



GCBA NEWS

The Law Firm formerly known as Driggs, Hogg & Fry are now **Driggs, Hogg, Daugherty, and Del Zoppo**.

Editor **Paul Newman** is happy to report that he is doing well.

Fred Green has been seen about town, walking without a cane.

Jim Dickinson received the 2007 Distinguished Estate Planner Award.

The Honorable Diane V. Grendell has been elected presiding Judge of the 11th District Court of Appeals.

Susan Proboski earned her Masters in Library and Information Science from Kent State University in December.

Laura & **Jim Flaiz** are expecting their first child this May.

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Treasurer Jim Flaiz, Secretary Lisa Carey, President Elect William Hofstetter, and President Robert Zulantt were sworn in at the GCBA Christmas Party on December 13

GCBA WEBSITE

Since May of 2007, www.geaugabar.org has received 2140 unique visitors. 434 of these visitors have returned to the site at a later time for more information. Do you have a page on the GCBA website? If you do, is it current? Website listings cost \$25 + \$5 for each practice area in which you are listed. To list or update your page, please contact Susan at gcll@nls.net. Also, photos will be added or updated for all members that had their photo taken for the Bar Composite.





PRESIDENT'S COLUMN

ROBERT E. ZULANDT, ESQ.

I wish to express my gratitude for allowing me to take the helm of your Geauga County Bar Association. Appreciation goes out to **Heidi Cisan** for her stewardship over the last year. Believe it or not we are envied by many from the Northeast Ohio area bar associations for our active bar, our First Friday Seminars program, and particularly our social events (thanks to **Susan Proboski** and **Ann D'Amico**, and **Jim Flaiz** (golf outing)). However, there is a core of committed and dedicated members who always step forward to help the bar and better our profession.

This year we hear a lot from the political candidates about change. Many who are computer savvy use the word "shift" instead of "change." It is inevitable that "Shift Happens."

We, too, are faced with change. We are less than a year working under the new Code of Professional Conduct. That Code's Preamble reminds us that we have a responsibility as "members of a learned profession [to] devote professional time and resources and use civic influence to insure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel." The Supreme Court has, for now, stopped short of mandating pro bono work by all attorneys, but the expectation is that we will voluntarily comply. After all, we are supposed to be a self-regulating body. I know that doctors, psychologists and other professionals do not have such requirements thrust upon them, but isn't that something that distinguishes us from the others? After all, we have played a "vital role in the preservation of society" as Shakespeare recognized in the 16th Century and doctors were employing leeches to cure people.

Please read **Judge Mary Jane Trapp's** article in this edition for more insight. I encourage you to become involved in your bar association, get on a committee, it's not too late, and make a difference. Consider giving time to those who can't afford an attorney monetarily but can't afford otherwise not to have one. If you are interested in serving on a committee to look into implementing a pro bono project for our bar please contact me.

We are currently faced with a mortgage crisis and recently the call has gone out from the Chief Justice and State Bar Association to assist in that matter. Look at the Ohio State Bar Association website to see what is being asked of us and consider assisting. This crisis impacts all of us.



Paul Newman, Mike Yaksic, Magistrate Bruce Smalheer, David Lowe & Anita Comella at the GCBA Christmas Party

Having practiced law for more than 30 years, it is amazing to reflect on the changes that have taken place in our society over that time frame. The law was less complex and technology was simple; a typewriter and carbon paper. I am not sure you can even buy those items anymore. Memory typewriters that could store 50 pages of text were the rage. There was no fax machine, and email did not exist. In 30 years it is projected that a \$1,000 laptop computer will exceed the knowledge of the human race. One strand of fiber optics can today

send in excess of 10 trillion bits of information per second. Soon everything will be wireless. Technological information is presently doubling every four years, and in three to four years will



double every three to four days. The number of text messages sent every day exceeds the population of the world, but text messaging didn't even exist several years ago, and cell phones weren't even in general use 25 years ago. If My Space were a country it would be at least the eighth largest in the world. None of this was even on the horizon 30 years ago, only things of science fiction. We are currently preparing students for jobs and technologies that don't yet exist in order to solve problems that we don't even know are problems yet. Where will the law be in 30 years? Change – we haven't seen anything yet!



Magistrate DH Lee and Karen Lee at the GCBA Christmas Party

11TH DISTRICT COURT OF APPEALS DECISIONS

LINDA IRELAND, COURT PARALEGAL

On March 23, 2007, in *Conway v. Conway Educational Trust No. 1*, 11th Dist. No. 2006-L-143, 2007-Ohio-1377, the court of appeals affirmed the judgment of the trial court. The court indicated that whether or not the trustees had the authority to remove appellee Neil Conway III as a general trustee fell within the authority that was given the Special Master and to the trial court by the agreement of the parties. The court determined that the issue fell within the continuing jurisdiction over the matter that the trial court retained to further administer the trust. The court held that there was no factual record before it to support the laches claim of appellants.

On March 30, 2007, in *Sefcik v. Mouyos*, 11th Dist. No. 2006-G-2730, 171 Ohio App.3d 14, 2007-Ohio-1546, the court of appeals affirmed the decision of the trial court, denying appellant's petition for heirship. Appellant sought a determination that he was entitled to inherit from the deceased as a grandson. Appellant is the decedent's biological grandson, but was adopted by his step-father, thus terminating his legal relationship with his biological father (the decedent's son). Appellant attempted to vacate the adoption, which occurred in Texas, and obtained an Ohio birth certificate identifying the decedent's son as his legal father. The court of appeals held that, although the Ohio birth certificate was prima facie evidence that he was decedent's grandson, this evidence was not conclusive. There was no clear or convincing evidence that the Texas court which granted the adoption ever vacated the adoption. Thus, appellant failed to demonstrate he was entitled to inherit.

On May 11, 2007, in *State v. Silsby*, 11th Dist. No. 2006-G-2725, 2007-Ohio-2308, the court of appeals affirmed the judgment of the trial court. The court noted that the sentencing guidelines at issue were already addressed in *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011. The court also held that because the appellant's case was final before Foster was decided, Foster could not be a basis to vacate the judgment of the trial court. The court concluded that the trial court properly sentenced the appellant pursuant to R.C. 2929.14(C) and R.C. 2929.14(E)(4). Finally, the court indicated that the trial judge advised the appellant that it was up to him, as the judge, to determine whether the sentence would run concurrent or consecutive, and that the appellant stated he understood.

On May 11, 2007, in *Wickliffe v. Kirara*, 11th Dist. No. 2006-L-172, 2007-Ohio-2304, the court of appeals affirmed the judgment of the trial court. The court noted that the officer had probable cause to arrest the appellant for driving under the influence of alcohol. Also, the court indicated that the evidence at trial was sufficient to prove that the appellant was operating a vehicle and that he was under the influence of alcohol.



(Left) David King and (below) David McGee at the GCBA Christmas Party

THE “MEAN’S” TEST?

ROBIN L. STANLEY, PETERSEN & BOLD

The heart of bankruptcy reform under BAPCPA was the introduction of the Means Test for determining whether a debtor would be able to file a Chapter 7 bankruptcy or whether it would be necessary for a debtor to file a Chapter 13 bankruptcy and pay back their creditors. The goal of the Means Test was to have an objective standard to differentiate between an individual that had the “means” to pay creditors under a Chapter 13 bankruptcy and those who did not. The Means Test was to be a barrier to filing a Chapter 7 case.

The first step in the Means Test is to determine whether the means test even applies to the debtor. The Means Test does not apply to individuals with primarily trade debt or bad business investments (like a house-flipper). A debtor that has 51% or more non-consumer debt is not under the Means Test. This distinction only affects a minority of bankruptcy filers. Most cases involve debtors with primarily consumer debts.

The Means Test now means that simple gross income is no longer a good indicator of whether a debtor will be allowed to file Chapter 7. Step (1) compares a debtor's income to the median income in Ohio for a family of the same size. If a debtor's income is less than the median income, a debtor can file a Chapter 7 case.

If a debtor's income is more than the median income, Step (2) of the test is triggered to determine a debtor's current monthly income (CMI). Current monthly income includes nontaxable income and payments from third parties (e.g. child support and alimony), but excludes social security benefits.

Certain allowable expenses are then subtracted from the debtor's income to determine a debtor's disposable income. These reductions include (a) food clothing and other, (b) housing and utilities,

and (c) transportation. The “food, clothing and other” standard varies according to the size of the household and gross monthly income, while the “housing and utilities” standard varies by size of household and geographical location. The transportation standard varies based on 28 metropolitan areas. These allowances are not reduced even if a debtor’s actual expenses are less than the standards.

Current monthly income is also reduced by, among other things, reasonable and necessary spending to care for an elderly, chronically ill or disabled member of the household, health insurance costs, average monthly payment on secured debts (usually mortgages and car loans), taxes, and child support and alimony.

After everything has been subtracted, if the disposable income over five years is less than \$6000, a debtor “passes” the means test and can file a Chapter 7. If the disposable income is more than \$6000, a debtor fails the means test and should file a Chapter 13. Therefore, because some of the allowable expenses can be very large, a debtor with relatively high monetary income can be allowed to make a fresh start under Chapter 7, while a lower-income filer might have to choose Chapter 13.

Since the introduction of the Means Test, the passage rate under the Means Test has been high. First, most of the Chapter 7 debtors have little ability to pay and fall below the annual median

income. On average, the annual income for most bankruptcy petitioners is between \$25,000 and \$30,000, which is far below the \$42,527 median income for U.S. households. Second, the outcome is predictable. This allows debtors who fail to bypass a Chapter 7 and instead initially file a Chapter 13 or with pre-bankruptcy planning, a debtor can pass the test. The most common way to pass the test would be to carefully time when a case is filed. Therefore, while the Means Test was meant to bar debtors from filing a Chapter 7 bankruptcy case, there are many, many filers that by mere application fall below the standards and pass the Means Test. What started out as a “mean” test has developed into just another hoop that filers must jump through, but that most jump through with ease and a little planning.



Todd Hicks and Joanne Monaco at the GCBA Christmas Party



GEAUGA COUNTY BAR ASSOCIATION'S SETTLEMENT DAY-2007

LISA J. CAREY, ESQ. CARRABINE & REARDON

Once again, over 40 mediators volunteered their services for Settlement Day this year.

Geauga County Common Pleas: Of the near record 46 cases which actually went forward for mediation on November 16, nine (9)



A rare quiet moment on the first floor of the Common Pleas Courthouse during Settlement Day (photo courtesy of Cindy DeMarco)

settled or partially settled (20%). At least five (5) scheduled cases settled in the week prior to Settlement Day or were dismissed. We also received reports of five (5) cases which settled in the weeks after Settlement Day as a direct result of progress made at the mediations. Using these total numbers the "settled" percentage is closer to thirty-three (33%) percent, once again over the average of approximately 25-30%.

Chardon Municipal Court: Of the 32 cases which were scheduled for mediation on November 16th, eleven (11) cases settled for a rate of thirty-four percent (34%). In addition, nine (9) cases settled just prior to Settlement Day and were removed from the schedule. Three (3) cases were dismissed and parties in two (2) additional cases filed for bankruptcy.

We, the Settlement Day Committee, wish to thank the courts and their staff for their continued support of this program, as well as members of the Geauga County Bar Association for the hours volunteered to make this program an ongoing success.

If anyone has any questions or suggestions for future Settlement Days, please do not hesitate to contact me.



Linda Kostelnik and Cindy DeMarco at the GCBA Christmas party



Jim Reardon, Ed Brice & Jim Flaiz at the GCBA Christmas party

TEN SMALL THOUGHTS ARISING, IN PART, FROM SERVING AS JUDGE, CHARDON MUNICIPAL COURT

THE HONORABLE MARK J. HASSETT

1 "May I be treated tomorrow as I treated others today." Posted in the lobby of our Court.
 2. "A person will not change until the pain of remaining the same is greater than the pain of change."

3. Based upon statistics, 85% of all persons who appear before Geauga County's four judges appear before the Chardon Municipal Court Judge.

4. Our County's criminal justice system works well primarily because of the respect the Prosecutor, the Defendant's attorney, and the Judge have for one another.

5. Normally, anger is symptomatic of fear and/or hurt.

6. Conflicts between the three branches of government inevitably will arise because of the role of each respective branch.

7. Proposal for selection of Judges in Ohio:

a. Trial Judges - to be elected by registered voters

b. Court of Appeals Judges - to be elected by the Trial Judges serving each appellate district

c. Supreme Court of Ohio - to be elected by the Appellate Judges

8. There is only one electoral race which is more obscure than that for the Court of Appeals -

State School Board.

9. If any attorney knows what is the upside of a Judge speaking directly to a member of the media, please contact me. (As an aside, when asked by a voter whether Jesus would have supported the death penalty, Republican Presidential Candidate Mike Huckabee replied, "Jesus was too smart to ever run for political office.")

10. "Life is normally a long lesson in humility."
Posted on one of our Courtroom walls.



CALL TO ACTION: PRO BONO SERVICES

THE HONORABLE MARY JANE TRAPP, 11TH DISTRICT COURT OF APPEALS

Oh no...here we go again. Is that your first response when you read another headline about the issue of pro bono legal services? Many of you know that as a bar leader I took a somewhat controversial position at the Ohio State Bar Association Council of Delegates speaking out against mandatory reporting by attorneys of their pro bono work. I continue to oppose any proposal which mandates a certain number of pro bono hours or reporting of voluntary pro bono work, but I support the on-going efforts of the bench and bar to support existing pro bono programs and to develop new programs.

On September 20, 2007, the Supreme Court of Ohio issued this statement, "The Court recognizes that many Ohio lawyers honor their professional commitment by regularly providing pro bono legal services or financial support to pro bono programs. The Court encourages lawyers to continue providing these essential services and to respond to this call by seeking to engage in new or additional pro bono opportunities."

It has been my experience that attorneys, especially

Geauga County attorneys, give hundreds of hours of their professional time without being asked. Attorneys take on a case with a small retainer knowing full well that the retainer is the only fee that will be realized from that case. Attorneys regularly donate their services to non-profit citizens' groups, churches or charities. Attorneys will not withdraw from a case even when the client can no longer pay a fee. These are just a few examples of pro bono work that for whatever reason do not "count" with those from outside our local bar community who seek to impose arbitrary, "one size fits all" pro bono requirements. Countless numbers of practitioners give of their professional time without fanfare and without ulterior motives such as marketing or garnering awards. There is also a publically unstated fear that organized pro bono efforts will only result in less work for young attorneys already struggling to develop a practice and other attorneys struggling to maintain their practices.



Chris Condon and Jen Hess display Ann D'Amico's Nut Tart

With that being said, it is also quite clear that many people are appearing in court pro se with sometimes tragic results because they think that they cannot afford an attorney. Many are totally unaware of their legal rights and do not know where to begin when faced with a legal problem. We have underserved populations in our county, our region, and our state; we have a growing foreclosure crisis; and we have been asked by Chief Justice Moyer to act.

As recently as December 20, Chief Justice Moyer issued a statement calling on Ohio attorneys to "assist courts, homeowners and lenders in addressing the increasing number of foreclosure cases filling Ohio court dockets."

"This is more than a legal issue; this is a social issue," Chief Justice Moyer told a group of more than 20 leaders from the legal community gathered at the Ohio Judicial Center for a meeting on the problem. "People's lives are being seriously affected, and the legal community must respond with action."

"Today I call on all attorneys in Ohio who are qualified to assist in matters related to foreclosure filings. In particular, we are in need of attorneys to assist in mediating these disputes because a concerted mediation effort offers the promise of making a real difference," the Chief Justice said. "Attorneys have a professional obligation to perform pro bono service, and this is one area where there is significant unmet need."

According to the press release from the Supreme Court of Ohio, "...foreclosure filings are expected to rise more than 40 percent in Ohio this year compared to four years ago. According to data supplied to the Supreme Court by the common pleas courts, 85 of 88 counties have experienced increases when comparing projected 2007 figures to those recorded in 2003. Only Meigs, Pike and Putnam counties are expected to have decreases. The Coalition on Homelessness and Housing for Ohio estimates that some 87,000 homeowners in Ohio face imminent foreclosure. The coalition's executive director, Bill Faith, said that with thousands of loans with adjustable rates expected to be reset in the coming months, foreclosure rates will likely continue to increase well into 2011."

But it is also quite clear that mandates from Columbus do not engender success only resentment, and finally it has dawned on the "powers that be" that successful pro bono efforts start locally and that judges need to provide leadership.

Thus the Ohio State Bar Association Judicially Led Pro Bono Committees Project was born in September of this year. Judges, bar leaders, and legal services leaders in each appellate district were asked to recruit a local committee which was tasked with developing a local work plan to identify areas

of need in the district, sharing information about existing pro bono programs, and developing new pro bono projects that address local needs.

On January 10, 2008, judges, bar leaders, and career legal services providers from our five county judicial district will meet at the West Woods Nature Center to develop a work plan. We will hear about a Portage County domestic relations court project which pays an attorney a flat fee of \$250 for handling simple cases. We will learn of a proposed Lake County pro se project for dissolutions, and we will learn about the latest plans in the area of foreclosures including pilot projects to offer mediation between lenders and homeowners to avoid foreclosure.

The committee will also discuss development of drop-in, short advice clinics and incentives for young lawyers to provide pro bono services. Questions pertaining to training, CLE credits, malpractice coverage, funding, and staffing will be addressed, and hopefully, an action plan will be developed to both answer the call to expand pro bono efforts and to quell further movement toward imposition of mandatory pro bono plans.

I urge the members of our bar to embrace this local effort.



BAR COMPOSITE

If you have not had your picture taken for the 2008 Bar Composite, you may call Image Photography, 286-9076 to set up an appointment between now and February 15. You must schedule your appointment by February 8. Image Photography is located on the southeastern corner of Chardon Square. The hours are 10-5, Monday through Friday. The GCBA has secured digital rights to the photos so that you may use that photo on your page at www.geaugabar.org.

Ipso Jure
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