

Ipso Jure



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EDITED BY PAUL A. NEWMAN, ESQ.
SUSAN PROBOSKI, ASSISTANT EDITOR/DESIGNER

UPCOMING EVENTS

- 8/21 - Golf Outing
 - 9/5 - CLE: Jeffrey Fanger - Ohio's New Non-Profit LLC Seminar (flyer enclosed)
 - 9/17 - Deadline for Settlement Day Case Submission and Mediator sign up (forms enclosed)
 - 10/3 - CLE: Magistrate Dan Bond - Municipal Law Update
 - 10/18 - Annual Dinner, Legend Lake Country Club
 - 11/7 - CLE: Dennis Ibold - Social Security and Divorce
 - 12/5 - CLE: Procrastinator's Seminar
 - 12/11 - Christmas Party, Chardon VFW
- Reservation forms for all events are available on www.geaugabar.org.

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Chardon Square Beautification
courtesy of the Treasurer's Office

SECRETARIES DAY 2008

The Geauga County Bar Association enjoyed another well attended Secretaries Day. Thank you to **Jake Yanchar, Karen Lee, Pat Schraff,** and **Allison Mantz McMeechan** for all their hard work to make this event special. Congratulations to **Peggy Geisman** and **Lisa Carey**, winners of the putting contest. Pictures taken at St. Denis on July 23 are featured in this issue.





PRESIDENT'S COLUMN

ROBERT E. ZULANDT, ESQ.

TOIL AND TROUBLE

A certain local attorney tries to do his duty to bench and bar and serves as a Guardian Ad Litem in a certain divorce case upon the Court's request. It is a very contentious divorce and involved two children aged 16 and 17. The Magistrate assured the GAL "it's a simple matter." Sounds uneventful regarding the child issues, but the children proceeded to get into various troubles with various courts in Northeast Ohio. After about nine months the trial is held, but before that takes place one of the children is emancipated and the other turns 17 years old. The Court made a decision



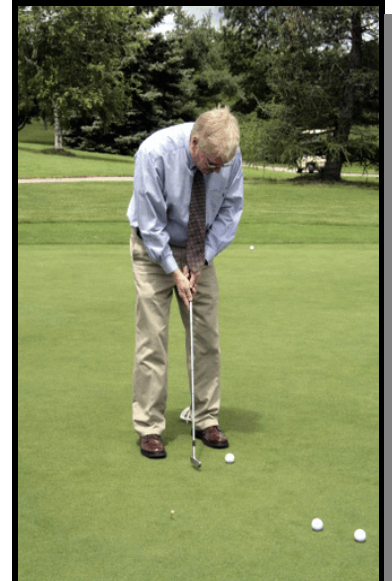
Elli Squire at Secretaries Day

dividing the assets and awarding custody of the 17 year old to the party who retained the marital home so that the child could continue to attend his local school. Just days before trial the other spouse fired their attorney and proceeded to trial unrepresented. Needless to say that individual was not satisfied with the Court's decision, objected thereto, and appealed. Upon appeal there was an issue as to the record, alleged missing testimony, and an accusation that the record was

falsified. The GAL spent approximately 80 hours in the case through trial at a rate of \$90 per hour, well below his normal rate as an attorney. He received payment from the "successful" party of one-half of the GAL fees and no payment from the dissatisfied Appellant. At least as many additional hours were spent reading subsequent pleadings and keeping abreast of the appeal. Needless to say the pro se Appellant papered the case to death, filing numerous motions and nine additional appeals. The GAL was accused of perjury and fraud by Appellant, and also accused of attempted murder. Various Court employees, including the Court Reporter, were accused of falsifying the record. One and a half years after the decision the Court of Appeals affirmed the Court's opinion in all respects. Dissatisfied still, the disgruntled spouse, who was still pro se and indigent, filed suit against the GAL, the Court Reporter, all her prior attorneys (3), numerous mortgage companies and asset holders, and other individuals.

Now the Guardian Ad Litem must defend this new suit, and for what compensation? All in a day's work of a Guardian Ad Litem, who is just an attorney trying to assist the Court. If this sounds like fiction, it is far from it.

Many times our jobs can be thankless and of little remuneration. As dedicated attorneys we carry on despite such obstacles. After the above circumstances the same Guardian Ad Litem recently got a call from the Magistrate to see if he would serve as a GAL on a new matter. The Magistrate said it was an "easy case." What else did the GAL do but agree to be appointed? In the words of the Simon & Garfunkel song "still crazy after all these years."



Bill Hofstetter trying the Putting Challenge at Secretaries Day





11TH DISTRICT COURT OF APPEALS DECISIONS

LINDA IRELAND, COURT PARALEGAL

On December 28, 2007, *Thorton v. Montville Plastics, Inc.*, 11th Dist. No. 2007-G-2760, 2007-Ohio-7115, was dismissed by the court of appeals for lack of a final appealable order. In the trial court, Thorton, claimant-appellee, dismissed his complaint for workers' compensation pursuant to Civ.R.41(A)(1)(a), without the consent of Montville, the employer-appellant. Montville asserted that its consent was required before Thorton filed the dismissal pursuant to R.C. 4123.512(D), as amended by 2005 Am.Sub.S.B. No. 7 ("S.B. 7"), which became effective June 30, 2006. Montville filed a motion for relief from judgment pursuant to Civ.R. 60(B). On February 12, 2007, the trial court overruled Montville's motion for relief from judgment, stating "[t]he Court agrees with Plaintiff's contention that the General Assembly specifically intended prospective application of the amendments to R.C. 4123.512(D)." On appeal, the appellate court held that once Thorton filed his voluntary dismissal, the trial court was divested of jurisdiction over the matter. Further, the voluntary dismissal at issue was not a "final judgment, order, or proceeding" under the Civil Rules. Accordingly, the trial court was incompetent to

entertain Montville's motion for relief under Civ.R. 60(B) and any resulting order was a nullity. The reviewing court therefore held that the trial court's decision to overrule Montville's motion for relief from judgment is not a final appealable order and accordingly dismissed the appeal.

In *State v. Magnusson*, 11th Dist. No. 2006-L-263,2007-Ohio-6010, the appellant alleged his conviction for felonious assault was neither supported by sufficient evidence nor the weight of the evidence. Appellant further asserted the trial court's jury instructions permitted the jury to infer his guilt from a civil negligence standard of culpability rather than the proper mental state of "knowingly." Appellant also challenged his six year sentence and the trial court's order of restitution. On November 9, 2007, the Eleventh District Court of Appeals affirmed the trial court holding (1) appellant's conviction was supported by sufficient as well as the weight of the evidence; (2) the jury instructions did not impermissibly water down the requisite mental state required for a conviction of felonious assault; and, (3) appellant's sentence as well as the trial court's order of restitution were proper.

In *Nova Information Systems, Inc. v. Current Directions, Inc.*, 11th Dist. No. 2006-L-214, 2007-Ohio-4373, the appellee filed a complaint for breach of contract. Appellant filed an answer, a counterclaim, and a new party complaint. Trial was scheduled, however, during a pretrial conference, the parties along with a third-party defendant discussed possible settlement options. While no written settlement appeared in the record, appellee maintained the parties reached an agreement which was communicated to the trial judge. The parties filed a "mutual dismissal with prejudice." Appellee subsequently moved the trial court to enforce the alleged settlement which was granted. On August 24, 2007, the Eleventh District held the trial court was divested of jurisdiction to proceed when it unconditionally dismissed the action upon which the motion to enforce is premised. Because the underlying matter was dismissed without a reservation of jurisdiction to enforce the settlement, the court lost jurisdiction and the motion was therefore void ab initio.



IT IS ALL ABOUT THE RECORD

JUDGE MARY JANE TRAPP

The court of appeals is primarily an "error" court; that is, appellate courts review the record from the trial court in order to determine whether there was a "mistaken judgment or incorrect belief as to the existence or effect of matters of fact, or a false or mistaken conception or application of the law."¹ That error

must appear in the record of the trial court proceedings.

While these are fundamental concepts of appellate practice, the number of cases in which the appellate court is presented with an incomplete record, and in some cases, no record at all, is increasing at an alarming rate and not solely in pro se appeals.



Jake Yanchar, chair of the Social Committee

Creating a proper and complete record for appeal begins at the pretrial stage. If a document is not filed with the clerk of court it will not be a part of the record unless it is later admitted into evidence at a hearing or trial.

Making a record during a hearing or trial is ultimately the trial attorney's responsibility. With increasing budgetary pressures, trial courts have opted for differing forms of electronic recording of proceedings or no recording at all, as opposed to the certified court reporter.

Never assume that the court will supply a reporter or a recording device for every case, and never

assume that the recording device will work properly at all times. In civil matters, there is no obligation to record the proceedings, but the court must provide a means of recording the proceedings in a civil case upon the request of a party. R.C. 2301.20 requires the court of common pleas to provide a reporter on request of a party or their attorney. That provision applies to the municipal court by virtue of R.C. 1901.21(A).² Crim. R. 22 requires that in serious offense cases all proceedings shall be recorded. In petty offense cases all waivers of counsel required by Crim. R 44(B) shall be recorded, but other proceedings shall be recorded only if requested by any party.³ When in doubt and when the nature and/or value of the case warrants, bring a professional reporter. The hourly rate to preserve the testimony is worth it when compared to the amount of attorney's time it takes to prepare an App. R. 9 (C) statement.



Allison Mantz McMeechan, also on the Social Committee

Side bar conferences are particularly troubling. The burden is once again on the lawyers to ensure that important side bar conferences are recorded. When a court reporter is present, do not forget to ask the reporter to join the conference. If the proceedings are being taped, remind the judge to position the microphone so that all speakers may be heard. If necessary, the party requesting the conference should ask the judge to excuse the jury so that the discussion may be in open court and properly recorded.⁴



David Ondrey & Pat Krebs at Secretaries Day

During trial it is again the trial attorney's responsibility to ensure that exhibits are properly marked and identified on the record and that they are offered into the evidence. If the trial court does not admit an exhibit, the exhibit must be proffered and included with the admitted exhibits so that the appellate court may consider the excluded exhibit. At the end of a trial counsel must also ensure that all of the exhibits are delivered to the court reporter or, in the case of an electronic recording of the proceedings, that all of the exhibits are in the court file before everyone leaves the courtroom. It is a wise practice, if not required by local rule or the trial court's standard trial management order, for counsel to prepare duplicate sets of trial exhibits in the event that exhibits are lost or misfiled. If the parties at trial agreed on the record that the duplicate set was correct, App. R. 9(E) can be invoked to supplement the copies for the originals by stipulation of the parties. With the advent of inexpensive color copiers, it is also wise to make color copies of documents in order to preserve evidence of margin notes or other evidence that will not appear from a black and white copy of an original document.



Ed Brice putting

Do not forget to proffer excluded testimony as well. When the court of appeals has no idea what anticipated testimony or evidence was excluded, we cannot evaluate the assigned error.

Another common misconception arises on appeal from a court that audiotapes its proceedings and does not have an "official court reporter". The proper procedure to be followed by counsel when the trial court does not have an "officially appointed reporter" is set forth in *City of Shaker Heights v. Johnson*.⁵ Counsel must file

with the trial court a motion to designate an official court reporter nunc pro tunc in which counsel requests the court appoint a private court reporting firm as the official court reporter for the purpose of reviewing the audio recording and transcribing the testimony. Further, counsel must use a professional registered reporter or merit reporter to transcribe, not the attorney's secretary.

App.R. 9(C) allowing a statement of the evidence or proceedings is only applicable when there was no recording or the recording is not available.⁶ It is critical to note that "unavailability" does not mean that a recording of the proceedings has not been transcribed or that the party chooses not to order a copy of the recording in order to have it transcribed.⁷



Judy McWayne putting

When an appellant fails to provide a transcript or an alternative to a transcript as provided for in the civil rules, there is nothing for the appellate court to pass upon, and the validity of the trial court proceedings is thus presumed.

Videotaped recordings of the proceedings constitute the transcript of proceedings;⁸ however, counsel must type or print those portions of the transcript necessary to decide the issues presented and attach a copy to the brief.⁹

As for the transcript itself, please note Eleventh District Loc. R. 9 which requires that the transcript of proceedings shall also be filed in an electronic format compatible with Word, i.e., a disk or compact disk and contain an electronic index. Should you find that the court reporter is reluctant to file a disk, the Eleventh District has accepted an electronic version

that is emailed directly to our Deputy Administrator.



Diane Moore at Secretaries Day

Although App. R. 10(B) appears to place the duty to transmit the record upon the clerk, in reality the ultimate duty to ensure that the record is complete rests with the appellant. Never assume that the exhibits, photographs, trial testimony videotapes and transcripts will necessarily make it into the files that are delivered to the court of appeals. A wise appellate practitioner will make a point of going to the clerk's office in order to review the file to ensure that critical documents have been included. In the past the Eleventh District has been taken a more liberal approach to requests to supplement the record with missing documents; however, many other districts are not so forgiving. When the court discovers that part of the record is missing and so advises counsel, do not delay in responding to the request. It is amazing that some attorneys actually ignore the time period given by the court for supplementing the record prompting a second request before facing dismissal.

App. R. 10(B) provides that the clerk shall transmit the record, App. R. 10(A) requires compliance with App. R. 9(B); thus appellant's counsel must "take any other action necessary to enable the clerk to assemble and transmit the records." Clearly it is counsel's obligation to see that the clerk has timely transmitted a complete record. Finally, motions for extensions of time to file the record are governed by both App. R. 10 and by

Loc. R. 10. Loc. R. 10 limits the trial court's ability to extend the time for transmitting the record on appeal to a total extension of time of no more than thirty (30) days so that the time as extended will in no event extend beyond the seventieth (70th) day after the filing of the Notice of Appeal; except in matters which have been placed on the accelerated calendar, in which case the trial court shall limit its extension to twenty (20) days.

Always consult the latest version of the local rules for the appellate district before you begin the appeal process because they contain a number of possible deviations from the Ohio appellate rules that could cause your appeal to fail otherwise than on the merits. For example, some districts by local rule allow for the sua sponte dismissal of the appeal for failure to timely transmit the record.¹⁰

The record on appeal is the foundation of your case. Make it a good one.

1. Black's Law Dictionary
2. See Staff Notes to Sup. R. 11
3. See *State v. Gaetano*, (1974), 44 Ohio App. 2d 233
4. *State v. Grey*, (1993), 85 Ohio App. 3d 165
5. (June 3, 1993), 8th Dist. No. 62825, 1993 Ohio App. LEXIS 2787
6. *Harris v. Transp. Outlet*, 11th Dist. No. 2007-L-188, 2008 Ohio 2917
7. *Beres v. G.S. Building Co.*, 11th Dist. No. 2007-L-061, 2007 Ohio 6564
8. App.R. 9(A)
9. App.R. 9(A) and 9(B)
10. Loc.R. 5 of the Fifth Appellate District



Joseph Svete and Dave McGee enjoying Secretaries Day

The Geauga County Bar Association Presents

Ohio's New Non-Profit LLC Seminar - September 5, 2008

Gallery West
109 Main Street
Chardon, Ohio 44024

Agenda

8:15 a.m. Registration and Continental Breakfast

8:30 - 10:30 a.m. Ohio's New Non-Profit LLC Seminar
Jeffrey J. Fanger, Esq.

This course is pending approval by the Ohio Supreme Court Commission on Continuing Legal Education for 2.0 Total CLE Credit Hours with 0.0 hours of Ethics, Professionalism and Substance abuse instruction.

Mail in your registration today. Registration must be received by August 29, 2008. A \$10 Late Fee will be applied to late registrations. Cancellations must be received by September 3, 2008 or no refund will be made.

Cost of this seminar if paid by 8/29 is \$40 for members, \$50 non member attorneys, \$30 non-attorneys. After 8/29, the cost is \$50 for members, \$60 non member attorneys, \$40 non-attorneys. Please contact Susan Proboski, 440.279.2087 or s.proboski@geaugabar.org with any questions regarding this program.

Geauga County Bar Association -Ohio's New Non-Profit LLC Seminar
September 5, 2008

Registrant's Name: _____

E-mail or phone: _____ Attorney Registration #: _____

Please send your registration and payment, payable to the Geauga County Bar Association,
P.O. Box 750, Chardon, Ohio 44024 by August 29

THE GEAUGA COUNTY BAR ASSOCIATION
INVITES YOU TO THE

**ANNUAL GOLF
OUTING**

**THURSDAY, AUGUST 21,
2008**

**LITTLE MOUNTAIN COUNTRY CLUB
CONCORD, OHIO**

**INCLUDES GOLF, LUNCH, STEAK DINNER, BEVERAGES,
RAFFLE & SKILL PRIZES AND FUN!**

DATE: Thursday, August 21, 2008
WHERE: Little Mountain Country Club
7667 Hermitage Road
Concord, Ohio 44077
REGISTRATION: 11:30
LUNCH: 11:45 - 12:30
TEE OFF: 12:30 p.m., Shotgun format
COST: \$95/person or \$380/team
\$25 Dinner & Raffle only

FOR MORE INFORMATION, CONTACT

JIM FLAIZ (440) 974-9911, FAX: (440) 974-9919, E-MAIL: FLAIZ@JCJRLAW.COM

RESERVATION FORM - GCBA ANNUAL GOLF OUTING

RSVP: AUGUST 8

FULL TEAM (\$380):

CAPTAIN NAME: _____

E-MAIL: _____

PHONE: _____

PLAYER 2: _____

PLAYER 3: _____

PLAYER 4: _____

OTHER OPTIONS:

SINGLE GOLFER (\$95):

DINNER AND RAFFLE ONLY (\$25):
(PLEASE ARRIVE BY 5:30 P.M.)

HOLE SPONSOR (\$100):

NAME: _____

E-MAIL: _____

**RETURN THIS FORM WITH A CHECK PAYABLE TO THE GEAUGA COUNTY BAR
ASSOCIATION, P.O. Box 750, CHARDON, OHIO 44024.**

GENERAL ASSEMBLY ENACTS INCREASE IN EXEMPTIONS

ROBIN STANLEY, ESQ., PETERSEN & IBOLD

Effective on September 30, 2008, Sub. S.B. 281 increases the exemptions for property that a debtor may hold exempt from execution, garnishment, attachment, or sale for the satisfaction of a judgment. This change brings exemptions in Ohio more in line with the exemptions under the United State Bankruptcy Code. The bill provides automatic adjustments to those exemptions based on changes in the Consumer Price Index.

From the standpoint of a bankruptcy practitioner, this is great news! Many of the previously recoverable assets are no longer available to creditors and the bankruptcy trustee. From the standpoint of the bankruptcy trustee and any creditor, this news makes recovery of assets more difficult. This change will affect most attorneys in some manner. For example, many times a personal injury client will ultimately file a bankruptcy while a lawsuit is pending and the client's attorney has had to deal with the bankruptcy trustee to approve any settlement. With the changes in Sub. S.B. 281, the bankruptcy trustee will likely only assert an interest in the lawsuit if recovery is expected to be over \$20,000.00.

The main changes are the following:

- (a) Interest in real estate or an item of real or personal property that the person or a dependent of a person uses as a residence increased from \$5,000.00 to \$20,000.00.
- (b) Interest in one motor vehicle increased from \$1,000.00 to \$3,250.00.
- (c) Interest in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, firearms, and hunting and fishing equipment increased from \$200.00 per item, for bedding and wearing apparel from \$200.00, and for a stove and refrigerator from \$300.00 each, to \$10,750.00 for all total items and not more than \$525.00 per item.
- (d) Interest in one or more items of jewelry

increased from \$400.00 to \$1,350.00.

- (e) Interest in all implements, professional books, or tools of the person's profession, trade or business, including agriculture increased from \$750.00 to \$2025.00.
- (f) Interest in a claim on account of a personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the person or an individual for whom the person is dependant increased from \$5,000.00 to \$20,000.00.
- (g) Interest in any other property (also know as the "wildcard" personal property exemption), applying only in a bankruptcy proceeding, from \$400.00 to \$1075.00.



The bill also allows for adjustment of the exemptions in accordance with the Consumer Price Index. This is likely the most important change in the entire bill, considering that the last time exemptions in Ohio were increased was prior to 1990.

Additionally, with this change, bankruptcy practitioners should be aware of the increases in exemptions. It may be malpractice to file a case prior to September 30, 2008, for a debtor with currently unexempt assets, whose assets after

September 30, 2008 would be completely exempt. Creditor's attorneys should be aware of these changes and advise their client's accordingly. This will certainly lead to less collection recovery.

Stay tuned next month for another exciting article on bankruptcy.



Phil King at Secretaries Day

THE THRILL OF JURY DUTY

C. LYNNE DAY, ESQ., PETERSEN & IBOLD

I received my summons to jury duty in the Cuyahoga County Common Pleas Court with mixed emotion. I was interested in the idea of being a juror, but I was worried about the time away from work. The week that I was originally scheduled to appear for jury duty I already had several work commitments including some court appearances. The summons contained a website at which you could defer your duty to another week. I was skeptical about the actual workings of the website, but I gave it a shot (pun intended as you read further about the case for which I actually ended up as a juror). The website was great, and I chose an alternate week for my service which worked better for me.

I arrived at the Justice Center slightly after 8:00 a.m., the time set forth on the summons, to find approximately 150 people already lined up in the hallway to check in for service. Apparently, 200 people arrive on Monday morning; and I believe that another 200 people may arrive on Wednesday morning. I noticed a distant cousin of mine also arriving, and I visited with an Ohio State alumni supporter both of whom were in my jury pool.

I was called up to the 19th floor with twenty nine (29) other potential jurors to see if we would end up selected for the jury. The judge conducted his own voir dire of all thirty (30) potential jurors for nearly a day and a half. He asked each potential juror the same questions so that we all knew each other fairly well by the time that the attorneys conducted their voir dire.

Many people believed that I would not be selected simply because I was an attorney. I, however, was not as convinced having recently spoken to an attorney friend who had served on a jury and having known some other attorneys who had served on a jury. I was more surprised that I ended up on the jury

after I responded to a direct question from the judge as to whether anyone had been or knew of someone (family/friends) that had been a victim of crime. While everyone in Cuyahoga County has apparently had a vehicle stolen or knows a family member or friend who has had a vehicle stolen (including me, as my father's car was stolen a year or so ago), I decided to forego the stolen car story and instead tell of the time that my boyfriend/now fiancé and I were held up at gunpoint by three (3)



Lynda Bedenko at Secretaries Day

men in Ohio City. My story actually garnered some attention from the judge, the attorneys, and other jurors. I also told the judge that my cousin had been murdered over twenty (20) years ago. Upon further inquiry from the judge about the murder, I indicated that the weapon was not a gun but rather a sledgehammer. Despite relating these stories in the courtroom and despite the assistant prosecutor trying the case confirming with me that I had been his "teacher" for a New Lawyers training course two (2) years ago, the attorneys left me on the jury.

The case was a criminal case involving armed robbery with firearm specifications for each of the two (2) defendants. Each defendant had their own attorney, one of which was a public defender and the other of which was appointed counsel. The robbery did not occur at a gas station or



Nancy Douglas at Secretaries Day

convenience store but rather at a birthday party at a private home at approximately 1:30 a.m. The victim and other two (2) witnesses knew the defendants. Despite the public defender suggesting that the police did not follow proper procedure in their inquiry of the victim/witnesses as to identification of the defendants, we jurors were all satisfied that identification was not an issue especially since the one (1) photo presented to the victim/witnesses was clearly one (1) of the defendants whom the victim/witnesses knew. This same public defender

also tried to make much of the fact that the victim/witnesses had different versions as to what the gun that was ultimately wielded by one (1) of the defendants actually looked like. We the jury really did not have an issue with discrepancies as to the appearance of the gun because everyone agreed that a gun was used.



Karen Manning at Secretaries Day

The case itself was interesting, and some of the other jurors who had previously served on civil juries commented on how much better being on a jury in a criminal case was than in the civil cases for which they had previously served. I was pleased to notice that the jury pool including the original potential thirty (30) jurors in the courtroom was fairly diverse ranging in age, ethnicity, race, and backgrounds. The jurors who served on the case included a retired NASA employee, a retired school teacher, a young African-American college student, and a goth-looking (think Marilyn Manson for those of you who know him) musician. [The musician was reading *The Martian Chronicles* by Ray Bradbury which he said that he re-read every few years or so.] All of us took our responsibilities quite seriously and worked well together to reach a verdict in just a couple of hours.

One of the jurors commented on how he had been trying to think of ways to avoid serving as a juror. I

asked him when we were done whether he felt the same way now that he had actually served on a jury. He responded that he was glad that he served and



Enjoying the putting contest at Secretaries Day



Stephanie Culpepper at Secretaries Day

that it was a good experience with which assessment I agreed. I enjoyed my time as a juror. It renewed my faith in the system and especially in the concept of a jury of your peers. At just \$25 per day compensation for serving as a juror especially when the cheapest parking around the Justice Center is \$8.00 per day, it was truly refreshing to see so many people participating in the system and ultimately proud to be a part of the justice dispensed.

I hope that you all have an opportunity to experience our justice system in the way that I did by serving as a juror. If you don't want to serve and are a Cuyahoga County resident, be warned: T-Shirts with provocative sayings will not get you dismissed.



IPSO JURE

P.O. Box 750
Chardon, Ohio 44024