. Ohio and Kentucky have no demand letter requirements.

The demand letter requires a lump-sum payment of the arrearage and is the final chance for the borrower to cure their delinquency before foreclosure fees/costs are incurred.

III. Referral to outside counsel

An attorney-client relationship is formed when the defaulted loan is referred to the attorney's office. This is the beginning of foreclosure fees and costs.

A title exam must be ordered before a foreclosure complaint can be filed. There is also a pre-suit review of the merits by counsel. Therefore, foreclosure fees and costs are being incurred by the lender even before the suit is filed.

IV. Filing of Complaint

The filing of a foreclosure complaint is an automatic acceleration of the debt. At this point significant court costs, attorney fees and title exam fees have been incurred. The borrower is now truly “in foreclosure”. This is the first action date used by the FHA and many lenders to measure the length of the foreclosure process.

A standard mortgage contains a clause allowing the borrower to reinstate their loan at any time before judgment is filed, but it requires the payment of all foreclosure fees and costs, which can be expensive. (which shocks most borrowers, since it could be far more than just the sum of their missed payments!)

V. Service of Process

In order to obtain judgment and exercise jurisdiction over the property, all parties to the foreclosure must be served with a copy of the complaint for foreclosure. New addresses are found for the borrowers if they no longer reside at the property. This is the first time the borrower is made aware of the judicial foreclosure.

This creates a double-edged approach, as many lenders will conduct loss mitigation while the foreclosure is pending. Both will move forward at the same time. A typical trial modification plan will last from 3-6 months, during which the foreclosure attorney will be asked to put the foreclosure on “hold”. The law of each state determines if this is possible.

No such “hold” actually exists in the foreclosure lawsuit. The Court is free to demand that the parties proceed promptly with the foreclosure litigation. Failure to proceed can result in an administrative dismissal of the entire foreclosure. Some Courts will not keep a foreclosure pending while loss mitigation is in effect. Hamilton County specifically attempts to resolve all foreclosures within one year of filing.

VI. Motion for Judgment/Decree of Foreclosure

In a normal, non-contested foreclosure the lender can obtain a judgment upon filing a motion for default judgment. It simply states that no answer was filed to contest the foreclosure, and the lender is entitled to judgment on the loan.

If a foreclosure is contested, a motion for summary judgment must be filed. This motion acts in place of a trial and presents all the evidence needed to overcome the borrower’s defenses. Usually an affidavit of the status of the loan, coupled with a payment history, will be sufficient to overcome a borrower’s standard defenses. If the motion is denied, the Court will require a full trial in order to adjudicate the foreclosure.

The Decree of Foreclosure is the final judgment on the loan. It is a personal money judgment which commands the property to be sold in order to pay amount owed. If a borrower is deceased or has a chapter 7 bankruptcy discharge, then the only remedy is the sale of the property. There is no personal money judgment.

At this point the lender can still accept a payoff or reinstatement of the loan. The Court takes a passive role on the case since a final decision was rendered. A different government agent, such as a Clerk, Sheriff, or Master Commissioner will handle the post-judgment sale of the property. If the loan is reinstated, the lender can simply vacate and

dismiss the judgment. There is no need to dismiss and refile the foreclosure if a repayment plan is broken – the lender’s judgment would simply remain unpaid, and they can pick up where they left off and order a sale of the property.

VII. Order of Sale

This is a formal request for the Clerk/Sheriff/Master to appraise, advertise and sell a property in order to pay the judgment. Once the auctioneer sets a sale date, he must normally give notice to all parties and run an advertisement in the newspaper before the sale.

At this point most borrowers will make their last attempts at loss mitigation. With a sale date on the horizon, they are given a deadline in which to cure their delinquency. (but as we will see, the sale might not stop them from curing their loan)

VIII. Foreclosure Sale

Foreclosure sales are public auctions conducted by the Sheriff/PSO/Master. The minimum bid at a Sheriff’s sale is set by state law and could vary. For example, in Ohio the minimum bid is 2/3rds of the appraised value of the house. I.e., a \$120,000 house has an opening bid of \$80,000. Lienholders are paid in the order of their priority. Normally a 1st lienholder will bid the amount of their debt, since they can credit their mortgage against the purchase price of the house. A 2nd lienholder will usually outbid the 1st lien if there is sufficient equity in the property.

If redemption rights exists, a foreclosure sale might have little legal effect. The borrower can payoff/redeem his property from sale by paying the full amount of the Judgment to the Court. Nothing is final and binding until the sale is confirmed by the Court.

IX. Confirmation of Sale

The Court must enter an order confirming the sale, distributing proceeds, and ordering a deed to be issued to the purchaser. The confirmation also discharges all the liens against the property so that the purchaser has clear title. Confirmation is when the purchaser is vested with rights and can exercise control over the property, such as evicting the current residents or changing the locks. The confirmation also cuts off any right to redeem by the borrower. (but that varies by state)

By this time, it is too late to help the borrower save their property.

X. Deed to Purchaser

The deed is the written memorial of the rights granted by the confirmation entry. The deed is issued by the Clerk/Sheriff/Master after the confirmation of sale. A purchaser inherits only the title granted by the foreclosure action. If a lienholder was left out of the foreclosure by mistake, his lien survives and becomes a cloud on the title. This is why it is important to run a title search before the foreclosure begins, so that all possible interests in the foreclosure can be marshaled (and released) by the foreclosure sale.

The REO and marketing of a property can occur once the Confirmation is filed, but most deals are not closed until the deed is available.

Prepared by:

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TAB B



Justin Lee Lawrence

Justin L. Lawrence focuses his practice in the areas of personal injury, worker's compensation, maritime injuries, wrongful death, and bankruptcy. Justin is a 2002 Cum Laude graduate of the University of Kentucky with Bachelor degrees in Accounting and Business Administration. While at the University of Kentucky, he was awarded the prestigious Woodson B. Gudgell scholarship. He earned his Juris Doctor degree from the Salmon P. Chase College of Law in 2005. In law school, he served as Vice President of the SBA and Justice of Phi Alpha Delta's Hoffman Chapter. Justin was also honored with the Alex P. Hotchkiss Award for outstanding Chapter Justice, and the Hoffman Chapter was awarded the Stanley H. Kohn Award for best chapter. Justin founded his successful law firm in 2005. Justin has years of experience in representing injured men and women in civil cases against insurance companies and large corporations. He has recently put a spotlight on some insurance companies' abhorrent practice of delaying payments to the victims of drunk drivers. Justin has years of experience in representing injured men and women in civil cases against insurance companies and large corporations. As his firm has grown, Justin has recently moved into a more full time management role, restricting his active case management to major trucking and product liability injuries. Justin also takes a full-time role in training new attorneys in the firm, with new attorneys shadowing Justin for as long as one year before operating on their own, to ensure the highest quality representation.

Associations/Organizations

Justin is on the Board of Governors for the Kentucky Justice Association, and is a member of the American Association for Justice, the Kentucky Bar Association, and the Northern Kentucky Bar Association. He continues to be active as a member of the Salmon P. Chase Inns of Court, and an alumni adviser to Phi Alpha Delta. He regularly practices in Kentucky and Ohio, and has also won awards in Pennsylvania and Indiana. In addition to Justin's professional memberships, he is on Redwood's Board of Trustees and is active with the Down Syndrome Association of Greater Cincinnati. Redwood is a school that helps children and adults with disabilities grow and live to their fullest potential, including entering the workforce and living independently. The Down Syndrome Association provides aid and support to individuals with Down Syndrome and their families.



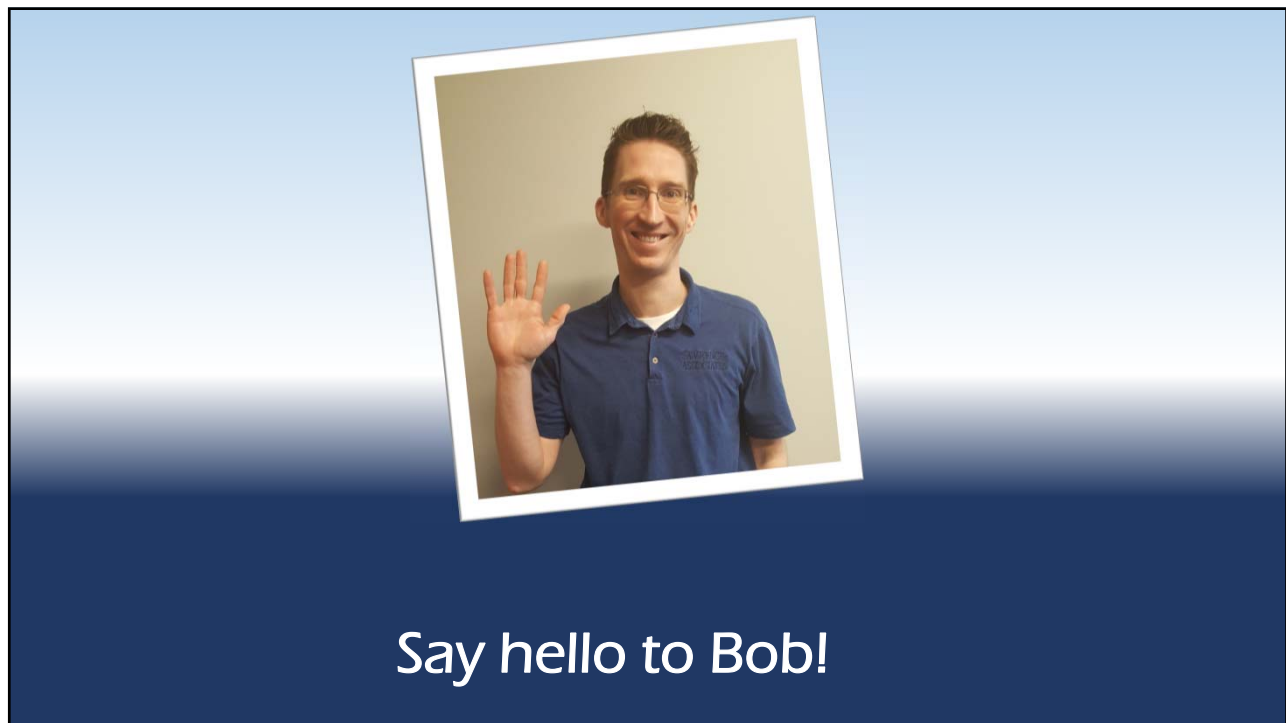
OHIO vs KENTUCKY
Workers' Compensation
Laws

Presented by
Justin L. Lawrence

LAW OFFICES OF
L LAWRENCE &
ASSOCIATES
Working Hard for the Working Class

The slide features a blue gradient background. On the left is a map of Ohio with the state flag. On the right is a map of Kentucky with the state seal. The text is centered in white and black. The law firm logo is centered below the presenter's name.

1



Say hello to Bob!

A photograph of a man named Bob, wearing glasses and a blue polo shirt, waving his right hand. The photo is tilted and has a white border. The text 'Say hello to Bob!' is written in white at the bottom of the slide.

2



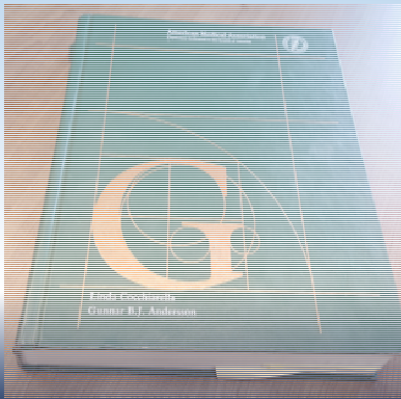
He doesn't know it yet,
but Bob is about to be injured at work.

3



During this Presentation we will follow him
through his Workers' Compensation case to see
how each system would treat him for his injury.

4



AMA Guides 5th

Provides the foundation for Workers' Compensation In both OH & KY with it's definitions and terminologies.

5



Statute of Limitations
Bifurcation
&
Jurisdiction



1 YEAR

2 YEARS*

Bridges v. National Engineering
& Contracting Co. (1990),
551 N.E.2d 163

KRS 342.670

**From DOI or last TTD payment*

6



Forums



Both states recognize the ability to contract with an employer to use the Workers' Compensation system of a particular state.

Otherwise, the injured employee's election for benefits prevails, so long as any benefits received in another state offset.

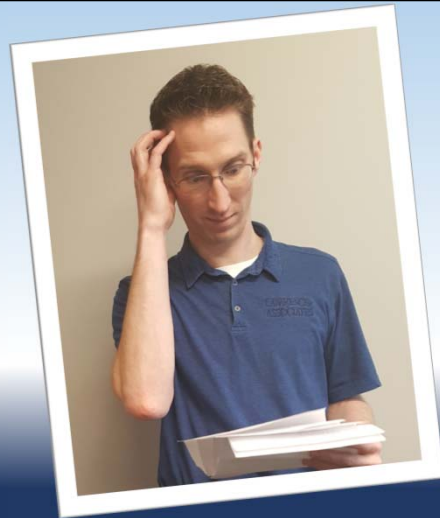
7



Which State is better for Bob?



8



Bob got hurt 13 months ago,
but didn't get an attorney because he had been regularly getting benefits...
TTD was cut off two weeks ago and now Bob needs help.

9

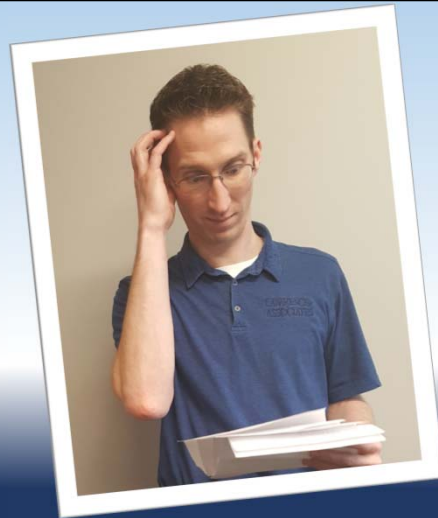


His claim is already filed,
there is no statute, but
there may be a quick
deadline to appeal the
TTD termination.



He has 2 years from his
last TTD payment to file a
claim.

10



Bob is already in the Workers' Compensation system, but received a notice yesterday that his TTD benefits were denied. The attorney files an appeal / initial claim the next day

11



A hearing will be scheduled within 45 days and, if successful, will get TTD benefits reinstated within 7 days, barring further appeal.



There will be a discovery period and 2 hearings, lasting at least 6 months. He will get back due TTD if successful, but nothing in the meantime.

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TTD Calculation: Amount



Bob gets Full Weekly Wage

This is 72% of the greater of:
Gross Wages, including OT, earned
over the 6 weeks prior to the injury divided by 6.
- OR -
Gross Wages, excluding OT, earned
over the 7 days prior to the injury.

AWW is 2/3 of the total earnings for the
year prior to the injury divided by 52.

Bob gets Temporary Total Disability

This is 2/3 of the AWW
& The first 7 days are unpaid,
& Overtime rates are not calculated,
& Fringe benefits are not calculated.

AWW is the highest Average Weekly
Wage of the four 13 weeks prior to DOI.

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TTD Calculation: Duration



Bob gets FWW for the first 12 weeks,
after that he receives AWW until he
reaches MMI, with maximums.

ORC 4123.56(B)
Bob is paid until he reaches MMI, so long as the
Medco 14 is filled out by POR. After 200 weeks
he will be sent to an IME to determine if his
restrictions are permanent. Additionally he must
miss 8 consecutive days of work to qualify.

Bob gets TTD until he reaches MMI, with
no maximum length of time.

MMI is the prime focus of the parties'
litigation. This can lead to Bob's TTD
being cut off for weeks or months while
the MMI date is contested.

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TTD Calculation:
Duration



Also, Ohio has Working Wage Loss Compensation, which is paid if the employee makes less money after returning to a job that is not the same job he was hurt in. This is $\frac{2}{3}$ the difference between the old rate of pay and the new, and extends for a maximum of 200 weeks.

Kentucky does not have this.

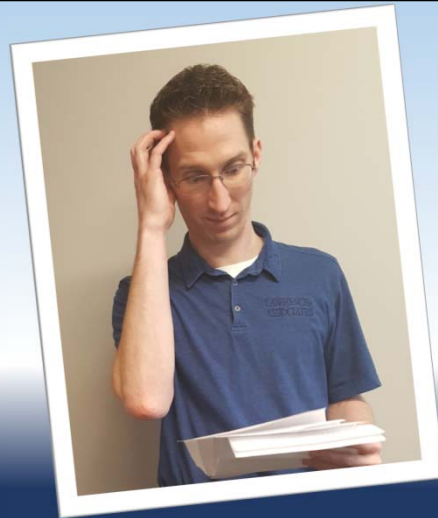
15



Which State is better for Bob?



16



Bob earns \$800 per week (gross) and avoids overtime. Five weeks before the injury he was forced to work OT and earned \$1,000 per week (gross) for four weeks. Nine months before the injury Bob was unemployed with no earnings. Bob will reach MMI in approximate 75 weeks.

17



The overtime helps his FWW:
 $FWW = 2/3 \text{ of } \$933.33$

The unemployment hurts his AWW:
 $AWW = 2/3 \text{ of } \$615.38$

The benefits of the OT were lost.
 $TTD \text{ Totals } \underline{\$33,312.60}$



No penalty for his time of unemployment, but no credit for the overtime either.

$TTD = 2/3 \text{ of } \$800.00$

$TTD \text{ Totals } \underline{\$40,000.00}$

18



Kentucky PPD Calculation:

$$\text{PPD} = \text{AWW} * \frac{2}{3} * \text{WPI} *$$

$$[\text{Statutory Multiplier}] *$$

$$[1, 2 \text{ or } (3 \text{ to } 3.6)] *$$

$$[\text{Present Value Multiplier if Lump Sum}]$$

19



Statutory Multiplier

Impairment Rating	Multiplier
0 – 5%	0.65
6 – 10%	0.85
11 – 20%	1.00
21 – 25%	1.15
26 – 30%	1.35
31 – 35%	1.50
36% and above	1.70

20



1, 2, or (3 to 3.6)

Age 50 - 54	0.2
Age 55 - 59	0.4
Age 60 and older	0.6
Education under 8 th	0.4
Education under 12 th	0.2

21



Present Value Multipliers (for 2018)

425 weeks	396.0190
520 weeks	477.0798

22



Ohio – ORC 4123.57

$$\text{PPD} = \text{WPI} * 2 * \frac{2}{3} \text{AWW}$$

With a Maximum AWW of \$310.67 (for 2018)

23



PPD Age Cut-Offs



ORC 4123.58(D)(1)-(4)

The IC will not grant PTD if the injured worker is unable to engage in sustained remunerative employment due to (among other reasons) the injured worker's age solely preventing him/her from obtaining employment.

This is currently a contested issue in Kentucky Comp. KY is using a Tier Down because the KY supreme court found the controlling statute is unconstitutional.

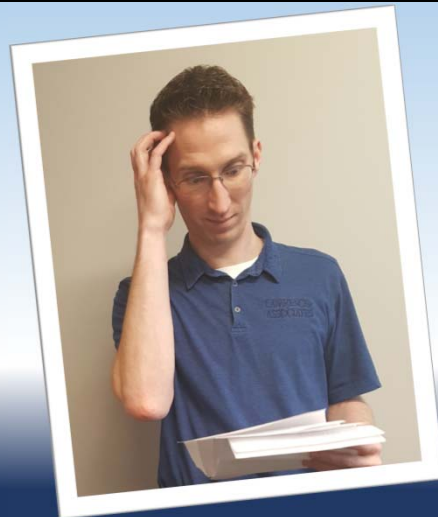
24



Which State is better for Bob?



25



Bob is 59 years old and only went to school through the 11th grade. He has a 30% impairment rating due to a knee replacement and can no longer return to his job. Further, due to his age and restrictions, it is unlikely that he will return to work at the same or greater wage in the foreseeable future.

26



AWW = \$800.00
Benefits will be paid for 425 weeks



$$[\$310.67] * 0.35 * 2 =$$

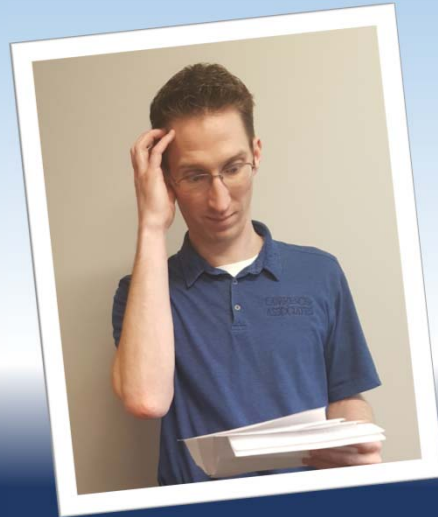
$$\$217.47$$

$$\$800 * 2/3 * 0.35 * 1.5 * 3.6 =$$

$$\$1,008.00$$

Benefits will lower by 10% on his
65th, 66th & 67th birthdays

27



But, What if Bob was younger and less injured?
Now he is 29 years old and has only a 5% impairment rating.
All other factors remain the same.

28



AWW = \$800.00
Benefits will be paid for 425 weeks

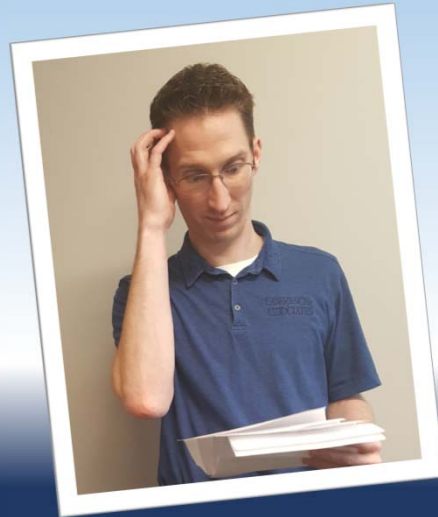


$$[\$310.67] * 0.05 * 2 =$$

$$\$31.07$$

$$\$800 * 2/3 * 0.5 * 0.65 * 3.2 = \$55.4$$

29



What if Bob is able to go back to work at the same pay?
Bob is still 29 years old and still has a 5% impairment rating.

30



AWW = \$800.00
Benefits will be paid for 425 weeks



$$[\$310.67] * 0.05 * 2 =$$

$$\$31.07$$

$$\$800 * 2/3 * 0.5 * 0.65 * 1 = \$17.33$$

31



PTD Calculation:



Permanent Total Disability

ORC 4123.58
2/3 of AWW capped at SAWW

KRS 342.0011
2/3 of AWW capped at SAWW

32



PTD Calculation:



Permanent Total Disability

ORC 4123.58
2/3 of AWW capped at SAWW

KRS 342.0011
2/3 of AWW capped at SAWW

**Bob will be treated the exact same in both states
if he is found permanently totally disabled.**

33



Death



ORC 4123.66
The administrator of workers' compensation shall disburse and pay from the state insurance fund the amounts for medical, nurse and hospital services and medicine as the administrator deems proper and, in case death ensues from the injury, the administrator shall disburse and pay from the fund reasonable funeral expenses in an amount not to exceed \$5,500.

A lump sum benefit is paid to the estate in the amount that is adjusted annually by the DWC.

In 2018 the amount is:
\$83,336.22

34

	<h2 style="margin: 0;">Dependency</h2>	
<p>ORC 4123.59</p> <p>Spouse & Children (under 18*): 2/3 of AWW Up to 2/3 of SAWW & no less than 1/2 SAWW <i>This is divided evenly among dependents</i></p> <p>Other Dependents: 0%</p>		<p>KRS 342.750</p> <p>Spouse (no Children): 50% of AWW Spouse (Children in home): 45% of AWW Spouse (Children NOT in home): 40% of AWW</p> <p>Children (under 18*) : 15% of AWW per child Maximum to be split evenly of 30% of AWW</p> <p>Other Dependents: 25% of AWW</p>

35

	<h2 style="margin: 0;">Which State is better for Bob?</h2>	
		

36



What if Bob died due to his work injury?

37




No Dependents



\$5,500 & medicals covered.


\$83,336.22 & medicals covered.

38



Dependents

AWW = \$800



Bob left behind a wife and a fully dependent brother who lived in the home with him because he is unable to support himself.

<p>\$5,500 & medicals covered</p> <p>Wife: 2/3 AWW = \$533.33/wk</p> <p>Brother: No Benefits</p>	<p>\$83,336.22 & medicals covered</p> <p>Wife: 50% AWW = \$400.00/wk</p> <p>Brother: 25% AWW = \$200.00/wk</p>
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39



Safety Violations



A Safety Violation must be a specific failure of a safety requirement and must be the approximate cause of the injury.

<p>VSSR</p> <p>IC has the right to add 15% - 50% of the maximum award of compensation when a injury or death results from the employer's violation of a specific safety requirement.</p>	<p>KRS 342.165</p> <p>The Court may <u>increase</u> an award by 30% if the <u>employer</u> commits a safety violation.</p> <p>The Court may <u>reduce</u> an award by 15% if the <u>employee</u> intentionally fails to use safety devices or follow a safety regulation.</p>
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40



Ohio
Bureau of Workers' Compensation


Which State is better for Bob?




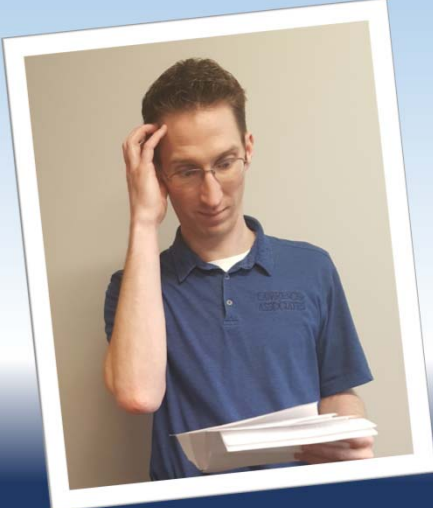
LABOR CABINET
Kentucky
ESTABLISHED 1993



41



Ohio
Bureau of Workers' Compensation






LABOR CABINET
Kentucky
ESTABLISHED 1993

Since Ohio allows for a range, it makes it difficult to compare the 2 states.

How Blatant was the violation? Have there been past violations?

How well were the maintenance records kept? What are the extent of Bob's injuries?

42



NOTE:
In Kentucky, an employee's negligence can offset the employer's negligence.

43



Thank You for Your Attention!

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Working Hard for the Working Class

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TAB C



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TCUNI@CFL-LAW.COM – EMAIL

College: University of Cincinnati, McMicken College of Arts & Sciences – Bachelor of Arts in Political Science in 1969

Law School: University of Cincinnati, College of Law – Juris Doctor in 1975

License to Practice Law: Admitted to the practice of law in Ohio and in the U.S. District Court for the Southern District of Ohio in 1975.

Work History: Partner in the firm of Osborne & Cuni from 1976 to 1978. Associate Attorney with the firm of Schwartz, Manes & Ruby Co., LPA from 1978 to 1983. The sole shareholder of Thomas L. Cuni Co., LPA from 1983 to 1988. One of the founding partners of Cuni, Ferguson & LeVay Co., LPA (originally Matre, Cuni & Orner Co. LPA) from 1988 to 2013. From 2014 to the present I have been of counsel to Cuni, Ferguson & LeVay Co., LPA.

Honors and Peer Ratings: I have maintained an AV rating by Martindale-Hubble for more than 20 years. I was named the VLP Lawyer of the Year in 2004 by the Volunteer Lawyers for the Poor and I was given the Trustees Award in 2015 by the Cincinnati Bar Association. I am the recipient of the John Warrington Community Service Award at the next annual meeting of the Cincinnati Bar Association in 2018.

Practice Areas: Corporate Law, Acquisitions and Sales of Businesses, Commercial Real Estate, Commercial Litigation, and Tax Deferred Exchanges

Practice Experience: The primary focus of my law practice was the representation of small businesses (under 200 employees) which included the formation of companies; the purchase and sale of businesses (approximately 350 significant transactions); the litigation of commercial disputes; and representation of business clients in the other normal business related issues and transactions for small businesses. I have organized several hundred business entities and represented clients in the purchase and sale of more than 200 significant commercial real estate holdings. I have represented parties in more than 600 civil cases of which approximately 100 resulted in trials to the bench or to a jury. Business disputes and construction related litigation were the most significant parts of my prior litigation experience. As a qualified intermediary, I have participated in excess of 2000 like-kind exchanges of real estate.

Alternate Dispute Resolution: As a member of the Hamilton County Court of Common Pleas Arbitration Panel, I participated as an arbitrator in more than 70 arbitrations. By the agreement of counsel, I have been selected as the single arbitrator in 5 controversies involving disputes among the shareholders, members, or partners of business entities.

Professional Activities and Memberships: I am a Past President of the Cincinnati Bar Association (“CBA”); a Past member of the CBA Board Trustees; a Past Co-Chair of Bench and Bar Committee of the CBA; a Past Chair of Alternate Dispute Resolution Committee of the CBA; a Past Chair of Professionalism Committee of the CBA; a Past Chair of the Continuing Legal Education Committee of the CBA. As a member of the Ohio Bar Association I participated in the Litigation and Real Estate Sections. As a member of the American Bar Association, I participated in the sections on Real Estate and Corporate Law. Currently I serve on the Board of Trustees of ProKids of Cincinnati. I am the Immediate Past President of that organization. I am a volunteer attorney for the guardian ad litem provided by ProKids in Juvenile Court cases. I am currently actively providing representation in 42 cases for ProKids. I have been a supervising attorney for the Entrepreneurial Law Clinic at the College of Law at the University of Cincinnati for three academic years and during the summer session of 2017 and the Fall semester, I served as the temporary director of the clinic. I am a member of the Literary Club in Cincinnati at which I have presented 4 papers on various topics.

Family: I have been married to Sally W. Cuni since June 20, 1970 and we have two sons, Seth C. Cuni and Zachary T. Cuni.

Born: Logan, West Virginia, October 4, 1947

Military Service: 1st Lt. U.S. Army, Field Art., 1969-1972. Service with the 101st Airborne Division in the former Republic of Vietnam as a forward observer attached to the 1/506th Infantry Regiment.

ADVISING SMALL BUSINESSES

1. Developing A Small Business Legal Practice.

- A. Join local organizations that serve small business.
- B. Offer to speak on business related legal topics, such as employment law, tax law, ADA, etc.
- C. Presenting CLE topics to other attorneys can result in referrals.
- D. Cultivate other professionals such as accountants, real estate agents, and insurance agents.
- E. Rather than investing in advertising, use your time and money to establish an internet presence and utilize selected referral sources such as Lawyers.com and the Cincinnati Bar Association resources.

2. Client Relationships.

- A. Provide an initial consultation at no charge or for a modest charge.
- B. Suggest that the next meeting be held at the client's business location.
- C. Look beyond the immediate need of the client and explore other areas in which you offer legal assistance, but avoid trying to load too many tasks into the engagement.
- D. Send engagement letter out within twenty-four (24) hours and transmit your contact information by email in the same time frame.
- E. Make notes in the front of your file about the client and the client's family and other distinguishing information.
- F. Encourage the client to schedule an annual meeting to review the legal needs of the client's business. It will be an opportunity to suggest succession planning agreements, annual minutes (particularly for corporations but also for some multi-member limited liability companies) to update employee manuals and other employee related documentation, to review business forms used by the business, estate planning for the principals of the business, and many other topics.

3. Maintain Your Legal Skills.

- A. Invest time and money in CLE seminars that actually address the areas of your business practice. Saving Twenty-five Dollars (\$25.00) on an unrelated topic but investing an hour of your time is not a good economic decision.
- B. Newsletters, in my experience, do not produce a result that justifies the time invested in getting the newsletter out on a regular basis. Sending a letter to clients when there has been a change in the law is an opportunity to remind the client that

you are up-to-date in your profession. Articles on topics, such as employment law will nearly always result in telephone calls from the clients which generate business. Of course, you should not bill the client for the informational letter.

4. Demonstrate Professionalism.

- A. Spelling and grammatical errors in emails and correspondence detract from your image as a knowledgeable professionalism. Emails should be neat and organized and they should have relevant subject line contact information for the attorney should be included with every email along with a confidentiality statement.
- B. Do not respond immediately to communications which anger you.
- C. Do send handwritten personal notes in appropriate circumstances.
- D. Carefully proof read the documents which you prepare. Avoid misspelling the client's name.

5. Plan for a Long Career.

- A. Try to temper your business and professional career with the knowledge that you will have a long career. Not every setback is the end of time.
- B. Have a life outside of the profession, but carefully consider the wisdom of being too social with business clients.