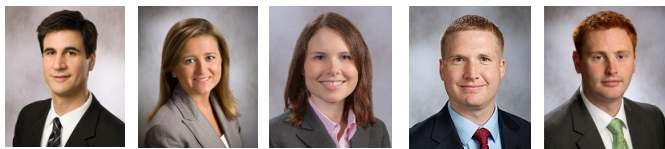


# Bonezzi Switzer Polito & Hupp Co. L.P.A.

## Fourteen BSPH Attorneys Honored as 2014 Super Lawyers and Rising Stars



### Super Lawyers



### Rising Stars

Continuing a proud history of excellence in the practice of law, Shareholders William D. Bonezzi, Steven J. Hupp, Ronald A. Margolis, Bret C. Perry, John S. Polito, Donald J. Richardson, Beth A. Sebaugh, Donald A. Switzer, and Jeffrey W. Van Wagner were all named 2014 Super Lawyers. Super Lawyers is a rating system identifying outstanding attorneys in more than seventy practice areas. Attorneys named as Super Lawyers have achieved a high-degree of peer recognition and professional achievement, as reflected by independent research, peer nominations and peer evaluations.

Shareholder Keith Hansbrough and Associate Attorneys Jennifer R. Becker, Claire C. Curtis, Brian F. Lange and Jason A. Paskan were named 2014 Rising Stars. Rising Stars recognizes exceptional attorneys under forty years of age or who have been practicing law for less than ten years.



## BSPH Welcomes Shareholder G. Brenda Coey

Bonezzi Switzer Polito & Hupp is pleased to announce that G. Brenda Coey joined the firm in October 2013 as a Shareholder. Ms. Coey brings a wealth of knowledge in the areas of nursing home and long-term care defense and regulatory compliance, professional liability defense, insurance coverage litigation, Medicare/Medicaid audits and recovery, occupational safety and health compliance and appeals, administrative appeals, and durable medical equipment regulatory compliance.



## Two Shareholders are Top 100 in Ohio and Top 50 in Cleveland



Shareholders Bret C. Perry and Jeffrey W. Van Wagner were both named as Top 100 attorneys in Ohio and Top 50 attorneys in Cleveland for 2014. The distinction honors the "best of the best" in both the Ohio and Cleveland bars.

## Four Shareholders Named 2014 Best Lawyers in America

Bonezzi Switzer Polito & Hupp Co. L.P.A. is pleased to announce that William D. Bonezzi, John S. Polito, Donald H. Switzer and Jeffrey W. Van Wagner have all been named as a Best Lawyer in America for 2014. *Best Lawyers* is the oldest peer-review publication in the legal profession, and being named a Best Lawyer is a great honor. BSPH is proud of the excellent reputation its attorneys enjoy.

## Risk Agreements and Assisted Living Facilities in Ohio

By Keith Hansbrough, Esq.



Suppose a prospective resident comes into your assisted living facility (ALF). He is of sound mind with no health care power of attorney to make his decisions. His doctor has deemed him fit for an ALF environment. He is completing all of the required paperwork when he notes that he has been prescribed Lipitor. The gentleman then says aloud, "You don't need to worry about bringing it to me, because I refuse to take it." In that moment, you have been confronted with a dilemma. You have a prospective resident who has been prescribed a medication by a doctor. You also know that he is going to refuse to let you administer it to him. What do you do?

The above scenario highlights an increasingly common issue confronting ALFs throughout the country. In Ohio, an ALF resident always has "the right to have all reasonable requests and inquiries responded to promptly." A resident also has "the right to give or withhold informed consent for treatment after the consequences of that choice have been carefully explained." In cases like the above, ALFs could benefit from abiding by the requests of the resident while disclosing the risks of such decisions. At the same time, ALFs need to be sure that they are not exposing themselves to civil liability by honoring the rights of their residents to make their own decisions. Here is where risk agreements can come into play.

A risk agreement is a written contract between an ALF and a resident. It details certain provisions of care provided by the facility at the resident's express request that may, in turn, expose him to a known risk. For example, residents can agree to the risk of refusing to take medication, to not abide by dietary restrictions, to not use ambulatory devices, etc. Both the Ohio Residents' Bill of Rights and the Ohio Administrative Code speak to and expressly allow for such agreements. ALFs are referred to as residential care facilities under Ohio regulatory law.

The Ohio Residents' Bill of Rights and Ohio Administrative Code Section 3701-17-57 state that an ALF may enter into a risk agreement with a resident. The resident and the facility then agree to share responsibility for making and implementing decisions affecting the scope and quantity of services provided by the facility. The facility must identify the risks inherent in a decision made by a resident not to receive a service provided by the facility. A risk agreement is valid only if it is made in writing. In turn, the ALF must maintain a copy of any risk agreement in the resident's record. Each ALF risk agreement policy must provide each prospective resident with the consent of the resident, as well as a written explanation of the policy and the provisions that may be contained in a risk agreement. At the time the information is provided, the facility must obtain a statement signed by the individual receiving the information acknowledging receipt. The facility must maintain the signed statement on file.

In entering risk agreements, ALFs must consider factors like fluidity, possible mental decline of the resident, loss of capacity, possible physician acknowledgment and/or physician consent, etc. Opponents of risk agreements argue that residents cannot "waive" their rights under Ohio law and that risk agreements attempt to do precisely that. ALFs should be prepared to frame the issue in terms of enforcing residents' rights under Ohio law to make their own choices after the risks have been properly disclosed to them. Ohio lawmakers have chosen to encourage risk agreements. As a result, ALFs will see the effectiveness of such agreements determined by the courts over the next decade.

For the time being, risk agreements may or may not serve as an absolute defense for an ALF to avoid liability in a lawsuit. The issue simply has not yet been resolved by the courts in Ohio. That said, risk agreements will at the very least be helpful to ALFs should a lawsuit arise. The agreements will serve as evidence that an ALF's actions were taken at the request of the resident. In Ohio, a person can sue for "punitive damages," which are levied against an ALF to punish it for conduct that a jury found to be evidence of malice. Malice may be inferred from "reckless, wanton, willful or gross" behavior. In such cases, a risk agreement signed by the resident is evidence that the ALF's conduct was not with malice but rather was done at the resident's request. "Punitive damages" can reach into the millions. A written risk agreement can counter the argument that the ALF was acting with malice. Even if the risk agreement is not an absolute defense, it will help an ALF should litigation arise.

Suppose a resident requests to take a bath in a private room and specifically requests to be left alone, in violation of facility policy. Under Ohio law, the resident has the right to have all reasonable requests and inquiries responded to promptly and the right to privacy in the care of personal or bodily needs. Wisely, the ALF enters into a risk agreement with the resident on this bathing request. Now, suppose the resident expires while bathing a week later. The family sues saying that their father should never have been left alone while bathing per the facility's policy. Here, the risk agreement may serve as a defense to liability. Ohio courts may hold that such risk agreements do not serve as an absolute defense. In that case, the facility still has a written agreement to show to a jury as evidence that it was not behaving maliciously towards the resident. The ALF can argue that it is actually respecting the resident's rights and choices under the law. Having such a risk agreement in place could only help the ALF should it end up in litigation.

An ALF should not use a risk agreement to avoid its responsibilities in order to admit a resident who requires a level of care or service that the ALF cannot possibly provide. If a resident requires care that cannot be provided by the ALF, the resident should not be admitted or should be discharged in accordance with the requirements of the Ohio Revised Code. It is not advisable for an ALF to enter into a risk agreement that says a service cannot be provided, but that the resident requests that it not be provided anyway. Again, there is not a great deal of guidance in Ohio on this issue. But it is not difficult to imagine the courts finding fault on public policy grounds when an ALF admits or fails to discharge a resident who they could not possibly care for absent a risk agreement.

## Ancient Guidance Can Still Serve as a Guiding Light in Employment-Related Decisions

By Beth A. Sebaugh, Esq.



As we approach the beginning of another year, it is helpful to remember that the climate for the “work-place” has continued to evolve, not only in terms of technology and flexibility of work locations, but most certainly with respect to governing employment laws and regulations. Application of time-tested principles and basic common sense in a technological updated fashion can go far in avoiding common pitfalls that lead to large numbers of employment claims and lawsuits.

The time-tested advice of “doing unto others as you would have them do unto you” is certainly appropriate in the employment arena, regardless of the size of the employer. After all, unresolved disputes of fact in employment situations are most generally headed to one decision-making body, that is a jury, if the dueling parties cannot ultimately come to terms voluntarily. Jurors routinely demonstrate that they need little to no advice in determining whether prohibited discrimination has occurred or whether an employee was treated “fairly”, i.e. in a legally non-discriminatory manner with respect to the disputed employment action. Regardless of the jury’s determination, the process is costly for the employer.

Practically speaking then, every employment action, BEFORE IT IS ENGAGED IN BY AN EMPLOYER, needs to be weighed as to whether it is “legal” and whether a jury of eight disinterested individuals would view it as appropriate under ALL of the attendant facts and circumstances.

Time-tested principles that go far in persuading a jury include:

1. Employee/Personnel Handbook that clearly reflects employer’s expectations and signed/electronic acknowledgement from ALL employees of receipt/reading of same
2. Clear reference and access to written/electronic policies and procedures to which an employee is expected to adhere and signed/documentated acknowledgement from every applicable employee of receipt and reading of same
3. Written/electronic warnings (dependent on severity of infraction) and an opportunity to correct the behavior, distributed consistently and evenly to every employee who has engaged in the unacceptable behavior

4. Documented progressive discipline (suspensions with/without pay) applied consistently and evenly to every employee who repeats the unacceptable behavior after having received warning(s) to refrain from same
5. Diligent adherence by the employer to the expectations, policies and procedures contained in the employer’s publication(s) and adherence to the applicable laws of the jurisdiction incumbent upon the employer

In my trial experience, I have found that jurors are looking to satisfy themselves that the employee was indeed given a “fair shake”, was treated the same as similarly situated employees, and that the employer has come before them with “clean hands”. If an employer can demonstrate the above, fact finders will tend to uphold a fair-minded employment decision even if it resulted in the loss of employment for the suing employee. Generally, ALL documentary, electronic, and digital communication within the employment environment or tangential to the employment environment is “fair game” in the discovery process and, more often than not, such communication becomes “dispositive” in one manner or another in determining the outcome of an employment dispute.

## BSPH Recognized as a 2014 Top Ranked Law Firm

Based on Martindale-Hubbell’s review of over 1.2 million law firms across the country, Bonezzi Switzer Polito & Hupp has been named a 2014 Top Ranked Law Firm. The honor is based on confidential reports from members of the bar and the judiciary and measures legal ability and ethical standards.

## Claire C. Curtis Presents to Cleveland Metropolitan Bar Association

On October 31, 2013, Claire C. Curtis presented “Special Policy Considerations in Auto Cases: Policy Language, Medical Bills, & Assignments” at the Cleveland Metropolitan Bar Association. The presentation was part of a day-long insurance law continuing legal education program. Ms. Curtis’ discussion covered current developments in litigation relating to the admissibility of medical bills and insurance write-offs, assignments of benefits, and policy language interpretation.





## Risk Agreements and Assisted Living Facilities in Ohio...Con't

The Residents' Bill of Rights states that a resident can be discharged when the welfare and needs of the resident cannot be met in the ALF or the safety of the individual in the ALF is endangered.

Due to the lack of development in this area of the law, it is difficult to draw a clear line regarding when a risk agreement is appropriate. A prudent ALF may want to adopt the following:

1. If the ALF resident requests a risk agreement as to a level of care or service typically provided in an assisted living setting, such an agreement may be entered into with the resident. But it is advisable to include a physician in the process and in the risk agreement document itself.
2. If the ALF resident requests a risk agreement as to a level of care or service not typically provided in an assisted living setting (i.e. skilled nursing care during the first 120 days as allowed under Ohio law) but the level of care or service can be provided in the ALF, such an agreement may be entered into with the resident. But a physician should be included in the process and the risk agreement document itself.
3. If the ALF resident requests a risk agreement as to a level of care or service not available in the ALF (i.e. ventilator services), a risk agreement should not be used. The resident should either not be admitted or should be discharged in accordance with the requirements of the Ohio Revised Code and Ohio Administrative Code.

A well-drafted risk agreement should clearly detail the following elements:

1. The issue or concern;
2. The stated preference and request of the resident/family as to the specific level of care or service;
3. The possible consequences of the preference and request;
4. Any alternative approaches to minimize risk; and
5. The agreed course of action.

By including "a physician in the process and in the risk document itself," an ALF may be able to document in the risk agreement that the resident discussed the above five elements with a physician and fully understood them. That may serve to provide another layer of protection to the ALF should litigation arise because it would be documented that the risk agreement was discussed with a physician prior to implementation. Of course, until the courts or the Ohio legislature provide more guidance on the issue of risk agreements, this is merely a suggested approach to handling risk agreements in Ohio. In other words, one cannot say absolutely that involving "a physician in the process and in the risk document itself" is required or is a defense under Ohio law. However, it represents a prudent and conservative path to follow until the issue is resolved.

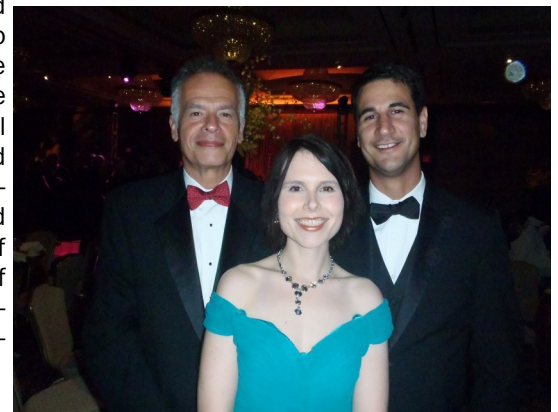
In conclusion, there is simply not much guidance from the courts as to risk agreements in ALFs. The legal question is: Are ALFs using risk agreements to provide negligent care under the cover of a waiver of liability from the resident or are they allowing residents to exercise and not waive their rights to make reasonable requests and to decline certain care? ALFs need to be prepared to argue that risk agreements are about residents exercising their rights to determine the care they want. ALFs must also argue that risk agreements bar civil liability and honor the informed choices of residents. While it is true that a resident cannot consent to waive his rights under the law and be subjected to negligent care, a resident absolutely has the right in Ohio to choose what care he wants and what care he does not want.

## BSPH Event Highlights Successful Women In Business

On October 23, 2013, the BSPH Women's Event Committee hosted "Ladder Down: Successful Business Women, Powerful Mentors" at the new Aloft Hotel downtown. The evening featured a dialogue about the power of mentoring, including a featured presentation by Regina Olbinsky of The Career Group, and a panel of five speakers from diverse industries. More than fifty dynamic women gathered to explore ways to "put the ladder down" for the next generation of female leaders. BSPH Attorneys Beth A. Sebaugh, Jennifer R. Becker, Michelle B. Block and Claire C. Curtis hosted the event.

## BSPH Gives Back – Boys and Girls Clubs of Cleveland

This October, attorneys Jeffrey W. Van Wagner, Keith Hansbrough and Claire C. Curtis attended Shazaam! 2013, a black-tie fundraising event for the Boys and Girls Clubs of Cleveland. The event helps to raise money to operate inner-city clubs that provide homework help, sports, the arts and the influence of caring and engaged adults for area children. The clubs are a safe place for Cleveland youth to go after school or on the weekends and the kids who participate are much more likely to excel in school and graduate. BSPH is honored to be a part of the work of such a meaningful organization.



**BONEZZI SWITZER  
POLITO & HUPP** CO. L.P.A.

ATTORNEYS AT LAW

BSPH provides this newsletter as general information regarding current legal issues and it is not intended to be construed as legal advice or as a substitute for the advice of legal counsel.

**Why Not Go Green!** If you prefer to receive this newsletter via email, forward your request to [newsnote@bsphlaw.com](mailto:newsnote@bsphlaw.com).