

GEAUGA COUNTY BAR ASSOCIATION VOLUME 38, ISSUE 1, MARCH, 2015

Prospero



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Time to Move on

Paul A. Newman

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I am sixty-seven years old. I have been the editor of *Ipsos Jure* from its inception in 1978, minus four years in the middle.

That is thirty-three years of editing. I think it is time for some other younger lawyer to take on the role.

I have had a good time doing this job. From fantasy and

deliberation to seriousness and outrageous conduct, I appreciate all the good and bad comments that I have received throughout the years. It has become a tradition in law firms. I also appreciate all of the voluntary articles I received from voluntary persons, judges, and politicians. It has been grand.

So, I wish you well, and I give my editorship to Robin Stanley.



The Grand River originates in Geauga County. Paul Newman shares this photo & the cover photo.

Paul, thank you for your service and your many years of outstanding photography! It has helped the *Ipsos Jure* stand apart from all other bar association journals.

—Robin L. Stanley,
Editor

President's Page: "Connections"

Jaredd Flynn

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The "connections" we make with others is vital to developing our lives and our profession. My first "connection" to Geauga County and my firm, Thrasher, Dinsmore & Dolan, was indirectly through Dave Lowe. Before 2002, I don't ever recall being in Geauga County, nor did I know anything about Dave Lowe. Nevertheless, my father knew his wife, Bev, from his time practicing law in Portage County. During one of their friendly chats at the courthouse, my father mentioned that I was in law school at Case Western, which prompted Bev to mention that her husband was a partner at TDD, who happened to be looking for a law clerk. A phone call, a few emails and twelve years later, I proudly call Dave Lowe, my law partner, and TDD and Geauga County, my home.

I've always wondered what things would have been like if certain "connections" were never made. Whether it is a "connection" made to or through a spouse, friend, job, school, client, volunteering opportunity, or otherwise, all of our lives would be different if certain "connections" never occurred. What if you never returned a phone call from that random cold call that turns out to be an important client? What if you did not go to that fundraiser

where you were introduced to your now significant other? What if you did not go to that bar association meeting where you discussed your expertise with a colleague looking to refer work? The more we put ourselves out there, the more we are likely to make "connections" that enhance our lives and our profession.

"Connections" lead to building relationships, which just happens to be the theme promoted last year by Todd Petersen. And while I thought Todd did a great job in promoting and fostering relationships within the Bar last year, I want to take one step backwards this year and focus on the first step of "connecting" members with each other and the community that we serve.

So why take a step backwards you might ask (besides the obvious – Todd took my idea for his last year)? The real reason is that during my time as a member of this Bar, I have generally seen the same people participating and contributing to the Bar. And while it is wonderful to have such an involved group of talented professionals attending Bar activities, I would love to see a broader base of members contributing to this organization, whether by volunteering for sub-committees, attending social events, or just showing up at regular meetings.

In carrying out the theme of "connections" this year, it is my

goal to make it easier for each member to be better "connected" to the rest of the members. We have already eliminated the extra fee for members to list their practice areas on the Bar's website with the hope that more members will submit detailed bios with their areas of practice. Speaking of the website, the Bar is currently developing a new website that will be more user-friendly and more informative. In particular, there will be an online calendar of all Bar events (social events, CLE's, meetings, etc.) for the entire year. Since all of our lives are extremely busy, I hope that having an online calendar makes it easier to schedule and participate in Bar events. Many of the events may be similar from years past, but I hope to mix in a few different events and locales, so don't be surprised if a CLE is held at the new KSU Geauga Branch meeting rooms or a general meeting is held at a different restaurant.

We are also collecting some historical data about Bar members that hopefully will help "connect" the different generations within our Bar. Finally, I plan to coordinate at least one activity with some of the neighboring bar associations. Whether it is a softball game, joint-hosted CLE, or a social event, I believe it is important to continue to make "connections" and build relation-

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Judicial Independence—A Necessity for Democracy

Judge Diane V. Grendell

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“In monarchies, the King is law. In our democracy, the law is King.”
—Thomas Paine

Maintaining the independence of judges from the control of the executive and legislative branches and without influence from the media, politics, or other outside factors is crucial to the functioning of our democracy. Courts play a critical role in protecting individual rights through the fair and impartial interpretation of the laws. Sometimes, a judicial ruling upholding the constitutional rights of an alleged criminal can be very unpopular, but the integrity and survival of our constitutional system, particularly the first ten amendments (the Bill of Rights) depend upon judges having the courage and independence to render those unpopular decisions. If “the push and pull of fear or favor accounts for the result, the [judicial] process is utterly compromised.”¹

Threats to Independence

In recent years, the judiciary has been under persistent attack. U.S. District Judge Paul Friedman has expressed this sentiment, stating: “It is hard to remember a time when judges, courts, and the judicial branch in general were subjected to so

much gratuitous criticism, vitriolic commentary, and purposely misleading attacks.² He further warned that “if this current, often politically motivated drumbeat against judges continues unchallenged, more and more people will lose faith not just in the courts but in the rule of law itself.”³ This opinion has been reiterated by others examining the issue, noting “the virulence with which many members of executive and legislative branches at the state and federal levels are assaulting the constitutionally-guaranteed independence of the judiciary” and the impact this has on public opinion of the courts.⁴

We must keep in mind that the need for judicial independence exists to protect the people. “The general liberty of the people can never be endangered ... so long as the judiciary remains truly distinct from both the legislature and the executive.”⁵

Judicial independence means that (1) the judicial branch should be independent from the executive and legislative branches, and (2) judges should be able to render their decisions without influence from the media, politics, or other outside factors, relying solely on the facts and the law. Judicial decisions should be based on the evidence and the

law.

There are two types of judicial independence: decisional independence and institutional independence. Decisional independence refers to a judge’s ability to make decisions free from political or popular influence. Institutional independence means the judicial branch should be viewed as a separate and co-equal branch of government with the executive and legislative branches. The Constitution established an independent federal judiciary by separating the power to make laws from the power to interpret and apply them. Alexander Hamilton warned of the dangers of joining the three branches, declaring “liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments.”

The principle of judicial independence is both institutional and individual aspects. An independent judiciary requires not only that the judiciary as a whole is independent but that the judges who interpret the law are independent in their exercise of power as well. The decisions of the judicial branch should be fair and impartial, not subject to domination by other branches of government, external influences, or personal interest.

(Continued on page 5)

Judicial (from page 4)

Moreover, judicial independence is important because it encourages respect for our courts, which is essential in enforcing unpopular decisions. Controversial decisions are widely complied with because of the public perception that those decisions were based on fair and impartial interpretations of the facts and law, and that the outcomes are not “rigged.” The belief that disputes can be resolved in a fair and impartial manner and that everyone will be equal under the law helps promote this respect.

Historically, executive and legislative leaders have, at times, tried to influence judicial outcomes. Today, there are many threats to an independent judiciary. Non-governmental groups have used political, social, and economic resources to influence both the selection and retention of judges. Although the Constitution establishes safeguards to protect judicial independence, vesting the courts with judicial power and granting certain federal judges with life tenure, judicial independence is inherently placed at risk in states where judges are elected. Judges can lose reelection campaigns because of legally correct, but unpopular decisions. Yet, good judges render unpopular decisions when the facts and law warrant such rulings.

Appellate Review

Maintaining strong, independently minded judges on appellate courts is particularly important in Ohio for several reasons. First, at the trial court level, parties have a constitutional right to have a jury decide their

case. Ohio Const. Art. I, Sec. 5. While the trial judge certainly plays an important and substantial role in the trial, the outcome is ultimately determined by eight jurors in a civil trial and twelve jurors in a criminal case. On appeal, the outcome rests in the hands of three appellate judges.

The structure of the appellate courts is designed to foster a more dispassionate administration of justice. While trial court decisions are often made in the bustle and pressure of trial, “in medias res” (“in the middle of things”), the appellate process begins only after matters are settled in the trial courts. Counsel for the litigants carefully review the transcripts, pleadings, and physical evidence before the lower court and select a limited number of errors for the appellate court to consider.

Another way of promoting independence at the appellate level is by having appellate review conducted by several judges or justices. Thus, an appellate decision is not merely the decision of a single person, potentially subject to that person’s biases. An appellate decision is a more measured decision, the result of a majority of judges, rather than being the product of a single will.

Second, in Ohio, the court of appeals is usually the final decision maker. Courts of appeal must hear all cases appealed to them. The Ohio Supreme Court has wide discretion to decide what cases it will hear and only a very small percentage of cases filed with the Ohio Supreme Court are accepted by that Court.

Third, appellate judges and justices enjoy the (relative) luxury of time in contrast to their counterparts at the trial level. Appellate decisions are made over the course of months, presumably allowing for greater reflection. Thus, the judicial independence of appellate courts, important for maintaining public confidence in the judiciary, is fostered by their insulation from the inherent pressures of the day-to-day operation of the trial courts.

In contrast to trial court decisions, which usually apply only to the parties to the case, appellate decisions are published and are binding on lower courts within a particular appellate district. An appellate court’s decision may also be cited as persuasive authority by other appellate courts. The immediate harm caused by an improperly influenced lower court decision is generally limited to the litigants involved. The potential harm when an appellate court makes a bad decision is much greater, since that decision will influence later decisions.

The publication of appellate court decisions illustrates another maxim that has been applied to the courts, “justice must not only be done but must be seen to be done.” Because appellate decisions are published, the reasoning behind each decision is fully exposed to public scrutiny.

Finally, the independence of the appellate courts is essential to the judiciary’s ability to be an effective self-regulating profes-

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Judicial (from page 5)

sion, which, in turn, is an essential component of the judiciary's independence from other branches of government. In other words, the duty of the appellate courts to reverse wrongly decided lower court decisions is important. The failure of the appellate courts to exercise this role effectively invites public scrutiny and legislative interference.

Therefore, independent-thinking appellate court judges are important because they usually are the final judicial decision makers and their decisions are binding precedent within their jurisdiction.

Ensuring Judicial Independence

The best way to ensure judicial independence is to gain public respect and appreciation for judicial independence. By educating the public on the importance of protecting fair and unbiased courts, people will be receptive to protecting the impartiality of the judiciary. "For the rule of law to be really secure, there has to be a widespread understanding among the people of a country, of the reasons why it is so important that judges should be truly independent of the state."⁶

The public's readiness to support judicial independence rests on the public's trust and confidence in the legal system. This trust and confidence can be gained by helping the public understand how the judicial system works and encouraging them to help improve the system. The public needs to have the confidence that the laws will be fairly and equally applied.

Other Safeguards

The doctrine of judicial

immunity is an additional way of protecting the judiciary's independence. This doctrine provides legal immunity to protect judges from lawsuits brought against them for official conduct in office. For example, a judge cannot be sued for libel stemming from statements made about a criminal defendant during trial. Judicial immunity can help to encourage judges to act in a fair manner and make decisions which may not echo the sentiment of the people in the community.

An additional safeguard on judicial independence is for judges interpreting the law to have the courage and conviction to base those decisions on the facts and law and not on fear or favor. Judicial decision making must not be impaired by the threat of reprisals.

Justice Kennedy affirms this sentiment in his concurrence in the controversial *Texas v. Johnson* case which invalidated prohibitions on desecrating the American Flag. Kennedy wrote "[t]he hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision."⁷

Justice Kennedy said "[t]he law makes a promise—neutrality. If the promise gets broken, the law as we know it ceases to exist. All that's left is the dictate of a tyrant, or perhaps a mob." Judicial inde-

pendence is essential to maintaining the rule of law. Judicial courage and integrity are critical to achieving judicial independence.

Endnotes:

1. James L. Morse, A Declaration about Judicial Independence, 20 Quinnipiac L.Rev. 731, 737-740 (Spring 2001).
2. Paul L. Friedman, Commencement Address at the University of Buffalo Law School, State University of New York (May 21, 2005).
3. Id.
4. Devera B. Scott, Esq., Keith J. Feigenbaum, Esq., Kelley M. Huff, Esq., and the Honorable Jan R. Jurden, The Assault on Judicial Independence and the Uniquely Delaware Response, 114 Penn St. L. Rev. 217, 223 (2009).
5. Alexander Hamilton, The Federalist No. 78 at 465, 466 (Clinton Rossiter ed., 1961).
6. Lord Justice Brooke, *Judicial Independence – Its History in England and Wales*. <http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbbrook.htm>.
7. *Texas v. Johnson*, 490 U.S. 397, 420, 109 S.Ct. 2533, 2548 (1989).

New Member Spotlight:

Ann Mitchell

***Miami University, 1991,
Cleveland-Marshall, 1995,
Admitted to Ohio Bar, 1995,
Currently Assistant
Prosecutor with the Geauga
County Prosecutor's Office***

Legal Aid Update

Melanie A. Shakarian

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Legal Aid uses the power of the law to ensure access to basic needs and lift people out of poverty. A legal solution is often the key to keeping your home, to securing a protective order to be free of an abusive relationship, or getting your child the extra help they are entitled to in school. Legal Aid is grateful for the partnership of the Geauga Bar Association: together, we provide services that focus on improving clients' health, safety, shelter, education, and economic security.

Last year, more than 20,000 people were assisted by Legal Aid. Among those helped was baby Elizabeth – a foster child who was in the system because of prenatal exposure to heroin. Her foster parents, the Weitas, were able to permanently adopt Elizabeth and give her a safe and loving home. However, Elizabeth's exposure caused developmental delays requiring therapy that would cost nearly 50% of the family's income without insurance. The Weitas applied for a federal program that supports families who adopt children with special needs and ensures federal Medicaid stays with the child until she turns 18. As adoptive parents, the Weitas clearly qualified, but Ohio Department of Jobs and Family Services denied their application.

The Weitas tried to file an

appeal themselves, but were quickly in over their head. "I was getting bullied.... I knew they would respect an attorney, but we didn't have money for that," Ms. Weita said. Legal Aid advocated for the family and won – securing the \$500 in monthly benefits needed to help the Weitas make a better life for baby Elizabeth.

Statistics show that 45% of people who spend at least half of their childhood in poverty continue to live in poverty at age 35. Baby Elizabeth's case is just one example of how Legal Aid's advocacy changes the trajectory of clients' lives and lifts people out of poverty. And, Elizabeth was among the 20,595 people helped by Legal Aid in 2014 through 8,286 cases. The cases were divided among a variety of civil legal issues, including: housing (16%); consumer (including foreclosure and bankruptcy) (36%); domestic relations (including helping victims of domestic violence) (22%); health and public benefits (6%); education (3%); employment (11%); immigration and other civil matters (5%). Legal Aid's effectiveness is evident in the outcomes achieved. For instance, in

2014 Legal Aid:

- Prevented 99% of the evictions clients faced;
- Stopped more than 58% of the foreclosure actions against clients;
- Removed barriers to education for children in 88% of education cases;
- Secured health insurance for 98% of clients;
- Secured the personal safety from abuse and other assaults for 99% of clients; and
- Increased clients' assets and income, and reduced their debt by a combined \$18 million.

Interested in getting involved? Legal Aid is seeking attorneys in the Geauga Bar who can volunteer and support our efforts. Email probono@lasclev.org to get involved today! Or, visit www.lasclev.org.



The
Legal Aid Society
of Cleveland
Since 1905

Reflections on Hanukkah and Christmas in Cuba

Kenneth Kabb

The Kabb Law Firm, kenkabb@yahoo.com



Trinidad Cuba Town Square



I was in Cuba when the resumption of diplomatic relations with the United States broke the news. The Cubans we met were thrilled, and understandably so. The contrasts between our modern economy and culture and Cuba are stark. I've been to islands in the Caribbean before. Most are poor, relics of an agrarian economy based on slavery. Sugar cane is no longer a profitable crop.

What struck me upon arriving are the cars: fifties Oldsmobiles, Chevys, Fords, and the odd Studebaker. Many in excellent shape; some hopelessly bedraggled. To keep them run-

ning with repair parts subject to embargo, Russian Lada parts have been modified.

Cuba under Bautista, before the communist revolution, had a strong mafia influence. Meyer Lansky is something of a national figure. Organized crime brought in casinos, hotels, restaurants, and most likely corruption. The revolution led by Che and Fidel in 1959 brought major changes. Gambling was outlawed, and the economy, almost overnight, became communist. Most private property was seized by the government, and businesses were nationalized. Many Cubans fled with what they could carry, or what they had stashed outside the country. Cuba's main exports became anti-colonial mil-

itary assistance and doctors. Anti-American rhetoric escalated. The United States responded with an economic embargo that is still in place.

There is a tourism industry. You see Canadians, French, Germans, and some Americans. There is a dual monetary system. Tourists convert American dollars into CUC's: Cuban Convertible Pesos at 1:1. Cubans, on the other hand, are paid in pesos that are about 1/25th of the CUC. Doctors are paid \$35.00 per month. Other Cubans live on \$25.00 a month. There is a rationed food allowance for each family that is close to a starvation diet. There are limited private markets, but most Cubans have very little money to spend. Even if they had money, many things we take for granted are unavailable, like toilet seats and paper.

In most of the world, we enjoy virtually unlimited exchange of information and communication over the internet and by telephone. The internet is controlled through government kiosks, with dial-up speeds and limited availability. Information is highly controlled. There are no longer private firearms in Cuba. The one remaining gun store is now a museum.

Hemingway was a hunter

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Reflections (from page 8)

and fisherman. We visited his home, “Finca Vigia” (Lookout Farm). He was also a friend of Fidel, and something of a national hero.

Cuba was a client state of Russia for many years. The economic system and architecture are Russian—boxy, clunky, and drab. When Russia pulled the plug, the Castro government decided that religion and communism could co-exist. By that time, Cuban Jews had forgotten what being Jewish was like. The Jewish community, once numbering 20,000, today counts maybe 1000. It almost seems there are more Jews in the cemeteries than above ground. Nevertheless, there are active Jewish congregations in Havana and several smaller cities. The largest, Patronato, in Havana, claims 400 members. The smallest in Cienfuegos and Santa Clara boast maybe 15-25. Non-Jews convert to marry; young Jews make Aliyah to Israel (and sometimes then to America). Somehow, the communities survive with lots of outside financial help and support. There is one kosher butcher in Cuba. The government grants a license to slaughter one cow per month. Beef is prohibitively expensive. Pork is the main meat. Cows are mainly kept for milk, not meat. Despite the difficulties, the Jewish congregations we met were enthusiastic and committed. B’nai B’rith, which sponsored our trip, has been doing so for 20 years. We all brought large amounts of supplies as “gifts for the community.” The Kabb Law Firm’s contribution was 42 pounds of

medical and health supplies, plus tzedaka cash.

Cubans get free education and medical care. All education, from toddlers on up, is laced with strong doses of communism. Ernesto “Che” Guevara is worshipped as a saint. The government is not at all representative. The only party permitted is the communist party. High government officials are appointed by the party and have no term limits. There is no independent practice of law; all lawyers are part of a government guild. Hugo Chavez is known as El Mejor Amigo (the good friend) for supplying oil in exchange for doctors and security to Venezuela after the Russians pulled out. Now that oil prices have dropped, both Venezuela and Cuba’s economies are severely strained. I’m sure Cuba would love to have United States supply money and oil. That could be an expensive undertaking, with no expectation of change in the Cuban government nor any improvement in the lives of most Cubans.

Cuba is an interesting



study in comparative government and economics. Like Venezuela, the people are quite hospitable; the government—not so much. While there is no anti-Semitism in Cuba (or so we were told), the government has close ties to Iran, which is strongly anti-Semitic, anti-Israel, and anti-United States. Most of the passengers on the World Atlantic plane that brought us back clapped when the wheels touched down in Miami. As chaotic as our government and economy can be, communism is at least a century behind. Economist Milton Friedman was right: socialism and communism require increasing destruction of individual liberty to function. Adam Smith’s “invisible hand” that guides a free market economy is far better than control by self-appointed government experts. Communism has made most Cubans equally poor. Hopefully, resumption of diplomatic relations will work to better the lot of the Cuban people, and not just the government.

Announcements



Thrasher, Dinsmore & Dolan L.P.A. is pleased to announce that Mary Jane Trapp has become an equity partner in the firm. Mary Jane has a unique background with over 30 years as an experienced civil and criminal defense litigator, mediator, arbitrator, and state appellate

judge. Mary Jane offers:

- A state-wide litigation consulting practice, which includes per case co-counsel relationships or “second-opinion” consults to other private attorneys, law firms, prosecutors and other governmental law departments and agencies, and organizations.
- Appellate consulting services including trial court record

review and case evaluation, brief review and writing, and conducting mock oral arguments.

- A dispute resolution practice including consumer, business contract, and employment disputes to construction litigation, complex tort claims, insurance coverage disputes, and probate and real estate matters with claim size ranging from \$25,000 to more than four million dollars.

Connections (from page 3)

ships with attorneys and judges in neighboring counties.

Whatever the reason, I

hope to see the participation within the Bar improve throughout the year. Accordingly, I challenge each and every Geauga County Bar member to go to at least one

more event or meeting this year, since you never know when that important, possibly life-altering “connection” might be made.

Ohio Supreme Court—Appeals in Contempt Cases Ruling

Judge Timothy Grendell

Geauga County Probate/Juvenile Court, 440-279-1830



In The Docks Venture v. Dashing Pacific Group, 141 Ohio St.3d 107, 2014 - Ohio-4254, the Ohio Supreme

Court certified a conflict on the issue of whether a court’s finding of contempt and imposition of sentence is a final appealable order when there are purge conditions.

The Eleventh Ohio Appellate District has generally ruled that when there is an opportunity to purge the contempt, there is a second step of bringing the con-

temnor back to court to determine whether the contempt has been purged and, if not, to execute the sentence before a right to appeal. In those cases, the Eleventh District ruled that the finding of contempt is not final and appealable until after the second step (failure to purge) has occurred.

The Ohio Supreme Court, in Docks Venture, held:

“A court order finding a party in contempt and imposing a sentence conditioned on the failure to purge is a final, appealable order on the issue whether the party is in con-

tempt of court. We further recognize that a contemnor may have an additional appeal on the question whether the purge conditions have been met following execution of sentence on the failure to purge.” Docks Venture at ¶ 23.

Now, the first entry holding a party in contempt and imposing a sentence with purge conditions is a final appealable order. The subsequent entry determining whether the purge conditions have been satisfied also is a final appealable order.

Cognovit Judgments: Are They Still Valid?

Jonathan P. Blakely

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Cognovit notes are a very effective tool for lenders. They allow a lender to obtain judgment against a defaulting borrower

on the same day the lawsuit is filed. However, Ohio courts have been overturning cognovit judgments for various reasons.

A 2014 case from Ohio's 9th Appellate District could invalidate most cognovit judgments if followed by other appellate districts. *Huntington National Bank v. Clark Development, Inc.* 2014-Ohio-2629 (9th District) ("Clark") held a court lacked jurisdiction to issue a cognovit judgment since the complaint did not *allege* the original cognovit note was presented. It accordingly avoided a judgment taken in April, 2009, in January, 2013.

What is a Cognovit Note?

Cognovit notes contain a provision confessing judgment by the borrower. This provision waives defenses. This enables a creditor to obtain a judgment without prior notice to the borrower. Because of its extraordinary nature, only 5 states recognize these notes: Ohio, Delaware, Maryland, Pennsylvania, and Virginia (In Indiana, it is a misdemeanor to use a cognovit note!).

In Ohio, cognovit notes are

only valid for *commercial* loans, not consumer loans. They are governed by statute (Ohio Revised Code section 2323.13). The note is not valid unless it complies with the requirements of this statute. The same with cognovit judgments.

Procedure to Obtain a Cognovit Judgment

The lender's attorney prepares a complaint, answer, and proposed judgment entry. Usually, an attorney friend reviews the paperwork and signs the Answer confessing judgment. The lender's attorney files the paperwork with the court. He/she then takes the paperwork to the judge to be signed. If the judge is available, the judgment will usually be signed within several minutes while the attorney waits.

The originally signed cognovit note must be presented to the judge. Most parties will attach a *copy* of the cognovit note to the complaint, and bring the *original* separately for the judge's review. The original cognovit note is then given back to the lender's attorney. If the judge was not available, the clerk will mail the original cognovit note to the lender's attorney.

It should be noted the original cognovit note is rarely in the court's file, the complaint and judgment rarely state the

original note was presented, and rarely does the court file indicate the original note was mailed back to the attorney or ever received.

Requirements for Cognovit Complaints

The following requirements must be met to obtain a cognovit judgment (Ohio R.C. § 2323.13):

1. The original note must be presented when the complaint is filed;
2. The amount due must be specified in the complaint (and the judgment);
3. The complaint must state the last known address of the borrower(s);
4. The complaint must state the loan was a commercial and not a consumer loan;
5. The complaint must be filed in the county where at least one of the borrowers resides (or, in some cases, where the note was signed).

Challenging a Cognovit Judgment

A motion for relief from judgment is filed pursuant to Ohio Civil Rule 60(B). *Buzby v. Chamoun*, 2014-Ohio-4676 (8th District). To prevail, the movant

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Cognovit (from page 11)

must show: (1) a meritorious defense exists; and (2) the motion was timely made. *Id.* at ¶ 7; *Huntington National Bank v. 199 South Fifth Street Co., LLC*, 2011-Ohio-3707 (10th District) at ¶ 8. A party asserting a meritorious defense does not need to prove it will prevail. *Chamoun*, at ¶ 7; *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St. 3d 17, 520 N.E.2d 564 (1988).

Since cognovit judgments are of an extraordinary nature, the statutory requirements are strictly construed against the party seeking to take cognovit judgment. *Lathrem v. Foreman*, 168 Ohio St. 186 (1958); *199 South Fifth Street Co.*, at ¶ 20.

A meritorious defense is one concerning the validity of the debt or cognovit note, the status of the debt at the time of the lawsuit, or the procedure used to obtain cognovit judgment. *Jacobs v. Acacia Chattanooga Vehicle Auction, Inc.*, S.D. Ohio No. 2:10-CV-912 (December 21, 2011).

Meritorious defenses include improper procedures in obtaining the judgment, payment or partial payment, and miscalculation of the note balance due at the time of confession of judgment. *K One Limited Partnership v. Salh Khan*, 2014-Ohio-2079 (10th District); *Market Ready Real Estate Services, Inc. v. Weber*, 2013-Ohio-4879 (10th District); *First National Bank of Pandora v. Freed*, 2004-Ohio-3554 (3rd District). This includes alleging one of the 5 requirements listed above was not met.

Court Imposed Limitations on Obtaining Cognovit Judgments

Ohio courts recognize cognovit judgments deprive a borrower of their day in court. As a result, courts have strictly interpreted the requirements of Ohio R.C. § 2323.13. Courts have invalidated cognovit judgments for various reasons. These include *non-monetary* defaults (i.e. failure to provide updated financial information, etc.). *Salh Kahn*, at § 14; *Henry County Bank v. Stimmels, Inc.*, 2013-Ohio-1607 (3rd District). Also, the failure to possess or produce the originally executed cognovit note has been grounds for the invalidation of cognovit judgments. *199 South Fifth Street, LLC* at ¶ 20; *Chamoun* at ¶ 12 and 15; *Foreman* at ¶ 2 of the syllabus.

Clark

However, *Clark*, decided on June 28, 2014, took things further. It invalidated a cognovit judgment when the complaint did not even *allege* the original was presented or the judgment entry did not *find* the original was presented at the time of judgment. In *Clark*, a cognovit judgment taken in April, 2009, was voided for this reason when a motion for relief from judgment was filed in January, 2013, close to 4 years later. *Since the Court lacked the subject matter jurisdiction to issue the judgment, the borrower's right to challenge the judgment was not limited to the year after judgment* under Ohio Civil Rule 60(B).

The

Court found the statute required an allegation in the complaint that the original cognovit note was presented. Alternatively, it found this failure could be rectified if the judgment entry contained a finding the original was presented to the Court. Since neither requirement was met, the Court found the cognovit judgment was invalid. The Court also noted the lender's affidavit attached to the complaint stated a true and accurate copy of the note was attached. The Court implied if the Affidavit stated the original cognovit note was attached or presented with the complaint, the judgment may have been upheld.

Effect of Clark

It remains to be seen if *Clark* will be followed by other courts. It is the law of the 9th Ohio Appellate District, which encompasses Lorain, Medina, Summit, and Wayne counties.

I have taken a number of cognovit judgments over the years, and have reviewed many more in representing borrowers. I have never seen a cognovit complaint or judgment that would remain valid if a borrower challenged it by seeking relief from judgment under the requirements of *Clark*.

Cognovit judgments are rarely challenged by borrowers. If they do, and *Clark* is followed by other courts, relief from judgment would be granted in most cases.

New Member Spotlight:

Lisa Pavlik

**Austin Peay, 1995, Cleveland-Marshall, 2001,
Admitted to Ohio Bar, 2002,
Currently self-employed**

Cases of Interest

Pearce Leary

Pearce Leary, Esq., pearceleary@windstream.net



Patterson vs. Godale (Lake), 2014-Ohio-5615. Held: In the absence of a written contract an attorney may recover his/her fees in quantum meruit.

Weitzel vs. Trumbull Cty. Comrs. (Trumbull), 2014-Ohio-5620. Deputy suddenly pulls out from speed trap, attempts u-turn, strikes plaintiff's car. Held: no summary judgment on immunity.

Key issues whether deputy responding to emergency call and whether wanton misconduct-jury issues.

Lozada vs. Lozada (Geauga), 2014-Ohio-5700. Award of attorney fees for frivolous conduct upheld. Trial court found ex-wife filed meritless domestic violence complaint containing materially false statements. (2-1 decision)

In the matter of: E.B. (Lake), 2014-Ohio-5764. Juvenile matter.

Held: objections to magistrate's decision must be filed within fourteen days. Unavailability of transcript is no excuse (unless trial court says so). Proper procedure to timely object and then supplement when transcript available.

Kent State University vs. Ford (Portage), 2015-Ohio-41. Held: liquidated damages clause in departing basketball coach's contract (\$300,000 times years remaining on contract) enforceable. (2-1 decision).

Recipe Corner: Tortellini Stracciatella Soup

Ann M. D'Amico

Law Offices of Michael J. Caticchio, amd@macyhouselaw.com



Ingredients:

- 8 cups of chicken or vegetable broth
- 2 carrots cut up into whatever size you prefer
- 2 cups of cut up, cooked white meat chicken (rotisserie chicken or cut up all white meat chicken breast)
- 1/4 cup freshly chopped parsley
- 2 cups of tortellini (The tortellini are dry and can be found in the pasta section of your grocery store)

- A bunch of baby spinach
- 2 eggs
- Salt and pepper to taste
- Grated cheese

Procedure:

- Boil 8 cups of broth.
- Add cut up carrots and let cook in broth until tender. Once carrots are tender, add chicken, parsley, and tortellini for 5 minutes.
- After 5 minutes, bring soup to a rapid boil.
- Beat 2 eggs in a small bowl and slowly pour egg mixture into rapid boiling soup with

one hand and whisk egg quickly in the soup with a fork with the other hand. You will see that the egg is turning into thin cooked shreds.

- Let cook for another 3 minutes and ladle into bowls.
- Take the baby spinach and put some in each bowl of soup. The hot soup will cook the spinach perfectly!
- Sprinkle some grated cheese on top and enjoy.

~Tip: Feel free to add celery and onion if you like or any other vegetables. This is one soup that will definitely warm you up!

Warm and Beautiful Australia

Joseph T. Svete

Svete & McGee Co., L.P.A., svete@smc-law.com



Australia is normally not the place one would think to visit in the middle of the winter. Actually, it is a great place to keep warm in the middle of winter. As you know, this is the middle of summer south of the equator.

Australia was originally populated by prisoners and other criminals that Great Britain deported, unlike our nation, which was populated by people seeking religious freedom. Notwithstanding a less than auspicious beginning, Australia turned out to be a very pleasant and hospitable country to visit. The people there are very friendly and courteous, and they could not be any more helpful if they tried. It is a refreshing and gratifying experience to interact either socially or business-wise with Australians. No question is too "stupid" while in Australia. We stayed in Melbourne which is located in the southeast part of Australia where the temperatures are generally warmer than here, probably more like

in South Carolina. Last year in January, 2014, the temperatures reached 115 degrees Fahrenheit resulting in the cancellation of all tennis matches for the day. This is rather unusual, however, the summer temperatures there do hover around 90 degrees Fahrenheit. This year it was much more pleasant; temperatures were in the eighties.

The city of Melbourne is blessed with beautiful architecture, and it is very neat and clean. There are no McDonald's wrappers and other papers littering the streets. Most people either walk on very wide pedestrian sidewalks or use public transportation; they still use trolleys and rail cars.

What was I doing in Australia? My real purpose was to watch my granddaughter, Lauren Davis, compete in the Australian

Open. Because of her high ranking, she is privileged to play in the main draw with other top world tennis players. This year in her first round she drew a Serbian young lady, Aleksandra Krunic, ranked 77th in the world. Lauren was ranked higher at 53rd in the world, and therefore, she should have won. (Ranking is based on the number of matches won in a 12 month period.) As fortune would have it she did win fairly easily. Her next match in the second round was with tennis legend, Venus Williams, who is ranked 17th in the world. It would have been a significant victory for Lauren, as the underdog, to defeat Venus, a higher ranked player. Unfortunately, Lauren succumbed to the powerful Venus. It was played in the newly domed and renovated "Margaret Court Arena" with a seating capacity of 15,000. The seating provides excellent viewing from all areas of the arena. I was privileged to sit in the Coach's Box.

It's fairly easy without emotion for me to talk now about wins and losses, but not so when I'm



(Continued on page 15)

Australia (from page 14)



watching Lauren; every stroke and every point increases the adrenaline and anxiety. As the saying goes, “The thrill of victory and the agony of defeat” is never more heartfelt than when a relative is competing. In the first set with Venus Williams, Lauren started serving, won her serve, and then when Venus served, she broke Venus and at the end of two games, it was 2 - 0 for Lauren. Then in the next game when Lauren served, Venus broke her, and it became 2 - 1 Lauren. Venus started unleashing her power and eventually won the set and the match. It was exciting to see Lauren play someone like Venus who has been recognized as one of the premier tennis players in the history of tennis.

Win or lose, I accepted this as a memorable event that I will cherish for the rest of my life.

Being related to Lauren, entitles me to a special guest pass to the tournament which permits me to mingle in the player’s lounge with all of the super stars such as Serena and Venus Williams, Maria Sharapova, Roger Federer, Novak Djokovic, Rafael Nadal, and others. I was also able

taboo.)

Diet wise, I noted, most of the European, Eastern European and Russian players will consume pastas, breads, and other high carbohydrate foods before matches. Whereas, the American players tend to stay away from carbohydrates and eat, in my opinion, more healthy foods such as fish, chicken, some red meat, and vegetables. Generally speaking, all the players are fairly thin but not overly muscular in appearance. Their exercise routines do not involve body building as we know it but instead concentrate on dynamic movement and flexibility and leg and arm strengthening.

Back to the Country of Australia, it differs from our economic culture and demographics. The population is composed of Caucasians from Great Britain, Europe, Eastern Europe and Russia. There is a significant Indian population as well as Asian population from China, Indonesia, Korea, Japan, and the Philippines. We noticed many of the retail establishments are either owned or operated by persons from India and Southeast Asia. Australia pays

to dine in the same dining area where the players dine; interestingly enough most of them are very friendly and down to earth. (The thing that one does not do is ask for autographs or take pictures. That is

their working people quite handsomely. For example, waiters and waitresses make \$20.00 to \$25.00 per hour. As a consequence tipping is not normally expected. Australia has a universal health system. However, people that can afford to pay for more individualized medical care can buy insurance, which allows them to select their preferred doctors and hospitals that may provide better quality and more timely service. In my conversations with some of the people in Australia, they didn’t understand how we have such a low minimum wage, and also, they could not understand why we resisted the “Affordable Health Care Act” a.k.a. “Obamacare”. (This is not intended to be a political statement but merely parroting their opinions.)

The trip is great once you are there, but I must warn you that the flight to Australia took 23½ hours. Now that Cleveland is no longer a hub for United Airlines, we flew from Cleveland to Washington, D.C., from Washington, D.C. to Los Angeles, and then from Los Angeles to Melbourne. The flight from L.A. to Melbourne was (only) 14½ hours in the air. The flight actually wasn’t too bad since we had the opportunity to fly Boeing’s new 787 Dreamliner. It is a very well appointed, quiet, and luxurious aircraft.

Would I go again? I most certainly would, as stated before Australians are very welcoming and fun to be around. So, if you have an opportunity to travel, I strongly recommend Australia as your next destination.

Join a Committee for 2015!

Contact Mary S. Poland, Esq.

Geauga County Law Library and

Geauga County Bar Association

secretary@geaugabar.org, 440-286-7160

Watch for upcoming issues as we examine the different committees and see them at work throughout the year!

Advanced Directives

Chair: Jennifer Peck

Laura Gorretta, Patricia Schraff

Bar Admissions

Chair: Jeffrey Orndorff (1 year)

1 year: Lynne Day, Jim Flaiz,

Dale Markowitz

2 years: Laura LaChapelle, Joseph

Triscaro, Sheila Salem,

Ann D'Amico

3 years: Richard Stege,

Jaredd Flynn, Kelly Slattery,

Amy Turos

Bar Poll

Chair: Casey O'Brien

Dan Cronin

Constitution

Chair: Frank Antenucci

Pearce Leary, Jim Flaiz,

Colleen O'Toole

CLE's

Chair: Heidi Cisan

Todd Hicks, Doug Brown,

Jeff Orndorff

Courts

Co-chairs: Joe Svete &

Pearce Leary

Jim Gillette, Todd Hicks, Mike

Apicella, David Lowe

District 18

Chair: Mike Apicella

Mary Jane Trapp

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Co-chairs: Mary K. Bender &

Lynne Day

Jeff Orndorff, Pearce Leary,

Ann D'Amico, Karen Hummel,

David Lowe, Elaine Tassi,

Amy Turos

Fee Disputes

Chair: Todd Hicks

Michael Yaksic, Yasmina Martin,

Phil King, Stephan Voudris

Golf Outing

Chair: Jim Flaiz

Jaredd Flynn, Terri Stupica

Good Deeds

Chair: Jaclyn Vary

Jennifer Peck, Justin Madden,

Dennis Wynne, Michael Judy,

Joe Svete

Grievances

Chair: Dennis Coyne (2 years)

1 year: Barbara Moser,

Michael Judy, J.A. Miedema,

Edward Ryder, Ward Lawrence

2 years: Dennis Wynne,

Bridey Matheney, Shawn Neece

3 years: Frank Antenucci,

Carol Szczepanik, Ron Swencki,

Patricia Schraff, Sharon Gingerich,

Todd Petersen

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Chair: Robin Stanley

Lisa Carey, Paul Newman,

Pearce Leary, Michael Judy

Law Day

Chair: Mary Jane Trapp

Terri Stupica, Forrest Burt,

Ed Brice, Jim Gillette,

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Law Library

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Jaclyn Vary, Laura Gorretta,

Denise Workum

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Bridey Matheney, Joe Svete,

Carolyn Paschke, Lynne Day

Notary

Chair: Bob Zulantz

Todd Hicks, Matthew Rolf

Social Events/Programs

Co-chairs: Terri Stupica &

Todd Petersen

Kate Jacob, Michael Yaksic,

Karen Hummel, Laura Wellen,

Christian Ondrey

Christmas Party

Todd Petersen, Dan Cronin

Secretaries' Day

Ann D'Amico

Public Relations/Community

Co-chair: Dan Cronin & Ed Brice

Mary Jane Trapp, Ann Bergen

Settlement Day

Chair: Lisa Carey

Ann D'Amico, Carly Ibold,

Anna Petronzio, Barbara Moser,

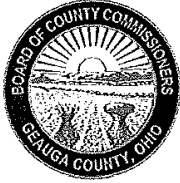
Karen Lee, Karen Hummel

Unauthorized Practice of Law

Chair: Carolyn Paschke

Steve Patton, Barbara Moser,

Dennis Coyne, Todd Hicks



GEAUGA COUNTY BOARD OF COMMISSIONERS

Walter M. Claypool Blake A. Rear Ralph Spidalieri

DEPARTMENT OF JOB AND FAMILY SERVICES
12480 Ravenwood Drive, P.O. Box 309, Chardon, Ohio 44024

Craig A. Swenson,
Executive Director

Geauga County Bar Association
C/O Mary Jane Trapp
1400 W. 6th St., Suite 400
Cleveland, OH 44113

January 28, 2015

Dear Members,

On behalf of Geauga County Job and Family Services, a heartfelt thank you for your participation in the 2014 Sponsor a Family Program. As you know, the Sponsor a Family program provides food and gifts for families in need throughout Geauga County during the holiday season. I'm pleased to report the program assisted 548 households in Geauga County this past holiday season. This translates to 1,876 people served and includes 1,082 children and foster children who received toys and gifts! In addition, approximately 14,000 pounds of food was donated and distributed.

The Sponsor a Family Program is an enormous undertaking. Work actually begins in October and continues until Christmas. Each year, I provide churches, schools, civic groups, businesses, organizations, and individuals with information on a family to "sponsor". Monetary donations to Sponsor a Family are used to purchase food, toys, and gifts for those families not matched with a community sponsor. The food and gifts are sorted, packed, and delivered by volunteers. This program year, we had 193 sponsors who either sponsored a family or collected food or toys to be distributed.

The Sponsor a Family program is supported solely through donations and volunteerism from residents and professionals living in Geauga County and beyond its borders. Whether you sponsored a family, made a donation, or volunteered time, your contribution to this program is what makes it successful year after year. Thank you again for your kindness and your help in making this holiday enjoyable for those in Geauga County who are less fortunate.

I have received many thank you cards and letters from families. While they are addressed to me, I would like to share a sampling with you since it was your kindness that brought enjoyment to so many families this holiday season.

Sincerely,

Sara Shining
Community Support/Volunteer Coordinator
Gauga Co. Job and Family Services

Paystubs: The Threshold Question

Robin L. Stanley

Petersen & Ibold, rstanley@peteribold.com



One of the most important questions in a bankruptcy is the amount of income a Debtor receives.

Last edition, I discussed the other types of income that Debtors receive besides pay advices or paystubs. However, most Debtors are employed and are receiving paychecks. Debtors are required to present to the bankruptcy court and trustee full disclosure of their current income as well as any future increases or decreases in pay. The ability-to-pay or disposable income is a primary determination as to whether a Debtor is eligible for a Chapter 7 or 13 bankruptcy.

The typical scenario occurs when a married couple comes to the office in need of bankruptcy advice. Most debtors are employed and receive no other types of income. In order to determine what ability they have to pay, under BAPCPA, we must examine their current paystubs and their paystubs for the last six months. The paystubs must be for the six months leading up to the filing of their bankruptcy. For example, if a Debtor files in April, the paystubs will be required from October 1 to March 30.

Today, most employers are familiar with bankruptcy, because they have had employees file for bankruptcy in the past. It has made the collection of paystubs much easier. However, large cor-

porations and small family-operated companies often pose the most difficult time when trying to get paystubs. In large companies, the human resources department may be completely separate from the payroll department, and sometimes, they do not communicate with each other. In a small company, one person often runs things and that person may not have time, or the resources or sometimes doesn't even have the expertise to re-print paystubs. The paystubs are required to file bankruptcy, so with some effort, the paystubs can be located. If there is no rush to file, the debtor may need to wait six months until he or she has all of the necessary paystubs.

Once I receive the paystubs, I will prepare a spreadsheet with all six months of income. This also ensures that you are using the correct six months. If the filing month flips from June to July (for example), you have to use the six months that include June as the last month. This can be tricky when you are trying to stop a sheriff sale or a garnishment, and it is nearing the end of a specific month.

Debtors may not be receiving all of their income, because they are being garnished. They may also be paying a non-mandatory retirement plan. These expenses need to be added back in to determine their actual monthly income. Additionally, some debtors make automatic deposits to different bank accounts like

Christmas funds or the like. These also need to be added back into the income. Additionally, if a debtor is married, the spouse's income must be analyzed, also. Some debtors receive bonuses on a regular or irregular basis. There may be some benefit for strategically waiting to file their bankruptcy. This is especially true if such bonuses are irregular or the amount varies significantly. All of these numbers are used to figure out median income and the means test. Additionally, the Debtor must also advise whether they expect to receive any increases or decreased in their income over the next 12 months.

The pay advices must be filed within 14 days of a new Bankruptcy Petition. At my office, we file them automatically with the bankruptcy petition. The need to do this ensures that you always have all of the necessary paystubs. These pay advices are reviewed by the Chapter 7 or Chapter 13 Trustee and the U.S. Trustee for accuracy. Having the spreadsheet ensures that these numbers are clear and accurate. It is a rare occurrence that the U.S. Trustee has any questions about the paystubs when this spreadsheet is also submitted.

Therefore, do not file a bankruptcy without fully and completely reviewing the paystubs. Make sure you have each and everyone, because it's a threshold question, and you don't want to see your clients' case dismissed.

The Christmas Party





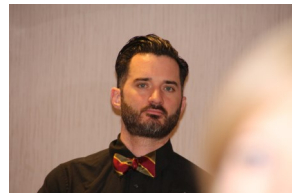
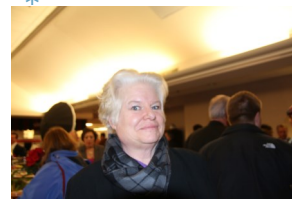
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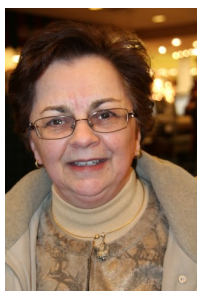
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Geauga Bar Association Announcements

Website Updates:

The Geauga County Bar Association website is up and running! Check there for meeting dates, deadlines and other important information: www.geaugabar.org.

Are you a G.C.B.A.

Committee Chairperson?

All chairs of the committees are reminded to attend the Executive Committee Meetings held on the second Wednesday of each month at 12:00 noon. The next meeting dates are: March 11 at Rosepointe Cottage Tea Room in Chardon, April 8, May 13, and June 10, 2015. R.S.V.P. to Mary Poland.

Upcoming General Meetings

The General Membership meetings are held on the fourth Wednesday of each month. All members are invited to attend at 12:00 noon. The next General Meetings are: March 25 at Joey's Grille, 209 Center Street, Chardon, April 22, May 27, and June 24. R.S.V.P. to Mary Poland.

Hit the Ground Running...

Robin L. Stanley

Petersen & Ibold, rstanley@peteribold.com

I want to thank Paul Newman for his dedication to the *Ipsos Jure*. Without his constant attention, I am sure there were many a-times that the issues would never have come out had he not been so diligent in making it happen! I cannot say that I will fill his shoes, nor would I ever attempt to do so. I just like to lay out the paper. Thank you to my committee of Lisa Carey, Paul Newman, Pearce Leary, Mike Judy, and Mary Poland for their commitment to getting out the *Ipsos Jure*. Thank you to all the contributors this month. I can't make this stuff up! I don't know if I'll last another 33 years, but I'll do my best! I have a pretty busy year, and we plan to have a paper go out every other month. See the back page for the next deadline! In the meantime, I coach the high school cheerleaders at Ledge-

mont, and you have probably seen our articles in the *Geauga County Maple Leaf*. They are outstanding young adults. The photo below is from the elementary cheerleading camp that we held on Friday before President's Day. If you want to see me sing the National Anthem, check it out on YouTube by searching for Geauga Maple Leaf and then National Anthem or at: <http://youtu.be/FGy80GrXLhU>. I've got work to do, so I've gotta run! Have a great month!



Law Day!

Mark your calendars: Law Day is Scheduled for May 1, 2015 at the Auburn Career Center for lunch. More details will be arriving by email soon.

Bob Zulandt is moved!

Robert Zulandt has moved into his new office at 100 Center Street, Suite 200, Chardon. This is the second floor of the Chase Building. His phone number remains the same.

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Dennis Coyne
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dmclpa@sbcglobal.net

Ipsos Jure Deadlines:

*Mark your calendars
and turn in an article!*

April 15, 2015

June 15, 2015

August 15, 2015

October 15, 2015

December 15, 2015

Quick Reminders

Next Executive

Committee Meeting:

March 11, 2015 at 12:00 noon

Next General Meeting:

March 25, 2015 at 12:00 noon

Law Day: *May 1, 2015*

*We hope to see you at the Bar
Association's next event!*