

# IPSO JURE

Vol. 25 No. 4

Geauga County Bar Association

October 2005

## Annual Dinner & Casino Night



**N**ovember 19 will be the GCBA's Annual Dinner. This year, it will be at the Chagrin Valley Athletic Club in Bainbridge Township. Cocktails will begin at 6:00 p.m. At 6:30, a fabulous dinner will be served. The introduction of new officers to the bar will take place during the meal. After dinner, the games will begin. If you have any questions, call **Sheila Salem** at (440) 285-2222 ext. 5760 or Susan at ext. 2450.3

## Golf Outing Winners

The annual golf outing was quite a success. Here is a rundown of the prize winners

1<sup>st</sup> Place Team:

**Joseph Svete**, captain

2<sup>nd</sup> Place Team:

**Pearce Leary**, captain

High Score:

**Dave McGee**, captain

Long Drive Men: **Jaredd**

**Flynn**

Long Drive Women:

**Lisa Carey**

Pin Shot #17: **James Reardon**

Pin Shot #7: **Perrin Sah**

Long Putt: **Dr. Jon Floriano**

Shortest Drive: **C. Lynne Day**



Committee Chair **James Flaiz** thanks the following volunteers for their work at the outing: **Diane Buxton**, **Joanne Monaco**, **Linda Kostelnik** and **Denise Kaminski**. He has already started planning next year's outing.3

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## CLE 1st Friday Seminars

There are 2 programs left in the series.

11/4 Notary Refresher Course and Domestic Relations Update

12/2 Procrastinator's Seminar for Ethics and Professionalism

Each program is 2 hours. The 12/2 program covers the Ethics and Professionalism requirements. Please call Susan at (440) 285-2222 to register. 3

Ipsos Jure, a publication of the Geauga County Bar Association, is edited by **Paul A. Newman, Esq.** Committee members are: **Mary Jane Trapp, Esq., Lisa Carey, Esq., Larry Wharton, Esq., Tom Perotti, Esq., Stephen G. Macek, Esq., Pamela Makowski, Esq. and Heidi Cisan, Esq.**



# PRESIDENT'S COLUMN

Ann M. D'Amico, Esq.

St. Yves the patron saint of Lawyers, is often depicted with or as a cat. Interesting that a traditionally a male profession is symbolized by a feline—a soft, cuddly, gentle creature with a female connotation.

Personally, I have never owned a cat. Most of what I know about cats, I have learned from reading. I am aware, however, of the rivalry between cat and dog owners. I am aware of famous cats—Garfield, Felix, Morris and Tom. But, are they even close in popularity to Lassie, Rin Tin Tin and Old Yeller? Eddie from Frasier? The RCA Dog? Spuds MacKenzie? Snoopy????? Have you ever seen a cat assisting a blind person? A rescue cat searching debris at a disaster site? A therapy cat visiting in a hospital? What is dog spelled backward? But, wait. I am getting caught up in the rivalry. And for those of you who have seen that little bit of fluff I call my dog, you know almost any cat could destroy her in a fight.



I am NOT a Poodle!

Cats are very independent creatures. They spend about 70% of the day sleeping and 15% of it grooming. The top two rows of a cat's whiskers can actually move independently from the lower two rows. Domestic cats have been known to reach running speeds of up to 25mph. Cats outnumber dogs by millions as house pets. Famous cat lovers include Winston Churchill, Abe Lincoln, Sir Isaac Newton and Mark Twain.

T.S. Eliot immortalized cats in Old Possum's Book of Practical Cats, which later became the basis for CATS, the longest running show on Broadway. Hard not to be impressed by that. We've all heard that a cat has nine lives. And that Black cats bring bad luck. Chinese legend holds that a cat is the product of a lioness and a monkey. The prophet Mohammed allegedly believed dogs to be unclean, but loved cats so much that he once cut the sleeve from his robe to avoid disturbing his cat which had gone to sleep in his arms.



Denise Kaminski & Susan sell mulligans at the Golf Outing

So, cat lovers, here's your chance, equal time. My last contest as President will be Feline Fotos. That's right, being Halloween, black cats and all that, I had to do it. I invite you to submit pictures and stories about your kitty companions for the next issue of Ipso to [gcll@nls.net](mailto:gcll@nls.net) or to Susan. Prizes for all!

Finally, on a serious note, I want to say that I have greatly enjoyed my year as Bar President. I am confident Steve Macek will make the next year an outstanding one for the Bar Association and I wish him and all the officers a successful term.<sup>3</sup>

## ARE "PAY TO STAY" JAIL COST REIMBURSEMENT PROGRAMS CONSTITUTIONAL?

by Thomas I. Perotti, Esq.

My visceral knee-jerk reaction to the increasingly popular "pay to stay" programs, that requires inmates to pay back the costs of feeding and housing them, has been that it must be a positive program because it recoups tax dollars.

However, I thought about this issue differently when the inmate in question (my client got a OVI) is a hard working, Geauga county homeowner and taxpayer that received a bill for staying at the euphemistically named Geauga Safety Center—Damn it, shouldn't this be taken out of his federal, state, local, county, city, regional sewer district, RITA, global, or universalism taxes????!! A Hamilton county, Ohio, "pay to stay" program was found to be unconstitutional. In *Allen v. Leis* (2002) 21 F. Supp2d 819, the plaintiff was charged a jail "booking fee" for his pre-trial detention in the Hamilton county jail. Plaintiff brought suit under 42 USC 1983 claiming that his Fifth and Fourteenth Amendment rights were violated by a taking of personal property without due process of law. The United States District Court, Southern District of Ohio, agreed and held the Pay for Stay Program fails to afford prisoners due process and is therefore unconstitutional.

More research to follow. If any of my distinguished colleagues have any thoughts, feelings, or information on this issue, please e-mail me at [attorneyperotti@yahoo.com](mailto:attorneyperotti@yahoo.com) <sup>3</sup>



# 11TH DISTRICT COURT OF APPEALS

Summaries October 2005

By Linda Ireland

**O**n September 9, 2005, in *Rendina v. Rendina*, 11th Dist. No. 2003-L-193, 2005-Ohio-4772, the court of appeals affirmed the judgment of the trial court. The court held that the trial court did not abuse its discretion in granting appellee a divorce based upon extreme cruelty. The court determined that appellant's contention that the trial court delayed him the opportunity for a hearing for over eight months and



Ed Brice's team at the 2005 Golf Outing

that the temporary restraining order was an unconstitutional deprivation of his real property interest was not well-founded. The court stated that appellant failed to show that \$25,000 allegedly hidden under his bed

constitutes separate property pursuant to R.C. 3105.171(A)(6)(a)(ii). According to the court, pursuant to R.C. 3105.18(E)(1), the trial court did not retain jurisdiction to modify the spousal support award since there was no change of circumstances and because the decree contained no provision specifically authorizing the court to modify the amount or terms of the spousal support award. Also, the court indicated that the trial court did not abuse its discretion in awarding attorney fees to appellee.

**O**n September 9, 2005, in *Kosovich v. Kosovich*, 11th Dist. No. 2004-L-075, 2005-Ohio-4774, the court of appeals affirmed the judgment of the trial court. The court stated that the trial court did

not abuse its discretion when it refused to deviate from the amount calculated in accordance with the child support guidelines. The court noted that the magistrate's decision, which was adopted by the trial court, contained a child support computation worksheet as required by R.C. 3119.022. The child support for the minor children was calculated according to the worksheet, and unless the trial court deviates from this amount, the court does not need to justify its decision. In addition, the court said that appellant failed to meet his burden of demonstrating that the guideline amount of child support was unjust, inappropriate, or not in the best interest of the minor children. Also, the court held that appellant has not shown that a deviation from the amount was warranted.



Steve Patton enjoys lunch before golfing

**I**n *Hiram College v. Courtad*, 162 Ohio App.3d 642, 2005-Ohio-4331, the appellate court affirmed the judgment of the Portage County Municipal Court, Ravenna Division. Following a bench trial, the trial court found for the defendant. The court of appeals upheld the judgment, ruling that the college did not meet its evidentiary burden of showing that a contract existed with the student. The court held that a plaintiff must still demonstrate the underlying elements of a contract when pursuing an action on account. 3

## THE SECRET PEDOMETER CLUBS OF THE CHARDON COURTHOUSE

by Paul A. Newman, Esq.

Newman & Brice

**U**nknown to many, but discovered by this intrepid investigative editor, there are secret Pedometer Clubs operating in and around the courthouse. I happened on this nefarious group whilst attending Annie Edgington's retirement party at the Bass Lake Club. I was talking to four lovely women, and two of them started talking about their steps, hands moved down to their waists, and they flipped open a little device to read. Having just purchased a pedometer the week before, and

coincidentally wearing it at the time, I knew exactly of what they flipped and spoke. I flipped open my little Accusplit (that's the name of a manufacturer, by the way) and paced right into the conversation about steps and mileage, etc.

Then, they started naming other persons who wear pedometers. I was compiling a list of aggressive walkers. Then, I discovered that there were at least three pedometer teams of no less than ten people per team operating in and around the courthouse. It was like a badge of courage. Then I discovered that these teams are on a one month schedule and that there is a prize for the most steps at the end of the month; whether monetary, congratulatory, or ambulatory, I do not know.

The end result of all this, I do not know. But the health of the courthouse, like the decibels at Annie's retirement party, has increased substantially.<sup>3</sup>



Chris Condon, Tammy McClintock, Karen Lee & Carolyn Paschke at Annie's party

Common Pleas judge) and Ben Skall sponsored a bill to create the private judge system. The first retired judge to become a private judge was the late George McMonagle of Cuyahoga County.

A private judge is a retired judge who registers with the clerk of a court of common pleas, municipal court, or county court to receive referrals for adjudications of civil actions or proceedings and submissions for determination of specific issues or questions of fact or law in any pending civil action or proceeding.<sup>1</sup>

Each court "shall" maintain an index of all retired judges who have registered with the clerk of that court and shall make the index available to any person, upon request.<sup>2</sup>

When a matter is either referred or submitted to a private judge that judge has "all of the powers, duties, and authority of an active judge of the court in which the action or proceeding is pending" and "[a]ny judgment entered, and any finding of fact, conclusion of law, or determination of an issue or question made, by a retired judge in accordance with this section shall have the same force and effect as if it had been entered or made by an active judge of the court, and any appeal from the judgment, finding, conclusion, or determination shall be made as if the judgment had been entered, or the finding, conclusion, or determination had been made, by an active judge of the court."<sup>3</sup>

There is no limitation upon the number, type, or location of courts with which a retired judge may register under this division.<sup>4</sup>

#### **Procedure for Use of A Private Judge**

Upon unanimous written agreement entered into by all parties and a registered retired judge, the parties to any civil action or proceeding pending in any court of common pleas, municipal court, or county court may choose to have the action or proceeding in its entirety referred for adjudication, or to have any specific issue or question of fact or law in the action or proceeding submitted for determination, to a judge of their choosing who has registered with the clerk of that court.<sup>5</sup>

#### **The Written Agreement**

The written agreement must contain all of the following; one, a designation of the retired judge; two, a detailed description



Pearce Leary's Team at the 2005 Golf Outing

## **PRIVATE JUDGES: EFFICIENT ADR OR CREATION OF A TWO- TIERED JUSTICE SYSTEM?**

By Mary Jane Trapp, Esq.

Apicella & Trapp

Recent articles in the Cleveland *Plain Dealer* have focused light on the use of private judges for civil jury trials. Some judges in Cuyahoga County have questioned the constitutionality of the practice and have also questioned whether the court and ultimately the taxpayers are obligated to provide the private judges a courtroom, support staff, and jurors for these private trials.

#### **The Private Judge Statute-O.R.C. Section 2701.10**

Private judging or "rent-a-judge", as the practice was called by one court of appeals judge, began with the passage of Revised Code Section 2701.10 in 1984. Representatives Ron Suster (now a Cuyahoga County

of the specific issue or question to be submitted; three, an indication that either the action or proceeding in its entirety is to be referred to, and is to be “tried, determined, and adjudicated” by that retired judge or an indication that the issue or question is to be submitted and is to be “tried and determined” by that retired judge; four, an indication that the parties will assume the responsibility for providing facilities, equipment, and personnel reasonably needed by the retired judge during his or her consideration of the action or proceeding and will pay all costs arising out of the provision of the facilities, equipment, and personnel; and five, identification of the amount of compensation to be paid by the parties to the retired judge for his or her services and the manner of payment of the compensation.<sup>6</sup>

The written agreement must be filed with the clerk of the court or the judge before whom the action or proceeding is pending.<sup>7</sup>

When the agreement is filed the statute mandates the referral or submission in accordance with the agreement.<sup>8</sup>

The statute makes it clear that the court “...is not required to provide the retired judge with court or other facilities, equipment, or personnel during his consideration of the action, proceeding, issue, or question...” and that the “...retired judge shall not receive any compensation, other than that agreed to by the parties and the retired judge, for his services during his consideration of the action, proceeding, issue, or question.”<sup>9</sup>

### **The Trial and Appeal**

After referral the retired judge will try all of the issues in the action or proceeding or will make a determination on the issue or question submitted, will prepare relevant findings of fact and conclusions of law, will enter a judgment in the action or proceeding and file same with the clerk of court in the same manner as if he or she were an active judge of the court. Any judgment entered, and any finding of fact, conclusion of law, or determination of an issue or question made, will have the same force and effect as if it had been entered or made by an active judge of the court. The procedure for appeal is the same as in a regular case.<sup>10</sup>

The Tenth District Court of Appeals in the case of *Huffman v. Huffman*, a domestic relations case involving a post-decree matter that was re-referred to the same private judge who heard the original action, addressed the question

of the extent of the powers conferred on private judges.

The court explained that “...the parties' consent does not confer subject matter jurisdiction on the retired judge. Rather, the statute, RC 2701.10, in accordance with Section 4(B), Article IV, Ohio Constitution, confers broad subject matter jurisdiction on a retired judge who is appointed to the legally existing office to adjudicate ‘any civil action or proceeding pending in any court of common pleas.’



The Svete, McGee & Carrabine team at the 2005 Golf Outing

Moreover, the statute provides that, as to a particular assigned case, the appointed judge is vested with the same jurisdiction and power over the matters the parties submitted as a sitting common pleas judge. R.C. 2701.10. The parties' consent is limited to: (1) whether a retired judge will be appointed as a special judge, in place of the common pleas judge, in the civil action or proceeding, and (2) the scope of the matters to be submitted to and decided by the retired judge during his or her assignment to the case over which the judge has subject matter jurisdiction by virtue of the statute.”<sup>11</sup>

The issue of the authority to conduct jury trials has not been addressed by any case to date, but Judge Richard Markus, a retired judge from Cuyahoga County who regularly serves as a private judge has addressed the issue in a memorandum on the topic. He writes, “...nothing in R.C. 2701.10 specifically denies the private judge’s authority to conduct a jury trial. R.C. 2701.10(A) expressly limits its application to “any civil action or proceeding.” Nowhere does the statute limit its use to “non-jury” actions or proceedings. When R.C. 2701.10(B)(1) specifies the agreement which the parties must sign and file to obtain a referral or submission, it does not mandate a waiver of their constitutional right to a jury trial. Indeed, Civ. R. 39(A) requires the court to provide a jury after any party makes a timely jury demand, unless the parties all sign a written jury waiver stipulation or an oral jury waiver stipulation on the record. For a matter of this consequence, courts should not infer a contrary legislative intent from silence. The statute does not deny the right to a jury trial for these statutory private judge proceedings.”<sup>12</sup>

Judge Markus’ memorandum also addresses the question of whether a court can and should provide jurors. He writes, “...we find nothing in RC 2701.10 which denies that authority.” He explains that statutory language “...eliminates the court’s duty to provide the parties and their private judge with support space, equipment, or court personnel, presumably because it seeks to avoid imposing any additional burden which the court would not otherwise incur.

It does not specifically affirm or deny any obligation to provide jurors. The combination of Ohio Constitution, Article I, § 5 (right to a jury trial); Art. IV, § 4(B), and RC 2701.10 may require trial courts to provide jurors for private judges cases. If a court must provide jurors when the Chief Justice assigns a visiting judge for that court, can that court decline to provide jurors for parties who select a private judge for that court? However, assuming that the reference in RC 2701.10(C) to “facilities” or “personnel” constitutionally encompasses jurors, it says the court is not required to provide the parties with those facilities or personnel for proceedings it refers to private judges. It clearly does not say that the court in which the action is pending shall not provide those parties with court or other facilities, equipment, or personnel.”<sup>13</sup>

Judge Markus notes that the expense in providing jurors for a private judge’s trial does not increase the court’s expenditures since the court would need the same jurors for a regularly assigned judge or a visiting judge to try the same case if it remained on the regular docket, and the recent amendment to O.R.C. Section 2335.38 in theory reduces costs by taxing all juror fees to the losing party.

### Why Use a Private Judge?

Why would parties voluntarily agree to pay for a private judge, especially when the hourly rate may range from \$200 to \$450 per hour? The proponents of the practice argue that the method reduces docket time, speeds motion practice, improves judicial access as the parties have the undivided attention of the judge, and permits greater schedule control. An informal survey of trial lawyers who have participated in this practice reveals, however, that the primary reason for turning to a private judge is dissatisfaction with the assigned judge. Thus an obvious question arises—is this just sanctioned “judge shopping” for those who can afford to shop? We must also ask whether it is appropriate to have a two-tiered system of justice in which those who can afford the “premium” system may opt out of the regular docket.

Litigants interviewed about their private judging experience express general satisfaction, especially those who utilized a private judge in the domestic relations area. One couple wanted a speedy dissolution conducted in a private setting. For the total cost of \$75 (exclusive of legal

fees) they hired a private judge, agreed to waive the waiting period, and had a hearing in private office setting.

The use of private judges has also been suggested as a new tool in pro bono projects.

### Practice in the Eleventh District

A telephone survey of judges, clerks of court, and court administrators of common pleas courts in the five counties within the Eleventh District reveals that while some parties have discussed the possibility of referral of a civil jury matter to a private judge, no one is aware of any case that has actually been referred.



The Thrasher, Dinsmore & Dolan team included Jeff Simler, Dale Markowitz, Jared Flynn, and Sandy Krulak.

Judge Forest Burt of the Geauga County Common Pleas Court and Judge Andrew Logan of the Trumbull County Common Pleas Court both note that their courts do not have extra courtrooms and court reporters for such private trials. Jurors in Geauga County are called for specific cases, so there is no excess juror pool to tap for jurors in a private case.

Another judge interviewed suggested that attorneys may be reluctant to remove a case to a private judge as it may offend the assigned judge.

### Supreme Court Review

The *Plain Dealer* reported that the Supreme Court of Ohio has declined a request to provide an advisory opinion about the use of private judges in civil jury trials. Cuyahoga County Common Pleas Judge Nancy Russo recently issued an order restricting the use of private judges. At some point this issue will make its way to the Supreme Court either by appeal or through the court’s rule making authority.

Some courts have addressed these issues through local rules pertaining to alternate dispute resolution.

On August 5, 2005, the Board of Commissioners on Grievances and Discipline issued an opinion that a retired judge who engages in the practice of law may also serve as a private judge pursuant to R.C. § 2701.10. The opinion cautions that in order to “avoid an appearance of impropriety, a retired judge should not practice law in the court in which he or she frequently accepts referrals as a private judge and should not act as a lawyer in any proceeding in which he or she served as a private judge or in any related proceeding.”<sup>14</sup>

### Conclusion

While the private judge statute has operated “under the radar” of controversy for many years and the current controversy appears to be confined to Cuyahoga County, the issue has focused light on the allocation of scarce resources

for our judicial system. Questions remain whether the statute has created a two-tiered system with a premium level of service only for those who can afford it and whether the “judge shopping” aspect, which is admittedly the intent of some parties who choose private judging, further undermines public confidence in our justice system.

#### Endnotes

1. O.R.C. § 2701.10(A)
2. O.R.C. § 2701.10 (A)
3. O.R.C. § 2701.10 (C)
4. O.R.C. § 2701.10 (A)
5. O.R.C. § 2701.10(B)(1)
6. O.R.C. § 2701.10(B)(1)(a)-(e)
7. O.R.C. §2701.10(B)(2)
8. O.R.C. §2701.10(B)(2)
9. O.R.C. §2701.10 (C)
10. O.R.C. §2701.10 (D)
11. *Huffman v. Huffman*, (November 5, 2002), Franklin App. No. 02AP-101, 02AP-698, unreported, 2002 WL 31466435 at ¶38.
12. *Can Private Judges Conduct Jury Trials*, Judge Richard Markus, retired.
13. *Ibid.*
14. Op. 2005-8, 8/5/05.3



C. Lynne Day, Lisa Carey, David McGee & Dorothy Lee at the 2005 Golf Outing

expenses to either party if the court finds the award equitable.” The statute distinguishes between pre and post-decree cases and the evidence that may be considered. In an original action or an appeal, the court may consider marital assets and income, temporary spousal support awarded, the conduct of the parties and any other relevant factors. In a post-decree matter the court may consider the parties’ income, the conduct of the parties and any other relevant factors. However, the court may not consider the parties’ assets.

R.C. 3105.73 further provides that the court may order attorney fees to be paid in gross or by installments. It also provides that attorney’s fees and litigation expenses can be designated as spousal support. Although the effective date of R.C. 3105.73 is April 27, 2005 it has been held to be retroactively applied to any case filed prior to April 27, 2005 and still pending. In *Packard v. Packard*, 2005 Ohio 4392; 2005 Ohio App. LEXIS 3988 the Eighth District Court of Appeals determined that the legislature intended the new statute to apply retroactively and held it to be controlling in a case which had been filed and briefed prior to April 27, 2005.

As a practical matter, R.C. 3105.73 will be applied to any case now pending before the domestic relations court that has an issue of attorney’s fees.<sup>3</sup>

## ATTORNEY’S FEES IN DOMESTIC RELATIONS CASES

By Lynn B. Schwartz, Esq.

Thrasher, Dinsmore & Dolan

**T**here is a new statute which governs the award of attorney’s fees and litigation expenses in domestic relations cases.

R.C. 3105.73, effective April 27, 2005 has replaced R.C. 3105.18(H). Formerly, in 3105.18(H), the court was to apply a two-pronged test. It had to determine 1) that the paying party had the ability to pay the fees awarded and 2) whether the receiving party would be prevented from fully litigating his or her rights and adequately protecting his or her interests without an award of fees. Under the new statute, this test has been replaced by an equitable standard. R.C. 3105.73 reads in part: “In an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that action, a court may award all or part of reasonable attorney’s fees and litigation

## THE LAW HAS PASSED YOU BY

by Paul A. Newman, Esq.

Newman & Brice

**L**ast week I got the green book, which I do every week. The Bar information was pages 484-506 (22 pages). The Supreme Court docket section was pgs 1521-1538 (37 pgs). The Supreme Court cases section was pgs 350-383 (33 pgs). The Courts of Appeal cases section was 204-296 (92 pgs). I don’t read every word, of course. And, some cases don’t interest me, but, that was 184 pages of information I am presumed to know.

I then got in the mail a document from OBLIC on Practice Tips for Fraud Prevention, Applicable Ethics, and Substance Abuse. (145 pgs).

I get a minimum of ten pieces of mail per day, some with voluminous discovery documentation.

I get a minimum of 60 emails per day, 80% of which I delete before I read them.

I get Lawyer’s Weekly (a daily issue) online which



# Nick Cerri's Hole in One

Chardon Municipal Court Bailiff Nick Cerri in a recent round of golf at Chardon Lakes got a Hole-in-one at the 14<sup>th</sup> hole.



describes at least five cases per day.

I get the OSBA web mail which describes cases weekly. I subscribe to Baldwin's Ohio Legislative Service which provides the pocket parts to the Ohio Revised Code and all the Session Laws on a monthly basis (typically 200 pages each) which I don't have time to peruse.

I meet with clients, respond to motions, discovery, etc. I do a some pro-bono work of my choosing, not necessarily imposed upon me by the Supreme Court, and I have a lot of it forced on me by non-payment of fees.

I do civic work by being involved with Rotary, Veterans Organizations, Library Board, Park

Foundation, etc.

I am required to do 12 hours of CLE each year, which costs me money, I don't get paid for it, but I have the uninterrupted time to learn something about the legal field.

I have surmised the following:

There isn't time to learn about the field in which we practice our profession. There isn't time to read what we need to read. There isn't time to research the cases we need to research.

By the way, without any time, you better not be late for that hearing on the case for which you don't have the law compiled. Sometimes I think the law has passed me by.<sup>3</sup>

