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OHIO STATE BAR ASSOCIATION
EST 1880

Corrections

The following are sustaining members of the Ohio State Bar Association. The OSBA apologizes for inadvertently omitting these names from the Sustaining Members insert in the November/December 2011 issue, and thanks these members for their meritorious support of the legal profession.

James R. Beatley Jr.
Columbus

Patrick J. Garry
Cincinnati

Michael C. Jones
Paulding

Mark A. Rafidi
Canfield

J. Patrick Thomas
Columbus

Vesper C. Williams
Toledo

Let's get personal

by Carol Seubert Marx

"In the span of just two days, I had the privilege of taking part in celebrating the beginning of the careers of 959 of our colleagues, and the privilege of celebrating the 50-year milestone of another."

Over a period of six weeks—from the end of September to the middle of November—the Ohio State Bar Association held nine of its district meetings from Toledo to Portsmouth, and Paulding to Youngstown. At all but one of these meetings we honored 20 members for their 50 years of service. They are all bar leaders and leaders in their communities. Many are still practicing law and, in fact, one is a sitting judge. Those in attendance were struck by these lawyers' ability to practice for such a long time without exception. At each location, there was pride and humility on the part of the honorees, and pride and respect on the part of their colleagues.

An honoree in Paulding for District 4 was attorney John Noble. He has been in solo practice in Findlay since 1997 after working in many other legal settings over his long career. He introduced me to a young attorney with whom he shares space and computers, and whom he regards as his mentee. The respect and regard between them was evident and mutual.

I met Mr. Noble two days after our newest attorneys were sworn in at the Ohio Theater in Columbus. As president of the OSBA, I was privileged to share the stage with our Supreme Court and the new dean of Cleveland-Marshall's law school, to address the applicants and to watch from one of the greatest vantage points in the theater as Justice Evelyn Stratton administered the oath of office.

After the ceremony, the Supreme Court opened the Ohio Judicial Center not only for the new admittees to register and tour the building, but also for the OSBA to have its welcoming reception in the main concourse. The crush was enormous as was the exuberance, relief and joy of everyone attending. Parents, families and friends all were there to witness, support and celebrate. One young man had just had a daughter the day after he found out that he passed the bar, and carried her throughout the concourse. To say he was proud is an understatement. Uncertainty was an undercurrent throughout the celebration, since many I talked to did not have jobs. Many parents were paying registration fees.

These are trying times for new lawyers to be entering the practice of law, but I felt that there was room for a positive message in my speech at the Ohio Theater. I outlined for them the collegiality of our profession, and of our Ohio State Bar Association, as well as our local, municipal and affinity bar associations. I urged them to be aware not only of the resources available to them from these affiliations, but also from their colleagues. Asking for guidance about our practice and our profession is a necessity, however close or far we are from our oath of office. My suggestion was to ask for advice and counsel and to continue asking.

Each of us has provided this support and assistance to other lawyers along the way, whether to newly minted lawyers or to those a little (or a lot) farther along the path, whether on an informal or more formal basis as a Supreme Court mentor. It is part of the practice of law to share our knowledge with each other. I am well into my fourth decade of practice and I still ask for such advice and counsel.

Those with 50 years of experience have learned the lesson that our new lawyers must learn for themselves: that the successes you may achieve and the satisfaction you gain from your career will depend on a network of colleagues and friends.

Among the recommendations of the OSBA's Masters at the Bar Task Force is to encourage senior lawyers to retain their active licenses and bar association participation to perform pro bono services through nonprofit organizations and to serve as mentors in their local communities and through the Supreme Court.

Whether and if the Supreme Court decides to act on these recommendations and others approved for submission by our

Council of Delegates, we should emulate Mr. Noble's example and take the opportunity to introduce ourselves to just one new lawyer, to introduce just one new lawyer around our courthouse and to our judges, to take just one new lawyer to a bar meeting, a bar committee meeting, or to lunch. Many of us are already volunteering our services in many types of pro bono efforts throughout the state. Take a young lawyer along and let him or her observe while you do good. These efforts do not cost us anything but a small amount of our time. We do not have to act within the more formal Supreme Court mentoring program to make a difference to a young lawyer. Make it personal.

But this is a two-way street. Whether you are a brand new lawyer or a few years into the practice, seek out other lawyers in your community and introduce yourself, ask for introductions or recommendations, join a committee, go to a bar meeting or take a lawyer to lunch. You have the time. Do not wait to be asked. Make it personal.

In the span of just two days, I had the privilege of taking part in celebrating the beginning of the careers of 959 of our colleagues, and the privilege of celebrating the 50-year milestone of another.

Both were momentous and moving.

I hope that our young lawyers will find their own Mr. Noble to take them under his wing. He is still sharing his knowledge—50 years into his practice of law—and it does not look like he intends to stop any time soon. He has made it personal with just one lawyer. Let's do the same. ■

Carol Seubert Marx is president of the Ohio State Bar Association.

ANNE LUNSFORD / *OWNER*
ANNE F. LUNSFORD, P.A.
MEDICAL MALPRACTICE ATTORNEY
ORMOND BEACH, FL
SINCE 1997 3 EMPLOYEES

NO SMALL ACHIEVEMENT: STAYING IN MOTION

CHALLENGE: Anne's law practice had a steady caseload, but only one attorney: herself. That meant juggling multiple cases along with monthly payroll and bills. She needed help managing her cash flow — and a bank that could keep up.

SOLUTION: Anne had the Cash Flow Conversation with her PNC banker, who put his detailed knowledge of the legal profession to work. Together, they set up a PNC Professional Services Checking account with Online Banking. Anne was now able to see her full financial picture 24/7, even while on the go. Plus a line of credit helped cover research fees and expenses leading up to her trial dates.

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EQUAL HOUSING LENDER

In Brief

Compiled by Andrew Hartzell and Kayla Lewis

Company litigation trends not expected to decrease

The 2011 Fulbright Litigation Survey has revealed that businesses in the United States and the United Kingdom initiated and faced slightly less litigation in 2011 than in 2010; however, more than one-third of corporate counsel reported that regulatory actions and internal investigations have increased, and more than 25 percent of respondents expect more litigation and regulation in the upcoming year as companies attempt to grow despite the unstable economy.

The survey revealed other issues:

- Ninety-two percent of U.S. companies think litigation will rise or remain the same in the next 12 months;
- The predicted increase in litigation was due primarily to stricter regulation and company growth instead of the poor economy, which was last year's main concern; and
- Companies that have had one or more regulatory proceeding filed against them have increased from 34 percent in 2009 to 40 percent in 2011. ■

—www.fulbright.com

Oct. 18, 2011

Law schools more prone to background checks

Kaplan Test Prep's 2011 survey of admissions officers has revealed that out of the top U.S. law schools, business schools and colleges, law schools are the most inclined to Google prospective students. Forty-one percent of law school admissions officers have Googled an applicant, and 37 percent have searched for applicants on Facebook or other social networking sites. Law schools also have the highest discovery rate of content that damages the applicant's chance of acceptance; 32 percent of admissions officers said that they saw something that negatively impacted the applicant. ■

—www.marketwatch.com

Oct. 24, 2011

Social media poses the question of exploitation in the courtroom

The growing presence of social media in the courts has led to new procedures for monitoring usage amongst staff members. To handle social media in a reasonable way, courts can try a few approaches:

- Communicate with staff members and directly address the groups of people that will be affected by decisions concerning the restrictions of social media;
- Understand the technology and how it works before making decisions;
- Balance needs of certain individuals to use social media, such as granting an attorney's access to electronic devices in the courtroom while still making it impossible for jurors to use the devices; and
- Recognize that some information that social media reveals cannot be controlled. ■

—www.ncsc.org

Americans unaware of decreasing crime rate

America's crime rate has declined a great deal since the mid-1990s, but 68 percent of Americans say that there is more crime in the United States than there was a year ago, and 48 percent say crime in their local area is increasing. Crime perception trends show that between the huge decrease in crime in 1996 and 2001, Americans were more optimistic about the frequency of crime; however, after an additional 40 percent decrease in crime from 2001 to 2010, Americans now believe that crime rate is increasing.

In contrast of the certainty that crime is escalating, the rating of the seriousness of crime has not changed much since 2001, with a majority of Americans still believing that crime in the United States is "extremely or very serious."

The Sept. 11, 2001, terrorist attacks impacted the findings of the study, revealing that weeks after the attacks, 30 percent of Americans felt unsafe walking within a mile of their homes at night, which is still an all-time low.

—www.gallup.com

Oct. 31, 2011

NAWL survey tracks career paths of women lawyers

The National Association of Women Lawyers (NAWL®) and The NAWL Foundation® released the results of their sixth annual Survey on Retention and Promotion of Women in Law Firms. The survey is the only national study of the nation's 200 largest law firms that annually tracks the progress of women lawyers at all levels of private practice.

For the first time since the survey began in 2006, there was a noted decline in the number of women entering big-firm practice. Other notable findings include:

Women's ranks in firms are thinning. For the first time since the survey began in 2006, there was a decline in the percentage of women lawyers who are associates and non-equity partners in the nation's largest firms.

Women lawyers are more likely to occupy positions that are not partner track. More than three-quarters of responding firms employ nontraditional staff attorneys, which are not partner-track jobs. Women represent 55 percent of staff attorneys, the highest percentage of women lawyers in any law firm position; significantly, a large percentage of lawyers holding these positions graduated from law school between 10 and 20 years ago. A similar phenomenon occurs at the counsel level where women lawyers comprise 34 percent of these positions in firms. In many firms, lawyers in the counsel position view it as the stepping stone between associate and promotion to partner. However, only a minority of firms indicated that most of their counsel are eligible to become partners.

Women have a much lower rate than men in promotion to equity partnership. Women lawyers account for barely 15 percent of equity partners. This number remains essentially unchanged since 2006, the first year of the survey. In fact, that level of equity partnership has been fixed at the same level for 20 years.

Women are not credited as rainmakers. The data show that women partners are less likely than men to receive credit for even a relatively modest $500,000 book of business. Parallel research highlights the difficulties women experience in obtaining credit for business development, opportunities for team development of new business, credit for new matters from existing clients, and other similar measures of rainmaking.

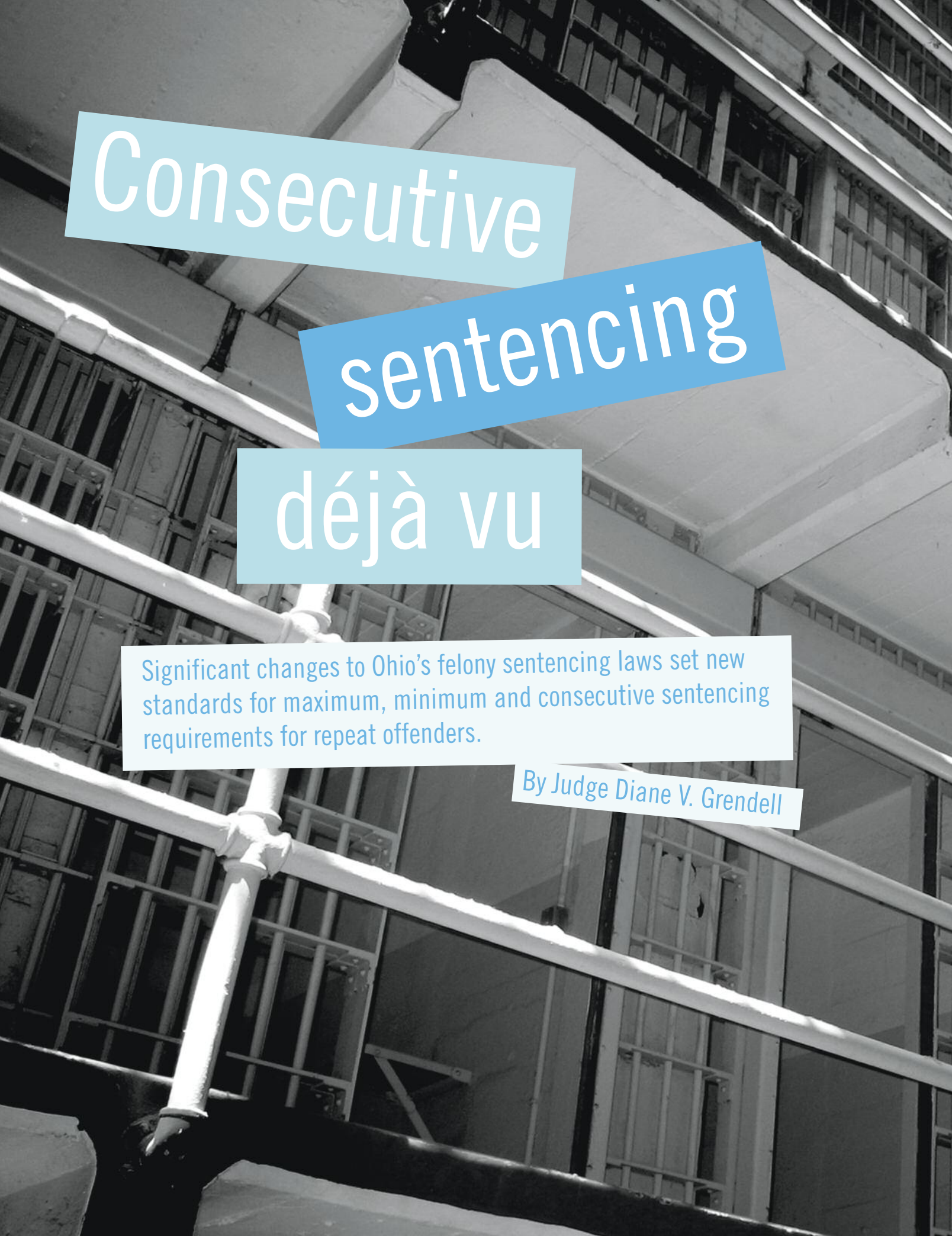
Women have low representation in law firm leadership. Women continue to be markedly under-represented in the leadership ranks of firms. The majority of large firms have, at most, two women members on their highest governing committee.

Compensation decisions disfavor women. As has been the case ever since the survey began collecting data, women at every stage of practice earn less than their male counterparts, with the biggest difference at the equity-partner level. In 2011, women equity partners earned 86 percent of the compensation earned by their male peers.

The full NAWL survey report can be accessed by visiting http://bit.ly/sBokSu. ■

—www.nawl.org

Nov. 10, 2011



Consecutive sentencing déjà vu

Significant changes to Ohio's felony sentencing laws set new standards for maximum, minimum and consecutive sentencing requirements for repeat offenders.

By Judge Diane V. Grendell

The most significant development of the last decade in Ohio's felony sentencing laws was the Supreme Court of Ohio's decision in *State v. Foster*, which struck down the laws governing the imposition of more than minimum sentences, maximum sentences, consecutive sentences and sentencing enhancements for repeat-violent and major-drug-offenders as unconstitutional.[1] For the next five years, sentencing judges had "full discretion to impose a prison sentence within the statutory range."[2]

In May 2011, the Ohio General Assembly passed Amended House Bill 86 affecting the first significant modifications to felony sentencing since *Foster*. The first noteworthy change to the felony sentencing laws concerns the purposes of felony sentencing, as stated in R.C. 2929.11(A). The two goals of felony sentencing remain "to protect the public from future crime by the offender and others and to punish the offender … ." However, these goals are to be effected "using the minimum sanctions that the court determines accomplishes those purposes without imposing an unnecessary burden on state or local government resources." This change reflects one of the legislature's concerns in passing H.B. 86, i.e., the more efficient use of state resources in the deterrence and punishment of crime.[3] The concern is also reflected in a 2008 report from the Council of State Governments Justice Center, commissioned "to help develop a statewide policy framework to reduce spending on corrections and reinvest in strategies to increase public safety."[4]

The former version of R.C. Chapter 2929 was deemed constitutionally infirm because it required "judicial fact-finding" before the imposition of particular sentences. Former R.C. 2929.14(B) required the sentencing court to impose "the shortest prison term authorized for the offense," unless the offender was serving or had served a prison term at the time of the offense, or the court found that "the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others."

House Bill 86 deletes this language. In the new version of R.C. 2929.14, a sentencing court is not required to give any particular consideration before imposing or exceeding the shortest authorized prison term.[5]

Former R.C. 2929.14(C) required judicial fact-finding before the imposition of "the longest prison term authorized for the offense." Specifically, maximum sentences

Consecutive sentencing déjà vu

could only be imposed "upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders … , and upon certain repeat violent offenders … ."

Likewise, H.B. 86 deletes this language without requiring a sentencing court to give any particular consideration before the imposition of a maximum sentence.[6]

With respect to the shortest and longest sentences, H.B. 86 conforms R.C. 2929.14 to the holding of *Foster* in that sentencing courts will enjoy "full discretion" to sentence within the statutory range. Sentencing decisions, nevertheless, "shall be guided by the overriding purposes of felony sentencing," i.e., "to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources."[7] As noted by the Supreme Court of Ohio in *Foster*, "There is no mandate for judicial fact-finding in the general guidance statutes."[8]

As with the provisions governing the imposition of the shortest and longest sentences, *Foster* struck down R.C. 2929.14(E)(4), governing the imposition of consecutive sentences, as unconstitutional, for requiring judicial fact-finding. The basis for this part of *Foster*'s holding, however, was undercut by the U.S. Supreme Court's decision in *Oregon v. Ice*.[9] As was acknowledged by the Supreme Court of Ohio, "[A]fter *Ice*, it is now settled law that … the jury-trial guarantee of the Sixth Amendment to the United States Constitution does not preclude states from requiring trial court judges to engage in judicial fact-finding prior to imposing consecutive sentences."[10]

Accordingly, H.B. 86 re-enacts the provisions of former R.C. 2929.14(E)(4) as they existed prior to *Foster*:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following: (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense. (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct. (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.[11]

Although the requirements for imposing consecutive sentences have been re-enacted, they will not, in practice, operate exactly in the same way as they did prior to *Foster*. The decision also struck down R.C. 2929.19(B)(2), which required the sentencing court to make a finding that gives "its reasons for imposing the consecutive sentences," as well as "its reasons for imposing the maximum prison term."[12] This statute was not re-enacted in H.B. 86. Thus, a sentencing court is not statutorily required to "make a finding that gives its reasons for selecting the sentence imposed."

The issue arises, then, as to a sentencing court's obligation to communicate its findings and/or reasons justifying the imposition of consecutive sentences. In *State v. Comer*, the Supreme Court of Ohio held that "when imposing consecutive sentences, a trial court is required to make its statutorily enumerated findings and give reasons supporting those findings at the sentencing hearing."[13] This holding, however, rested on R.C. 2929.14(E)(4) and 2929.19(B)(2)(c), both of which were found unconstitutional in *Foster*. As noted above, R.C. 2929.14(E)(4) has been re-enacted while R.C. 2929.19(B)(2)(c) has not. While this issue may be revisited by the legislature or addressed by the Supreme Court of Ohio, trial courts would be well-advised to make the statutory findings required by re-enacted R.C. 2929.14(E)(4) and give reasons supporting these findings in the record at the sentencing hearing.

While a sentencing court will not be expressly statutorily required to state its findings at the sentencing hearing, such action is implied by the new R.C. 2929.14(E)(4) and there exists practical reasons for doing so. As noted in *Comer*, "an in-court explanation gives counsel the opportunity to correct obvious errors" and "encourages judges to decide how the statutory factors apply to the facts of the case", whereas, "[i]f these important findings and reasons were not

Summary of changes to Ohio criminal sentencing

From: Judge Diane V. Grendell

	S.B. 2[1] (1996)	FOSTER (2006)	H.B. 95 (2006)	HODGE (2010)	H.B. 86 (2011)
Minimum Sentence	Impose shortest term unless the court makes certain findings on the record	R.C. 2929.14(B) unconstitutional	N/A	N/A	R.C. 2929.14(B) deleted; court to consider, per R.C. 2929.11, general purposes of felony sentencing; remains discretionary per Foster
Maximum Sentence	Only impose if the court makes certain specific findings (R.C. 2929.14(C))	R.C. 2929.14(C) unconstitutional	N/A	N/A	R.C. 2929.14(C) deleted; remains discretionary per Foster
Consecutive Sentence	Only if the court makes certain specific findings (R.C. 2929.14(E)(4)	R.C. 2929.14(E)(4) unconstitutional	N/A	R.C. 2929.14(E)(4) constitutional under federal precedents, but not revived by the Ohio Legislature	Reenacts R.C. 2929.14(E)(4) and R.C. 2929.14(D)(3)(a) (constitutional per Hodge)
Repeat Violent Offender	Maximum prison term mandatory in some instances; additional prison term may be imposed if the court makes certain specific findings (R.C. 2929.14(D)(2))	Mandatory maximum prison term constitutional (R.C. 2929.14(D)(2)(a)); additional prison term unconstitutional (R.C. 2929.14(D)(2)(b))	Maximum and additional sentences mandatory in some instances (R.C. 2929.14(B)(2)); additional sentence discretionary if certain findings are made	N/A	N/A
Major Drug Offender	Mandatory 10-year prison term for certain offenders; additional prison term may be imposed under certain conditions (R.C. 2929.14(D)(3))	Mandatory 10-year prison term constitutional (R.C. 2929.14(D)(3)(a)) ; additional prison term unconstitutional (R.C. 2929.14(D)(3)(b))	Additional prison term provision deleted	N/A	Additional prison term (R.C. 2929.14(D)(3)(b)) deleted

[1] The felony sentencing provisions enacted by S.B. 2 were amended prior to their effective date pursuant to "emergency" S.B. 269.

given until the journal entry there is the danger that they might be viewed as after-the-fact justifications."[14]

A sentencing court's duty to communicate its findings justifying the imposition of consecutive sentences in the record, i.e., the written judgment entry of sentence, is codified elsewhere in the sentencing statutes. "If the sentencing court was required to make the findings required by … (E)(4) of section 2929.14, … , and if the sentencing court failed to state the required findings on the record, the court hearing an appeal under division (A), (B), or (C) of this section shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings."[15]

The changes enacted by H.B. 86 discussed thus far are those that must be understood in relationship with the Supreme Court's *Foster* decision. House Bill 86 introduces other changes into Ohio's felony sentencing law, which serve the broader goals of the reform legislation.

Newly enacted R.C. 2929.13(B)(1)(a) establishes a preference for, and in certain conditions, a presumption of, community control sanctions for fourth- and fifth-degree felonies. Where an offender has been convicted of a fourth- or fifth-degree felony that is not an offense of violence, "the court shall sentence the offender to a community control sanction of at least one year's duration," depending on the offender's criminal record, the seriousness of the current charges, and the availability of community control sanctions.[16]

Conversely, a sentencing court will have "discretion to impose a prison term on an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence," depending on the circumstances of the current offense and the unavailability of community control sanctions.[17]

Newly enacted R.C. 2929.13(B)(1)(c) requires the department of rehabilitation and correction to provide sentencing courts with information regarding the availability of community control sanctions on request.

Otherwise, a court imposing a sentence for a fourth or fifth degree felony is required to make a finding as to whether any of the circumstances contained in R.C. 2929.13(B)(2) (formerly (B)(1)) apply and whether prison or community control sanctions are more consistent with the purposes and principles of sentencing set forth in R.C. 2929.11, in light of the seriousness and recidivism factors contained in R.C. 2929.12.[18]

In sum, H.B. 86 follows the holding of *Foster* with respect to the shortest and longest sentences authorized by statute, i.e., they may be imposed at the court's discretion. With respect to consecutive sentences, the General Assembly has re-enacted the major provision struck down by *Foster*, but later sanctioned by the U.S. Supreme Court's decision in *Ice* and recognized for re-enactment by the Supreme Court of Ohio in *Hodge*. Finally, with respect to many nonviolent fourth- and fifth-degree felonies, H.B. 86 enacts a sentencing procedure that explicitly favors the imposition of community control sanctions, rather than prison, for nonviolent offenses. ■

This article first appeared in the August 2011 *Lake Legal Views.*

Judge Diane V. Grendell has served in the 11th District Court of Appeals for 11 years, writing and participating in more than 3,850 opinions from Ashtabula, Geauga, Lake, Portage and Trumbull counties. Judge Grendell has also been requested to hear cases on the Supreme Court of Ohio on nine occasions, and to date has had more than 60 of her opinions published.

Endnotes

1 *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

2 Id. at paragraph seven of the syllabus.

3 While adding language to R.C. 2929.11(A), H.B. 86 removed the following similar language from R.C. 2929.13(A): "The sentence shall not impose an unnecessary burden on state or local government resources."

4 Council of State Governments Justice Center, Justice Reinvestment in Ohio: Reducing Spending on Corrections and Reinvesting in Strategies to Increase Public Safety (New York: Council of State Governments Justice Center, 2009).

5 The versions of H.B. 86 passed by the House did contain a provision comparable to former R.C. 2929.14(B): "the court imposing a prison sentence upon an offender for a ~~felony elects or is required to impose a prison term on the offender, the court~~ who has not served, or is not serving, a prison term shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section."

6 The versions of H.B. 86 passed by the House did contain a provision comparable to former R.C. 2929.14(C): "the court imposing a prison sentence upon an offender ~~for a felony may~~ shall impose the longest prison term authorized for the offense pursuant to division (A) of this section only ~~upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes~~ if the longest prison term is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code or, upon certain major drug offenders ***, and upon certain repeat violent offenders ***."

7 R.C. 2929.11(A)

8 2006-Ohio-856, at ¶42.

9 *Oregon v. Ice* (2009), 555 U.S. 160.

10 *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, at ¶19.

11 R.C. 2929.14(C)(4). Again, the final version of H.B. 86 differed significantly from the version passed by the House with respect to consecutive sentences. The earlier version provided for different findings before consecutive sentences could be imposed: "If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court shall first consider imposing the prison terms as concurrent sentences. The court may require the offender to serve the prison terms consecutively only if the court finds in language specific to the offender and the offenses that ~~the~~ consecutive ~~service is~~ terms are necessary ~~to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate~~ because they are proportionate to the seriousness of the offender's conduct and to the danger of future crime of the offender poses to the public" [sic].

12 Former R.C. 2929.19(B)(2)(c) and (e).

13 99 Ohio St.3d 463, 2003-Ohio-4165. Id. at paragraph one of the syllabus.

14 Id. at ¶22.

15 R.C. 2953.08(G)(1). This provision was added to R.C. 2953.08, effective Oct. 10, 2000. A year earlier, the Supreme Court of Ohio decided *State v. Edmonson*, 86 Ohio St.3d 324, 1999-Ohio-110, where it distinguished between the obligation to state the findings necessary to impose a particular sentence (as required R.C. 2929.14(B)), and the obligation to state the reasons or basis for its findings (as required by R.C. 2929.19(B)(2)).

16 R.C. 2929.13(B)(1)(a).

17 R.C. 2929.13(B)(1)(b).

18 R.C. 2929.13(B)(3)(a) and (b).

Equal access to justice

The impact of Ohio's legal aid societies

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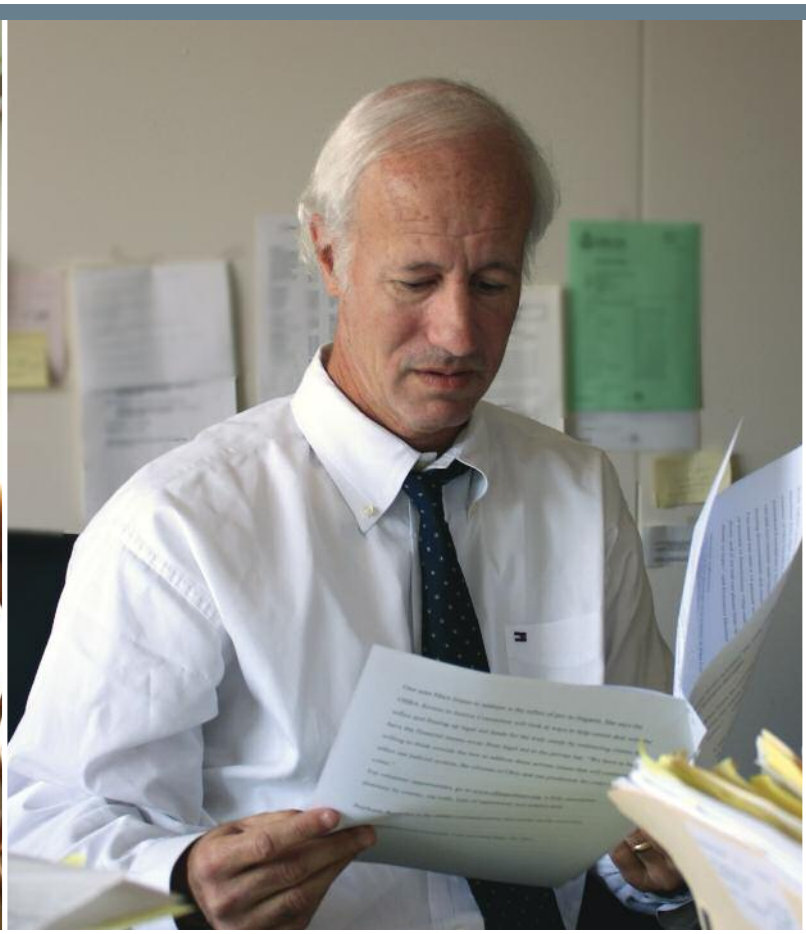
A personal look into four individual cases reveals the life-changing effects and momentous importance of legal aid services in Ohio.

by Stephanie Beougher



From left: Betty Bright sits in her favorite spot in the Fairfield County home she fought to save from foreclosure; Chuck Gordon is a staff attorney for the Southeastern Ohio Legal Services Lancaster office. Opposite page: Penny Hamilton credits her legal aid attorney, Joseph Warden (right), with saving her life.

"When funds for civil legal services are unavailable to provide service to eligible clients, the impact on all segments of society is detrimental to the administration of justice."

— OSBA President Carol Seubert Marx, Sept. 13, 2011

"My legal aid attorney, Alexandria Ruden, specialized in working with women in abusive situations. She asked me questions that challenged me to consider the direction of my life."

Ilah Adkins, board president, Legal Aid Society of Cleveland

A little more than 15 years ago, Ilah Adkins was a young mother of two and barely 30-days sober when she walked into the office of the Legal Aid Society of Cleveland. Adkins did not have a steady job or a permanent home, and she needed help getting out of an abusive marriage.

"My legal aid attorney, Alexandria Ruden, specialized in working with women in abusive situations. She asked me questions that challenged me to consider the direction of my life." That encounter changed Adkins' life. She went on to earn a bachelor's degree in political science from Cleveland State University and a law degree from the Cleveland-Marshall College of Law. In 2011, Adkins was named the agency's board president. "Legal Aid's services gave me the stability I needed to find my way out of poverty. In this difficult economy, hardships for people are increasing, and Legal Aid has to meet ever-growing demands with limited resources. There is immense need for more pro bono legal assistance and financial support."

While Adkins' story may not be typical, there are many other Ohioans who have benefitted from legal services. In 2010, the five legal aid societies covering all 88 counties of Ohio handled more than 70,000 cases. According to the Ohio Legal Assistance Foundation's 2010 Annual Report, legal aid societies helped more than 164,000 low-income individu-

als and families with cases such as child custody, housing discrimination and employment rights. The Legal Aid Society of Cleveland has seen a 14 percent increase in intake since 2008, with the largest area of increase in foreclosures. "The reality is that if we had more people to answer the phone, and if we had our phone lines open 24 hours, we would see that intake double or triple," said Executive Director Colleen Cotter.

Mortgage nightmares

Gary and Kay Reisinger own a home in Pike County on 1.97 acres nestled between Piketon and Beaverton in southern Ohio. In 2008, the Reisingers turned to Southeastern Ohio Legal Services for help when their bank began foreclosure proceedings. They were able to save their home of eight years by negotiating a loan modification. Everything was settled, or so they thought. About a year later, the mortgage company started a new round of problems for the family. "It's been a nightmare," Mrs. Reisinger recalls. "We were constantly harassed to change our loan agreement, and they started rejecting our payment. We tried working with them but they wouldn't cooperate."

With no money to hire a lawyer, the Reisingers once again turned to legal aid for help. Melissa Benson, staff attorney at Southeastern Ohio Legal Services, worked on their case. "After months of negotiation, we've been able to work out a settlement that will allow the Reisingers to remain in their home with a mortgage payment that they can afford," Benson said.

Betty Bright of Fairfield County understands what the Reisingers are going through. The U.S Department of Agriculture (USDA) started foreclosure proceedings in 2008 against Bright on the loan for her home of 25 years. Bright remembers the shock when she received the notice of acceleration on the loan. "I sent a payment that somehow got lost and a few months later they foreclosed on me. They seemed ready to dump my loan."

Disabled and unable to work, Bright knew she needed legal help but had no way to pay for it. Then, she remembered an article in the local newspaper about the legal aid society office in Lancaster. She took her notice of acceleration and knocked on Chuck Gordon's door at Southeastern Ohio Legal Services.

"Our office went about appealing that for her, but the address the USDA included in the letter was incorrect and the appeal came back," Gordon said. "That meant our appeal was not timely and the foreclosure process continued."

Gordon adds the USDA admitted the address mistake and not only negotiated a settlement so that Bright could keep her home but also suspended foreclosures against 340 other homeowners nationwide who had received the incorrect address. As for the missing payment that prompted the foreclosure action, it finally showed up as credit on Bright's account. "I was so overwhelmed when I first got that notice," Bright said. "I am

Joseph Warden handles legal cases in Montgomery, Greene, Darke and Preble counties.

so glad I handed all this over to Mr. Gordon. He saved me."

Domestic discord

Rosiland Pettaway of Toledo had been married 12 years when she decided to file for divorce. Pettaway, legally blind and unable to work, was concerned about her future since her husband was making minimum wage and the prospects of spousal support were dim. Lucinda Weller, an attorney at Legal Aid of Western Ohio, was assigned the case. "We took a holistic approach to Rosiland's case," Weller said. "In addition to handling the divorce, we found a group that helped her address some health issues and provide insurance for her eye surgery."

Thanks to the surgery, Pettaway is able to see and work as a seamstress again to support herself. She gushes when she talks about what Weller did for her. "Ms. Weller helped me stay in my home. I think I would have been on the street or in a shelter because I wouldn't have had any money. She also comforted me and boosted me up when I got down."

Life-changing

Penny Hamilton's life was spiraling out of control. Her abusive husband was controlling every aspect of her life, making her a prisoner in their home. "After seven years of marriage, I wasn't allowed to work or go outside without my husband, and I couldn't have 50 cents in my pocket."

Hamilton tried to leave, but held back when her husband threatened either suicide or harm to her two children and her mother. With her health failing and her children grown and out of the house, Hamilton knew the time had come for her to make a move.

She contacted Legal Aid of Western Ohio to get a protection order, and attorney Joseph Warden guided and encouraged her through the process and divorce. Warden chokes up when he talks about the case. "It was a very emotional case. I admire Penny's extraordinary courage and strength she showed to do this. She was so trapped and victimized she didn't know what to do, but today you see a different person in front of you."

Hamilton credits Warden with saving her life. "Without him and legal aid, I would have spent the rest of my life in a bedroom very, very sick, but instead I am living a very full and productive life."

Since the divorce, Hamilton's health has improved—she has lost 90 pounds—and she has gone back to work in medical billing and as a college instructor. She also serves on the Legal Aid of Western Ohio Board of Trustees.

"I sometimes wonder why I had to go through all of this. Standing here today stronger than I have ever been in my life and helping others who are suffering through domestic violence—I am starting to see the purpose."

The future of legal aid

As the demand for legal aid continues to increase, federal and state budget cuts have meant a decrease in funding. According to the Ohio Legal Assistance Foundation's 2010 annual report, financial support for legal services in Ohio has dropped by approximately 77 percent between 2007 and 2010.[1] Funding on the national level for the current fiscal year approved by Congress has been set at $348 million—more than $100 million less than the funding requested by the Obama Administration.

Legal Aid Society of Cleveland's Colleen Cotter knows the reality of less funding means serving fewer people. "However, even in light of that difficult reality, I am confident that the legal aid societies are here to stay. We may for the near future be smaller than we have

been, but we will be strong, and we will continue to provide high-quality legal assistance to our clients through difficult times." Cotter calls on Ohio's legal community to continue to assist legal aid societies by volunteering and providing financial support.

Siobhan Clovis of Reese Pyle Drake & Meyer PLL in Newark was a public defender before going into private practice. To continue to "champion for the underdog," she volunteers for the Save the Dream project through the Southeastern Ohio Legal Services' Newark office. "I feel volunteering for pro bono cases is something lawyers should do," Clovis said. "We understand the complex laws of our society and it's our responsibility to make sure people can navigate the legal system—particularly those who can't otherwise afford an attorney."

Ohio State Bar Association President Carol Seubert Marx understands the sacrifice it takes to be a pro bono volunteer. "I want to personally thank our members who have committed their time and energy to staffing pro bono clinics, taking referrals from legal aid offices, saying yes when asked to participate in foreclosure hearings or participating in our statewide appellate district pro bono projects," Marx said. "At a time when many of our members are having a difficult time meeting their own expenses, they continue to step up and provide free legal assistance for those in need."

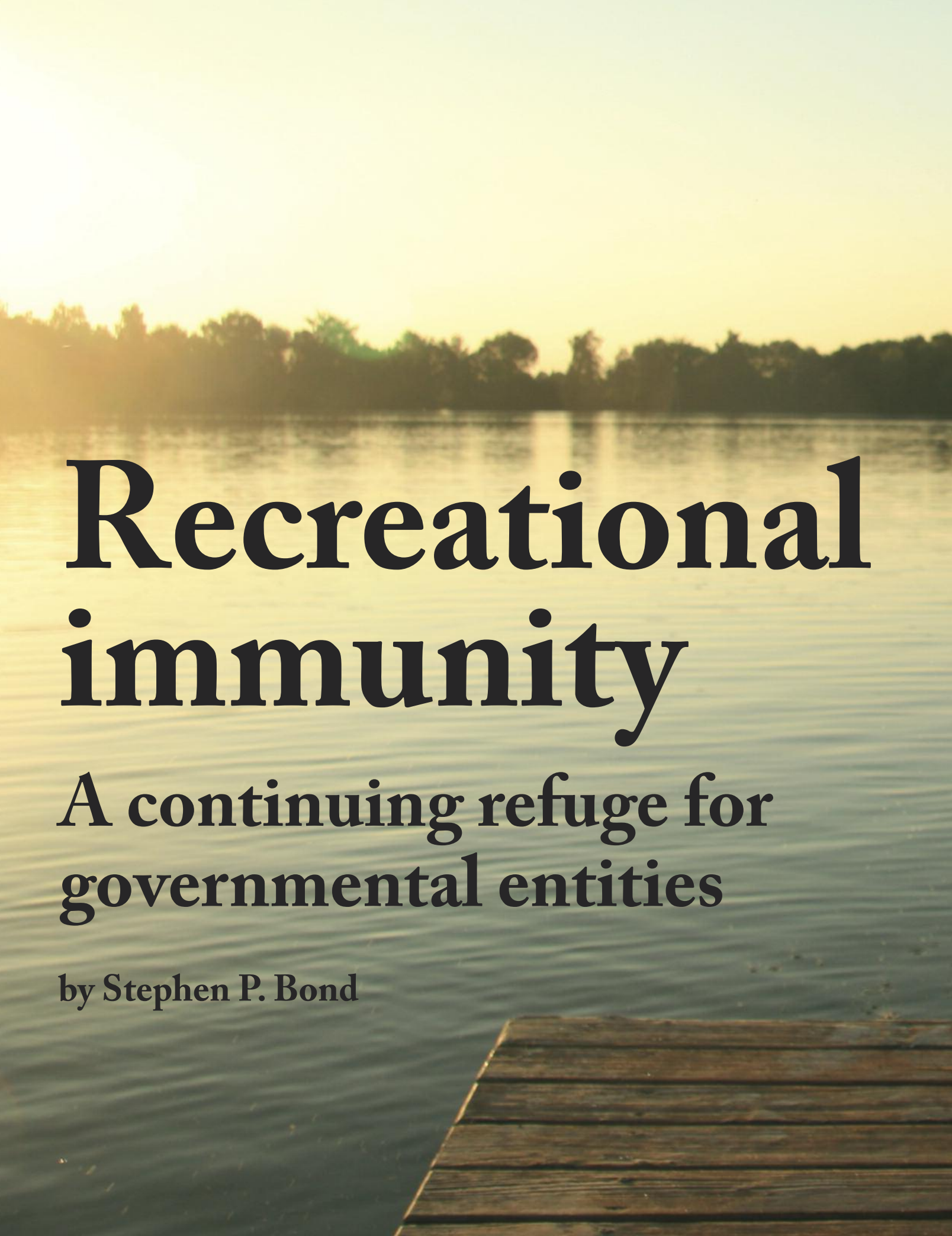
One area Marx hopes to address is the influx of pro se litigants. She says the OSBA Access to Justice Committee will look at ways to help courts deal with the influx and freeing up legal aid funds for the truly needy by redirecting clients that have the financial means away from legal aid to the private bar. "We have to be willing to think outside the box to address these serious issues that will continue to affect our judicial system, the citizens of Ohio and our profession for years to come."

For volunteer opportunities, go to www.ohioprobono.org, a fully searchable directory by county, zip code, type of opportunity and subject area. ■

Stephanie Beougher is the OSBA communications and online media associate.

Endnotes

1 www.olaf.org/about-olaf/financials/. Last accessed Sept. 26, 2011.



Recreational immunity

A continuing refuge for governmental entities

by Stephen P. Bond

Whether playing, running, swimming or cycling, the right to enjoy a park or public area is all fun and games—until someone gets hurt. When the unfortunate happens, who is liable?

"Sovereign immunity" was an age-old doctrine—you may have heard of it in law school—that, in the case of political subdivisions, was abolished by the Supreme Court of Ohio in 1982.[1] There was no small sense of concern by local government officials at the time as to how they should proceed; however, one defensive reaction by inventive government legal counsel was to assert that if we have the same theoretical liability exposure as a private enterprise, then we ought to also have the benefit of statutory immunity granted to landowners who allow their property to be used for "recreational" purposes.

To be specific, the statute being urged was R.C. 1533.181, which states, in pertinent part, that no owner, lessee or occupant of premises:

> (1) Owes any duty to a recreational user to keep the premises safe for entry or use;
>
> (2) Extends any assurance to a recreational user, through the act of giving permission, that the premises are safe for entry or use;
>
> (3) Assumes responsibility for or incurs liability for any injury to person or property caused by any act of a recreational user.

Which is to say, where there is no duty, there can be no liability for mishaps.

The legislature had further defined "premises" to mean "all *privately* owned lands, ways, and waters, and any buildings and structures thereon, and all *privately* owned and state-owned lands, ways, and waters leased to a *private* person, firm, or organization, including any buildings and structures thereon."[2] While it may not seem convincing to someone reading the definition, the Supreme Court of Ohio agreed with this novel argument and held that, in theory, R.C. 1533.181 "recreational immu-

nity" *does* apply to political subdivisions, as well as the state itself.[3] The major limitation on that protection lies in the statutory definition of who is deemed a "recreational user" whose claims will be affected by this immunity:

> "Recreational user" means a person to whom permission has been granted, without the payment of a fee or consideration to the owner, lessee, or occupant of premises, other than a fee or consideration paid to the state or any agency of the state, or a lease payment or fee paid to the owner of privately owned lands, to enter upon premises to hunt, fish, trap, camp, hike, or swim, or to operate a snowmobile, all-purpose vehicle, or four-wheel drive motor vehicle, or to engage in other recreational pursuits.[4]

In the nearly 30 years since Ohio subdivisions lost *judicially* recognized sovereign immunity, much has happened, most notably the enactment of Chapter 2744 of the Revised Code, laying out a whole new body of *statutory* governmental immunity. Contemporaneously, a significant body of law has continued to develop and remain viable under RC 1533.181, expanding on the circumstances under which a governmental entity may be entitled to this independent defense.

For one thing, recreational immunity has prevailed against all manners of arguments, attacking the law or attempting to find loopholes of liability. Courts have held that R.C. 1533.181 does not create an equal protection violation and is not contrary to public policy, nor the right to jury trial.[5] It has prevailed against claims that Chapter 2744 supersedes Chapter 1533 or that liability should be superimposed under R.C. 2744.02(B)(3) or R.C. 723.01.[6] Courts have held that R.C. 1533.181 immunity prevails against a claim of nuisance (as opposed to negligence) or affirmative creation of a hazard, and against allegations of willful or wanton conduct or active of passive negligence.[7] Recreational immunity continued after the adoption of comparative negligence.[8] This immunity has been honored regardless of the complainant's status as a trespasser, licensee, social guest, invitee or minor; regardless of claims that the "special duty rule" applied; and even if the claimant's use was in violation of rules.[9] Not insignificantly, the courts have held that it also extends to the *employees* of governmental entities.[10]

This immunity applies in a wide array of contexts (see sidebar on page 24): extending to those participating in sports, those watching sports, even those traveling on their way to sports activities.

Despite the liberal interpretation courts have been willing to take with this law, they generally have not been willing to extend immunity where access to the site has been limited to residents of the subdivision.[11]

In 2002, the Supreme Court seemed to acknowledge another exception, which was not readily apparent from the statute and which one may not have anticipated from the case law that had developed up to that point. Previously, the Court established the following principle:

> If the *premises* qualify as being open to the public for recreational activity, the statute does not require a distinction to be made between plaintiffs depending upon the *activity* in which each was engaged at the time of injury. For example we recognize immunity to the owner of a park (which qualifies as recreational premises), whether the injury is to one who is jogging in the park, tinkering with a model airplane or reading poetry to satisfy a school homework assignment.[12]

However, in the case of *Ryll v. Columbus Fireworks Display Co.*, a spectator at a fireworks exhibition was killed when hit by shrapnel from an exploding shell.[13] Two justices on the Court held that there was no "recreational immunity" available for the city because the injury was caused not

by the recreational premises per se, but by the *activity* conducted *on* the premises (two other justices felt that the reach of R.C. 1533.181 should no longer extend to political subdivisions at all).

At least one court felt that *Ryll* was establishing a new distinction between "recreational premises" and the activity conducted on those premises vis-à-vis R.C. 1533.181. In a 2006 case, *Henny v. Shelby City School District*, a pole-vaulter alleged he was injured when his body hit a hard surface rather than "side pads," which he contended should have been installed by defendant.[14] The court held that the case turned on the installation of the "portable" side pads; therefore, this was not a case about "premises," to which recreational immunity would apply. In contrast, that same year, another court held that immunity would apply in a case where one discus thrower was hit in the nose with a discus from another participant—the court acknowledged Ryll, but held that the issue in the case before it was whether the premises where the discuses were being thrown was unsafe.[15]

In 2009, a court had before it a case in which plaintiff, like decedent in *Ryll*, went to a park to see fireworks and injured his hand on a rolling fence gate—the majority held that the injury related to the gate, which was part of the *premises* (to use *Ryll*'s reasoning)—the dissent noted that the gate had been activated by a person, so that the injury resulted from a person, not the premises.[16]

Several other courts seem not to have been concerned with the parameters of any exception suggested by *Ryll*, deciding immunity applies where:

- A motorcyclist in a park hit a tree which had fallen into the pathway;[17]
- A skater was injured while trying to avoid a stopped vehicle;[18]
- A park employee damaged a vehicle while operating a "weed eater" that propelled an object into the windshield; and[19]
- A rolling garbage receptacle damaged a parked vehicle after being emptied.[20]

The foregoing make it clear that at this point in time, "recreational immunity" remains an available defense that counsel for both plaintiffs and governmental entities need to evaluate when considering the viability of pending claims. Also, counsel to municipalities would be prudent to consider this statute when advising their clients concerning the set-up of governmental programs, inasmuch as they may benefit from this type of immunity if structured appropriately. ■

Stephen P. Bond is a partner at Brouse McDowell's Avon Office and is law director for Wellington, Ohio, and solicitor for New London, Ohio.

Endnotes

1 *Haverlack v. Portage Homes*, Inc. (1982), 2 Ohio St.3d 26.

2 R.C. 1533.18(A).

3 *Marrek v. Cleveland Metroparks* (1984), 9 Ohio St. 3d 194; *Johnson v. New London* (1988), 36 Ohio St. 3d 60; *McCord v. ODNR* (1978), 54 Ohio St.2d 72. (Note, the state had itself waived sovereign immunity with the enactment of R.C. Chapter 2743, in 1975.)

4 R.C. 1533.18(B).

5 *Moss v. ODNR* (1980), 62 Ohio St.2d 138; *Fetherolf v. ODNR* (10th Dist.), 7 Ohio App.3d 110; *Nelson v. Bd. of Park Commrs.*, 2002 WL 5356.

6 *Kendrick v. Cleveland Metroparks* (1994), 102 Ohio App.3d 739; *Ledwick v. Marion*, 1989 WL 145157; *LiCause v. Canton* (1989), 42 Ohio St.3d 109; *Miller v. Dayton* (1989), 42 Ohio St.3d 113; *Bell v. Cleveland*, 1989 WL 98766; *Vitai v. Sheffield Lake*, 1987 WL 5561; *Bien v. Cincinnati*, 1993 WL 381206.

7 *Ledwick*, supra; *Vitai*, supra; *Wicker v. ODNR*, 2003 WL 22765545; *Fetherolf v. ODNR* (1982), 7 Ohio App. 3d 110; *Look v. Cleveland Metroparks* (1988), 48 Ohio App.3d 135; *Phillips v. ODNR* (1985), 26 Ohio App.3d 77; *Russell v. Cleveland*, 1987 WL 5464; *Erbs v. Cleveland Metroparks System*, 1987 WL 30512.

8 *Florek v. Norwood* (1985), 25 Ohio App.3d 47.

9 *Fryberger v. Lake Cable Recreation Assn.* (1988), 40 Ohio St.3d 349; *Phillips v. ODNR* (1985), 26 Ohio App.3d 77; *Aumock v. State*, 2001 WL 95877; *Sorrell v. ODNR* (1988), 40 Ohio St.3d 141; *Squires v. ODNR* (10th Dist.), 1990 WL 21450; *Kaeppner v. ODNR* (10th Dist.), 1989 WL 99415 (the argument that, if the plaintiff was violating the rules, he was not using it "with permission" and, hence, did not meet the definition of "recreational user" was rejected).

10 *Rankey v. Arlington Bd. of Ed.* (1992), 78 Ohio App.3d 112.

11 *Tomba v. Wickliffe* (2001), 114 Ohio Misc.2d 1 and 114 Ohio Misc.2d 10; *Jarrett v. South Euclid* (1990), 64 Ohio App.3d 743.

12 *Miller v. Dayton* (1989), 42 Ohio St.3d 113, 115.

13 95 Ohio St.3d 467.

14 2006 WL 747475.

15 *Mason v. Bristol Local School Dist.*, 2006 WL 2796660.

16 *Mitchell v. Blue Ash* (2009), 181 Ohio App.3d 804.

17 *Estate of Finley v. Cleveland Metroparks* (2010), 189 Ohio App.3d 139.

18 *Gudliauskas v. Lakefront State Park*, 2005 WL 2711087.

19 *Meiser v. ODNR*, 2004 WL 885563.

20 *Raymond v. Rocky Fork State Park*, 2003 WL 22765268.





When does recreational immunity apply?

Baseball/Softball Players

- Hurt in tournament game provided that the team paid the sponsor.

  Miller v. Dayton (1989), 42 Ohio St.3d 113; and see *Boggs v. Bowling Green*, 2003 WL 21781644.

- Hurt in tournament game (if the team pays the city, immunity depends on the court of appeal).

  Dinarda v. Louisville, 1991 WL 136101; *Pippin v. M.A. Hauser Enterprises* (1996) 111 Ohio App.3d 557; *Nowak v. Ries*, 1991 WL 271353.

Spectators

- Walking to, or from, watching a game if no fee is paid.

  LiCause v. Canton (1989), 42 Ohio St.3d 109; *Dowdell v. Eastlake* (11th Dist.), 1990 WL 117083.

- Hit by a ball if no fee is paid.

  Miller v. Broadview Hts. (8th Dist.), 1992 WL 19459.

- Hit by a tree branch if no fee is paid.

  Opheim v. Lorain (1994), 94 Ohio App.3d 344.

- Child came to watch but wandered off and drowned.

  Buchanan v. Middletown, 1987 WL 16062.

Bicycles

- Riding on a service road at a football stadium.

  Zachel v. Mahaney, 1990 WL 97668.

- Traveling across public park land without intending to use park.

  Goodluck v. Findlay, 1999 WL 156033.

- Riding down a roadway in a park.

  Milliff v. Cleveland Metroparks System, 1987 WL 11969; but compare *Vinar v. Bexley* (2001), 142 Ohio App.3d 341, which reached a different conclusion when the roadway through the park was a "thoroughfare."

Boating

- Rental of canoes.

  Moss v. ODNR (1980), 62 Ohio St.2d 138.

Camping

- Family rented cabins at Buck Creek State Park and were injured walking across catwalk at a marina.

  Howell v. Buck Creek State Park (2001), 144 Ohio App.3d 227. However, when a man paid a fee to camp at Mohican Park and was injured in hooking up electricity there was no immunity, *Huth v. ODNR* (1980), 64 Ohio St.2d 143; and, in *Meinking v. East Fork State Park*, 2006 WL 538140, payment of a fee by one person extended to family members, avoiding immunity.

Festival

- Attending a festival being held in a park.

  Hubbard v.Norwood, 1995 WL 734053.

Fishing

- Boy entered public park to fish in Lake Erie and drowned.

  Mitchell v. CEI (1987), 30 Ohio St.2d 92.

- Man walking on his way to go fishing.

  Parks v. Eaton, 1995 WL 591148.

Football

- Boy playing football on school grounds.

  Wheeler v. Lakewood Bd. of Ed. (1989), 61 Ohio App.3d 776; *Rencher v. Cleveland Bd. of Ed.*, 1991 WL 41743. However, when a boy was injured while playing football on public land adjacent to right-of-way, it was a jury issue as to whether immunity would apply. *Brinkman v. Toledo* (1992), 81 Ohio App.3d 429.

Golf

- Child playing in park hit by golf ball.

  Kasunic v. Euclid, 1988 WL 136014.

Hiking

- Hiking through a park.

  Look v. Cleveland Metroparks (1988), 48 Ohio App.3d 135; *Phillips v. ODNR* (1985), 26 Ohio App.3d 77.





Marina
- Marina owned by the federal government and leased to a private party; individual injured walking across the property.

  Thatcher v. Holiday Point Marina, 1996 WL 682163.
- Boat hit submerged dredge pipe.

  Masters v. ODNR, 2005 WL 3642703.

Motorcycling
- Riding a park trail in prohibited area.

  Kaeppner v. ODNR, 1989 WL 99415.

Parking
- Car parked in front of a gate while the owner was working at a state park, and wind blew the gate into the car.

  Loudermilk v. Buckeye Lake State Park, 2004 WL 550675; see also, *Shockey v. ODNR*, 2005 WL 376609.

Party in the park
- Picking up family at a party in the park.

  Haviland v. ODNR (1987), 36 Ohio Misc. 2d 29.

Picnic
- Child drowned while at family picnic.

  Kendrick v. Cleveland Metroparks (1994), 102 Ohio App.3d 739.
- Family paid to reserve a shelter, and family member fell into a hole in the ground.

  Reed v. Miamisburg (1993), 96 Ohio App.3d 268.

Playgrounds
- Injury on playground equipment.

  Bell v. Cleveland, 1989 WL 98766; *Esson v. Cleveland*, 1993 WL 425194; *Scimenes v. Cleveland*, 1993 WL 76880; *Hardy v. Miracle Recreation Equipment Company*, 1987 WL 11517; *Miller v. Sheffield Lake*, 1987 WL 9477.

Recreation Program
- Injury on swing set.

  Christman v. Columbus Bd. of Ed.,1989 WL 61732.

Rollerblading
- Rollerblading in a parking lot.

  Ross v. Strasser, 116 Ohio App.3d 662.

Sledding
- Sledding in a park.

  Marrek v. Cleveland Metroparks (1984), 9 Ohio St.3d 194; *Ledwick v. Marion*, 1989 WL 145157; *Harman v. Fostoria*, 1994 WL 50259.

Snowmobiling
- Snowmobiling in a park.

  Sorrell v. ODNR (1988), 40 Ohio St. 3d 141; *Johnson v. New London* (1988), 36 Ohio St. 3d 60; *Price v. New Madison*, (2nd Dist.), 1994 WL 587548 [even where plaintiff claimed he was not intentionally in the park].
- Note: "Snowmobiles" were expressly added to the definition of a recreational use by Senate Bill 106 in 2003.

Swimming
- Swimming in a lake.

  McCord v. ODNR (1978), 54 Ohio St.2d 72; *Wheeler v. Port Clinton* (6th Dist.), 1988 WL 96184. However, when there was an injury in a lake posted as "no swimming" and not maintained, it was a jury issue as to whether the use met the definition of a "recreational use." *Jackson v. Plusquellic* (1989), 58 Ohio App.3d 67.
- Going to watch someone else swimming.

  Fetherolf v. ODNR (1982), 7 Ohio App.3d 110.
- Rope-swinging into a lake where prohibited.

  Squires v. ODNR, 1990 WL 21450.
- Diving into half-filled pool at night.

  Russell v. Cleveland, 1987 WL 5464. However, for an injury at a city pool where a gate fee was paid, immunity was not applied. *Jarrett v. South Euclid* (1990), 64 Ohio App.3d 743.

Swinging
- Child on a swing falls on glass.

  Vitai v. Sheffield Lake, 1987 WL 5561.

Tennis
- Injury on school tennis courts.

  Kaplan v. Worthington, 1990 WL 174086.

Track
- Spectator at a track meet hit by a shot-put.

  Rankey v. Arlington Bd. of Ed. (1992), 78 Ohio App.3d 112.

Walking
- Walking on a path in a park.

  Wearn v. Cleveland, 1988 WL 47443; *Dusan v. Buckeye Lake State Park*, 2003 WL 23095947.
- Walking on park path on the way to somewhere else.

  Shutrump v. Mill Creek Metropolitan Park District, 1998 WL 158864; *Yurkiewicz v. Cleveland*, 1993 WL 259931.
- Leaving park after fireworks.

  Trina v. Warren, 1994 WL 321084.
- Walking in park to see a memorial.

  Kendrick v. Cleveland Metroparks (1994), 102 Ohio App.3d 739.
- Walking at a roadside rest area.

  Hoover v. State, 1993 WL 104896.
- Wading in a creek in a park.

  Frantz v. Xenia (1988), 62 Ohio Misc. 2d 651. ■

Inside OSBA

Committee and section news

You are invited to attend the winter committee and section meetings. Visit www.ohiobar.org to view the schedule.

Antitrust Law Section

The section hosted its annual Great Lakes Antitrust Institute on Oct. 28. Attendees were invited to join section council members for a dinner the evening before the institute. Additionally, S.B. 196, proposed by the section council to amend certain sections of the Revised Code that regulate business opportunity plans, is making its way through the Ohio Senate.

Daniel R. Warncke, chair
warncke@taftlaw.com

Estate Planning, Trust and Probate Law Section

Senate Bill 117, an OSBA proposal that was drafted by the section council, is awaiting Senate confirmation. Senate Bill 117 contains six proposals: 1) to modify a trustee's duties with respect to life insurance policies held as trust assets; 2) to authorize a trustee who has discretionary powers to distribute principal of a trust to exercise its discretion by distributing all or part of the first trust principal in further trust for the benefit of one or more beneficiaries of the original trust, subject to certain conditions and limitations; 3) to allow a credit to "resident" trusts for income taxes paid to other states; 4) to amend the anti-lapse statute, R.C. 2107.52 as it relates to wills, to enact a statute to create an anti-lapse statute applicable to trusts, and to add provisions to the Ohio Trust Code to grant statutory authority to a trustee to make distributions directly to the heirs of a deceased trust beneficiary, rather than through the deceased beneficiary's estate; 5) to enact the Uniform Power of Attorney Act in Ohio, as modified; and 6) to enact R.C. 5810.14 relating to Titling of Assets in Trust Form and R.C. 5301.071 (E) relating to the Validity of Instruments.

Kevin G. Robertson, chair
krobertson@bakerlaw.com

Federal Courts and Practice Committee

On Oct. 27-28, the committee hosted the Sixth Biennial Federal Bench Bar Conference, which provided federal court practitioners from the northern and southern districts of Ohio with the unique opportunity to meet and interact with one another as well as federal judges. The majority of Ohio's federal judges and magistrate judges participated.

Magistrate Judge Michael J. Newman, chair
Michael_newman@ohsd.uscourts.gov

Judicial Administration and Legal Reform Committee

During the fall meeting, the committee held a one-hour CLE titled Live Cameras in Trial Courts—Time to Reconsider? Judge Charles Brown, Stark County Common Pleas Court, Prof. Susan Gilles, Capital University Law School, and Tim Young, Ohio Public Defender, discussed threats and public hostility against the jurors in the Casey Anthony trial following their verdict and whether is it time to reconsider live cameras in the courtroom.

Justice Robert R. Cupp, chair
bob@bobcupp.org

Senior Lawyers Section

The recently activated Senior Lawyers Section is seeking new members. The charge for the section is to:

- Provide guidance and assistance to senior lawyers in preparing for and adjusting to changes in their professional life and financial activities;
- Serve as a clearinghouse of information concerning matters affecting senior lawyers, including the identification of services, programs and publications that enhance the careers and quality of life of its members, including the development of programs;
- Undertake tasks and analysis as requested by the Board of Governors and officers of the Association;
- Identify and work on a cooperative agenda with other committees and sections of the Ohio State Bar Association on issues of mutual interest; and
- Serve as the voice of senior lawyers within the OSBA.

Membership in the section is open to any Association member and dues are $10. The section will be governed by a section council appointed by the OSBA president. The first priority for the section is the implementation of the Masters at the Bar Task Force recommendations.

Reginald S. Jackson, chair
rjackson@cjc-law.com

Join a committee or section today

The Ohio State Bar Association has 50 committees and sections. For more information on their activities or to join, please contact Committee and Section Manager Jessica Emch at jemch@ohiobar.org. ■

Call for articles

Ohio Lawyer is seeking submissions of feature articles and "Did You Know," "In My Opinion," "Beyond the Courtroom," "Practice Tips" and other items for publication in upcoming issues. Please see the *Ohio Lawyer* Editorial Policy, available online at www.ohiobar.org/editorialpolicy, before submitting. ■

Board of Governors report

Nov. 4, 2011

- Established dues and changes in the criteria for admission to the Senior Lawyers Section.
- Approved the merger of the Elder Law and Disability Law committees.
- Approved the application for accreditation to certify specialists in insurance coverage law.
- Approved the 2012 section budgets.
- Approved the TechnoLawyer proposal.
- Approved an amendment to the OLAP Code of Regulations increasing the number of consecutive terms a director may serve from two terms to four terms.
- Approved the acceptance of the report of the unincoporated association task force and its subsequent submittal to the Ohio General Assembly for consideration. ■

Get into compliance with OSBA self-study CLE

If your CLE reporting deadline has passed and you are in need of additional CLE credits, turn to the OSBA and our self-study CLE program. There is not an easier, more cost-effective way to get into compliance with Gov. Bar Rule X.

You can satisfy up to six hours of your 24-hour biennial CLE requirement online through the OSBA.

Visit us at www.ohiobar.org/onlinecle and get into compliance today! ■

2012 certification deadlines

The OSBA will be certifying attorneys as specialists in nine areas of law in 2012, along with paralegals seeking the OSBA Certified Paralegal designation. The attorney certification application deadline is June 30, 2012. The paralegal application deadline is March 31, 2012. Watch the OSBA website for details on application availability. ■

Continue to enjoy the benefits

OSBA dues statements for 2012 were mailed in early December. By renewing now, you will continue to benefit from all OSBA services, products and resources without interruption.

To pay your dues online with a credit card, visit the OSBA website at www.ohiobar.org/dues. If you have question, contact the OSBA Members Services Center at (800) 232-7124 or (614) 487-8585. Thank you for your continued support. ■

Council of Delegates acts on proposals

On Nov. 4, 2011, the Ohio State Bar Association Council of Delegates met pursuant to notice at Ohio State Bar Association Headquarters, Columbus, to consider reports and recommendations of OSBA committees and sections. The reports were published in Volume 84, No. 43 of the Ohio State Bar Association Report with the complete text of the reports mailed directly to the Council of Delegates; the determination of the Board of Governors was sent by e-mail.

The Council of Delegates took the following action on the matters before it:

Report of the Estate Planning, Trust and Probate Law Section

- ADOPTED A proposal to amend R.C. 2133.04 to establish a presumption that a validly-executed living will declaration revokes all previously executed living will declarations, to parallel the already-existing statutory presumption under R.C. 1337.14(C) regarding revocation of durable powers of attorney for health care by later-executed health care powers. Presenter: Alan S. Acker
- ADOPTED A proposal to amend R.C. 5805.06 to clarify the scope of creditors' rights with respect to property subject to powers of withdrawal or distribution in favor of the settlor of a trust. Presenter: Alan S. Acker
- WITHDRAWN A proposal to amend R.C. 2131.08 and 2131.09 and to amend R.C. 5808.18(E) (now pending as part of S.B. 117), as appropriate, to enhance the usefulness of powers of appointment under Ohio trusts designed to continue for extended periods of time up to 1,000 years, and to clarify when an interest in property is created for purposes of measuring the duration of any applicable perpetuities period.
- ADOPTED A proposal to amend R.C. 2101.24 to expand the concurrent jurisdiction of Ohio probate courts, to enable probate courts to resolve all manner of disputes concerning gratuitous transfers of property, including transfers occurring at death by means other than a will or trust agreement. Presenter: Richard L. Kolb
- REFERRED BACK A proposal to amend R.C. 2107.07 and 2107.10 to facilitate (and ultimately require) the prompt deposit of wills in probate court. Presenter: Alan S. Acker

Report of the Legal Ethics and Professional Conduct Committee

- ADOPTED A proposal to amend R.C. 2317.02(A) to clarify when a lawyer may be compelled to testify regarding attorney-client communications. Presenter: Frank E. Quirk ■

2012 OSBA Annual Convention heading south

Earn a bunch of CLE, network with colleagues and vote for the next president-elect of the OSBA at the 2012 Convention, May 2-4 in downtown Cincinnati. Watch for your convention program in the mail, but put the date on your calendar today! ■

Disability trusts in Ohio

by David Zwyer

Attorneys in Ohio have several options when it comes to establishing trusts for people with disabilities. In addition to wholly discretionary trusts and supplemental services trusts for funds from a third party (typically family members), assets belonging to a person with a disability can be placed into either one of two versions of a Medicaid payback trust—a special needs trust or a pooled trust.[1] Any Ohio resident who meets the Social Security definition of disability may be a beneficiary of these trusts.

Policy issues and goals

These four trust options allow clients to establish different types of trusts that will not be considered to be assets for the disabled beneficiary. With revisions to the law governing discretionary trusts, Ohio law—now perhaps more strongly than ever—supports a grantor's intent as expressed in discretionary trusts and spendthrift provisions. In addition, when Congress created the Medicaid Payback Trust options, it made a policy decision that allows people with disabilities to set aside some of their own assets into a trust as long as they agree to pay any surplus funds back to Medicaid on their death, i.e., a "pay me later" instead of a "pay me now" approach. State law and regulations now mirror federal law.

These trusts help safeguard the eligibility of trust beneficiaries for means-tested governmental benefit programs such as Medicaid and Supplemental Security Income (SSI). Funds can be requested from a trust to pay for supplemental items typically not paid for by government programs such as cable television, cell phones, vacations, Internet, advocacy, respite, entertainment, pets and pet care, hobbies and attendance at sporting events.[2]

These trusts are legitimate vehicles that greatly improve the quality of life for the beneficiaries who often have significant disabilities by paying for items that public assistance programs do not—items that parents or other relatives would have to pay for if they were still alive. Using trusts to enhance the happiness of the beneficiaries and to keep them more engaged in meaningful activities can reduce behavioral problems, reduce peer-to-peer incidents and reduce costs to the public.

Additional pooled trust considerations

The creator of a pooled trust has the option to leave remaining funds in the trust at the death of the beneficiary rather than paying them back to Medicaid.[3] In addition, the age 65 limitation for the beneficiary, which appears in provisions governing the special needs trust, does not appear in the provisions that govern the pooled trust. A pooled trust must also be irrevocable. Finally, if sufficiently competent, a person with a disability—in addition to a parent, grandparent, guardian or court—can create a pooled trust. This is the only situation where people can create a trust for themselves and still remain eligible for Medicaid.

The newest wrinkle: Expanded authority for representative payees

The Social Security Program Operations Manual System (POMS Section GN 00602.75) now authorizes a representative payee to transfer Social Security Disability Insurance (SSDI) and/or SSI benefits to establish a trust or fund an existing trust on behalf of the beneficiary, provided that:

- Establishing the trust is in the beneficiary's best interest;
- The trust is established exclusively for the use and benefit of the beneficiary, to meet the beneficiary's current and reasonably foreseeable needs; and
- The Title II (SSDI) and/or Title XVI (SSI) beneficiary is the sole trust beneficiary during his or her lifetime.[4]

Although the representative payee cannot use past-due SSI benefits, which meet dedicated account requirements for recipients who are under age 18, to establish a trust or fund an existing trust, a representative payee can help other recipients maintain eligibility by putting excess SSDI or SSI payments into a trust for future expenditures for food, clothing, housing, medical care, recreation, education, etc. As a result, the trust document itself cannot contain language that would prohibit expenditures for these purposes.

Going forward

Although the law regulating disability trusts appears to be stable, Ohio attorneys have learned to be alert to both legislative and regulatory changes that impact their clients and their carefully drafted estate plans. ■

Author bio

David A. Zwyer works with the Ohio pooled trust program, Community Fund Management Foundation. His law degree is from The Ohio State University Michael E. Moritz College of Law. Much of his career has involved disabilities law, especially guardianship and estate planning. He is a past chair of the OSBA Disability Law Committee.

Endnotes

1 See R.C. 5111.151, subsection (F)(1) and subsection (F)(3). See 42 USC §1396p(d)(4)(A) and (C) for the authorizing federal legislation. See R.C. Chapter 5805 together with R.C. 5111.151(G). See R.C. 5815.28. A Medicaid payback trust is a trust that enables persons with disabilities to become eligible or to remain eligible for Medicaid, and allows the state to recoup certain benefits paid on their behalf on their death from the assets remaining in the trust.

2 A more complete list of examples of such supplemental items can be found in O.A.C. 5123:2-18-01.

3 See R.C. 5111.151(F)(3)(a)(v).

4 A representative payee is an individual or organization appointed by SSA to receive Social Security and/or SSI benefits for someone who cannot manage or direct someone else to manage his or her money. The main responsibilities of a payee are to use the benefits to pay for the current and foreseeable needs of the beneficiary and properly save any benefits not needed to meet current needs. A payee must also keep records of expenses (from Social Security website).

About the Community Fund Management Foundation

Using a pooled trust option offered by a nonprofit corporation allows attorneys who do not often work in the area of disability trusts to serve clients with a minimum of research, time and effort. The Community Fund Management Foundation (CFMF), a nonprofit, tax-exempt organization that was created in 1995, is one option. CFMF administers trust accounts for Ohio residents with disabilities. It offers two different types of trusts: a pooled trust containing assets of a person with a disability, and a discretionary trust called a "master trust" containing assets of a third party, typically a family member. The trusts offered by CFMF help safeguard the eligibility of trust beneficiaries for means-tested governmental benefit programs such as Medicaid and Supplemental Security Income. For more information, go to www.CFMF.org or call (216) 736-4540. ■

Opinions help guide attorney conduct

by Eugene P. Whetzel

As of this writing, five important informal advisory opinions were promulgated in 2011 by the Ohio State Bar Association (OSBA) Legal Ethics and Professional Conduct Committee, the Board of Commissioners on Grievances and Discipline, and the Board on the Unauthorized Practice of Law.[1]

Indemnification of third parties

Both the OSBA and the Board of Commissioners on Grievances and Discipline issued opinions dealing with whether a lawyer may agree to indemnify an opposing party as a condition of a settlement.[2] Interestingly, the requests for opinions came from different sources, thus highlighting the significance of the issue.

OSBA opinion

The questions presented were whether plaintiff's counsel may agree to indemnify defendant and/or its insurer against third-party liens or subrogation claims arising out of defendant's payment of settlement proceeds to plaintiff; and whether defendant's counsel may request such an agreement as a condition of settlement.

The OSBA opined that requesting or entering into such agreements contravenes several provisions of the Rules of Professional Conduct.[3] The opinion noted that it required consideration of the following rules of the Ohio Rules of Professional Conduct:

- 1.2(a): Lawyer shall abide by client's decision whether to settle a matter;
- 1.4(a)(1): Lawyer shall promptly inform client of any decision or circumstance that requires client's informed consent;
- 1.7(a)(2): Conflict of interest is created when a substantial risk exists that lawyer's ability to consider, recommend or carry out an appropriate course of action for client will be materially limited by lawyer's own personal interests;
- 1.8(e): Lawyer shall not provide financial assistance to client in connection with pending litigation except court costs and expenses of litigation;
- 2.1: Lawyer shall exercise independent professional judgment in representing client; and likewise requesting such an agreement would violate Professional Conduct Rule 8.4(a): Lawyer shall not violate rules of conduct or knowingly assist or induce another to do so.

Board of Commissioners on Grievances and Discipline Opinion

As noted by the board, the opinion addresses whether, during settlement of a matter, it is ethical for a lawyer to propose, demand and/or agree to personally satisfy any and all claims by third persons as to settlement funds. Finding that "[s]uch agreements are not authorized by Prof. Con. Rule 1.15(d) and violate Prof. Con. Rules 1.8(e) and 1.7(a)(2)," the board determined it is "improper for a plaintiff's lawyer to personally agree, as a condition of settlement, to such indemnification agreements." The board further found that a lawyer who proposes or requires such indemnification agreement as a condition of settlement violates Professional Conduct Rule 8.4(a).[4]

Multijurisdictional practice and debt settlement legal services

In Opinion 2011-2, the board addressed the application of Professional Conduct Rule 5.5(a) to the issue of the provision of debt settlement legal services to Ohio clients, by out-of-state lawyers.[5] As noted by the board, this is "the board's first advisory opinion on Prof. Con. Rule 5.5."

The opinion addressed the "safe harbor" provision of Rule 5.5(c)(4), dealing with nonlitigation activities. Under (c)(4), a lawyer may engage in nonlitigation activities that "arise out of" or are "reasonably related to" the lawyer's practice in the jurisdiction in which admitted. Comment [14] to Rule 5.5 lists seven factors as evidence of this relationship.

Applying these factors, the board concluded that the "lawyers are not authorized to practice law in Ohio." In support of this conclusion, the board noted: the Ohio clients became aware of the lawyers for the first time through an Internet search; the clients had no prior relationship with the lawyers; the clients are not residents of the state of licensure; a significant portion of the work done for the client is not located in the home state; and, the governing law is likely not that of the home state.

The board also noted that the conduct of the lawyers may potentially violate Rule 5.5(b)(1), establishing a "systematic and continuous presence for the practice of law in Ohio" through their advertising and representation of a number of Ohio clients; and Rule 5.5 (b)(2)—holding out or otherwise representing to the public that the lawyer is permitted to practice in Ohio.

Medicaid assistance and planning by nonattorneys

In Advisory Opinion UPL 11-01, the Board on the Unauthorized Practice of Law addressed the question of "whether a nonattorney, for a fee and in the course of a business enterprise, may provide advice and assistance ... regarding qualification for Medicaid benefits."[6]

The board's definition of "advice and assistance" consisted of:

1. Reviewing documents to determine an individual's countable resources for Medicaid purposes.
2. Establishing a Medicaid planning strategy specific to an individual, including (a) a determination of the exact amount and nature of the resources the individual will be able to retain; (b) a determination of the date of Medicaid eligibility; and (c) a specific plan for reduction of the individual's assets to qualify for Medicaid, including advice on how to "spend down," gift resources, change title to resources, and convert one type of asset to another type of asset in order to maximize the assets transferred to others while qualifying for the maximum benefits at the earliest time.
3. Preparing and filing a Medicaid application on behalf of the individual with a county department of job and family services.
4. Attending hearings with the individual, on behalf of the individual, or both.

In the opinion, the UPL Board separated the various activities to be performed to determine which are permissible and which are impermissible.

Permissible

- Review of financial documents or records for a potential Medicaid applicant to evaluate income and resource levels.
- Preparation and filing of a Medicaid application.
- Appearance at state Medicaid hearings as a representative.

Not Permissible (Unauthorized Practice of Law)

Medicaid planning (involving estate planning), i.e., activity requiring specialized legal training, skill and experience constitutes the practice of law. (Medicaid planning involving only document review and a financial calculation may be permissible.)[7]

The Board noted that its opinion should not be extended to Medicaid appeals before an Ohio court.

Professional Employer Organizations (PEO)[8]

In Inf. Adv. Op. 2011-02, the OSBA addressed two questions: first, whether a law firm may contract with a PEO to manage human resources and personnel responsibilities as to the firm, itself, and second, whether the firm may own and operate a PEO as an ancillary business.[9]

After analyzing the application of Rules 5.4, 1.6, 1.7, 1.4, and ethics opinions from other jurisdictions, the Committee opined that,

> Lawyers and law firms may provide non-legal services by operating ancillary businesses, sometimes referred to as "law-related services." Rule 5.7(e) of the ORPC defines "law-related services" as those that "might reasonably be performed in conjunction with the provision of legal services and that are not prohibited as unauthorized practice of law when provided by a nonlawyer." Comment [4] to Rule 5.7 notes that such ancillary services "may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations or owns an interest in the entity." The rule requires reasonable measures to inform customers of the entity that they are not receiving legal services, and that the protections of the attorney-client relationship do not apply.
>
> Law firms may operate many different kinds of ancillary businesses. "A broad range of economic and other interests of clients may be served by the lawyers' engaging in the delivery of law related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, ... and patent, medical or environmental consulting." ORPC 5.7, cmt. [9].
>
> The commitee concluded that a law firm's ownership and operation of a PEO as an ancillary business is permissible, provided that the firm complies with Rule 5.7. This mandate includes Rule 5.7(b) (a law firm that operates a PEO as an ancillary business may not make its provision of PEO services contingent on the PEO's customers also agreeing to legal representation) and Rule 5.7(c) (the law firm may not make its provision of legal services to clients contingent on the clients agreeing to become customers of the law-firm-operated PEO).
>
> Provided that applicable Rules of Professional Conduct are adhered to, a law firm may contract with a professional employer organization that would assume and manage the firm's human resource functions. Equally, a law firm may own and operate a professional employer organization as an ancillary business.

Future conduct

These opinions, while informal and nonbinding, provide significant guidance to lawyers and others concerning future conduct. They may be viewed on the websites of the issuing entities.[10] ■

Eugene P. Whetzel is general counsel for the Ohio State Bar Association.

Endnotes

1 OSBA and Board of Commissioners opinions may be issued at the request of individuals. Unauthorized Practice of Law Board opinions may be issued at the request of a UPL committee of a bar association or Disciplinary Counsel.

2 OSBA Inf. Ad. Op. 2011-01 (Feb. 9, 2011). Board of Commissioners Inf. Adv. Op. 2011-1 (Feb. 11, 2011).

3 The Committee limited its opinion to the application of the Prof. Con. R. "and therefore no opinion is expressed here regarding the potential liability of an Ohio attorney under any federal statute or federal regulation pertaining to Medicare payments made in the context of a settlement or judgment in a personal injury or wrongful death suit. See generally 42 U.S.C. § 1395(b); 42 C.F.R. § 411.24."

4 The board recommended that its "opinion be prospective in application."

5 Oct. 7, 2011.

6 Oct. 7, 2011.

7 Especially where the applicant's income and resource levels are near the Medicaid limits.

8 A professional employer organization is a business entity that enters into an agreement with one or more employers for the purpose of co-employing all or part of the employer's workforce. R.C. 4125.01(c).

9 Dec. 2, 2011.

10 The foregoing are brief synopses of the opinions. The opinions should be read in their entirety.

New rules on en banc review: Strategic implications for Supreme Court and appellate practice

by Dennis D. Hirsch

Of the recent changes to the Rules of Appellate Procedure and to the Supreme Court's Rules of Practice, the most significant may be the new rules on en banc review in the district courts of appeals.

Until a few years ago, it was unclear whether the Ohio Constitution even allowed en banc proceedings. The Ohio Constitution states that "three judges shall participate in the hearing and disposition of each case" in the courts of appeals.[1] Some courts read this to prohibit en banc review, which requires that all of a district's judges convene to resolve conflicting decisions in that district.[2]

The Supreme Court of Ohio settled the issue in *McFadden v. Cleveland State University*.[3] The plaintiff 's case turned on whether a two-year or a six-year statute of limitations applied. The 10th District had previously issued conflicting decisions on this question. On appeal, it elected to apply the two-year statute and barred plaintiff's claim.[4] In his motion for reconsideration, the plaintiff argued that the court should have used an en banc proceeding to resolve the intra-district conflict. The panel denied the motion on the grounds that such proceedings were unconstitutional.[5] The Supreme Court reversed the panel's decision, holding that the Constitution's reference to three judges created a "quorum requirement" not a "cap."[6] The Court made it clear that courts of appeals can identify intra-district conflicts and, where they do, "must convene en banc" to resolve them.[7] This will ensure "uniformity and continuity" in decisions, maintain the "integrity" of the court and promote "finality and predictability" in the law.[8] Justice Judith Ann Lanzinger, dissenting, argued that the majority's ruling would add an additional layer of review and so create "[d]elay, cost and uncertainty."[9]

At the time of the *McFadden* decision, the Ohio Rules of Appellate Procedure and the Supreme Court of Ohio's Rules of Practice did not establish a process for en banc review. The recent rule amendments fill this gap. As amended, the Rules of Appellate Procedure provide that an en banc proceeding can arise in two ways. First, the judges of a given district court of appeals may themselves determine that a case creates an intra-district conflict and sua sponte order en banc review to resolve it.[10] Second, a party can apply for rehearing en banc within 10 days of the clerk's service of the judgment or order.[11] A response is due 10 days thereafter, and a reply seven days after that.[12] The Rules provide that, as a general matter, "[c]onsideration en banc is not favored."[13] To obtain it, the applicant must identify a conflict on a "dispositive issue" and explain why en banc review "is necessary to secure and maintain uniformity of the court's decisions."[14] The entire court of appeals (other than disqualified or recused judges) will hear the application, and, if it agrees that an intra-district conflict exists, meet en banc to resolve it.[15] If, on the other hand, the en banc court rejects an application, then a party may appeal to the Supreme Court of Ohio for discretionary review of this determination.[16]

The amendments to the Supreme Court's Rules of Practice spell out how en banc proceedings affect the time for filing a notice of appeal to the Court. The Rules provide that the filing of an application for rehearing en banc, or a court of appeals' sua sponte determination that such a hearing is needed, tolls the standard 45-day period for filing a notice of appeal.[17] This means that, where a party files an application for rehearing en banc and the district court of appeals rejects the application, then the party's notice of appeal is due 45 days after the court of appeals' decision denying the application.[18] If, on the other hand, the court of appeals *grants* the party's application and hears the case en banc, or if it sua sponte decides to hear the case en banc, then a party's notice of appeal to the Supreme Court is due 45 days after the en banc court enters judgment on the matter.[19]

The new en banc procedure presents strategic opportunities. Attorneys who lose an appeal should assess whether the decision creates or resolves an intra-district conflict on a dispositive point of law and, if so, apply for rehearing en banc. They should not abuse the process, though, since some districts will meet frivolous applications with sanctions.[20] In their applications, attorneys should refer to the policy reasons the Court articulated in *McFadden*: "uniformity and continuity" in judicial decisions, the "integrity" of the court and "finality and predictability" in the law.[21] They should track emerging local rules and standards on what constitutes an intra-district conflict and which issues are "dispositive." For example, the 8th District Court of Appeals recently issued both a local rule and a practitioner's guide on en banc review, and the 9th District adopted a standing order.[22]

Finally, lawyers should begin to think through some key questions.[23] Can a standard of review ever be "dispositive"? Dictum cannot create an intra-district conflict. So where precisely is the line to be drawn between holding and dictum? When is a new

decision truly in conflict with an earlier one, and when does it merely create an exception to a more general rule?

What of Justice Lanzinger's concerns about "[d]elay, cost and uncertainty"? In 2010, the first year under the new rules, the 8th District received approximately 50 applications for rehearing en banc—a marked increase over prior years—and has designated a staff attorney to handle these applications.[24] By contrast, applications for en banc review appear rare in the smaller districts.[25] The reason for this difference may be that courts with fewer judges are more able to work out conflicts informally. Or, it may be that attorneys in the 8th District, which allowed limited en banc review even before the recent rule changes, have been able to grasp more quickly the opportunities that the new rules present. Over time, as more Ohio attorneys become familiar with these rules, en banc proceedings should assume even greater strategic importance. ■

Author bio

Dennis D. Hirsch is counsel to the firm at Porter Wright Morris & Arthur where he is a member of the firm's Supreme Court and appellate practice group, and its environmental law practice group. He also serves as professor at Capital University Law School where he teaches appellate litigation, property and environmental law.

Endnotes

1 Section 3(A), Article IV, Ohio Constitution.
2 See, e.g., *Schwan v. Riverside Methodist Hosp.* (1982), 1982 Ohio App. LEXIS 15078.
3 *McFadden v. Cleveland State University* (2008), 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672.
4 Id., at ¶4-6.
5 Id., at ¶7-8.
6 Id., at ¶13-14.
7 Id., at ¶19.
8 Id., at ¶16.
9 Id., at ¶39, quoting *W. Pacific RR. Corp.*, 345 U.S. 247, 273 (1953) (Jackson, J., dissenting).
10 App. R. 26(A)(2)(b).
11 App. R. 26(A)(2)(b). App. R. 26(A)(2)(c); App. R. 26(A)(1)(a).
12 App. R. 26(A)(2)(c); App. R. 26(A)(1)(b).
13 App. R. 26(A)(2)(a).
14 App. R. 26(A)(2)(a).
15 Id.
16 S. Ct. Prac. R. 2.2(A)(6)(b); *McFadden*, supra note 3, at ¶19.
17 S. Ct. Prac. R. 2.2(A)(6)(a), (d).
18 S. Ct. Prac. R. 2.2(A)(6)(b).
19 S. Ct. Prac. R. 2.2(A)(6)(b), (d).
20 Loc.R. 26(c)(1) of the 8th District Court of Appeals.
21 *McFadden*, supra note 3, at ¶16.
22 Loc.R. 26 of the 8th District Court of Appeals. Practitioner's Guide, available at http://appeals.cuyahogacounty.us/PDF/EnBanc PractitionersGuide.pdf. Standing Order, available at www.ninth.courts.state.oh.us/En%20Banc%20Standing%20Order.pdf.
23 I thank Tina Wallace, staff attorney for the 8th District Court of Appeals, for helping me to identify these questions.
21 Telephone interviews with Ute Vilfroy, court administrator (Oct. 24, 2011), and with Tina Wallace, staff attorney (Oct. 25, 2011), 8th District Court of Appeals.
24 Telephone interviews with Erin Scanlon, deputy court administrator, 2nd District Court of Appeals (Oct. 19, 2011); Mark Combs, court administrator, 1st District Court of Appeals (Oct. 19, 2011); C. Michael Walsh, court administrator, 9th District Court of Appeals (Oct. 25, 2011); and Jack Kullman Jr., court administrator, 10th District Court of Appeals (Oct. 25, 2011).

Foundation News

OSBF awards honor difference-makers in the profession

The Ritter Award

Stephen E. Chappelear

A partner with Hahn Loeser & Parks LLP, Chappelear devotes substantial time and talent to many legal organizations. He is the current president of the National Conference of Bar Foundations and serves as the chair of the Trial Techniques Committee of the American Bar Association Tort Trial and Insurance Practice Section. Chappelear is the past president of the Ohio State Bar Foundation, the Ohio State Bar Association, the Columbus Bar Association, the Chief Justice Moyer American Inn of Court and the National Metropolitan Bar Caucus. Nominator Stephen Tilson said of him, "I can think of no one who better exemplifies what the Ritter Award is all about than Steve Chappelear. He is one of Ohio's legal giants and philanthropic gems."

Chappelear dedicates countless hours of time to The Ohio State University. He serves on the advisory council of the College of Arts and Sciences and is a member of the board of directors of the Social and Behavioral Sciences College Alumni Society. He also serves as a member of the OSU Moritz College of Law National Council and as president of its Law Alumni Association. "Steve has demonstrated that, no matter how busy a lawyer may be in his or her practice, there is always time available to do the right thing by the profession and the public," said Tilson.

The Honorary Life Fellowship Award

Harold D. Spears

Spears was recognized for his dedication to the legal profession and the community. After having graduated magna cum laude from Marshall College, Spears received a scholarship to study at the Duke University School of Law. A WWII Navy combat veteran, he was elected as Ironton's city prosecutor in 1953. He took on big-time gambling syndicates, burglary rings and even the mafia. Three of his high-profile murder cases became the subject of stories published in national detective magazines. Following two terms as prosecutor, Spears went on to be elected probate and juvenile court judge. Soon after, he began to practice law privately and established a successful firm that continues today with his son and grandson. "Hal is a gifted attorney and a man of the highest standards of personal and professional qualities," said Spears' son-in-law, Joseph Halcomb.

Over the years, Spears has served as chairman for the Volunteer Services and Rehabilitation Committee of the Ohio Mental Health Association and as president of the Lawrence County Bar Association. He was recognized by the Ohio State Bar Association for 60 years of service to the legal profession and has been listed as one of the top 10 most influential people in Lawrence County by the *Ironton Tribune*. His lifetime dedication to leadership and the law has been a blessing to countless people.

The Community Service Award for Attorneys 40 and Under

Shawna L'Italien

L'Italien has excelled both professionally and in her service to her community. Having received her undergraduate degree magna cum laude from Mount Union College, she attended The Ohio State University Moritz College of Law, where she served as managing editor of the Journal on Dispute Resolution. After law school, she joined Harrington, Hoppe & Mitchell, LTD. In just six years, she achieved the status of partner with the firm while giving many hours of service to her community.

L'Italien serves on the board of directors for the Salem Community Hospital, the Columbiana County Mental Health Clinic and the United Community Scholarship Foundation. She has also dedicated her time and expertise to serve as the chair of the Charitable Foundation for Salem Community Hospital. L'Italien has received the Mahoning Valley Professionals 20/30 Club's Forty Under Forty MVP Award as well as the Athena Award from the Youngstown/Warren Regional Chamber and *The Vindicator* for professional excellence and community leadership. Nominator Patricia Brozik said of L'Italien, "Shawna is persistent, tenacious and focused of the community's needs. She is also humble and has the heart of a true philanthropist."

The Outstanding Program or Organization Award

Fugitive Safe Surrender

The Fugitive Safe Surrender (FSS) program was created by U.S. Marshal Peter Elliot after a Cleveland police officer was killed by an individual being served an arrest warrant. In fall 2010, FSS brought in a national record of 7,431 fugitives over a four day period at Mount Zion Church in Cleveland. Since its inception, thousands of fugitives have surrendered in 25 cities across the country.

The goal of Fugitive Safe Surrender is to reduce the risk to law enforcement officers who pursue fugitives, to the neighborhoods in which they hide, and to the fugitives themselves. Federal Public Defender Dennis Terez said, "I am pleased to nominate the FSS program for the prestigious OSBF award. It is long overdue. We in our community and in our state need to take the time to acquaint ourselves with this great program that has helped so many people."

The FSS program uses churches and community centers as temporary courthouses where people with outstanding arrest warrants can turn themselves in by way of a non-threatening environment. For thousands of fugitives who have no history of violence, FSS offers a unique opportunity to take their first and most crucial step toward community re-entry. This is not an amnesty program, but individuals who turn themselves in often benefit from their cooperation and willingness to participate in the program. One evaluator of the program said, "People have continued to show up to put their lives back together, to live without looking over their shoulders." ■

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Books and Bytes

Compiled by Andrew Hartzell and Kayla Lewis

Supreme Court adopts new Writing Manual

The Supreme Court of Ohio released a new comprehensive guide to writing judicial opinions, which will be applied in the Court's opinions effective Jan. 1, 2012. The new guide replaces the original Manual of Citations, an interim version and later revisions.

Divided into three parts, the Writing Manual contains guidance on proper citation format for opinions, cases and statutes in Supreme Court opinions; proper style for Supreme Court opinions; and a new section with examples on how to structure an opinion.

Justice Judith Ann Lanzinger served as chair of the Supreme Court of Ohio Style Manual Committee.

"We on the committee are pleased with this update. Certain rules idiosyncratic to Ohio have been modified for easier citation, and the sections on style and drafting offer specific suggestions and illustrations for consideration," Justice Lanzinger said. "We hope this manual will be easy to work with and useful not just to the Supreme Court, but to other judges and attorneys as they draft their own opinions and briefs."

The first portion of the manual includes a few significant changes:

- The date of a judicial opinion now appears at the end of the citation;
- Signals are now italicized;
- Citations of print-published appellate cases now identify the district of decision.
- The federal circuits are now identified using "Cir.," e.g., 6th Cir. instead of C.A.6;
- Federal statutes are now cited using "U.S.C.," e.g., 42 U.S.C. 1982 instead of Section 1982, Title 42, U.S. Code;
- Ohio case citations no longer include Ohio Bar Reports (OBR) or Ohio Opinions (O.O., O.O.2d, O.O.3d);
- Block quotations now may be used; and
- Citations in footnotes are disfavored.

Manual instructions also cover how to cite opinions before and after May 1, 2002, when the Supreme Court began posting all opinions online.

The manual is available on the Supreme Court website at www.supremecourt.ohio.gov/ROD/manual.pdf. ■

—www.supremecourt.ohio.gov
Nov. 28, 2011

Cloud computing brings rise to security issues

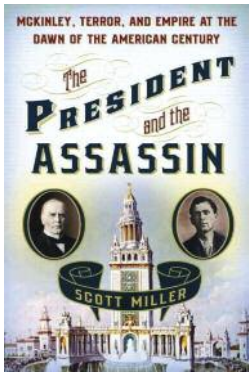
Law firm technology managers are addressing cloud computing with a larger focus on security, according to an annual survey at www.americanlawyer.com. Of the respondents, 61 percent said that security concerns were a drawback to cloud computing. Although 65 percent said that they still use cloud computing, a majority of the use was for non-core functions like human resources.

The technology survey revealed other key findings:

- Technology capital budgets of reporting firms average $4.7 million, 7 percent more than last year; and
- Ninety-six percent of firms use iOS, which is the operating system for iPhones and iPads. ■

—www.marketwatch.com
Nov. 1, 2011

Book Review



The President and the Assassin: McKinley, Terror and Empire at the Dawn of the American Century, by Scott Miller. 422 pages. New York, NY: Random House. 2011. Illus. $28.

At the turn of the 19th century, the United States was a violent land. Public hangings were still in vogue. The dying embers of Civil War Reconstruction were still used to torture the bare feet of former slaves, and the huge influx of immigrants became a rallying cry for industrial and social reforms. In 1901, William McKinley was serving his second term as the 25th president when, like his White House predecessors Abraham Lincoln and James Garfield, he was assassinated.

Against this backdrop, Scott Miller, a correspondent for The Wall Street Journal and Reuters, has written a sprawling book about McKinley's ill-fated role in America's rise as a superpower.

Born in 1843 in Niles, Ohio, McKinley forged a classic political route to the presidency. Despite dropping out of college his freshman year, he eventually was admitted to the Ohio bar in 1867. He served in the Civil War and subsequently held elective offices as Stark County prosecutor, a member of the U.S. House of Representatives and Ohio governor before succeeding Grover Cleveland as president in 1896.

Squared up twice against his Democratic rival, William Jennings Bryan, in both the 1896 and 1900 presidential elections, McKinley was succinct in summarizing his own public speaking deficiencies: "I might just as well put up a trapeze on my front lawn and compete with some professional athlete as go out speaking against Bryan." McKinley's front lawn was located on Market Street on the northside of Canton. (The house has been demolished and is now the site of a library.) His "Front Porch" campaign kept him at home, unlike Bryan, who traveled widely, giving hundreds of stump speeches in far-flung campaign stops.

Miller's biographical treatment of McKinley's assassin, Leon Czolgosz, is sparse in comparison to the rest of the book and belies the book's main title, The President and the Assassin. Miller delves into esoteric minutiae of one of the defining episodes of McKinley's tenure, the Spanish-American War, linking America's quest for naval superiority and land grabs in the Philippines and Puerto Rico with the rise in socialism and anarchist adherents. Miller could have cut the book's length in half by concentrating on the details of McKinley's death and the prosecution of his assassin or expanded it into a detailed primer on the rise of America's global power in the 1900s.

McKinley was shot by Czolgosz while standing in a public receiving line attending the Pan-American Exposition in Buffalo, N.Y. Czolgosz, who had strong ties to northeast Ohio, was infatuated with the anarchist movement. Miller describes the anti-government lot "as a collection of intellectual crackpots, almost exclusively foreign born, and maladjusted."

Captured immediately after the shooting, Miller's analysis of Czolgosz's murder trial is brief, geared more for a general audience than readers familiar with the legal system. Justice was swift, like the hung Lincoln conspirators. The jury trial lasted less than two days. At the arraignment, one of the defendant's lawyers informed the court, "I wish to say that I am accepting this assignment against my will and while it is more repugnant to me than my poor words can tell, I promise to present whatever defense the accused may have." Within two months after the shooting, Czolgosz was dead—tried, convicted and sentenced to death by electrocution.

Vestiges of McKinley's life are still prominent in Ohio. The state flower, scarlet carnation, pays tribute to the president's habit of wearing the blossom on his lapel. His wife's former home in downtown Canton now serves as part of the grounds of the National First Ladies' Library, and an impressive memorial towers over the west side of the city.

Miller's version of McKinley's death leaves open the question whether the pistol wounds were severe enough to cause the president's demise eight days after being shot, or he died because of deficient medical care. The author also raises the intriguing question of whether the assassination was part of an anarchist conspiracy or whether Czolgosz acted alone. A more in-depth study of such details would have sharply narrowed the focus of the book from simply a wide-ranging overview of McKinley's main foreign policy goals. ■

—Bradley S. LeBoeuf
Akron

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Member News

Beachwood

Laurie G. Steiner, Budish, Solomon, Steiner & Peck Ltd., has been honored as a 2010/2011 Professional Woman of the Year in Elder Law by the National Association of Professional Women.

Cleveland

Stacy Chubak Hinners, Buckley King LPA, has been selected to join the Cleveland Employment Lawyers Inn of Court.

Ronald R. Janke, Jones Day, has been inducted into the American College of Environmental Lawyers as a Fellow.

Irene M. MacDougall, Tucker Ellis & West LLP, has been named a national 2011 Impact Award Winner by the Commercial Real Estate Women Network.

Columbus

Thomas I. Blackburn, Buckley King LPA, has been invited to join the Council on Litigation Management.

Lisa House, Reminger Co, LPA, has been appointed to the Heinzerling Foundation Board of Trustees.

Jeffrey D. Porter, Kegler Brown Hill & Ritter, has been selected to serve on the U.S. Department of Health and Human Services' Regional Health Equity Council for Region V.

Dublin

Jeffrey A. Rich, Rich & Gillis Law Group, LLC, has been reappointed as chair of the Ohio Arts Council.

Valoria Hoover, Kohrman Jackson & Krantz PLL, has been appointed to the Columbus State Community College Board of Trustees. ■

In Memoriam

Joseph F. Cook Jr., 54	Akron	Jan. 20, 2011
Robert Blair Matusoff, 80	Dayton	March 2, 2011
Roger Matheny, 55	Dayton	March 3, 2011
C. Richard Fox, 31	Columbiana	March 10, 2011
Dr. Solomon M. Fulero, 60	Dayton	April 29, 2011
Bennett Yanowitz, 88	Cleveland	May 31, 2011
William F. Snyder, 88	Rocky River	June 6, 2011
Norman Harold Weinstein, 85	Cleveland Heights	July 18, 2011
Richard T. Watson, 77	Cleveland	July 20, 2011
Charles J. Gallo, 82	Cleveland	Aug. 3, 2011
James R. Graves, 82	Copley	Aug. 26, 2011
Clark Pritchett, 68	Columbus	Sept. 24, 2011
Norman Rubinoff, 70	Toledo	Oct. 11, 2011
Leon L. Wolf, 84	Cincinnati	Oct.11, 2011
Harold B. Talbott, 93	Columbus	Oct. 12, 2011
Edgar A. Strause, 84	Columbus	Oct. 14, 2011
H. Alfred Glascor, 97	Columbus	Oct. 20, 2011
L. Jay Clark Jr., 84	Malvern	Oct. 20, 2011
Alton L. Rinier, 90	Canton	Nov. 17, 2011
Robert V. Franklin Jr., 85	Toledo	Nov. 29, 2011

Editor's note: The following is corrected information from the November/December 2011 issue.

F. Stuart "Stu" Wilkins, 83	North Canton	March 29, 2011 ■

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Program: 8:30 a.m. - 4:30 p.m.

1/26 - Columbus - Ohio State Bar Association

2/10 - Cleveland - The Ritz Carlton

Whistleblower

3.0 CLE credit hours

Registration: 8 a.m.

Program: 8:30 a.m. - 11:45 a.m.

2/9 - Columbus - Ohio State Bar Association

Live Simulcast

Nuts and Bolts of Wills and Trusts

6.0 CLE credit hours

Registration: 8 a.m.

Program: 8:30 a.m. - 4 p.m.

2/16 - Akron, Cleveland, Columbus, Fairfield, Perrysburg

Insurance Staff Counsel

4.0 CLE credit hours

Registration: 8 a.m. 2

Program: 8:30 a.m. - 12:45 p.m.

2/24 - Columbus - Ohio State Bar Association

2/24 - Cleveland - The Ritz Carlton

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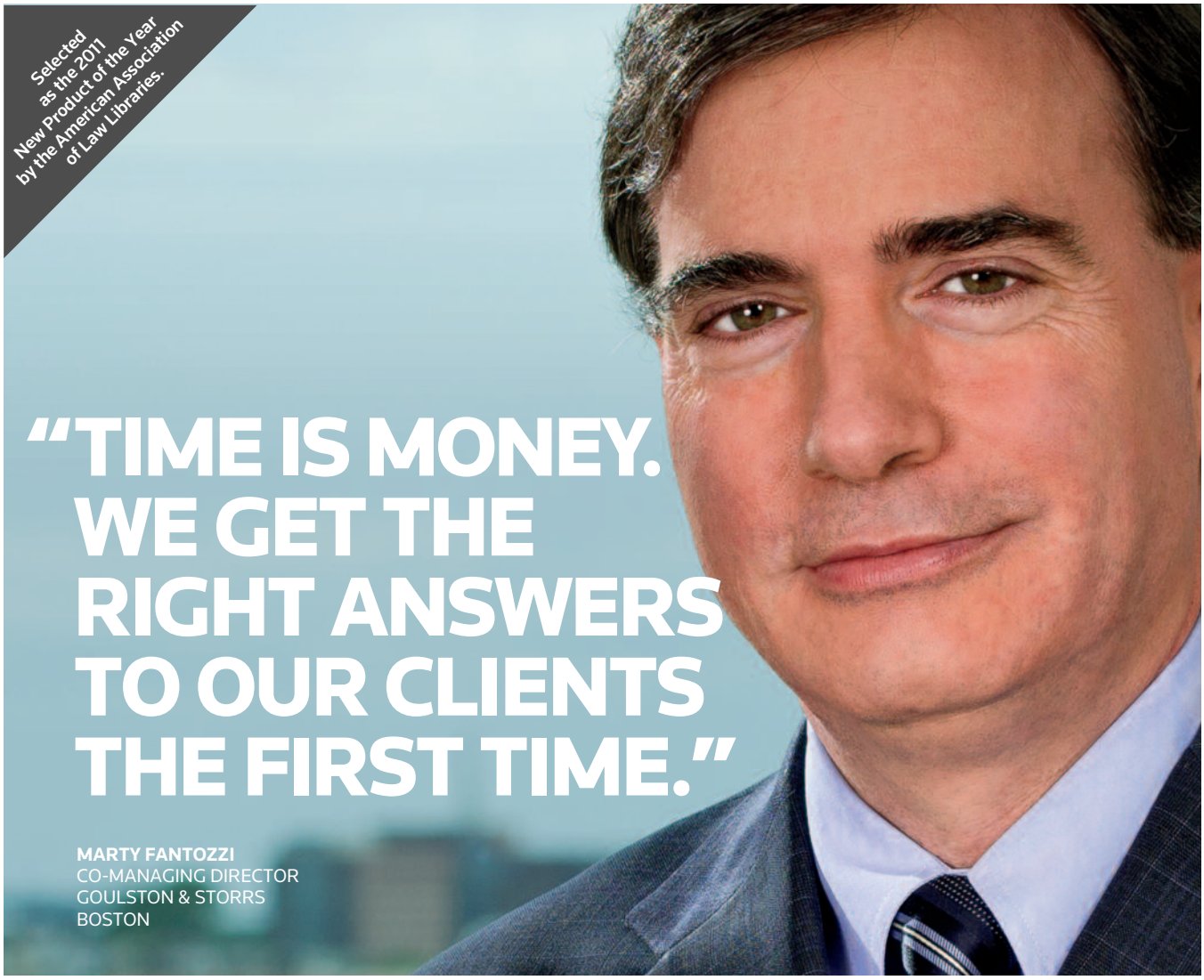

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