

# Ipso Jure



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## 2009 LAW DAY

Once again, **Ed Brice** and his committee put on a great Law Day. Pictures of the event are throughout this issue. The students at Auburn Career Center served delicious food in a professional manner. We had a wonderful turn out and filled the room to capacity. As promised, the program ended by 1:30. Mark your calendar for next year!



Maple Elementary Art Teacher Kathleen Cataldo with her students and Poster Contest Winners James Tierney and Kathryn Fairbanks along with GCBA PR Chair Katharine Szczepanik

## MAY GCBA GENERAL MEETING

The next General Meeting of the Bar Association is May 27 at Bass Lake Tavern, Upstairs. Reservations for the \$15 luncheon are greatly appreciated. **Georgia Yanchar** will discuss Intellectual Property for the general practitioner. Please contact Susan (440.279.2087 or [sproboski@geaugabar.org](mailto:sproboski@geaugabar.org)) if you plan to attend.



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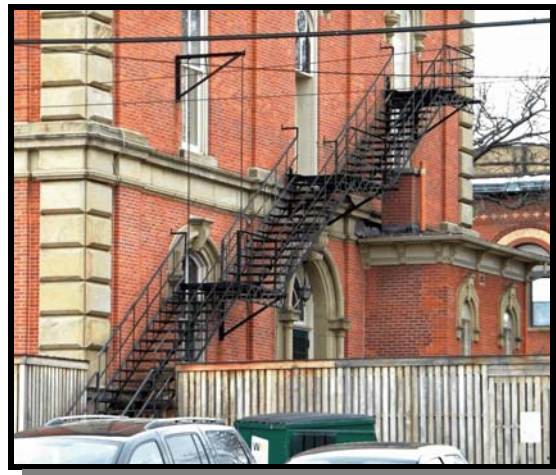
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## BANKRUPTCY CLE

The First Friday CLE program has returned. The June 5 program will be Bankruptcy Practice After BAPCPA. **Mary Ann Rabin, Esq.** and **Julie E. Rabin, Esq.** are scheduled to speak at 8:30 a.m. at Gallery West, 109 Main Street, Chardon. The program will run two hours. Please see the enclosed flyer for more information and to register.





## 11<sup>TH</sup> DISTRICT COURT OF APPEALS DECISIONS

LINDA IRELAND, COURT PARALEGAL

**O**n April 4, 2008, in *Feathers v. Gansheimer*, 11th Dist. No. 2007-A-0052, 2008-Ohio-1652, the court of appeals dismissed appellant inmate's appeal of the trial court's denial of an injunction against the warden and the operator of the Lake Erie Correctional Institution, alleging deleterious conditions at the institution amounting to cruel and unusual punishment. The appellate court held that appellant no longer had the personal stake in changing the allegedly deleterious conditions required to support injunctive relief, as he had been transferred to a different facility.

**O**n May 9, 2008, in *State v. Baker*, 11th Dist. No. 2007-A-0068, 2008-Ohio-2322, the court of appeals affirmed appellant's conviction, following jury trial, of trafficking in cocaine. Appellant asserted that the principal witness against him was unbelievable, as he was a convicted drug trafficker, working as a police informant, in order to obtain a favorable plea recommendation from the state. The appellate court held that belief in the informant's testimony was not against the manifest weight of the evidence, as the court before which the informant had appeared had rejected the state's recommendation of leniency, and the informant, having already served his sentence, had no reason to be biased in favor of the state.



Dennis Coyne and Mike Lear at Law Day



Law Enforcement Officer of the Year  
Middlefield Police Chief Joseph Stehlik

**O**n May 23, 2008, in *Joyce v. Barnes*, 11th Dist. No. 2007-G-2809, 2008-Ohio-2510, the court of appeals affirmed the trial court's grant of summary judgment to a township zoning inspector and the township board of trustees, in a zoning dispute. The zoning inspector had sought an injunction against appellant using his property for composting, an industrial use under the township's

zoning laws. Appellant testified that his family had always done composting, in connection with the family sawmill, which was grandfathered under the zoning law. On appeal, appellant argued that the trial court incorrectly ignored his testimony under Evid.R. 803(20), which excepts from the hearsay rule testimony concerning reputation in a community regarding the boundaries and customs pertaining to land. The appellate court held that Evid.R. 803(20) was inapplicable to the case, since it requires that the testimony concern boundaries and customs known generally in the community, not simply within an individual family.



Todd Petersen, Dennis Ibold, Karen Hummel & Lynne Day at Law Day

## PREFERENTIAL PAYMENTS: IS MY BUSINESS CLIENT AT RISK?

ROBIN STANLEY, ESQ., PETERSEN & IBOLD

Imagine your client has finally received payment on a delinquent account and you are breathing a sigh of relief. Unfortunately, a few days after payment, your client is notified that its customer has filed a bankruptcy. A few months later or up to two years later, your client receives notice from the bankruptcy trustee that he or she is asserting a preference claim against the



Geauga County Sheriff Deputy Larry Hunt gave a tribute honoring the service of Deputy Greg Harmasek

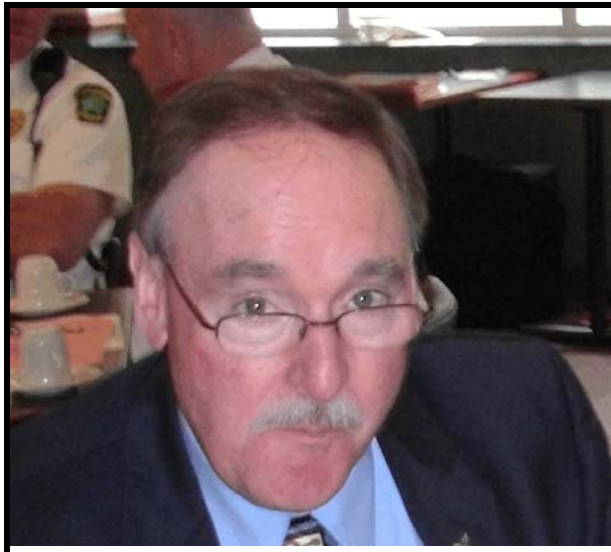
payment that your client received. What should you do?

First, don't panic! Examine the claim before immediately sending the bankruptcy trustee a check. What is a "preference?" Why is a "preference" being asserted against your client?

Under Section 547(b) of the federal bankruptcy code, a preference is a transfer of an interest of the debtor in property:

- a. to or for the benefit of a creditor
- b. for or on account of an antecedent debt (a past due account) owed by the debtor before such transfer was made
- c. made while the debtor was insolvent
- d. made within 90 days of the date of the bankruptcy filing OR made within one year before the filing if the creditor was an insider,
- e. that enables a creditor to receive more than such creditor would have received if the case were a Chapter 7 liquidation.

A preference claim is used to discourage preferential treatment to creditors that are extremely aggressive or those that are on friendly terms with the debtor. Because most Chapter 7 distributions to unsecured creditors are less than



Law Day Chair Ed Brice

100%, any payment to an unsecured creditor during the preference period would likely provide the creditor with more than it would have received under liquidation. The Trustee, Debtor-in-possession, or the Creditor's Committee can bring a preference action and they bear the burden of establishing all of the elements of the prima facie case.

While most preference claims are to non-insiders, an insider preference would be a payment to relatives, general partners, directors, managing agents etc., of a debtor. The trustee can recover repayment of monies received one year prior to the petition date of the debtor if the total is more than \$600.00 to a single creditor if the debtor is an individual whose debts are primarily consumer debt. These are most frequent when a child borrows money from a parent or sibling and then pays them back before paying other creditors. If the debtor is not a debtor whose debts are primarily consumer debts, the amount must be more than \$5,000.00. Further, if the claim is for non-insider business debt in an amount less than \$10,000.00. The claim must be filed in a district where the creditor has its principal place of business.

So your client has received a payment and the payment is more than \$5000.00, now what? There are several defenses to such claims.

#### 1. Ordinary Course of Business

- a. The creditor must demonstrate
  - i. The debt was incurred in the ordinary course of business,
  - ii. The payment was ordinary between debtor and creditor OR
  - iii. The payment was made according to ordinary business terms in conformance with industry norms.

This defense was developed to leave the normal financial and business relations of the debtor and his creditors undisturbed. E.g. A creditor's arrangement with the debtor is that the debtor is to pay on 60-days net terms or 60-days net terms are the customary terms in the industry.

Unfortunately, over the last two years, the debtor frequently paid within 65-75 days. In the 90 days prior to the debtor's bankruptcy filing, the debtor made payments to the creditor which are within 55-75 days net. Although the agreed terms were 60-days net, if this occurred frequently enough or this was ordinary within the industry, many courts would find that none of the payments received in the 90 days prior to the debtor's bankruptcy filing were a preference.



Jim Gillette and Bill Hofstetter honor Ward Lawrence's years of service to the bar on the Grievance Committee

## 2. Subsequent New Value

- a. The creditor has received preferential payment against which there is no defense
- b. The creditor advanced additional unsecured credit to the debtor after this preference payment; AND
- c. This additional credit remains unpaid (in whole or in part) as of the date of the bankruptcy.

In order to succeed at this defense, the creditor must prepare an analysis showing the date of each preference payment and the dates of invoices for debts claimed as new values. Only the amounts invoiced after the preference payment will be subtracted from the amount due back to the bankruptcy estate under the preference. An example of this would be when the creditor receives a payment within 90 days of the debtor's bankruptcy filing in the amount of \$40,000.00. The creditor subsequently ships to the debtor \$50,000.00 worth of goods. The Debtor after receiving the goods, files for bankruptcy. The \$40,000.00 would not be a preference.

## 3. Contemporaneous Exchange for New Value

- a. The creditor must prove
  - i. The value given to the creditor equals the value the debtor received.



Jim Reardon & Jim Flaiz enjoying Law Day

- ii. The debtor and creditor both intended the transfer to be contemporaneous
- iii. The exchange was, in fact, contemporaneous. The court will closely examine the timing of the exchange.
- iv. A specific measure of new value was provided to the debtor. The new value provided generally must actually enhance the worth of the debtor's estate.



This generally applies to payments made by cash on delivery, cash in advance, or cash with order. A trade creditor that is doing business with a financially-troubled debtor that wishes to preserve this defense should create a new account ledger for the debtor and apply payments received to this account contemporaneously with any shipment being made by the debtor. Trade creditors may lose this defense when they apply the payments received by the debtor to aging invoices instead of current invoices. The courts generally require that the transfer occur in writing one to fourteen days after the transfer of new value to the debtor.

Therefore, if your client receives a preference claim, do not automatically submit a check. Begin preparing your defenses. Even if your defense is shaky, you may be able to negotiate a settlement. In many cases the trustee, attorney or collection firm attempting to collect the preference is employed on a contingency basis. This usually encourages the claimant to try to settle claims

quickly while spending as little time as possible. Second, the debtor's records are generally a mess. As a result, initial preference claims are generally generated based merely on the debtor's check register with no other analysis. Also, big claims get more attention than small claims.



Marc Burr performed the Gettysburg Address for the Law Day program

As for some practical strategies, you can try to delay. Your client has the money and you should try to hold on to it as long as you can. Second, it is easier to defend a claim if you know the other side's factual and legal arguments. Write a written demand letter to the claimant stating that your company records do not show any receipts of

payments that would be considered preferences and ask that the claimant furnish any information that they have against you. Once you have received that information, analyze your defenses. If the claim is large, consult a bankruptcy attorney. The next step would be to respond with a detailed letter setting forth your defenses. Settlement will depend of the size of the claim and the strength of the defenses. Even if you feel that you have no viable defense, you still can negotiate. In most cases, the claimant will take less than obvious preference amount just to settle the case.

Remember, claimants have up to two years to bring a preference claim so it is important to be cautious and gather all of your defenses at the beginning should a claim arise down the road..



## TRAVELING THROUGH THE PROSECUTOR'S OFFICE

PAUL A. NEWMAN, ESQ., NEWMAN & BRICE

When you are ready to travel to the prosecutor office, don't use the steps. The double doors are locked and you have to knock to get yourself admitted. I did it, and I had to get admitted after identifying myself to the person who let me in. Use the elevator; it will get you into the office accordingly.

The first thing to do is to get a tour guide. Mine was **Laura**, a delightful prosecutor, who knew the area well. She knew the area too well. We started at her desk, which is a table, open wide, with space all around her. She has tons of room to put

bookshelves and space for other stuff. A computer, granted. Laura had the northeast corner office with a nice second floor view of the courthouse (the imagined, but unattainable).

Outside of Laura's office was a waiting area, reading room, relaxing area, or anything room. On the walls were ancient brick and contemporary wood. The brick made the area look solid, the wood made the area look contemporary. No one was in the area.



Assistant Prosecutor (and Tour Guide) Laura LaChapelle

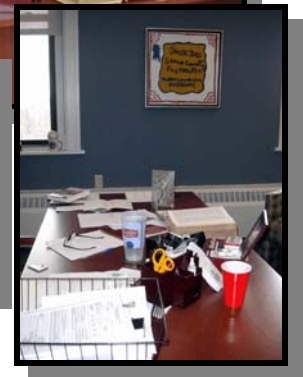
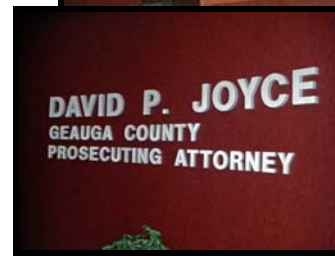
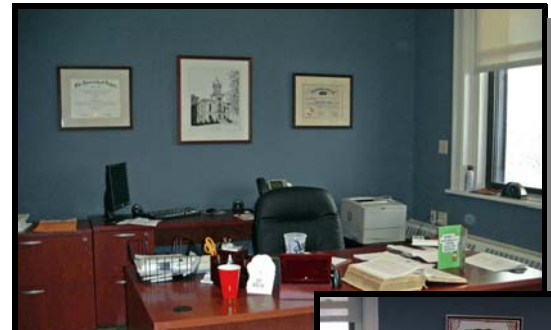
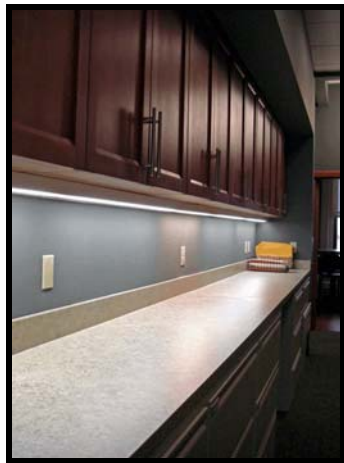


Down the hallway on one side were offices, similar to Laura's, but dissimilar in their own decorations. On the other side was a line of drawers and cabinets which held books, electronic equipment, and other things.

At the end of the hallway was a kitchen and bathrooms. The bathrooms were nice, clean, spacious, and orderly.



There are offices along the backside of the building. The Prosecutor's Office is the largest office, as it should be. It has a conference room attached to it. It is a nice office, roomy, well appointed, and contemporary. It is well decorated. It is the opposite end of the building to Laura's office, the southwestern most office.



Along the hallways surrounding the area were pieces of artwork secured by solicitation to Geauga Archives. They are fascinating pieces fitting the area. Several of them are depicted for you in the pictures.

Along the hallways are offices and files. Very compact, but efficient. **Miede's** office is three times the size of her previous office (she needs it for the work that she does). There are three types of carpeting in the facility, all matching, all green.

The outstanding office is the office of the secretary, **Cathy**, who maintains a companionable office. The lettering for the Prosecutor is grand, and legible.



An interesting thing is the offices for the witnesses and the Grand Jury. The witnesses get to stare at the courthouse across the street, a pleasurable experience. The Grand Jurors have a large screen TV/computer screen/image which plays very well. They have sufficient chairs in the room and good accommodations.

All in all, a very nice professional office.



## CHANGE OF ADDRESS

**S**chraff & King Co., L.P.A. is pleased to announce that effective April 1, 2009 their new offices are located at 2802 S.O.M. Center Road, Suite 200, Willoughby Hills, Ohio 44094. Their new numbers are: TEL (440) 585-1600 and FAX (440) 585-1601.

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