

# Impact

An Overview of Current Legal Events of Concern and Interest

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## How to Use a Lawyer

By: William V. Strauss

You may have noticed that, unlike major appliances, lawyers don't come with warnings or instructions. This article is intended to fill that gap and explain how you can use us effectively and efficiently. Whether you regularly need a lawyer for your business or only for specific tasks, the principles of this article should be helpful to you.



### **The First Meeting**

The first meeting is that uncomfortable time when the lawyer is thinking, "Thank goodness I got this deal," and the client is thinking, "I hope I'm not going to be paying for that oriental rug!" It is important to get a clear understanding of the financial aspects of the representation and to be sure you will get monthly statements so that you can avoid surprises. Please recognize that a fee estimate is just that and often depends on unforeseeable events, but you can ask to be told about such events when they happen and their effect on the bottom line. And, if you have a problem with a bill, you should feel free to call the lawyer to work it out. Finally, avoid contingent fee arrangements in business deals, because somebody is going to "lose," and that somebody will be unhappy.

### **Working with Your Lawyer**

In general, it is best to stay within one firm and work with one lawyer who can develop an understanding of your overall situation; your lawyer can bring in someone else in the firm when specific needs arise.

The client usually has certain unarticulated assumptions about the lawyer, most of which are incorrect:

- The lawyer already knows what you want. (You have to tell him.)
- The lawyer learned everything he needs to know for your situation when he was in law school. (He didn't.)
- The lawyer is purely a technician. (Usually the client is involved in a dynamic situation, which requires more than just an intellectual exercise.)

Many clients have a misconception that there must be a particular law out there that addresses their exact situation. There are two kinds of laws in our judicial system: statutory law and common law. Statutory law is passed by the legislature, and is sometimes referred to as laws which are "on the books." Statutory law can be envisioned as a kind of grid, consisting of rules that govern issues contemplated by the legislature. The common law is created by judges in numerous specific cases; it is supposed to fill in the spaces on the grid. But life is often too complex and varied even for the common law. For example, the lawyer may receive a research memorandum with language like this: "Ohio courts and the Sixth Circuit Court of Appeals have not yet spoken on this issue." The lawyer then has to give the client a clear answer to the straightforward question, "Can we do it or not?" The lawyer's best answer might be "I think so, but here are the risks and some other options." That's an honest answer, but not necessarily what the client expected to hear.

The lawyer should work with you in an alliance relationship, which is about:

- identifying goals and objectives;
- understanding available options and probable legal and business consequences of choices; and
- creating a process to get the deal done.

One advantage of the alliance model is that your engagement with the attorney becomes relationship-based rather than transaction-based; once that happens, you usually will feel comfortable that the lawyer is concerned with enhancing the relationship for the long term, and that inures to your benefit.

Insist on good communications with your lawyer, including face-to-face interaction when practical; request and expect your lawyer to return calls within 24 hours and to respond promptly to your communications. In some instances, the lawyer should give important advice in writing; this kind of formality eliminates ambiguity and future misunderstandings.

Use your attorney as a sounding board for your problems, ideas and plans. Active listening on the part

of the attorney is a kind of sifting process; give your lawyer all the facts, and then let her figure out what is factually or legally significant. (That's when the lawyer should be frantically taking notes.) This "sounding board" process does not always have to involve billable time; I recently had lunch with a client who told me about the problems in his retail business; after 20 minutes or so, I tried to respond with some constructive suggestions, but the client said "I really would like you to just listen today." I managed to stay quiet for another hour (it wasn't easy!), and actually, the meeting felt beneficial to both of us.

### **Common Mistakes**

The most common mistakes that clients make are to try to save money by drafting documents themselves, or by starting with the other side's draft. Usually, it will cost more in the long run for your lawyer to re-draft something that someone else has created; if the entire document is slanted against you, your lawyer will have to chip away at numerous provisions just to level the field. In residential real estate transactions, it is common practice to mark up changes in the contract by hand and send it back and forth with initials; in most kinds of business transactions, this practice leads to ambiguity or even litigation. Also, watch out for a lawyer who tries to take shortcuts or advises you to do something risky or even improper; when this happens, head for the door and get another lawyer. Don't try to repair the situation; this lawyer is broken, and there is no authorized service representative. Finally, a surprising number of clients will sign a document and *then* call the lawyer. For example, a loan commitment usually looks like a letter of intent, but it actually locks the client/borrower into the deal and leaves the lawyer without leverage to make significant changes.

### **Conclusion**

Be careful in choosing your attorney, reach a clear understanding on legal fees, call the attorney early in the transaction, and work closely with your attorney in a constructive and professional alliance. The purpose of this alliance is to bring order out of chaos in some part of your personal or business life.

By the way, if you have any thoughts, suggestions or other responses to this article, please let me hear from you. I will return your call within 24 hours.

*Bill Strauss is the President of Strauss & Troy.*

## **Triennial Property Valuation Reassessments: Valuation Appeals**

By: Andrew M. Shott



County tax bills mailed to Ohio residents in January 2003 will not only reflect the impact of November's tax levies and potential reductions in tax rollbacks (i.e., the stadium tax, City of Cincinnati charter millage, and perhaps State tax rollbacks), but also the triennial property valuation reassessment. Hamilton County Auditor Dusty Rhodes has warned that these events "could combine to drive property taxes higher in January." You can count on it! Butler and Clermont County tax bills will also reflect new assessed values as of January 1, with Brown and Warren Counties to follow in late 2003.

The reassessment revalues all 340,000 residential, commercial and farm

properties in Hamilton County. Valuation changes are extrapolated by analyzing sales of similar properties for the past three years. This short-handed methodology predictably yields imperfect results since it does not take into account the physical condition of the property, its income potential, or capitalization rates. Downtown central business district properties, hard hit by recent rioting, plummeting hotel occupancy rates, and flat or decreasing office rental rates, are expected to see decreased valuations. However, residential properties and suburban commercial developments, benefiting from historically low interest rates, could see substantial increases in value. The last mass property revaluation, completed in 1998, resulted in overall valuation increases of 17.1% in Hamilton County and 16.3% in Warren County. Several taxing districts in Butler County exceeded those levels. More of the same can be predicted for 2003 tax bills.

Property owners, however, have powerful tools available to insure that the valuation of their property is accurate and fair. Ohio law permits property owners to appeal assessment valuations to the County Board of Revision by filing a property valuation complaint between January 1 and March 31 of any calendar year. There is a limit of one valuation appeal during any triennial assessment period.

Property owners who elect to challenge their assessment valuations will not be alone. Since January 2000, over 6,200 valuation appeals have yielded successful results in Hamilton County. The Hamilton County Auditor's Office reports that about one-third of the valuation reductions were for residential properties, with two-thirds for commercial properties. The aggregate amount of the valuation reductions was approximately \$295 million, certainly a substantial sum to the property owners, but less than 1% of Hamilton County's \$49 billion property valuation portfolio.

The legal landscape for tax valuation appeals in Ohio is currently a confusing morass of conflicting laws and court decisions, aggressive school districts opposing reductions, and quasi-judicial administrative bodies (i.e., County Boards of Revision and the State Board of Tax Appeals) who decide valuation cases without significant regard to prior precedent or past practices. Procedural rules vary from county to county. Unfortunately, if a defective valuation complaint is filed, not only will it be dismissed on procedural grounds, but the unwary property owner will also be precluded from challenging the valuation until the beginning of the next triennial period — in 2006. In these cases, an erroneous filing means that the merits of the case will never see the light of day.

The Ohio Supreme Court unleashed this state of confusion in its 1997 Sharon Village decision in which it held that an attorney is required to prepare and file valuation complaints for all properties other than those owned by individuals or general partnerships. The Court held that the act of preparing and filing a valuation complaint constitutes the unauthorized practice of law. Thus all valuation complaints filed by corporations, limited partnerships, limited liability companies, trusts and similar entities were dismissed unless they were filed by a licensed attorney.

The Ohio legislature, in the final days of Governor George Voinovich's term, attempted to fix the problem in House Bill 694, which permits specified corporate or entity representatives and other designated real estate practitioners to file valuation reduction complaints. The Ohio Supreme Court, however, responded by again limiting the persons who can prepare and file valuation complaints. The result is a confusing set of rules, with some County Boards of Revision following House Bill 694 and other counties attempting to follow the evolving and conflicting case law.

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The moral of this story is clear: When in doubt, engage an attorney with property valuation expertise to assist with the preparation and filing of the complaint and the presentation of the appeal.

Property owners considering a valuation appeal should not evaluate the merits of their case by focusing solely on the increased valuation and higher tax bill. This analysis begs the question. Regardless of the percentage increase, you do not have a good case if the new value is still less than your most pessimistic estimate of the sale price of the property. The owner must ask the same questions the County Board of Revision will ask at the hearing. What is the property worth on the open market? What do similar properties in comparable locations sell for? What property value results from dividing a stabilized net operating income by a market-derived capitalization rate? For properties acquired within two years from the relevant tax date (January 1, 2002 for tax bills issued in 2003) what was the sale price? For newly built improvements, what was the construction cost? The answers to these questions will indicate whether a valuation complaint stands a reasonable chance of success.

Property owners who file valuation complaints must be prepared to present probative evidence from credible sources. Although owners are free to testify on their own behalf, third-party testimony from qualified valuation experts (i.e., experienced real estate brokers or qualified appraisers) is far better. Although the Butler and Clermont County Boards of Revision give owner testimony due consideration, Hamilton County typically discounts it as self-serving. For reduction cases of any magnitude, appraisal reports are essential in Hamilton County. Also, any written evidence or valuation reports to be introduced at the hearing must be submitted to the Board of Revision no less than ten days before the hearing.

*Strauss & Troy represents owners in property valuation cases before County Boards of Revision, in state court, and in the State Board of Tax Appeals. Andrew Shott, Frank Klaine and Tom Rink can assist owners in evaluating potential valuation reduction claims and guide owners through the complicated valuation appeal process.*

## Examining Potential Mold Liability

By: Joseph J. Braun

When you mention the word “mold,” people listen.

Over the past few years, the media has convinced people that mold, which has existed in our world forever, is not only bad -- but it is deadly. To a certain extent the media pundits are right – but knowing the difference between a serious mold problem and the common mold we often find in our showers is the difference between purchasing a bottle of bleach and sheer panic.

As a result of all of the recent publicity about mold, claims related to potential mold exposure and the many problems associated with mold growth are one of the fastest growing areas of litigation across the country and even here in the Cincinnati/Northern Kentucky area. Many local builders are still feeling the effects of this as their attorneys seek to try to limit their exposure for mold related claims. Many people have compared



this sudden growth of mold litigation to the asbestos litigation that dominated headlines and court dockets in the 1980s and they are correct in doing so.

The liability that may attach to mold exposure can be extended to a vast array of professions and companies. Oftentimes, people do not realize the broad reach of potential liability for this type of claim. Everyone from builders, contractors, subcontractors, repair people, property management and maintenance companies, construction-product manufacturers, landlords, and commercial and residential property owners may be at risk. Liability could also potentially even attach to appraisers, home inspectors, and real estate agents. Essentially anyone who builds, repairs, owns, or rents a home or building is at risk. Experts often attribute the sudden outburst of recent mold litigation to modern airtight and efficient heating and cooling systems. Additionally, a flurry of tabloid and news programs have instilled a level of fear in many people, resulting in a heightened interest by the public as to mold and the problems associated with it. Many people have begun to take a second look at their homes and buildings when they experience water leakage or moisture problems, something they may have otherwise ignored in the past.

### General Information About Mold

Mold exposure has been blamed for a variety of medical problems including respiratory ailments, internal bleeding, neurological problems, cancer, chronic fatigue, reproductive problems and even death. Despite the risk of all of these problems, mold can be found almost everywhere. In fact, not only is it found naturally in the environment and the air we breathe, but it is consumed regularly by us in some cheeses, breads and beer. The distinction between those molds which are believed to be harmless, and those which may cause serious problems is that some molds are toxic. Such “toxic molds” can be harmful if digested, breathed or otherwise consumed. The proper way to determine if the mold you find in your home is of a toxic nature is to hire one of many local environmental consulting or testing companies that have blossomed in the area in the wake of this new heightened awareness of potential mold problems. These types of professionals can properly advise you of any health risks that you may face as a result of mold growth in your home or building.

The most serious types of mold problems that often lead to costly litigation are those that include the presence of three specific strains of toxic mold: stachybotrys, aspergillus and penicillium. These strains of mold only grow in conjunction with long-term water damage. Stachybotrys, commonly referred to as “black mold,” is found in all 50 states. It was the type of mold involved in the now infamous \$32 million dollar Texas verdict in *Ballard v. Fire Insurance Exchange* that many point to when discussing mold verdicts.

Water leaks, poor site drainage, bad design, construction defects, and moisture are the basis for many mold cases. Keeping this in mind, the key to prevention of mold growth is to eliminate moisture from getting into a structure, often easier said than done.

### Preventative Measures to Limit Liability for Mold Claims

There are several ways builders can act to reduce their exposure to being the subject of a mold litigation. First and foremost, in new construction situations, when building homes and other structures, always comply with all applicable zoning codes and other municipal, state and manufacturer guidelines. It is also advisable to have your agent and your attorney review your insurance policy to determine if it will cover mold claims. Most

insurance policies now exclude mold claims. If your insurance company advises you that mold coverage is excluded, you should speak with your insurance agent to try to obtain a separate insurance policy to cover mold-related claims.

### **Careful Contract Drafting**

When drafting or negotiating a contract for new construction, builders should also try to limit the purchaser's recovery of damages in the unfortunate event that the building occupants become afflicted with mold. Contracts should be carefully drafted and should expressly define the limits of liability for indoor air quality problems. Builders and landlords may want to ask purchasers or tenants to sign a statement acknowledging that purchasers and tenants bear the responsibility of maintaining the home or building, by looking for moisture and taking action if it is found.

Courts are more likely to uphold these exculpatory clauses between two commercial businesses rather than between a builder and a residential homebuyer. Ohio courts recognize that freedom to contract is a fundamental part of our society and absent some overwhelming public policy, courts will usually not disrupt such a contractual relationship. Furthermore, exculpatory clauses are normally enforceable under Ohio law.

### **Creation of a Limited Liability Company to Protect Against Liability**

Also, to insulate against liability, builders or developers can create separate legal entities for each project or building. For example, a Limited Liability Company ("LLC") can be created to hold title to a project or building. Ohio courts make it difficult to pierce the "corporate veil" when a party

forms an entity such as an LLC and conforms to formalities for formation and operation of the entity. Creating a corporate entity is not foolproof in creating a shield of liability against these types of potential claims, but it is one way to reduce liability.

### **Conclusion**

Recently, several attorneys from Strauss & Troy spoke at a seminar entitled, "Solving Water Intrusion and Mold Problems in Ohio." The presentation was well attended and revealed how concerned many people are about these types of problems as mold can be a very costly problem to almost anyone, but as discussed there are steps that can be taken to limit liability. Builders and sellers must strive to make purchasers aware of any known problems with mold, and take steps to inform them of ways to prevent mold formation to prevent future problems from arising. In addition, the most significant way to reduce potential exposure related to mold is to draft a thorough contract that contains exculpatory language or disclosure provisions. The science of mold and mold related diseases is new, uncertain and sometimes driven by media and personal paranoia. The media is filled with news of large jury verdicts supported by huge punitive damage awards. In reality, these claims are hard to prove because of high legal standards and limited science. Nevertheless, all property owners can take some of the above-mentioned steps to help neutralize a mold problem and avoid costly litigation.

*Jason Tonne, a third year law student at the University of Cincinnati, and law clerk at Strauss & Troy also contributed information related to this article.*

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# Client Spotlight



**HealthBridge™**  
Collaborative NetWorking for Healthcare

Your Federal Express courier typically has more up-to-date information on packages delivered to your business than your doctors have about you when you are being cared for in their office. Rectifying that is the mission of HealthBridge, a healthcare Internet company here in Cincinnati.

HealthBridge was founded by regional hospitals in 1997 to improve the quality of care, decrease the cost of providing area physicians with critical patient care information and to reduce overall healthcare costs.

HealthBridge provides physicians and their staff secure access to radiology images, lab tests, transcribed reports and other information using a web browser. Current participants include Mercy Health Partners, TriHealth, The Health Alliance, St. Elizabeth Medical Center, Cincinnati Children's Hospital Center, Drake Center and 280 physician groups.

HealthBridge created the first community-wide clinical messaging system in the country. Physicians receive critical information in a form similar to e-mail. "It's important to understand that the vast majority of critical patient results are still paper based in most regions of our country," said Robert Steffel, CEO of HealthBridge. "With our clinical messaging platform, we are able to securely provide clinical data to physicians on a real-time basis regardless of where they are."

HealthBridge is expanding beyond hospital/physician communication to providing access to all medical information generated outside the physician's office, including local and national labs, free standing surgery centers, independent transcription services and rural hospitals. "It's hard for people in the corporate world to understand how far behind the medical world is in automating results reporting. Imagine all communications in your office and among you, your vendors and customers being almost completely paper based," said Steffel.

"Productivity in corporate America would be a fraction of what it is today if communication were the same as it is in the medical world. Moving these outdated paper processes to electronic ones represents a huge opportunity for our healthcare community."

There are approximately 16 million laboratory, transcribed reports, radiology readings and hospital registration notifications in Greater Cincinnati each year. It costs about \$1 per transaction to communicate these results to physicians in a paper world. Moving the communication of these results to an electronic form, therefore, can provide a significant impact to the healthcare community's bottom line. The benefits of improved information during care, as well as reduced duplicate tests, can dwarf these savings.

In October, HealthBridge delivered 183,000 clinical results electronically or 14% of total community-wide results. HealthBridge expects that number to climb to 40% of all results in this region by the end of next year and 60% by the end of 2004.

HealthBridge also provides access to physicians' offices and hospital administrative electronic tools. Hospitals and physicians' offices can improve their efficiency by using on-line insurance eligibility verification, claim-coding tools, and Internet medical research among others.

Other regions have noticed the high-level of collaboration in Cincinnati and are interested in working with HealthBridge to improve care in their regions. HealthBridge is exploring how the tools developed here can be leveraged elsewhere.

"Hospitals provide funding for this service," Steffel said. "It's important for employers and managed care organizations to understand and support initiatives such as HealthBridge that will improve the care of their employees and reduce the cost of providing insurance."

## Attorneys on the Move



Mark Berliant

**Mark H. Berliant** has again been selected to appear in *The Best Lawyers in America*®, the definitive guide to legal excellence in the United States. This marks the 20<sup>th</sup> year that Mr. Berliant has appeared. **Richard S. Wayne** has also been selected to appear. Listing in this volume is considered a singular honor, as it is based on an exhaustive peer-review survey in which 15,000 attorneys throughout the country rate the legal abilities of other lawyers in their specialties.



Richard Wayne

At its annual meeting on October 15, 2002, the Board of Directors of the Greater Cincinnati Tennis Association elected **James G. Heldman** as a member of the Board. For the fifth year in a row, Jim Heldman and Rob Hertzell, a long-time client of Strauss & Troy, co-sponsored The Day After Thanksgiving Platform Tennis Fundraiser to benefit Inner City Youth Opportunities and the Free Store. Close to \$1,100 was raised this year to benefit these two worthwhile causes.



James Heldman

**Jeremy Hayden** was recently appointed to the Small Business Development Committee and the Taxation Issues Committee of the Northern Kentucky Chamber of Commerce. Additionally, Mr. Hayden, who was already a member of the Kentucky Bar Association, recently passed the Ohio Bar.



Jeremy Hayden

University of Cincinnati Law School graduate **Matthew R. Chasar** has joined the firm as an Associate. He graduated from Miami University in Oxford, Ohio in 1998, with a degree in Finance and received his J.D. from the University of Cincinnati in 2002. Also, Mr. Chasar recently passed the Ohio Bar.



Matthew R. Chasar

On October 22, 2002, **Tim Theissen** spoke before the Kentucky League of Cities ("KLC") and the Kentucky Association of County Officials ("KACO") in Elizabethtown, Kentucky on *Liability Risks in Zoning Matters*. Additionally, On November 8, 2002, Mr. Theissen presented a talk entitled *Avoiding Meeting Disasters in Zoning Hearings* for the same two groups in Berea, Kentucky.



Tim Theissen

**Marilyn Maag** has had two articles published in the Probate Law Journal

of Ohio during the past year. One was entitled *House Bill 85, Probate Reform Bill: A Noble Experiment*, and was published in the November/December 2001 issue. The second article, *Practical Application of House Bill 85 (Probate Reform 2001)*, appeared in the November/December 2002 issue.



Steven Stuhlberg

**Steven F. Stuhlberg, Thomas P. Glass** and **Michael A. Ruh, Jr.**, have been elected as Shareholders of Strauss & Troy, Effective January 1, 2003.



Thomas P. Glass

### MAKE A DIFFERENCE (MAD) TEAM

For this year's holiday project, the **Make A Difference ("MAD") Team** at Strauss & Troy chose Holly Hill Children's Home in California, Kentucky. The MAD Team went to the home on December 17 and provided each of the children with a wonderful bounty of wrapped gifts including a new coat, hat, gloves and outfit, along with three items that were "wished for" by each of the children. They were also treated to a visit from Santa and a party with a DJ for dancing (provided by Strauss & Troy employee Mark Earley and his Earley Bird Music). In addition to providing the party and all of the gifts for the resident children, the MAD Team made approximately 50 stuffed Christmas stockings for children of all ages who are served through Holly Hill's Foster Care Program.



Michael Ruh, Jr.

This annual project is made possible as a result of the exceptional generosity of all at Strauss & Troy who purchase and wrap gifts for the children and who contribute funds on "Dress Down Fridays" throughout the year.

### Sponsorships: "Your Community—Our Commitment"

In the last few months, Strauss & Troy has sponsored a variety of deserving causes as a part of our tradition of sharing gifts and talents with others. We are proud to have supported the following programs and events as evidence of our continuing commitment to the Greater Cincinnati community:

- Women Helping Women—Sunday Salon—*The Envelope Please*
- *Crohns & Colitis Foundation of America*
- *Diocesan Catholic Children's Home*—DCCH Summer Festival and Flea Market
- *Healing Connections Associates, Inc.*—Rock (and Roll) of Ages
- *The Baker Hunt Foundation*
- *Inner City Youth Opportunities*—7th Annual Tennis Masters Cincinnati Mercedes Benz Pro-Am