GEAUGA COUNTY BAR ASSOCIATION VOLUME 39,ISSUE 3, MAY, 2016

Ipso Jure

Cover: Eric Long presents on *Miranda* at Law Day.

Inside this issue:

From the Editor

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First, I want to thank everyone who responded to my call for "HELP!" As you can see, the *Ipso Jure* is packed full of interesting articles and information thanks to all of our contributors!

I would like to make mention of the articles written by Robert Zulandt, Jr. and David Lowe on their trips to the other side of the world. As we approach summer, they remind me that we all need to take some time off to unplug and relax. I find as attorneys we have an extremely hard time doing just that—unplugging. Everyone else's problems become our problems, and even when we are on "vacation," we are still working.

Some times, we just need to walk away and be refreshed. Lucky for us, we don't have to go very far. We have such great opportunities here in Ohio to take the time to be away.

For me, this summer as I do every summer, I will run a residential summer church camp from June 12-18 at Pilgrim Hills Camp in Brinkhaven, Ohio. This year, it is for campers in grades 2-12. I know many of them have been packing their bags and are eagerly waiting…

Each year, the participants and my volunteer staff come from across Ohio to be welcomed into community, to learn new things, and to just play in the sun. It is their chance, and mine, to disconnect and to become more of our authentic selves. There will be chances to be leaders and to share their life experiences and to reconnect with something more than just themselves. We do all the normal camp things—hiking, swimming, crafts, and cooking out—but it is the moments in between that we have the most fun—the time to laugh and the time just to be.

We all need time to just breathe in fresh air and to exhale all of the things that we have been holding inside. We get out into nature, and sometimes I am reminded that it is the only way to really see the world.

It is a time to be refreshed and renewed and to let go. Year after year, we journey to the hills to share in the best time of the whole year.

I find that it is a challenging and freeing experience to set aside the cell phone and to not look at the hundreds of emails that come in during the week. I would strongly suggest that everyone should try it at least once a year. Put away your work phone and your work schedule and give yourself time to just be and to breathe. You need it, and your children need it. We all need time to be ourselves.

So this summer, I hope that each of you can find a time or a place to relax and breathe and just be. I know that I will have my time, when I lead Circle of Friends Camp this year, and I cannot wait… Only a few...more...days... to go…! www.journeythehills.org

Reflections on Law Day 2016 From the G.C.B.A. President

Frank Antenucci, Esq.

Frank Antenucci, Esq., frankantenucci@gmail.com

Law Day 2016, hosted by the Geauga County Bar Association, was a fantastic event. Much thanks to the Law Day committee chaired by Mary Jane Trapp, along with committee members, Judge Terri Stupica, Judge Forrest Burt, Doug Brown, Jim Gillette, Laura Wellen, Davida Dodson, and Ann D'Amico, and our Bar Executive Secretary, Mary Poland, for all their work in organizing and effectuating such a noble event. The bar likewise greatly appreciated the historical *Miranda* presentation by Eric Long and Ian Friedman and their staff. Most importantly, gratitude should be afforded to all the law enforcement and attorneys who participated in the event—our distinguished law enforcement and attorneys are the foot soldiers of the Republic who daily toil in the trenches of liberty to uphold the rule of law. And lastly, I would be remiss not to thank the commendable student essay participants—Kelly Holl, Ryan Bass, and Carley Scott—for the gravitas they exhibited through their essays in valuing the significance of the rule of law.

For some relevant background information, Law Day was first established by President Dwight D. Eisenhower in 1958. He established Law Day as a set-aside day to recognize, celebrate, and honor our Nation's commitment to the rule and order of law. In 1961, Congress officially recognized May 1 annually as Law Day, and every President since then has issued a Presidential proclamation on May 1. Below is President Eisenhower's unabridged proclamation:

> *Whereas* a free people can assure the blessings of liberty for themselves only if they recognize the necessity that the rule of law shall be supreme, and that all men shall be equal before the law; and
>
> *Whereas* this Nation was conceived by our forefathers as a nation of free men enjoying ordered liberty under law, and the supremacy of the law is essential to the existence of the Nation; and
>
> *Whereas* appreciation of the importance of law in the daily lives of our citizens is a source of national strength which contributes to public understanding of the necessity for the rule of law and the protection of the rights of the individual citizen; and
>
> *Whereas* by directing the attention of the world to the liberty under law which we enjoy and the accomplishments of our system of free enterprise, we emphasize the contrast between our freedom and the tyranny which enslaves the people of one-third of the world today; and
>
> *Whereas* in paying tribute to the rule of law between men, we contribute to the elevation of the rule of law and its application to the solution of controversies between nations:
>
> *Now, Therefore, I, Dwight D. Eisenhower,* President of the United States of America, do hereby designate Friday, May 1, 1959, as Law Day in the United States of America.
>
> I urge the people of the United States to observe Law Day with appropriate public ceremonies and by the reaffirmance of their dedication to our form of government and the supremacy of law in our lives. I especially urge the legal profession, the schools and educational institutions, and all media of public information to take the lead in sponsoring and participating in appropriate observances throughout the Nation.
>
> *In Witness Whereof,* I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

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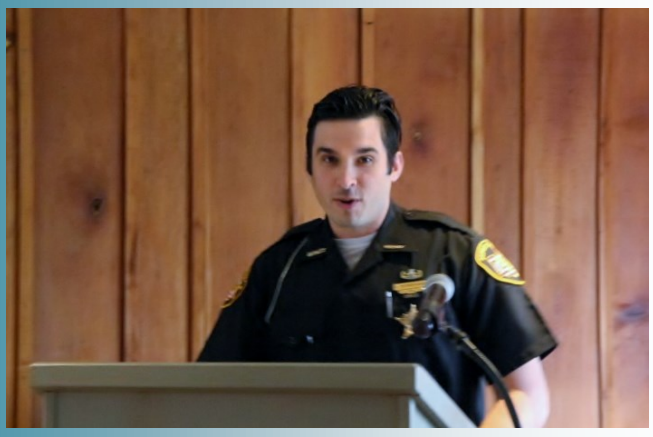
Law Day

Law Enforcement Officer of the Year:
Detective Steven Deardowski

Special Recognition:
Sheriff Dan McClelland

Keynote Presentation:
Miranda: More than Words, featuring Attorneys Ian Friedman, Eric Long, & Staff



Top Right: Detective Deardowski, Mary Jane Trapp, Sheriff McClelland, Frank Antenucci. **Above:** Detective Deardowski accepts his award. Judge Stupica recognized him for being dedicated, conscientious, and humble.

Above: Judge Burt thanks Sheriff McClelland for his years of service to Geauga County.

Law Day (from page 5)

Done at the City of Washington this thirty-first day of December in the year of our Lord nineteen hundred and fifty-eight and of the Independence of the United States of America the one hundred and eighty-third.

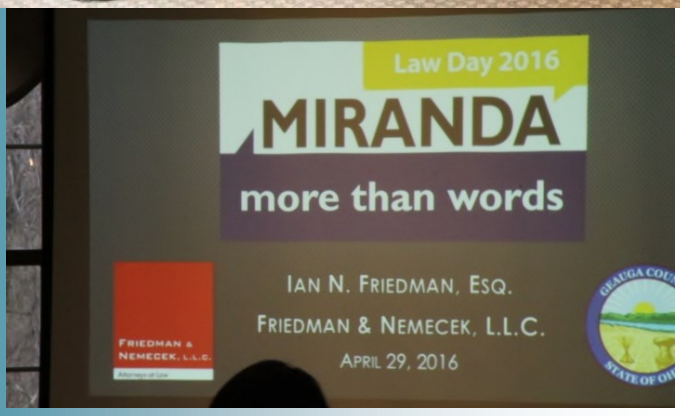
Dwight D. Eisenhower

DWIGHT D. EISENHOWER
By the President:
CHRISTIAN A. HERTER,
Acting Secretary of State

Indeed, President Eisenhower's reflection from nearly sixty years still holds true: we are a Nation of laws—a Nation that, because of our laws, remains an example to the world. ✿

2016

Pictures by Paul Newman & Lisa Carey



Student Essay Contest Winners

1st Place Winner: Kelly Holl

Student Rights: Miranda in Schools

According to a study by Dr. Richard Rogers, a psychology professor at the University of North Texas, ten percent of total arrests made in 2009 involved a misunderstanding of rights. Of this ten percent, one-third were juvenile arrests. The Miranda Warning, a statement of rights read by the police to individuals in custody prior to questioning, is designed to minimize this percentage. However, the necessity of this warning is not always clear. If a banned substance is found in a student's locker, whether the student should be Mirandized before answering an assistant principal's questions depends on the situation. A finding of allergy medicine would require a different approach than illegal drugs. When a student is questioned at school and could receive criminal charges, he is unable to leave the building and is in danger of self-incrimination; because of this, he should be aware of his Constitutional rights as described in the Miranda Warning.

A Miranda Warning must precede any custodial questioning, and a school building is no exception. The absence of law enforcement does not negate the student's Constitutional rights and he should be

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Essays (from page 5)

Mirandized regardless of whether a police officer is present. The student is being interrogated by an authoritative figure, the assistant principal, who has the power to discipline the student based on statements made under duress during questioning. If the student attempted to walk out of the school, he would be detained from doing so. The prevention of the student leaving verifies that the student is considered in custody and therefore should be Mirandized.

Many adolescents do not understand their rights. A college undergraduate survey administered by Dr. Richard Rogers showed that the majority of participants answered multiple questions regarding Miranda rights incorrectly. Even if the student in question knows his rights, he may be cajoled or pressured into disregarding them under intimidating circumstances. In *J.D.B. v. North Carolina,* the United States Supreme Court acknowledged that a child's brain is different than an adult's in ways that could affect a student's ability to avoid implicating himself. If the assistant principal confirms the student's rights with a Miranda Warning, the student might perceive this as an invitation to take advantage of them and feel more secure in doing so.

The Fifth Amendment of the Constitution protects Americans from self-incrimination. Depending on the substance found, the student could face legal trouble and his words could be held against him in any attempt to lessen these consequences. In a case where the punishment extends beyond the school's control, the student must be aware of his rights before his claims are held against him. The assistant principal giving a Miranda Warning does not grant extra rights, it ensures that the student's Constitutional rights are known and understood. Before an accused student is questioned, an assistant principal must give him a Miranda Warning. Since the student is in a state of custody and could be criminally charged, this warning will enable him to competently protect himself. Students are taught to obey authority figures and may feel intimidated when confronted by a school staff member, which could result in self-incrimination. It is clear that a Miranda Warning is necessary in the case of a school questioning where legal measures may be taken.

1st Runner-Up Winner: Ryan Bass

"You have the right to remain silent. Anything you say or do can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney then the courts will appoint you one. Do you understand these rights as they have been read to you? With these rights in mind would you like to speak with me?" These are the "Miranda Rights." These rights have played a major factor in the American court system for a great amount of time. The Miranda rights along with their companion, the 5th Amendment, serve as a reminder that our great nation and its courts only want what is fair, whether it is for your neighbor across the street or for a foreign man lost here in America. Miranda vs. Arizona, along with countless other court cases along the same lines have, in my opinion, made our American constitution only stronger. With all the rights activists today, I would be curious to see a major court case as the Miranda vs. Arizona play out today.

The topic for this essay was a very tough one to answer at first, but then it became clear. "After a locker search, an assistant principal questions a student about a banned substance found in a locker. Should the student be given the Miranda warning before being questioned?"

Well, arguing the side of the student, not everyone knows their rights and when being detained, arrested or questioned should be advised of their rights. After all, isn't this one thing that sets America apart from many other nations?

Now most parents do not accompany their child(ren) to school all day, as most have their own work to attend to, so someone like an assistant principal serves as a daily role model to students at the institution. For the matter of research I have obtained a definition of an assistant principal, along with that I found that their tasks are mostly carrying out work given to them by the school's principal along with other things, such as attending or helping with after-school clubs or parties. Another great factor to present is the fact that students are the next generation of our great country. If we were to give them an unfair court case not only would it be unfair, but we would need to ask ourselves, "If we do not give this generation their rights then who would share our rights to the generation after them?" I

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Essays (from page 6)

would like to state that a country which questions and interrogates its youth without telling them their rights is not a country I would like to live in. I am very proud to live in a country which provides rights to not only freedom, but we get to know that we are entitled to an attorney. This great country is America, The Land of The Free.

In conclusion, I would dare to say, in the event a student is questioned about his/her banned substance found in their locker they SHOULD be given a Miranda warning before the questioning, they should be able to contact a lawyer and they should be able to remain silent. I said before that the answer became clear to me and it has. Thinking about it now, it sounds more like, "Do my rights apply here?" and yes! Your rights should apply anywhere. At school of all places you should be given a Miranda warning from the teachers, the assistant principal and everyone working there are simply there to teach and educate the student! If ever I would not be given a Miranda warning at school I would wonder if the school was even there for my teaching. I am glad I will never have to be given the Miranda warning, but should I ever need it, I know I have more than words.

However, an assistant principal or any non-law enforcer has no power outside the court trial, they may call a police officer or law enforcer and relay the information given by the questioned student, at this point the law enforcer must give the Miranda warning before questioning the student for themselves; no matter if it had been give beforehand.

Finally, I have found it would be beneficial for the student to know his rights before his questioning, again the Miranda Rights are more than just words.

2nd Runner-Up Winner: Carley Scott

Miranda Warnings!

Have you ever witnessed someone being arrested? Have you ever been arrested? Well, maybe you've heard it first hand or maybe seen it on the television, but either way, I'm positive you have heard of the Miranda Rights. "You have the right to remain silent. Anything you say can and will be used against you in the court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand these rights I have just read to you? With these rights in mind, do you wish to me?" They are also called the Miranda Warnings. These originated from one of the most well-known court cases in American History, over fifty years ago. The State of Arizona vs.

Ernesto Miranda was one of the most argumentative cases ever heard of.

The Exclusionary rule was born out of this case. The Exclusionary rule simply states that evidence obtained illegally cannot be used in the court of law. This rule is what paves the pathway for Miranda to win the third trial at the Supreme Court.

Ernesto Miranda robbed a bank employee of eight dollars. The police followed him homes and was then arrested. When he was in the interrogation room being "interrogated," he snapped and confessed. He confessed to everything from stealing to kidnapping to the rape of an eighteen year old girl. A trial sent him to the prison with a twenty year sentence.

Well, little did they know that as he wrote at the top of his paper, *"With Full Knowledge of My Legal Rights,"* he did not mean it. So they did not read him his rights. In the next trial Miranda claimed that he, in fact, did NOT understand his rights. The Supreme Court ruled in his favor because no one bothered to tell him his rights! The whole confession was garbage! Without it, the prosecutors had no case. Ernesto was a Free Man. Well, for a while anyway. He wound up serving eleven years. " *It would be irony enough Miranda Rights were meant to protect us for unlawful imprisonment, were put in place to benefit a man who clearly deserves all the imprisonment that came his way."* Says Author Eric Yosomono of "Cracked" Webpage.

After a locker search, an assistant principal questions a student about the illegal substance found in the locker. Should the student be given a Miranda Warning before being questioned? The answer is no, because he is not under arrest yet. If the situation was that the assistant principal called the police and the student was arrested, then the Warning would come into place.

The Miranda Warnings/Rights are very crazy but informative and interesting. If you are ever arrested make sure you understand your rights. You should always know the law. It could just save your life one day!

Student Loans Can Be Discharged in Bankruptcy

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Prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCA), student loan debts were dischargeable in bankruptcy. Since then, many are under the assumption that student loan debts are not dischargeable in bankruptcy. And, for the most part, everyone is right in their assumption. However, the tide is turning, and courts are beginning to allow more and more discharges based on "undue hardship," and more politicians and courts are coming up with plans to ease the financial burden that student loans are exerting on people across the country.

Under 11 U.S.C. §523(a)(8), student loan debts can be discharged if the debtor can show "undue hardship:"

> (a) A discharge under section 727, 1141, 1228 (a), 1228(b), or 1328(b) of this title does not discharge an individual debtor form any debt—
>
> (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—
>
> (A)
>
> (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
>
> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
>
> (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

Congress never defined the term "undue hardship" and it has been left to the courts to determine what qualifies as an undue hardship. There are two tests that bankruptcy courts across the United States have used to determine what student loan debts can be discharged under §523(a)(8). A handful of courts use the "totality of the circumstances" test which examines all relevant factors to determine if the debtor can afford repayment of the loans.

The majority of the courts, however, use the three part Brunner test set forth in *Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395 (2nd Cir. 1987).* Under the Brunner test, the debtor must show (1) he cannot maintain, based on current income and expenses, a minimal standard of living for debtor and dependents if forced to pay student loans; (2) additional circumstances exist indicating the state of affairs is likely to persist for a significant portion of the repayment period; and (3) a good faith effort has been made to repay the student loans.

Unfortunately, with the invention of the Department of Education's Income Based Repayment (IBR) options, many courts have been holding that debtors have been unable to satisfy the first prong of the Brunner test because repayment amounts can be as little as $0.00. The bankruptcy judges are re-examining this prong, however, with some judges determining that the IBR options are insufficient to prevent a debtor from discharging his loans due to undue hardship.

Judges in jurisdictions from Massachusetts and Wisconsin have held that the income based repayment plans prevent the financial "fresh start" that bankruptcy is meant to allow because the interest continues to accrue, thereby increasing the debt; and, at the end of the 25-year repayment period, the income tax debt that would be owed as a result of the debt forgiveness will likely cause even more financial

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Student Loans (from page 9)

hardship for the debtor.

The elderly are particularly strained by student loan debt. In 2013, people aged 60 and older held $18.2 billion in student loan debt. There were 2.2 million borrowers over the age of 60. Twenty-seven percent (27%) of all student loans held by people over the age of 65 were in default. Worse than these figures, however, is the fact that 155,000 seniors have lost part of their social security benefits, because the federal government can garnish social security benefits. No other creditor can garnish social security benefits except the federal government when a federal debt is owed (taxes and student loans). A glimmer of light to elderly debtors has been provided by Democratic Senators, Ron Wyden, of Oregon, and Sherrod Brown, of Ohio. In December, 2015, these Senators introduced a bill that would stop the government from being permitted to garnish social security benefits to pay federal debts. If it makes it through to signature, it will provide relief to hundreds of thousands of elderly debtors across the country.

In a case in Massachusetts, debtor Robert Murphy is on track to have his Parent Plus loans discharged by the bankruptcy court. Mr. Murphy is 65 years old. He was the president of a manufacturing firm when he lost his job in 2002, and had been unable to find new employment. He and his wife were living on her $13,000 teacher's aide salary. At the time he filed bankruptcy he owed approximately $246,000 in Parent Plus loans which he took out for his child's education. The Department of Education argued that Mr. Murphy should not be allowed to discharge his debt, because he took out the loans when he was unemployed and knew he would be unable to discharge them. Mr. Murphy is winning his argument, however, as the court of appeals has asked the parties to attempt a settlement of the case. Mr. Murphy's case shows that it is possible to fight for discharge of student loan debt.

In fact, a 2011 study conducted by Jason Iuliano (JD Harvard School of Law, Ph.D. candidate in Politics from Princeton) found that four out of ten debtors that attempted discharge of student loan debts were successful in those efforts. His study found that in 2007 there were more than 169,000 student loan borrowers who filed for bankruptcy across the country. Of those debtors only 213 attempted to discharge their student loan debt. And, of those 213 who attempted to discharge the debt, 51 received a full discharge, 30 received a partial discharge, 25 received an administrative remedy, and 107 received no relief.

Even the U.S. Department of Education is recognizing that some borrowers need their student loan debts discharged in bankruptcy. In July, 2015, the Department of Education released its "guidelines" for determining undue hardship in bankruptcy adversary proceeding cases. The guidelines that the Department of Education set forth to determine if it should fight or concede to discharge include:

- *Whether there was a physical or mental impairment that qualified the debtor for an administrative discharge by Total or Permanent disability (i.e., SSDI or service connected disability);*
- *Whether the debtor had filed for bankruptcy due to factors beyond his control (i.e. protracted illness or divorce which severely impacted the debtor's income);*
- *Whether the debtor pursued income driven plans;*
- *Whether the debtor made any payments when he had the resources to do so;*
- *How long the debt had been in repayment*
- *Whether it was the only debt owed by the debtor;*
- *Whether other debts were reaffirmed;*
- *Whether the debtor is approaching retirement;*
- *Whether the debtor's health had substantially been altered since the debt was incurred; and*
- *Whether the debtor's expenses are reasonable and there were no unnecessary expenses (i.e. no expensive vacation trips, luxury vehicles, etc.).*

As the media has been reporting for the past several years, student loan debt is about to become the new bubble that will burst, similar to the housing crisis this past decade. The U.S. Department of Education, federal bankruptcy courts, the United States Congress, and the President have all taken steps to slow or stop the bubble from bursting and from a full crisis becoming reality. Today and going forward, bankruptcy attorneys will likely look closer at student loan debts and take steps to discharge those debts in bankruptcy adversary proceedings.

Practice Tips:
Motions for Summary Judgment

Barbara Powell

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Today's practice tip: Attach evidence to your summary judgment motions and oppositions. Double, even triple, check your attachments.

Typically, when moving for summary judgment, evidence must be placed before the Court. *See* Civ.R. 56(C). Evidence includes "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." *See* Civ.R. 56(C).

If a report, record, or some other document is merely attached to a summary judgment motion, it is not evidence. To be evidence, the report, record, or other document must be authenticated and incorporated into a properly framed affidavit. *See* Civ.R. 56 (E).

In professional tort cases, an expert's report and opinion on the standard of care and other issues must be supported with an affidavit.

With surprising frequency, litigants fail to attach authenticating affidavits. Sometime, litigants fail to file the cited deposition transcript, fail to mention the page and line of the transcript, or fail to attach the cited transcript pages. Litigants have even failed to attach the affidavit referred to in their own motion.

Test your knowledge: Civil Rules 56(C) and 12(B)(6).
Q: Civil Rules 12(B)(6) and 56(C) can both be used by a defending party to terminate civil litigation. One of these rules limits consideration to the complaint. The other requires evidence. Which rule limits consideration to facts alleged in the complaint?

A: Civil Rule 12(B)(6). [Bonus points if you know the Court may convert a motion for failure to state a claim which included evidence into a motion for summary judgment.]

Test your knowledge: Geauga County Local Rule 7.B.
Q. A motion for summary judgment must include a supporting memorandum and evidence. Is anything else required?

A: Yes. The motion must contain citations to authority (unless none is available) and a proposed judgment entry. *See* G.C.R. 7.B.

Effective Firearms Training Teaches Analysis and Retreat

Dennis Wynne

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On April 30-May 1, I attended the FIST (Final Intensive Scenario Training) program at the Tactical Defense Institute (TDI) in Adams County, Ohio. I have attended several training programs at TDI—in fact, the prerequisites for attending FIST are attending TDI's handgun training levels I-VI (or equivalent training). I have always found the TDI instructors to be professional, friendly, helpful, and extremely knowledgeable. My experience with FIST was no different. Most of the TDI instructors are current or retired police officers, with a few from other professions, including an experienced litigator from a large firm in Cincinnati. In addition to civilians, TDI trains law enforcement personnel from all over the country, teachers and staff in school districts that have instituted Faculty Administrator Safety Training and Emergency Response (FASTER) programs, and even West Point cadets make the trip to TDI once a year for training. The West Point cadets agree that the training at TDI exceeds anything they receive at the U.S. Military Academy. Having served in the U.S. Army, I can say first hand that TDI's training programs are superior to anything I received during basic training (although that was a long time ago).

Beginning with my first class at TDI, I have always been impressed that the training not only includes, but stresses, the legal aspects of self-defense. TDI training scenarios include situations in which use of firearm by a lawful carrier of a concealed firearm (CCW Holder) is not advised and may be unlawful. This is unusual based on my experiences at other firearms training venues. Too often when one attends a firearms training program, the attendee's "default" position is that every scenario requires the use of a firearm. Why else would anyone pay for firearms training other than to learn how to use his/her firearm? This is often the "wrong" answer at TDI, and the TDI instructors do an excellent job at driving this point home.

TDI scenarios, and especially FIST scenarios, are designed to teach the students to: (1) observe/detect, (2) analyze/decide, and then (3) engage or disengage in simulated "real world" situations and under pressure. Most of the TDI advanced training courses use Airsoft firearms that discharge plastic BBs using compressed air as the propellant. In these "force-on-force" training exercises students wear protective equipment covering their eyes and faces, but often a BB or two to the arm, torso, leg, etc. will leave the student with a "reminder" (read: "welt") that his/her choice of action was probably not a good option. By way of example from my recent FIST experience, there are two less than optimal options: (1) engaging multiple armed robbers when you are a customer in a convenience store being robbed, and (2) not staying aware of your surroundings when in a dark parking lot.

Some FIST scenarios were designed to have the students experience tunnel vision and auditory shutdown, both of which happen in "real life" and can be simulated by way of well-designed and sufficiently stressful role-playing exercises. One example from FIST is a plainclothes (or uniformed) police officer arriving on the scene [and properly identify him/herself] as, or just after, a student/CCW Holder has used a firearm to defend himself. In many cases, with all the confusion and the student focused on the threat(s) [tunnel vision], the student did not see or hear the police officer yelling "Police, drop the gun" [auditory shutdown]. This is dangerous for the student (and any real life CCW Holder) as in those instances what does the police officer see? The officer sees the CCW Holder holding a firearm and not responding to the officer's commands. The police officer, especially if dispatched to a "shots fired" call, may misidentify the CCW Holder as the "bad guy." In

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Overtime (from page 11)

some cases, the FIST student pointed the firearm [again an Airsoft training pistol] at the police officer at which point the student received a few of those "reminders" I mentioned above.

Examples of other "wrong" answers during my recent FIST experience: (1) drawing your firearm when approached by one or more panhandlers [who are aggressive, obnoxious, and will not take "No, I don't have any money" for an answer] at night, perhaps at a rest area on the highway when you come out of the rest room, (2) drawing your firearm when some people with whom you are playing cards get into a physical altercation during the game, (3) trying to break up an altercation while standing in line waiting to enter a concert, (4) shooting an unarmed intruder in your home, and (5) entering your home when you return to find it has been broken into and there is no loved-one in the home. In these, as well as all TDI, scenarios there exists a potential threat, but in none of these situations was there a threat of death or grievous bodily harm. So use of lethal force and a claim of self-defense might result in a CCW Holder being arrested and charged with aggravated assault, manslaughter, or some other violation of a criminal statute.

Of course some FIST scenarios involved a clear imminent threat of death or grievous bodily harm so use of lethal force was the best option. However, after each FIST scenario where there was a question as to whether the use of a firearm was appropriate, the TDI instructors and students discussed the legal aspects from the perspectives of the CCW Holder, the police, the witness filming everything on his phone to post to YouTube, the prosecuting attorney, and a jury. We discussed if we thought that a jury would agree with our perception of the situation and our course of action. Even though most of us experienced tunnel vision and/or auditory shutdown during the FIST program, we all agreed that convincing members of a jury that a CCW Holder was experiencing tunnel vision and/or auditory shutdown in a "real world" situation would be a hard sell, even with expert testimony, unless the jurors had experienced these phenomena themselves.

So during the two days of the FIST program for a significant number of the scenarios in which I was a participant the "correct" answer was for the student to NOT use his/her firearm, but rather extricate him/herself from the situation and call the police. This disengagement from "sticky" situations is also important for CCW Holders as, in addition to training in analysis and restraint, CCW Holders need to train to become proficient in protecting the firearms that they carry. If a CCW Holder is involved with an altercation that does not warrant use of a firearm, the CCW Holder now has to protect that firearm from the assailant (or others) possibly trying to take control of the firearm, while also being able to effectively deploy the firearm in the event the altercation escalates and becomes an imminent threat of death or grievous bodily harm. This is not an easy feat—especially if the assailant and the CCW Holder are in a "hands-on" (close quarters) entanglement. TDI and others offer training for these close quarters situations too (I took a one day course offered through the Buckeye Firearms Association a few years ago).

As with all my TDI training experiences the FIST program was excellent. I was very pleased to be part of a program that not only teaches students safe handling and operation of firearms, but also the "real world" legal aspects of the use of lethal force in the State of Ohio. Later this year, I will attend TDI's Active Shooter program, which I expect will include more on the legal aspects of the use of lethal force.

New Federal Overtime Regulations Become Effective December 1, 2016 Part 1—The Basics

Douglas B. Brown

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New regulations changing the Fair Labor Standards Act (FLSA) regarding eligibility for overtime were announced on May 17, 2016, by the U.S. Department of Labor (DOL). The actual final regulations were published in the Federal Register on May 23, 2016. The FLSA sets rules governing minimum wage and eligibility for overtime.

The changes consist of:

1. A new minimum salary threshold before applying the Executive, Professional or Administrative "Duties Test" of $47,476 annually ($913 per week), up from the current threshold of $23,660 annually ($455 per week).
2. The effective date for the new regulations is December 1, 2016. This gives employers slightly more than six (6) months to complete their implementation strategy.
3. An automatic adjustment to the salary level will occur every three (3) years.
4. There has been no change to the Duties Test for Executive, Professional or Administrative employees.
5. The threshold for the Highly Compensated Employee (HCE) exemption is now $134,004 annually.
6. Up to 10% of the salary amount required for non-HCE employees can consist of non-discretionary bonuses, incentive pay or commissions, if paid at least on a quarterly basis.

This means that an individual must earn at least the new annual threshold ($47,476), before application of the FLSA's "duties" exemption test can be considered. The "duties" test evaluates whether the individual meets one of the Executive, Professional, or Administrative exemptions.

Unless an employee is being paid the new limit annually on a salaried basis (with limited exceptions for certain classifications of work), their employer must pay them overtime regardless of their duties. It is only when an employee is paid a salary of at least the new annual limit and meets one of the "duties" exemptions (Executive, Professional, or Administrative) that they will be considered "exempt" and not required to be paid overtime. The new thresholds will be inflation-adjusted and will therefore present a moving target that employers will have to monitor to ensure that exempt employees do not fall below the minimum as the threshold is adjusted.

Accordingly, it is recommended that employers act now to establish a plan for coming into compliance. The following are steps and concerns employers should now be taking into account as they develop their compliance strategy:

1. Identify those employees who are currently considered exempt (not eligible for overtime) who are earning less than $47,476.
2. For those whose salaries are close to $47,476, determine whether a raise would be appropriate to keep the employee above the minimum salary threshold.
3. For all employees who will either be moved to or are already above the minimum salary threshold, also evaluate whether their job duties meet one of the Executive, Professional, or Administrative duties exemptions.
4. For currently exempt employees who are earning

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Overtime (from page 13)

less than $47,476, determine how much overtime they are actually working. If they do not regularly work more than 40 hours in a week, it may be more economical to reclassify them as non-exempt and pay them overtime on an occasional basis as opposed to raising their wages above the minimum salary threshold.

5. Determine currently exempt employees who are below the new minimum salary threshold, and who also work a significant amount of overtime, then evaluate the impact on the organization when they become non-exempt. If the overtime they would receive would be greater than giving them a raise to above the threshold, then a raise may make sense. If the amount of overtime they would earn is less than what it would cost to raise their pay above the minimum threshold, then making them non-exempt would make sense. If the employer does not want to either raise wages to above the threshold or pay overtime, then the employer has to determine how they will limit or prevent the employee from working overtime.
6. Consider how you will communicate to your employees what is happening. Determine what you will say to those employees who receive a raise to bring them over the minimum threshold as opposed to those who do not. For example, if you have two exempt administrative employees, one who works a lot of overtime and one who does not, and you give one a raise while the other is told that they now receive overtime, consider how you will explain the difference.

There are other cost implications to be considered when the new regulations come into effect. Where benefits, bonuses, insurance coverage, and premiums are linked to either base pay or total earnings, if base pay is adjusted or total earnings increase due to overtime eligibility, these linked costs will also likely increase.

This is a significant change as to who receives overtime. Compliance may be a significant burden. In any event, starting now to establish a plan to comply will provide a better opportunity to come into compliance without a last minute rush and potentially overlooking a serious consideration.

The final regulations and a summary and overview is available at www.dol.gov/overtime. "Part II – The Details" will shortly follow.

Impressions of the Far East

Robert E. Zulandt, Jr.

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I just returned from a fabulous trip to Asia to see how the other half of the world lives. I visited Hong Kong and Thailand. My son and his wife are attorneys in Hong Kong. She is an international lawyer (as well as a Hong Kong solicitor) and does mergers and acquisitions on a large scale. My son does legal consulting for U.S. companies and a fair amount of work for an N.G.O. (non-governmental organization, an international non-profit organization) that provides legal assistance to migrant workers.

Hong Kong is supposedly the most

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Far East (from page 14)

densely populated city in the world, and it certainly felt that way. It is a sea of high rise buildings and people, all built mostly on the side of very mountainous terrain. The volume of people and lack of space was astounding. In fact, no matter where we went in Asia, Hong Kong, the islands of Thailand or Bangkok, there were virtually no wide open spaces or uncrowded public areas. My son and daughter-in-law's high rise luxury apartment was three bedrooms, but all of 900 square feet—considered huge by Hong Kong standards.

Hong Kong contains a mix of various backgrounds and cultures from all over the world, and there is a large expatriate population from the U.K. and Europe. For the most part, everyone seems to tolerate each other. However, there is tension between local residents and those from mainland China, which can be largely attributed to the increasing influence and control over Hong Kong by the People's Republic of China (PRC). By way of illustration, my daughter-in-law, who is of Chinese ancestry, speaks (along with my son) fluent Mandarin, the language of the PRC. However, the language of Hong Kong is Cantonese, and she has been confronted by locals for not speaking the Cantonese dialect.

Hong Kong also has a large and distinct underclass of migrant workers (mostly female domestic helpers) from the Philippines, Indonesia, and Sri Lanka. Domestic helpers make around $500.00 U.S. dollars a month in an extremely expensive city and live in many instances, at best, in closets in their employer's homes. There is no legal limit on the hours they can work (many work over 12 hours a day) or minimum standard for living conditions (many live in squalor and eat poorly). Helpers have no right to gain citizenship, regardless of their length of employment, and must exit Hong Kong within two weeks of their dismissal or expiry of their contract. There are also many instances of physical and sexual abuse by employers, to which the government largely turns a blind eye. My son has always been interested in advocating for the disenfranchised classes and spends a great deal of time helping these workers' fight for their human rights.

We argue in this country over conservation and being ecologically sound. It appears the far east gives it little attention. Recycling appears extremely limited. Pollution is evident. We were reluctant to visit mainland China, because the air was so bad. Even the air quality in Hong Kong, a non-industrial city, was poor.

The food we sampled was outstanding and delicious, but I was not always sure what I was eating. Chinese cuisine is vast and includes almost everything from fish and shark to sea cucumbers, even seahorses, can be dried and reconstituted.

The trip made me appreciate all we have in this country, particularly our freedoms. Hong Kong is a quasi-democracy that is heavily influenced and controlled by the PRC, and Thailand is a monarchy. What we take for granted, others can't comprehend. What we currently argue over, whether ecological, social inequities, etc., are often trivial compared to what others are experiencing elsewhere in this world. Having just celebrated another Law Day, we should reflect upon the stability and equity inherent in our system of laws. While still imperfect, it has created the freedoms that are but a pipe dream to many on this small planet; many no more than a 15 hour plane trip to the other side of the world.

Cases of Interest

Pearce Leary

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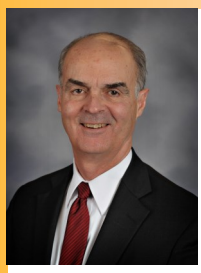

Calkins vs. Calkins, 2016-Ohio-1297.
Magistrate finds husband guilty of financial misconduct. Trial Court finds no financial misconduct but does order an unequal division of marital property finding that even though there is no wrongful scienter, husband's unilateral actions were financially damaging. Affirmed. Trial court has this authority under "any other factor" language of R.C. 3105.171 (F)(10).

MidFirst Bank vs. Stychno, 2016-Ohio-1298.
Held: Rule 53(D)(3)(b)(iii) requires that a party objecting to a magistrate's decision must file objections within fourteen days and cannot request an extension of time to file objections so that the transcript can be prepared. The proper procedure is to file the objections within fourteen days; prepare the transcript within thirty days thereafter (which may be extended); and file supplemental objections if deemed necessary. Although the Court of Appeals does not specifically say so, it would appear that the trial court does retain discretion to grant the extension of time to file objections but if the trial court chooses not to, it is not error.

Espyville of Pennsylvania, LLC vs. Ron-Bon, Inc., 2016-Ohio-1304.
Buyer drafts purchase agreement. Seller makes handwritten changes, signs agreement and sends to Buyer. Buyer revises agreement again and sends it to seller. Buyer revises agreement again and sends to seller. Seller rejects changes and says business no longer for sale. Buyer signs earlier version of agreement that seller revised and signed and sues for breach of contract. Held: summary judgment for seller affirmed. Last revision by buyer was counteroffer which seller was free to reject.

CSI...Well, Sort of...

Michael T. Judy

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I have never watched an episode of CSI. Truth be told, I do not watch much television, and when I do, I generally avoid shows about the law. What's more, I had a bad attitude about science when I was in grade school and high school. As a result, it was not a subject in which I excelled academically. I do enjoy criminal defense work, however, and my attitude toward science has improved dramatically since I was 17 years old. So, when I received the brochure again this year after having dismissed it as impractical for several years, I considered attending the "Medicolegal Investigation of Death" seminar, offered by the Wayne State (Michigan) School of Medicine and now in its 40th year.

In the past, I had dismissed the idea of attending this seminar. How practical could this information be? I have had two criminal defense cases in which death was involved, but neither turned on forensic evidence. At the same time, I have generally been able to fulfill my CLE requirements without too much trouble, often even attending 24 hours in a calendar year. Still, upon reviewing the brochure, I noted that for a rela-

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CSI (from page 16)

tively modest fee, the seminar offered the opportunity to earn 16.5 hours of continuing education over the course of 2 ½ days in presentations that promised to be interesting if not practical. A conversation I once overheard came to mind. Two women were talking with each other. One said "I saw this dress I love, but I couldn't buy it; I don't have anywhere to wear it!" "Buy it." said her friend, "The event will come." Hmm . . . if I attended this seminar, would I suddenly be busy with lucrative, interesting criminal defense cases involving allegations of homicide? Would they turn on exciting forensic evidence? Did I mention that lunch would be provided on both days? I signed up.

The seminar started promptly at 8:30 a.m. on a Wednesday morning. I didn't know what to expect, but I was surprised by a turnout of what must have been about 150 people (well, okay, I guess I was expecting about 50 or 60). The seminar is marketed to law enforcement, attorneys, and medical professionals. If the short haircuts and mustaches were any indication, the law enforcement folks had the biggest turnout. The fact that many attendees were also openly wearing guns on their hips also made me think that most of them must been in law enforcement. There were several female attendees, but they were decidedly in the minority.

The courses covered topics such as "Advanced Sharp Wound Recognition," "Bloodspatter Pattern Analysis" and "Back Page Murders and Human Trafficking." The wound recognition courses (gunshot wounds, blunt object wounds, and knife wounds) were all taught by the same retired Wayne County (Detroit area), Michigan Medical Examiner, who had certainly seen quite a bit in his career. A "Medical Examiner," is what Ohioans call a "coroner," by the way. The bloodspatter (not "bloodsplatter,") which is the sound that blood makes when it makes contact with a surface and the use of which term will mark you as a certain rube) sessions were given by T. Paulette Sutton, a woman from Tennessee who displayed not only an impressive command of the material, but an entertaining, if not dark, sense of humor. Formerly with Tennessee's version of BCI, she now serves as a bloodspatter consultant and spoke about a case in which her investigation and testimony about the location and angle of blood at an alleged crime scene resulted in a "not guilty" verdict for her client.

Joe Navarro, a retired FBI officer, author of several books, and polished speaker, gave a presentation about nonverbal communication in an interview setting. He debunked several "myths" about what certain postures express. He also had nothing good to say about polygraph tests, stating that in every internal investigation at the FBI in which he had been involved, the person ultimately identified as the bad actor had previously passed a polygraph test. In a way that verged on refreshing, he also debunked the idea that there was any scientific evidence supporting the assertion that any specific behavior was indicative of dishonesty. Addressing law enforcement in particular, he stressed that the primary clues that might indicate that someone is not being entirely truthful are physical displays of psychological discomfort, not always displayed and not always indicative, but if recognized might alert one to probe further.

Francisco Diaz, M.D., a current Medical Examiner in Wayne County, shared some astounding statistics: there are nine Medical Examiners in his office who perform approximately 3,000 autopsies a year. In 2015, 600 of those were drug-related. 450 of that 3,000 are homicide or suspected homicide. In case you might be wondering, that averages out to cutting open the body of a homicide victim every day of the year with two on every fourth day. "It does change you," he told me when he and I spoke after his presentation.

He gave a fascinating presentation on investigation of a pair of double murders (yes, I mean four dead bodies) involving classifieds posted on the Back Page website. He also shared the information that Toledo, Ohio is a crossroads for human trafficking due to its proximity to Interstates 75 and 80 and the Canadian border.

All of the lectures were accompanied by PowerPoint presentations. As you might imagine given the subject matter, there was no shortage of gruesome photographs. Most disconcerting was the fact that many of them had not

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been edited in any way; wounds, faces, and, by extension, identities were often displayed in full view. Initially, I was taken aback. Was there no concern for the privacy of these victims? I can't say that I was offended, but I do wonder if there are rules of etiquette in such situations and whether they had been observed. Maybe they figured that we were all "part of the club" at that point. Fortunately, there were no horrified cries from the audience along the lines of "That's my Uncle Jim!"

In addition to the explicit photographs of the victims themselves, I could not help but notice that the photographs taken inside someone's home—of which there were many—depicted what appeared to have been very poor housekeeping. In fact, many of the homes in the photographs looked like they must have been an outright mess even before they became an official crime scene. Some also displayed poor taste in furniture and décor. Although it might be false logic to say that keeping a clean home would make it less likely that you'll die prematurely, I came away with the thought that perhaps keeping your home tidy and tastefully decorated will not hurt your chances of escaping a grisly death.

Most of the speakers were informative and even entertaining, but I'm afraid not all of them were. The worst presentations were given by people who had impressive credentials but did little in the way of conveying anything interesting, much less organized useful information. Still, the positives outweighed the negatives and, considering some of our CLE alternatives (anyone interested in an all-day CLE on "Real Estate Titles in Ohio"? How about the fascinating and ever-popular "Choice of Business Entity"?), I consider the event a success and I'm glad I went.

Wanting some return on my investment nonetheless, I did hope for a chance to use what I learned once I got back to the office. Fortunately, I did not need to wait long; I received a telephone call from a potential client my first day back. Thanks to what I learned at the seminar, our telephone conversation went something like this ("PC" = Potential Client):

PC: Hello, I just got a ticket for speeding in Chesterland over the weekend. Your client, John, is a friend of mine. He had nothing but good things to say about you and recommended that I give you a call. He said you really helped him out of a jam! Can you help me?

Me: Well, I'm not sure. Why don't you tell me what happened?

PC: Well, I was going to pick my son up from his baseball practice on Saturday afternoon and...oh, I don't know, I guess I was going faster than I should've...a cop pulled me over and said I was going 51 in a 35. I haven't had a speeding ticket in several years, but I really don't want any points on my license and I don't want my insurance rates to go up. Do you think I need a lawyer? Is this the type of thing you handle?

Me: Hmmm...Were you able to recognize any indication of a blunt force wound?

PC: What?

Me: Blunt wounds. Did you recognize the indication of any?

PC: I don't understand what you're talking about.

Me: Well, that's understandable. Do you think you would have recognized a blunt instrument wound if you had seen it?

PC: What? I…

Me: (cutting him off) Unless you've been trained to recognize blunt wounds, they can be very hard to spot. Most people have no idea what to look for. Fortunately for you, I've just come back from a seminar where we discussed that very thing and I...

PC: What are you talking about? I think I know what blunt trauma is, but there was no blunt trauma here. There was no accident and no one was injured. The cop just stopped me, asked me for my license and insurance card, I gave it to him, and he gave me a ticket.

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Me: Hmmm . . . Did you notice any bloodspatter on the ticket itself? Notice that I did not say "bloodsplatter."

PC: I have no idea what you're talking about.

Me: (thinking to myself: If displaying signs of psychological discomfort are any indication of deception, this guy was an off-the-chart liar! I concluded that I was finally getting somewhere with this call and mentally congratulated myself on the use of my new knowledge.)

Me: I think this case must be much more involved than you're letting on. Is there anything you're not telling me?

PC: Look I don't know what you did for John, but there must be some mistake...he said good things about you, but I think there must be some misunderstanding. Oh, forget it! I'll just send in the money, take the two points, and forget about it!

With that, he hung up. He didn't hire me and I haven't heard from him since, but I was comforted by the fact that, because of the training I received at the "Medicolegal Investigation of Death" seminar, I now have the confidence to ask the tough questions and the ability to recognize what's important.

A Trip Around the World

David E. Lowe

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An old Army buddy of some 55 years called me a couple of months ago and asked if I wanted to go to Vietnam. His girlfriend had just dropped the hammer on him and I was second choice. My friend had booked a rather luxurious trip, and didn't offer to pay my share, but away we went.

Reading Graham Greene's The Quiet American on the way to Saigon was surreal. We went to some of the haunts Greene loved, including the Rex Hotel (where the war correspondents met every evening); the Majestic Hotel (another landmark); prowled around the Rue Catinat (now the "Dong Koi", as the French are persona non grata); the Palais Café; and a warren of side streets in the middle of one of the noisiest cities in the world, and where you could get great street food.

The War Remnants Museum was gut-wrenching. Photos of Agent Orange babies, posters condemning the U.S., and graphic war photos. The museum used to be called "The Museum of American Aggression", but the Commies changed the name after they realized tons of American tourists were

Above: The tank that crashed the gates at the Palace in 1968.

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Trip (from page 19)

drawn to this bitter sweet country. Paul Newman knows what I mean.

My pal had a connection in Saigon—an ex-CIA type who's sort of married to a Vietnamese woman who owns a bar. We became intimately familiar with this place. Lots of ex-pats, street people and assorted characters. But you'd want to top the night off at the Apocalypse Now Bar.

I asked some of the natives if the Party takes care of the poor and the elderly. The universal response was: "The Party takes care of itself." Fortunately, at least for now, most of the populace still believes that the kids should take care of their parents and elders.

We were on a boat for a couple of days in the Mekong Delta. We saw floating markets, lots of river traffic, and more markets on land. In the Delta, rat is a specialty, along with eels, frogs (looked like toads) and snake. We had our own chef on board, and I cross-examined him carefully before each meal.

After the buzz of Saigon (motor bikes by the millions), we flew to the Con Dao Islands off the east coast of Vietnam. The Six Senses Resort is when I realized why my friend planned the trip with his girlfriend. It was luxury to an embarrassing degree.

From Saigon to Singapore —truly from the ridiculous to the sublime. One of the top 10 things on my bucket list has always been to stay at Raffles (an old English colonial hotel). It's where the Singapore Sling was born, and has hosted just about every celebrity, president, king, queen, movie star, and (more to my taste) guys like Hemingway, Kipling, Maugham, Michener, and so on.

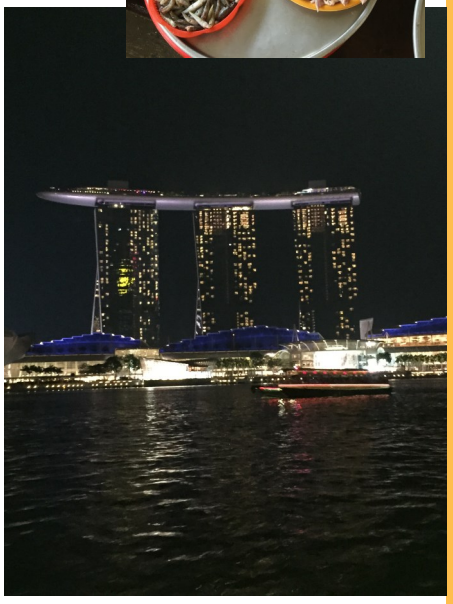
If you think the U.S. is up-to-date on things, I can tell you that most of the developed world (and some not so developed) is ahead of us on electronics, city scapes, architecture, traffic control, etc. And our airports (except maybe Denver and a couple others) are pitiful when compared with Narita in Tokyo, Changi in Singapore, Hong Kong International, even Tan Son Nhat in Saigon.

Singapore is a big (5 million) beautiful city. It's a dramatic fusion of Victorian England and the 21st Century. Strange rules: no chewing gum, no jaywalking, no eating or drinking on public transportation, no begging, no littering (a capital crime I think). Regardless, it's a friendly, sophisticated town with Orchard Road shopping, Botanic Gardens, stunning architecture, and Raffles.

I took a side trip to Batam, an island in Indonesia. Third world all the way. But with bright spots—I just can't remember them.

This trip took me around the world. And it felt like it.

Top Right: People on motorcycles—This defines Saigon—note the face masks. **Second Right:** Mehong Delta Rat on the right.



Far Left: "My man at Raffles." **Above:** Singapore Architecture. **At Left:** At a mosque in Indonesia.

The Underdog Can Still Prevail
With a Balanced and Reasoned Argument

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Recently, I had a client who owed federal taxes and had a 1999 Honda, which was valued at approximately $2770.00, and was under a purchase money security interest promissory note. At the meeting of creditors the trustee indicated that he was considering seeking turnover of the Honda based on 11 USC §522(c)(2)(B) despite my client claiming an exemption for the full value of the vehicle. For those unfamiliar with bankruptcy law, this particular section of the Code states as follows:

> "**(c)**Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except—* * * **(2)**a debt secured by a lien that is—* * * **(B)**a tax lien, notice of which is properly filed"

Basically, the Trustee asserted that he was entitled to turnover of the vehicle because the Federal Tax Lien overrides the Debtor's exemptions.

I argued to the trustee that turnover of the vehicle was not in the best interests of the creditors whose interests the Trustee represented. I further argued that if the Trustee was permitted to sell the asset, there would be a *deminimus* benefit to the creditors, if any, after costs of liquidation and administration expenses, and there would be a significant detriment to the Debtor, because the vehicle was his only means of transportation. The Debtor was working in a temporary job that was only lasting for approximately eight weeks. He needed to seek new employment after that. I further presented to the Trustee that if the Debtor had no vehicle his job prospects would be limited, because some, if not many, of his job prospects would require that he had available transportation, and some, if not many, of his interviews would be in places where he would not be able to use public transportation. I expanded my argument to include the fact that if the Trustee were to sell the vehicle, the amount of funds that would be paid to the IRS would not justify the hardship that would be placed upon the Debtor to the extent he would not be able to obtain employment sufficient to pay the remainder of the IRS lien. In fact, the IRS, itself, in its manuals states that it may release a lien if the Debtor can show that the taking of the property would be a "hardship" upon the Debtor:

> The [Internal Revenue] Code prohibits levy on property if the amount of estimated sale-related expenses exceeds the fair market value of the property at the time of levy. There has to be equity in your vehicle, value beyond what you may owe to a lender." Internal Revenue Manual 5.17.3.3.5.3.

In my client's case, there was approximately $700 in equity, but after expenses of seizure and sale of the vehicle, that equity would likely have been less than 1-2% of the amount owed to the IRS.

Further, I presented that 26 U.S.C. §6343 states, in pertinent part:

> (a) Release of levy and notice of release
> (1) In general
> Under regulations prescribed by the Secretary, the Secretary shall release the levy upon all, or part of, the property or rights to property levied upon and shall promptly notify the person upon whom such levy was made (if any) that such levy has been released if—
> * * *

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Underdog (from page 21)

(D) the Secretary has determined that such levy is creating an economic hardship due to the financial condition of the taxpayer, or

In other words, if one needs a vehicle at issue to get to work, the store, the doctor, or to school, most likely the IRS would consider taking it to be a hardship for the Debtor, and not levy on it. I claimed that as potentially the only creditor who may receive a benefit of turnover of the property, albeit a significantly small benefit, even the IRS, as creditor, believed that levying upon my client's vehicle would not be in its own best interest. My client was not even seeking a release of the lien, which the Code and the IRS contemplate, but only that the Trustee not seek turnover as it would be a "hardship" if there was a turnover that would neither benefit the Debtor or the IRS. Additionally, I maintained that the Debtor was looking to work with the IRS in an offer in compromise after the bankruptcy case was completed to pay the debt for which the Trustee was seeking the turnover.

I also represented that the administrative expenses of the seizure and sale of the automobile had to be considered. There are costs associated with the seizure and sale of a vehicle in bankruptcy, including but not limited to, towing fees and/or transportation costs, storage costs, advertising costs, auctioneer services, appraisal fees, title search expenses and other miscellaneous expenses. I claimed that by the point those expenses, along with the Trustee's fees and other administrative fees such as legal fees were paid, there would be little to no funds available to the creditors, including the IRS, and the IRS would remain in the same position as a lienholder had the property not been taken, if not worse, because the Debtor would not have the transportation available to search for or remain gainfully employed in order to pay back the entirety of the debt, or whatever compromised amount upon which the IRS and my client agreed.

Finally, I claimed that the IRS would continue to have a lien on the automobile no matter whether it was sold by the Trustee, or taken by the IRS at a later date, if necessary. I asserted that if the property was turned over and sold, and the IRS was paid only a part of its debt, the purchase money lienholder was out its investment. While one creditor whose interest would remain no matter what happened would possibly receive a very minimal monetary benefit, the purchase money security interest lienholder would lose its money because its debt would revert to an unsecured, discharged debt rather than a secured debt. I argued that if the Debtor were permitted to keep the property, the purchase money security interest lienholder would receive its funds, and the Debtor could work with the IRS to pay the tax debt, or the IRS would continue to have a lien on all the Debtors property, including any "after acquired" property. Thus, it was the Debtor's position that the IRS would lose more from the turnover of the property because it would lose the Debtor's ability to repay the remainder of the tax debt within a reasonable time from an inability to gain employment, and the purchase money security interest lienholder would lose more from the turnover because it would receive NO funds at all. Therefore, it stood to reason that it was not in the best interest of either of the creditors for the turnover of the property.

Neither the IRS, the purchase money security interest lienholder, or the Debtor were going to benefit from the turnover. The IRS would remain as a priority lienholder after completion of the bankruptcy and its interest would not be diminished by the bankruptcy discharge. In fact, the IRS would have been left in a worse position if the property were required to be turned over because the Debtor would have been unable to seek gainful employment to repay any remaining tax debt after receipt of the small amount of funds that it may have received from the sale of the vehicle. The purchase money security interest lienholder would have been in a worsened position because its debt would have become an unsecured debt that would have been discharged with the bankruptcy discharge, thereby losing monies as a result of the turnover. The Debtor would have been in a worse position because he would have been limited in his ability to seek gainful employment and would have needed to rely on public assistance if he couldn't find gainful employment.

The Trustee accepted my

(Continued on page 23)

The Ohio Innocence Project in North East Ohio

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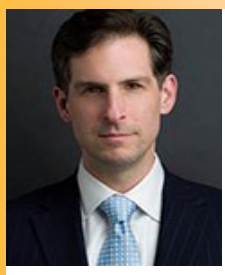

Join the Ohio Innocence Project for the October 11 Ohio Innocence Project lunch program at Lakeland Community College. Across the Nation, Innocence Project initiatives and programs have freed more than 250 wrongfully convicted persons. The Ohio Innocence Project was founded within the Rosenthal Institute for Justice at the University of Cincinnati's College of Law. The Ohio Innocence Project to date has helped 23 individuals obtain their long-sought freedom.

The fight for the wrongfully convicted has many allies, two if its strongest are Mrs. Nancy Petro and former Ohio Attorney General Jim Petro. With his background as Attorney General, Mr. Petro was the first to admit he was unaware of the extent of wrongful convictions. His experience during his term and after made him one of the Nation's leading advocates for the wrongfully convicted. There is no greater accolade then the release of the wrongfully convicted; but Mr. Petro has since been the recipient of many regional and national awards. On April 8, 2011, he received The 2010 Innocence Network Champion of Justice Award, "Honoring the person who goes above and beyond in supporting and championing efforts that free the wrongfully convicted and/or reform the criminal justice system to prevent wrongful convictions."

Along with Mrs. Petro, they are the authors of *False Justice: Eighth Myths that Convict the Innocent*. *False Justice* is an account of their personal experiences and the contemporary research on the causes of wrongful convictions and their insights in how to bring justice to those in need. Mrs. Petro is a powerful advocate for the wrongful conviction and criminal justice reform in her own right. In addition to co-authoring *False Justice*, she has written for In Brief, The Magazine of Case Western Reserve School of Law, the Ohio Innocence Project's Annual Review (2011 and 2012), and, worked as a contributing editor, for the Wrongful Convictions Blog, an international forum.

The stores of the tragedy and triumph of the wrongfully convicted exonerated persons provide the greatest lessons. Two of the most compelling success stories are found in the exonerations of Dean Gillispie and Raymond Towler. Both men spent in excess of 20 years in prison for crimes they did not commit. Their stories of triumph and forgiveness are the most compelling reason to advance the work of the Innocence Project.

This October 11 lunch program will feature all of these speakers. Do not miss this opportunity to hear from Dean and Raymond about their experiences and to learn from Attorney General Jim and Nancy Petro their insights. Anyone interested in participating in the ongoing planning and outreach for this October 11 event is welcome. Feel free to contact Joseph "Randy" Klammer at reception@klammerlaw.com to RSVP or assist in planning for this event. ❁

Underdog (from page 22)

arguments and didn't file for turnover of the vehicle. My client was able to get his bankruptcy discharge and begin his financial fresh start. The moral of this story is that even if the opposing party has the law on his or her side, with a balanced and reasonable presentation of the facts and law as it applies to ALL interested parties, the underdog can still prevail. ❁

Announcements

Columbus, Ohio (April 28, 2016) – Willoughby attorney Ann S. Bergen today received the 2016 John C. and Ginny Elam Pro Bono Award from Supreme Court of Ohio Justice Judith L. French at the Ohio State Bar Association All-Ohio Legal Forum in Cincinnati. The award recognizes and encourages outstanding pro bono legal work in the state of Ohio.

Bergen began her career as a staff attorney at the Legal Aid Society of Cleveland. In 1998, Bergen opened The Law Offices of Ann S. Bergen, a general civil practice firm. In addition to handling pro bono cases as part of Legal Aid's Volunteer Lawyers Program and participating in Legal Aid clinics, Bergen's firm greatly reduces fees for clients who cannot afford legal assistance without foregoing basic necessities.

According to Colleen Cotter, executive director of the Legal Aid Society of Cleveland, Bergen demonstrates "how small firm and solo practice attorneys can make a life-changing difference." Cotter went on to say of Bergen, "Even as a busy solo practitioner and volunteer for Legal Aid, she is an undisputed leader in the legal community."

Bergen joined Legal Aid's board of directors in 2006 and served as board president in 2013. Also in 2013, Bergen received the President's Award from the Lake County Bar Association. The award recognizes outstanding service to the community and service to the profession. Under Bergen's leadership, more than 2,900 Northeast Ohio attorneys have agreed to participate in Cleveland Legal Aid's Volunteer Lawyers Program.

Wickliffe attorney John Shryock said of Bergen, "She represents the best of our profession." He called her the "inspiration and driving force" behind the Lake County Family Law Committee Pro Bono Clinic, which provides four annual clinics. Citing her tireless support of pro bono programs sponsored by The Legal Aid Society of Cleveland and efforts on behalf of the nationally recognized Pro Se Divorce Clinic for the Lake County Ohio Domestic Relations Court, Willoughby attorney C. Lynne Day referred to Bergen as "an inspiration to our profession."

Bergen's interest in encouraging her fellow attorneys to support Legal Aid took her to the national stage when, in 2014, she was a solo practice presenter at the LSC 40th Anniversary Event in Washington, D.C. In 2012 and 2015, during an Equal Justice Conference presentations, she offered advice about how solo and small firm attorneys can become more involved in pro bono service through pro se clinics and by partnering with legal services organizations.

Judge Colleen A. Falkowski, of the Lake County Domestic Relations Court, said of Bergen, "Ann's lifelong commitment to ensure lower income families are not forgotten by the legal system has truly energized Lake County's legal community. If every local bar association had an 'Ann Bergen,' access to justice for the less fortunate would be guaranteed." Judge Timothy P. Cannon of the 11th District Court of Appeals had this to say about Bergen: "There could not be a more appropriate and deserving recipient for this award. Not only is Ann dedicated and committed to helping those in need of legal services, but she has inspired many of her colleagues to do the same. Our community and the legal profession owe a debt of gratitude to her for the example she has set."

Bergen received her bachelor's degree from John Carroll University and her law degree from Cleveland-Marshall College of Law. She is a member of the OSBA and the Ashtabula, Geauga and Lake County Bar Associations. In her community, she is past president for Lake County's Forbes House, which provides services to victims of domestic violence and their children.

The Ohio State Bar Association, founded in 1880, is a voluntary association representing approximately 22,000 members of the bench and bar of Ohio as well as nearly 4,000 legal assistants and law students. Through its activities and the activities of its related organizations, the OSBA serves both its members and the public by promoting the highest standards in the practice of law and the administration of justice.

ACT 2: Attorneys "Do Good"

The Legal Aid Society of Cleveland

Attorneys often use their transition from active full-time work as an opportunity to volunteer in *pro bono* efforts. In the past attorneys were required to pay the full cost of keeping their license active in order to do *pro bono* work during retirement. Today, there is good news for attorneys who want to volunteer in the later years of their career; Ohio will soon have a new emeritus attorney registration status. The Ohio Supreme Court announced in March new rules that will allow retired attorneys to engage in limited legal practice to provide *pro bono* service.

The new registration status is the result of changes to Rule VI of the Rules for the Government of the Bar of Ohio. The changes were in a response to the recommendations made by the Supreme Court Task Force on Access to Justice, which was charged with identifying gaps in and obstacles to accessing the civil justice system in Ohio. These changes will take effect on September 15, 2016.

The emeritus *pro bono* status will be available to an attorney admitted to practice law in Ohio and is associated with a law school clinic, legal aid, approved legal services organization, public defender's office, or other legal services organization. The attorney will be required to have supervision from an active-status attorney and routine legal services will not require supervision. The emeritus attorney will not be allowed to receive compensation beyond reimbursement for expenses from the *pro bono* organization.

The new rule includes provisions that:

- Require an attorney to have practiced for a minimum of 15 years;
- Require a *pro bono* organization verify the attorney involvement;
- Add a biennial registration requirement and a $75 registration fee;
- Require an emeritus *pro bono* attorney, upon expiration, or revocation of emeritus status, to file for either active or inactive attorney status.

Access to justice remains a problem across the United States. Roughly 80% of people with low incomes are not having their civil legal needs met. Many lawyers are doing their part by providing *pro bono* services; the attorney emeritus status in Ohio will help to encourage more *pro bono* work throughout the state. Ohio joins several jurisdictions across the United States in making this change.

What type of work can late-career and retired attorneys do?

The Legal Aid Society of Cleveland, through its ACT 2 initiative of Legal Aid's Volunteer Lawyers Program and in collaboration with the CMBA, provides attorneys with a variety of opportunities to get involved.

Volunteers work closely with Legal Aid staff attorneys in their *pro bono* efforts. Legal Aid's Volunteer Lawyers Program supports ACT 2 volunteers with malpractice insurance, office space and resources, training, and mentors.

Roles for ACT 2 volunteers at Legal Aid include:

- In house work at Legal Aid in a substantive practice group or in the Community Engagement practice group;
- In house work at Legal Aid within the Volunteer Lawyers Program, leading a project or program, and
- Traditional *pro bono* work, such as participation in brief advice clinics, assisted pro se clinics, or accepting a *pro bono* case.

Within any of these opportunities, ACT 2 volunteers will also have the option to mentor law students and newer attorneys. Volunteers and law students or newer attorneys will be matched based on mutual interest in a project or area of law. In this way, ACT 2 attorneys can pass on their skills

(Continued on page 26)

Legal Aid (from page 25)

and experiences to the next generation of lawyers.

Attorneys who participate currently in Legal Aid's ACT 2 program all have a commitment to public service and to advocacy for low-income persons and are making a positive impact on our communities. For example, an ACT 2 volunteer at Legal Aid recently ensured housing for a person being displaced by the Ohio Department of Transportation's new Opportunity Corridor project, a $331 million, 3.5 mile road linking I-490 and University Circle. The new road and surrounding development could bring jobs back to the neighborhoods and improve access to jobs, education and cultural activities for residents.

However, 64 homes and 25 businesses remain in the path of construction. The state has the right, by eminent domain, to access the land for development, but residents needed help to protect their rights.

Cleveland's Department of Aging approached Legal Aid for help. Homeowners, many of whom are older adults, who live along the construction route, needed legal advice.

As a Legal Aid ACT 2 volunteer, Paul Binder has been the point person at Legal Aid to help homeowners. He has reviewed a number of cases and has advised several residents whose property is slated to be taken for the Opportunity Corridor.

Mr. Binder brings 36 years of experience as a federal prosecutor to his volunteer work with Legal Aid. He recently retired from his practice of prosecuting anti-trust, fraud, and violent crime cases with the U.S. Department of Justice. In retirement, he wanted to continue using his skills as an attorney and joined Legal Aid as an in-house volunteer under Legal Aid's ACT 2 program. "It's a terrific opportunity to give back," says Mr. Binder.

"There is a wealth of experience and expertise in the community of potential ACT 2 attorneys. We are so fortunate to have so many talented attorneys willing to share that talent.", says Ann Porath, managing attorney of Legal Aid's Volunteer Lawyers Program. Porath adds, "To maximize that experience and expertise is a key to addressing access to justice issues and strengthening our communities."

ACT 2 is a great opportunity for attorneys to continue or to begin giving their time and expertise to "do good." With flexible hours and a wide array of projects available, it is easy to find the right experience for you with ACT 2. To learn more and to sign-up for ACT 2 with Legal Aid, visit www.lasclev.org/ACT2.

❁

Save the Date! October 11, 2016 Lakeland Community College

The Ohio Innocence Project

Presents the lunch program:

Former Attorney General Jim Petro and Mrs. Nancy Petro,
Authors of *False Justice: Eight Myths that Convict the Innocent*
Special Guest: Raymond Towler: Ohio Exoneree

Learn about the work of the Ohio Innocence Project, the insights of Jim and Nancy Petro, and the triumphs of Raymond Towler.

Watch your inbox for reminder notices this summer.
Tentative time: 11:30-1:30 with light lunch.
Feel free to R.S.V.P. to reception@klammerlaw.com

Geauga Bar Association

Announcements

Website:
Check out the Geauga County Bar Association Website for updated meeting dates, deadlines and other important information:
www.geaugabar.org

Upcoming Executive Committee Meetings
June 8, July 13
Second Wednesday of each month
at 12:00 noon.
R.S.V.P. to Mary Poland

Upcoming General Meetings
July 27
Fourth Wednesday of each month at 12:00 noon
R.S.V.P. to Mary Poland
(Secretary's Day, June 22, takes the place of our June Meeting)

Take Note:

Secretary's Day is June 22, 2016 at the Munson Town Hall, at 12:00 noon. More information to follow.

The Family Law Committee will meet July 22, 2016, at Square Bistro at 12:00 noon, for a presentation by Magistrate Paschke.

The Golf Outing will be Tuesday, September 13, 2016, at Wicked Woods for 18 holes.

Geauga County Bar Association

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Ipso Jure Deadlines:

Mark your calendars and turn in an article!

June 15, 2016

August 15, 2016

October 15, 2016

Quick Reminders

Next Executive Committee Meeting:

June 8, 2016 at 12:00 noon

Next General Meeting:

July 27, 2016 at 12:00 noon

Secretary's Day:

June 22, 2016 at 12:00 noon

@ Munson Town Hall

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