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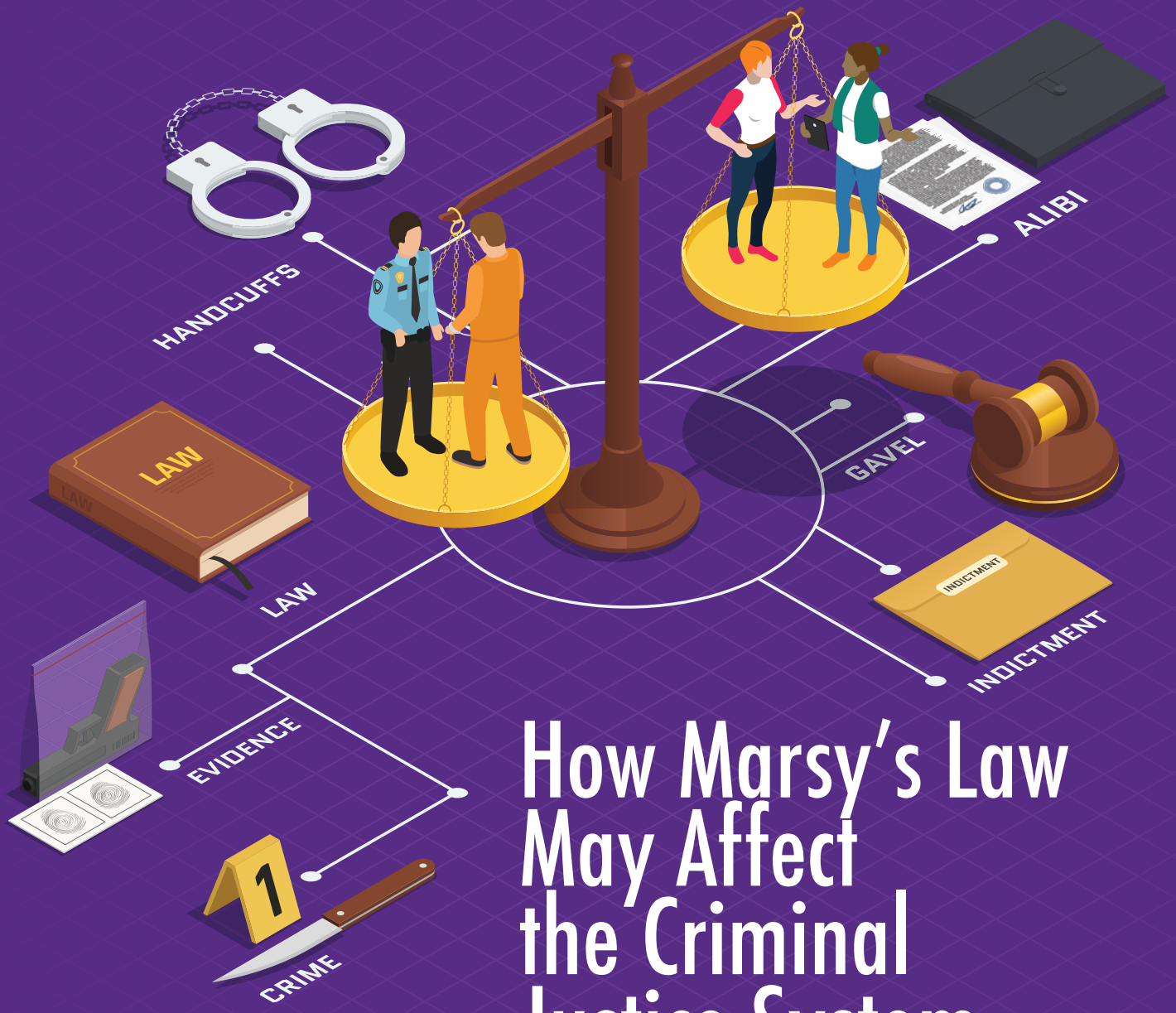

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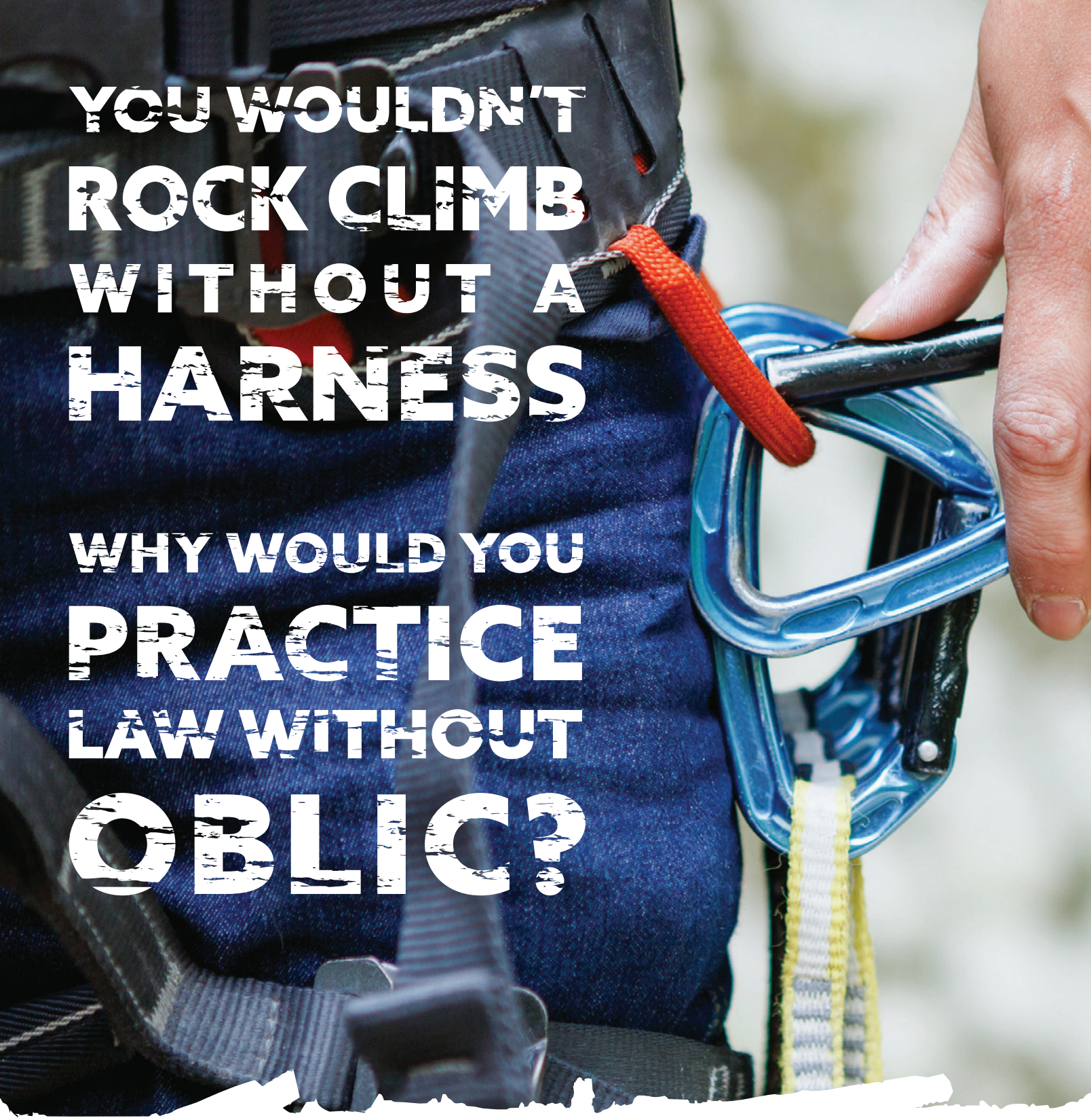

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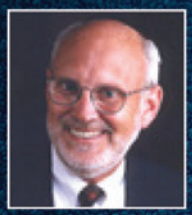

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PRESIDENT'S PERSPECTIVE

Randall M. Comer

President, Ohio State Bar Association

Resolved: I Shall Not Die a Slow Death by Email

I am going to ask you to suspend reality for just a moment and imagine practicing law without email. You probably fall into one of two camps—one—horrified at the mere suggestion (and thinking to yourself *this guy is old school and out of touch*), or two—wistful —either because for you it's a wonderful, but unrealistic dream, or (if you were in practice prior to the early 2000s) a very happy memory.

Today, as I sifted through my 121 average emails per day like a game of Space Invaders (shoot down one, three more pop up in more rapid succession), I was thinking about how email has on one hand, revolutionized the way we communicate, but on the other hand, has significantly contributed to the stress levels of an already stressful profession. The stress caused by email is insidious and manifold.

Market research estimates that 269 billion (with a b) emails flood inboxes each day. In fact, in the time it takes you to read this column, 1.2 million emails will have been sent (149,000 per minute on average). It would not be an exaggeration to say that one could spend the entire work day solely dealing with email. When was the last time you were out of the office for a day (on business or pleasure) and returned to a stack of 100 or more snail-mailed letters?

And though volume is part of the challenge, perhaps an even bigger concern is the fact that each new email, regardless of its subject matter or level of importance, creates an open loop in our psyche. We feel extreme pressure not only to reply, but to reply quickly. This can be a dangerous game, especially for attorneys, who are trained to research, to carefully assess the situation, and to thoughtfully counsel – none of which are easily done via email.

In addition to the sheer volume and the increased pace of practice, we are further stressed by how to manage and file email. Just ask any litigator about discovery practice in the age of email and other electronically stored information and I am sure they will have plenty of cautionary tales of woe to share. And, if you are like me (a little OCD…or perhaps a lot OCD), my emails have to be filed in electronic subfolders on a regular (like daily) basis, which takes an extraordinary amount of time. Yes, more stress.

There are many who are far better versed than I in the ethical pitfalls of email and the law, as well as in the technical tricks for keeping your inbox under control. In fact, the OSBA regularly has some pretty handy CLE courses available for you on these very topics. However, as we are in prime resolution-making season, I thought I'd share some personal goals surrounding email management that I believe could transform our discourse with clients, colleagues, and co-workers, as well as improve our relationships and our collective mental health, should they be widely adopted by Ohio attorneys:

Resolved: Email is not suited for persuasive or rhetorical writing and shouldn't be used that way. Email is great for neutral information exchange – to schedule meetings, distribute an agenda, or share a document—but not to debate or win over the recipient (or any third party he or she forwards it to) to your side of an issue. Use email for logistics and save your rhetorical flourishes for your formal briefs, memoranda, opening and closing statements.

Resolved: Err on the side of picking up the phone or walking down the hall, especially when you need to discuss sensitive or complicated matters. Emails are far more likely to result in miscommunication or misinterpretation as opposed to just having a conversation with someone. Not only is back and forth via email more cumbersome, but absent paralinguistic cues – voice volume, intonation, body language—it's difficult to discern the writer's intention or emotion. And it's nearly impossible to do so when you are exchanging email with someone you don't know well. I suppose employing emoji or the taboo ALL CAPS can indicate emotion to an extent; however, I wouldn't recommend either for professional email communications.

Resolved: Create email-free zones. I have decided to completely remove the email app from my tablet. When I use that device, it's to read or listen to music, and not to reply to correspondence. I also like the idea of email-free days, and considering the fact that the average person checks their email 15 times per day, an email-free hour could do a person a lot of good. In addition, I'm sorry to report that there are studies which show that 50 percent of people check email in bed, 18 percent while driving (though I suspect it's even higher than that), and 42 percent while in the bathroom. Can we at least agree email should be off limits on all these fronts?

Resolved: Check email at regular and scheduled intervals. In the same vein, it's best not to leave the inbox open while you are trying to think through a problem or to do focused reading or writing. One study recommends checking email a maximum of three times per day to reduce stress and increase productivity. This may be easier said than done and a word to the wise: If you employ this technique, encourage those around you to call you in case of emergency rather than rely on email. (And when the shoe is on the other foot, please refer back to my second resolution and be sure to pick up the phone when you have an emergency to report).

Resolved: Follow the Golden Rule and do unto others as you would have done to you. Email sparingly. Keep it short. Write clear subject lines. Be clear about expectations (i.e., let you recipient know the email is time sensitive or just an FYI). Get to the point in the first sentence or paragraph. And before you hit "reply to all" stop and think about who really needs the information or comment you want to share, especially when there are many email addresses in the cc field.

Resolved: Don't use email to pass the buck. It's the oldest trick in the email playbook: responding to an email with a question just to get it off your plate and onto someone else's. While it may buy you some extra time, more often than not, it will only lead to more questions and inevitably more emails in your inbox.

Resolved: Avoid printing emails. This is my environmentally friendly service announcement. Rather than printing and filing email communications, establish an electronic file for keeping necessary correspondence, preferably a system the whole firm would adopt. Though going paperless is often touted as an advantage of email, my suspicion is that with the collective tendency towards printing email (including long chains with multiple pages multiple times) we haven't really saved any trees since the dawn of email communications.

Email is a powerful tool and just one of the many technological advances that has transformed our profession over the last two decades. We owe it to ourselves and our clients to use it judiciously. This year let's all resolve not to die a slow death by email.

What do you think? Are there any email best practices I've missed? In the spirit of this column, rather than emailing me with your suggestions, please share your tips with our full membership via the OSBA Facebook page, where I've posted this column.

Note: All statistics regarding email usage were gleaned from 85 Interesting Email Statistics and Facts (2017) By the Numbers posted by Craig Smith of DMR (Digital Market Ramblings).

LiveCLE

January 23
Family Law Institute Highlights Video Replay
Columbus, Cleveland, Fairfield, Webcast

January 25
Discipline Problems Video Replay
Columbus, Cleveland, Fairfield, Webcast

January 30
The Law of Sexual Harassment and Hostile Work Environments
Columbus, Fairfield, Akron, Perrysburg, Webcast

January 31
Probate Litigation Video Replay
Columbus, Cleveland, Fairfield, Perrysburg, Webcast

February 1
1040 Tax Return Preparation
Columbus, Cleveland, Webcast

February 8
1040 Tax Return Preparation
Cleveland

February 14
Data Breach and Cyber Security Summit Video Replay
Columbus, Cleveland, Akron, Dayton, Perrysburg, Webcast

February 21
2017 Oil and Gas Update Video Replay
Columbus, Cleveland, Wooster, Webcast

February 23
Nuts and Bolts of Wills and Trusts
Columbus, Cleveland, Dayton, Perrysburg, Webcast

February 28
OVI Update Video Replay
Columbus, Cleveland, Fairfield, Perrysburg, Webcast

Ohio State Bar Foundation Announces Fall Grantees

Every day the Ohio State Bar Foundation (OSBF) empowers nonprofits across Ohio to meet specific legal needs in their communities through our grantmaking initiatives. The OSBF is proud to partner with 10 law-related organizations across the state to put our mission into action.

$386,953 total funding statewide
$120,000 to **Law and Leadership Institute (LLI)** to support the second year of their 10th grade start pilot project. This program provides students with instruction and mentoring from lawyers, judges and others in the legal community with focuses on mock trail exercises, internships, ACT prep, college visits and more.

$75,000 to **Catholic Charities Corporation** for their "Immigration Legal Assistance for Vulnerable Populations" program. This program is designed to meet the needs of those most at risk of detention and criminalization and other immigration issues in their communities to provide outreach and education.

$12,200 to **Disability Rights Ohio** to translate online documents and legal forms into Spanish and Somali for increased accessibility.

$48,000 to **Equality Ohio Education Fund** to support their LGBTQ legal clinic.

$11,925 to **Jewish Family Services of Akron** to fund their volunteer guardian handbook that will include best practices and hands-on techniques for new recruits.

$8,732 to **The Ohio State University Foundation** for the creation and distribution of a compilation of Ohio's legal history.

$26,636 to **Ohio University Foundation** for their Summer Law & Trial Institute, a program geared toward southeastern Ohio high school students that provides a residential experience with aims to increasing understanding of the law and a possible legal career.

$36,360 to **Operation Legal Help Ohio** for their veterans' outreach initiative including specialized attorney education, legal assistance, volunteer recruitment and veteran community education.

$32,000 to Legal Aid Society of Columbus, an affiliate of **Ohio State Legal Services Association**, for their partnership with Columbus State Community College to provide legal support and advocacy to low-income students facing legal barriers.

$16,100 to **Towards Employment** to increase access to Certificate of Qualifications for Employment through stakeholder education opportunities.

OSBF Requesting Strategic Grant Proposals

The Ohio State Bar Foundation believes our democracy works better when people understand the law. We work to improve the justice system, enhance public understanding of the law and recognize excellence in the profession. Through our grantmaking efforts, OSBF seeks to convert ideals into real-world actions and impact communities across Ohio. Join us in 2018 as we work to create impactful change through our new Strategic Grantmaking initiative!

A fundamental goal of OSBF is to increase participation in and knowledge of our system of law and government. With that, our first Strategic Grantmaking Initiative will focus on **Civics Education for Adults.**

Request for Proposals will be released on Jan. 2, 2018. Please see our website for details: www.osbf.org/what-we-do/strategic-grants/.

Stage 1 applications are due to Julia Wyche on or before Feb. 15, 2018, by 5 p.m. EST. Organizations selected for Stage 2 will be notified on Feb. 28, 2018.

Stage 2 applications are due to Julia Wyche at jwyche@osbf.net on or before March 30, 2018, by 5 p.m. EST. Selected projects will be announced on May 1, 2018.

For additional questions please contact Julia Wyche, Grants & Communications Specialist, at (614) 487-4450 or jwyche@osbf.net.

CONNECT WITH OSBF

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Facebook: facebook.com/OhioStateBarFoundation

OSBF Contributes to Hurricane Relief

The OSBF has granted $10,000 to the Texas Bar Foundation and $10,000 to the Florida Bar Foundation, and these funds will support nonprofits who are providing legal services to those impacted by Hurricane Harvey and Hurricane Irma. Donations are being accepted at Texas Bar Foundation and the Florida Bar Foundation's websites.

HONOR. REMEMBER. CELEBRATE.

Honor the exceptional, celebrate an occasion or recognize the significant people in your life with a charitable gift to OSBF. Tribute gifts are an easy way for you to support OSBF grantmaking initiatives and to ensure special colleagues, friends and family receive the statewide recognition they deserve.

To dedicate your gift, call (614) 487-4477 or visit www.osbf.org and click "Donate Now."

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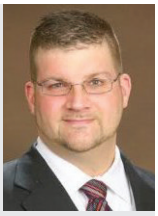
Ten Tips for Writing a Better Brief

STEVEN T. VOIGT



Steven Voigt is a Principal Assistant Attorney General in the Constitutional Offices section of the Office of the Ohio Attorney General. In 2016, the Office of the Attorney General awarded Steven its annual Excellence in Writing Award.

From new lawyers to seasoned litigators, we can all improve our writing. We each have our own style, which is fine, but we can all learn from experience and from others. Here are 10 ideas to consider for your next pleading.

1. Tell the court what you want

At a recent writing workshop, a D.C. Circuit Judge told the group, "If I do not understand what you are requesting in a pleading, I give it to my clerk to puzzle through. You don't want to be that person." Courts are busy. You are not likely to be persuasive when the Court has difficulty understanding your brief or motion. Consider two openings for a motion to compel answers to interrogatories:

> **Motion A:** Plaintiff, pursuant to the Rules of Civil Procedure, hereby states as follows. Plaintiff is A Corporation. Defendant is B Corporation. Plaintiff filed its Complaint on December 1, 2016. Plaintiff claimed breach of contract under the August 2015 Park Construction Agreement. In that Complaint, Plaintiff alleged…[o]n February 1, 2017, Plaintiff served Interrogatories, Requests for Production, and Requests for Admission on Defendant. The Interrogatories asked for….

This is tiresome. Do we even know that plaintiff is moving to compel answers to Interrogatories? Now, consider this to-the-point opening:

> **Motion B:** This is a motion to compel Defendant to answer Interrogatories that Plaintiff served on Defendant three months ago.

2. Shorten unnecessarily long sentences

Look again at Motion B's opening. Although it is better than Motion A, it can be even better. Consider this revision:

> **Motion B (Revised):** This is a motion to compel Defendant to answer three-month-old Interrogatories.

There is little substantive difference between the opening sentences of Motion B and Motion B (Revised). But the latter is shorter. It gets to the point. Plaintiff tells the Court what it wants. And the Judge is not exhausted trying to understand the writing.

3. Intersperse short sentences

Short sentences can help avoid reader fatigue and accentuate an important point. Here is an example:

> Bell swerved off Broad Street, ran over the curb, narrowly missed two pedestrians, and slammed into the front window of the Luggage Shop. Bell was drunk. Several witnesses described his erratic driving on Interstate 70. At least once, his car had two wheels on the road and two wheels in the grass. Jodie Lane said Bell stumbled from the accident scene.

"Bell was drunk." This short sentence nestled among longer ones accentuates an important point that the lawyer needs to establish—Bell's intoxication. This three-word sentence also breaks apart the monotony of the longer sentences and allows the reader to take a breath.

4. Avoid hyperbole

Some attorneys think that proper advocacy requires inflammatory adjectives. In fact, pejoratives can be one of the quickest ways to lose credibility. Consider these questionable-tone examples:

> **Example 1:** The Court should not consider Defendant's insulting allegation of fraud.

> **Example 2:** This illegal process intentionally discriminates. The illegal process began in 1990. Prejudicial from its beginning, the illegal, racist procedures slightly changed in 1997. Senator Smith, the sponsor of the illegal bill, made his derogatory remarks in 1991. Those inflammatory remarks show Smith is a racist.

In the first example, the word "insulting" is probably unnecessary. The writer comes across as thin-skinned. The better approach is to strike the adjective and simply tell the Court why the allegation is wrong.

The second example illustrates that numerous adjectives can detract from an argument. A better way to make the point might be:

> **Example 2 (Revised):** The law violates the Fourteenth Amendment because it discriminates on the basis of race. The process started in 1990, and while it changed in 1997, the purpose of the law has always been to discriminate. Senator Smith's explanation in 1991 illustrates the true purpose of the law.

The revised version of Example 2 focuses less on pejoratives and more on law.

Why is the law illegal? It violates the 14th Amendment. How should the Court discern intent? Smith's 1991 comments.

Used sparingly, a tone-appropriate adjective may add value. When dramatic adjectives become routine, advocacy loses persuasion. Make sure that all adjectives have the "right" tone. Over-the-top name-calling, even once in a brief, kills professional credibility.

5. Avoid a grab-bag of repetitive transition words

Do you start too many sentences with these words: "further," "furthermore," "moreover," "in addition," "nevertheless," "consequently," "clearly," "next," "additionally," "first," "thus," "however," "lastly," "accordingly," and "finally"? Some briefs so repetitively use these words that the style becomes a distraction. Go through your next brief and delete some of the transition words that appear at the beginning of sentences. You may be surprised that in many instances, the words are not needed. The sentences may read more smoothly without them. Also consider using these words within, rather than at the beginning, of sentences.

6. Use a coherent structure

There is no single "best" way to start writing a brief. Stick with what is comfortable for you. Some attorneys brainstorm and script numerous ideas in no particular order, just to put everything on the page. Some start with an outline. Others begin with short sections describing core legal arguments.

The key is not the beginning, but instead, how you end. Briefs that ramble and have multiple points in a single section are not effective. It is easier to digest information in a brief that has a coherent structure, with one argument in each section or sub-section. I do not hesitate to use multiple sub-sections.

When a person is finished reading your brief, he or she should be able to understand most of the arguments, aside from any highly technical legal points. The reader should be able to say, "The attorney makes three arguments. They are 1, 2, and 3."

"When you finish writing your arguments, you are not done. Spend at least as much time editing and revising as you put into the substance."

Muddying your arguments by jumping around from topic to topic and then back to a prior topic can weaken your presentation. Brainstorm and execute a coherent, logical structure.

7. Develop a theme

A story is behind every lawsuit—even an ordinary contract dispute. Somewhere in that story is a theme that you will want to convey to the fact-finder. Before writing a single pleading, develop the theme.

In some cases, the theme is the centerpiece of your case. In others, such as the ordinary contract dispute in examples 1 and 2 below, the theme adds background.

> **Example 1:** A is a construction company. B is a building supply company. A and B executed a contract. A paid B $50,000. B was required to deliver lumber but instead delivered cement blocks. The error delayed A's project.
>
> **Example 2:** The same facts as Example 1, but add this: A told B that the production schedule depended on a delivery by September 1. After the error, B did not express remorse and instead sent caustic emails to A. B left the cement blocks at A's work site for two months.

The story elements in the second example may not add to the legal requirements for A's claim, but they do make it much harder to sympathize with B. They are part of developing an ethical and emotional appeal.

Consider two illustrations of a banker-client relationship:

> **Example 3:** Widget is a $100 million company. Widget hired Bank Great to conduct due diligence on Gizmo, a potential acquirer of Widget. Bank Great did not do its job but nevertheless recommended that Widget proceed.
>
> **Example 4:** Widget's sole owner, Stacey Smith, is a scientist whose inventions transformed Widget from a two-person operation in Stacey's garage into a $100 million powerhouse. Stacey has no business training and little business experience. Several others handle Widget's day-to-day operations while Stacey spends her time developing new products. Bank Great is highly respected in the community. After learning that Gizmo was interested in buying Widget, Bank Great made a series of marketing pitches to Stacey and assured her that Bank Great is the most experienced and best bank in the world for due diligence work. Stacey trusted the bankers from Bank Great and relied on Bank Great's representation that it would exhaustively vet Widget's potential acquirer, Gizmo. Stacey had no reason to suspect that Bank Great's recommendation to proceed with the acquisition was not based on thorough research.

The second example tells a story. Example 4 would be more appealing to a judge or jury than merely the core elements of Stacey's claim in Example 3.

8. Do not misrepresent the record

Consider this representation from a hypothetical defendant's brief:

> John Appletree, Plaintiff's expert, never asked about the rivets in the beams when he interviewed the building engineers about structural stability. Appletree Dep. at pp. 12:1-25, 15:12-15, 57:3-7.

Defendant's assertion had better be in pages 12, 15, and 57 of the transcript. If not, a skilled opposing counsel will let the Court know.

In the above example, assume that pages 12, 15, and 57 are simply examples of Appletree's questions to the engineers. Assume the pages do not include any exchanges such as "Q: Did you ever ask the engineers about the rivets in the beams? A: No" or "Q: Aside from your question about the weather, did you ask the engineers any other questions? A: No. I only asked them whether it was a nice day. We didn't discuss anything else." In this scenario, the record does not support Defendant's claim that Plaintiff's expert never asked the engineers about rivets. That claim is a huge inference, portrayed as fact. The defense has instantly lost credibility with the Court.

If a transcript does not say what you want it to say, you are not helping matters by representing that it does. Good advocacy is not stretching the facts. Good advocacy is taking the facts as they are and crafting the best argument.

9. Edit and revise

When you finish writing your arguments, you are not done. Spend at least as much time editing and revising as you put into the substance. If you have time, walk away from the brief for a day. Come back to it with fresh eyes. You will see ways to improve the product. Re-work confusing sentences. Simplify complex sentences. Remove wordiness. Strike sentences with the wrong tone. Fix typographical errors. Perhaps shorten or expand arguments. Perhaps brainstorm a new argument. Address readability issues.

Give the brief to a colleague who knows little about the case. Attorneys sometimes get so far into minute details that they forget the bigger picture. Someone who knows little about the case should be able to pick up the brief and understand your arguments. A non-lawyer should be able to read and understand most of your brief.

Do not be afraid of constructive feedback. It is easy to bristle at redlines and feedback, but remember that your goal is the best possible product. Put aside your ego and actively solicit feedback from your colleagues. Polish your brief.

10. Study and improve

Learning to write well is a lifelong process. Ask the world's best writers whether they can learn more and all will emphatically respond "yes." I am a better writer than I was 10 years ago. But I am still a work-in-progress. I hope that in 10 more years I will be better than I am now.

Learn from others. If you are a junior associate in your firm, study the work product of your firm's senior partners. Read briefs and opinions from the U.S. Supreme Court. The Justices of the Supreme Court are at the top of our trade. Much of the briefing before that Court is also excellent.

For even more writing tips, two recent books you might consider are *Point Made, How to Write Like the Nation's Top Advocates* (Second Edition, Oxford University Press) by Ross Gruberman and *Persuasive Legal Writing, A Storytelling Approach* (Wolters Kluwer) by Camille Lamar Campbell and Olympia R. Duhart.

Writing a good brief takes time. After the work is done—developing the theme, conducting fact discovery, brainstorming legal theory, doing legal research, drafting, revising, and editing—stepping back to view the finished product can be rewarding. Be committed to your best. Every time, craft your brief into a product that you are proud and honored to sign.

The case of the missing comma

ROBERT L. GUEHL, ESQ., JD, LLM

Robert G. Guehl is an attorney at Guehl Law Offices in Dayton.

A lowly comma would certainly cost less than an Oxford College education, but it all apparently depends on the context.[1] The absence of an "Oxford comma" (otherwise known as a "serial comma," that is, the final comma in a list of things) can be expensive.[2] How does the Oxford comma relate to the absence of a comma in the Ohio Condominium statute?

Much has been written about the Oxford comma and its proper or improper usage,[3] with the grammatical controversy sometimes described as a comma "war."[4]

"There are people who embrace the Oxford comma and people who don't, and I'll just say this: never get between these people when drink has been taken."[5]

A recent court case illustrates the problem with the ubiquitous comma, or lack thereof, in a legal context.

The Maine Court of Appeals in O'Connor v. Oakhurst Dairy, stated[6]:

> **For want of a comma**, we have this case. It arises from a dispute between a Maine dairy company and its delivery drivers, and it concerns the scope of an exemption from Maine's overtime law... **Specifically, if that exemption used a serial comma to mark off the last of the activities that it lists,** then the exemption would clearly encompass an activity that the drivers perform. And, in that event, the drivers would plainly fall within the exemption and thus outside the overtime law's protection. But, as it happens, there is **no serial comma** to be found in the exemption's list of activities, thus leading to this dispute over whether the drivers fall within the exemption from the overtime law or not.

An academic commentator discusses the case:

> Three dairy-truck drivers sued Oakhurst Dairy in 2014 for four years of unpaid overtime wages. The case hinged on the missing comma after "packing for shipment" in the following clause of Maine state law, which lists exemptions from overtime:
>
> The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of:
> (1) Agricultural produce;
> (2) Meat and fish products; and
> (3) Perishable foods.
>
> The missing comma, in this case, would have separated "packing for shipment" and "distribution" into distinct activities, both exempt from overtime. Without the comma, the drivers argued, the law refers only to the act of packing, for the purpose of either shipping or distributing.[7]

Under this analysis of a missing comma, Oakhurst Dairy was held liable by the court for unpaid overtime pay estimated at $10 million.

Application to Condo Budgeting Practices in Ohio

To switch gears and to apply the grammar review in the context of Ohio condominium law—how does the grammar issue (specifically the absence of an Oxford comma in the applicable statute) affect the finances of a condominium in Ohio?[8] The 2004 statutory amendments to Ohio Condominium Law mandated the procedure for funding capital improvements reserves.

O.R.C. 5311.081(A)(1) was amended to read:

> Duties and authority of [Condo] association and board...
>
> (1) Adopt and amend budgets for revenues, expenditures, and reserves in an amount adequate to repair and replace major capital items in the normal course of operations without the necessity of special assessments, **provided that the amount set aside annually for reserves shall not be less than ten per cent of the budget for that year unless the reserve requirement is waived annually by the unit owners exercising not less than a majority of the voting power of the unit owners association.**[9] [Emphasis added.]

"Under this analysis of a missing comma, Oakhurst Dairy was held liable by the court for unpaid overtime pay estimated at $10 million."

The statute's omission of a comma before "unless" controls the availability of an annual waiver of reserve funding. To reference Oakhurst Dairy's, "for want of a comma," full Reserve funding for condominiums is mandatory on an annual basis, not subject to waiver by vote of unit owners.

The standard of care set by the statute for funding capital reserves for condominiums is clear:

> Condominium living suffered from the tendency not to budget long-term, but instead to special assess owners for major repair projects...we have a **state mandated standard of budgeting**, that is, budgeting "for...**reserves** in an **amount adequate to repair and replace major capital items in the normal course of operations without the necessity of special assessments.**"[10] [Emphasis added.]

Punctuation Is Important

The explicit language and grammar in R.C. 5311.081(A)(1) do **not** allow an annual vote by condominium owners to waive the reserve requirements except in the very limited circumstance of a proposed Reserve budget under 10 percent of the operating budget. Had the legislature inserted a comma after 'year' and before 'unless' in O.R.C. 5311.081(A)(1), the availability of an annual Reserve waiver vote might well apply to the general reserve funding requirement.[11]

The premier Ohio law firm on "Condo Law" assumed an extra comma in the statute to smooth the way to their interpretation:

> ...the new condominium statute in Ohio mandates that boards either fund reserves or obtain a vote of the unit owners to waive the requirement. The statute states that funding of reserves is necessary unless it "is waived annually by the unit owners exercising not less than a majority of the voting power of the unit owners association...**the vote for waiver must be taken each year.**[12] (Emphasis added.)

Likewise, a company specializing in performing reserve studies for condominiums, adds a comma and misstates the statutory requirement for waiver of full reserve funding:

Ohio House Bill 135 Summary:

> 1) "unless otherwise provided in the declaration or bylaws," the board must adopt and amend budgets for revenues, expenditures, and reserves in an amount adequate to repair and replace major capital items in the normal course of operations, without the necessity of special assessments,

"Likewise, a company specializing in performing reserve studies for condominiums, adds a comma and misstates the statutory requirement for waiver of full reserve funding...."

> 2) provided that the amount set aside annually shall not be less than ten percent (10%) of the budget for that year, [sic, comma added]
>
> 3) unless the reserve requirement is waived annually by the unit owners exercising not less than a majority of the voting power of the unit owners' association. [13]

However, analysis by counsel for the Ohio Valley Chapter of the Community Association Institute shortly after passage of the statute is consistent with a limited availability of a waiver vote:

> [July 21, 2004, interpreting 5311.081(A)(1)] 7.The Association, through the Board, must adopt and amend budgets for revenues, expenditures, and reserves in an amount adequate to repair and replace major capital items in the normal course of operations without the necessity of special assessments. The amount set aside annually for reserves must not be less than ten percent (10%) of the budget for that year unless the reserve requirement is waived annually by the owners exercising at least a majority of the voting power of the Association.[14]

In the context of Ohio's Condominium statute, the clarity factor[15] of the Oxford Comma protocol mandates that Condominium Boards follow the explicit language and grammar of O.R.C. 5311.081(A)(1), which requires:

1) a condominium association board to adopt a reserve budget without the necessity of special assessments, and

2) any waiver of such mandate by annual majority vote of unit owners is available only when reserve funding is under the threshold of ten percent of operating funds.

Endnotes

[1] http://money.cnn.com/2016/09/22/pf/college/best-university-oxford-tuition/ An education at Oxford University might cost a US student anywhere between 15,295 pounds ($19,860) and 22,515 pounds ($29,230) a year. See also, March 17, 2017, Norris, "A Few Words About That Ten-Million Dollar Serial Comma" New Yorker Magazine.

[2] https://www.grammarly.com/blog/what-is-the-oxford-comma-and-why-do-people-care-so-much-about-it/.

[3] https://www.nytimes.com/2017/03/16/us/oxford-comma-lawsuit.html; See also e.g., "Overtime pay hinges on missing comma," Coke Ellington, Montgomery Advertiser, http://on.mgmadv.com/2oNrGK2.

[4] http://mentalfloss.com/article/33637/best-shots-fired-oxford-comma-wars.

[5] Lynne Truss, "Eats, Shoots & Leaves." London: Profile Books, 2004 ISBN 1-86197-612-7.

[6] No. 16-1901 (1st Cir. 2017) http://cases.justia.com/federal/appellate-courts/ca1/16-1901/16-1901-2017-03-13.pdf?ts=1489437006.

[7] "Grammarians rejoice in the $10 million comma," Petelin, University of Queensland, https://theconversation.com/grammarians-rejoice-in-the-10-million-comma-74824#comment_1245329.

[8] See "A Panda Walks Into a Bar", Dayton Bar Briefs, May 2016, pp. 8 and 29.

[9] http://codes.ohio.gov/orc/5311.081v1—verbatim.

[10] See, e.g., Kaman & Cusimano, LLP website: www.ohiocondolaw.com/articles/budgets_new_reserve_req.htm.

[11] See, Village of W. Jefferson v. Cammelleri, 2015-Ohio-2463 (Ohio App., 2015) (court must read words and phrases in context and construe them in accordance with rules of grammar and common usage; interpretation of ordinance where a comma was inadvertently omitted between the phrase "motor vehicle" and the word "camper").

[12] www.ohiocondolaw.com/blog/budgets-reserves-and-the-ohio-requirement-for-an-annual-o wnership-vote-if-reserve-funding-is-to-be-waived-the-special-assessment-problem. Kaman & Cusimano Law Firm, "Exclusively Dedicated to Counseling, Educating, Informing, and Representing Ohio Condominium & Homeowner."

[13] Criterium statement of requirement: http://ohioreservestudies.com/OhioHouseBill135.htm [recently deleted].

[14] www.caiohiovalley.org/page/10391~29197/Summary-of-House-Bill-135.

[15] See Columbia Journalism Review: http://www.cjr.org/language_corner/oxford-comma.php.

Seventh Circuit Charts New Course for Claims of Sexual Orientation Discrimination Under Title VII

Sets Stage for Supreme Showdown Before Nation's Highest Court

DAVID J. OBERLY

David J. Oberly is an associate with Marshall Dennehey Warner Coleman & Goggin and primarily focuses his practice on the defense of professionals in civil litigation.

Does Title VII of the Civil Rights Act of 1964 protect workers from discrimination based on sexual orientation in the workplace? The answer is one of the most hotly contested disputes in all of employment law today. While workplace protections for LGBT employees have rapidly expanded in recent years, federal courts of appeal that have considered the matter have answered the question in the negative, finding in uniform fashion that sexual orientation is not a protected class under Title VII. In one fell swoop, however, that all changed when the Seventh Circuit issued its landmark decision in Hively v. Ivy Tech Community College of Indiana, No. 15-1720, 2017 U.S. App. Lexis 5389 (7th Cir. April 4, 2017). In that case, the Seventh Circuit became the first federal court of appeals to hold that Title VII encompasses claims of sexual orientation discrimination as a form of unlawful employment discrimination based on "sex." The Hively decision is noteworthy, as the opinion creates a clear circuit split that lays the groundwork for the U.S. Supreme Court to issue a decisive ruling on the cognizability of sexual orientation discrimination claims under Title VII, which would definitively resolve this rigorously litigated issue once and for all.

Factual and Procedural Background

Jennifer Hively, a part-time professor at Ivy Tech Community College, brought suit against her former employer, claiming that she had been discriminated against as a result of being denied full-time employment and promotions based on her sexual orientation in violation of Title VII. In response, Ivy Tech argued that Title VII did not apply to claims of sexual orientation discrimination, and therefore Hively had asserted a claim for which there was no legal remedy. The district court agreed with the college, and granted Ivy Tech's motion to dismiss. Hively appealed. In July 2016, a panel of Seventh Circuit affirmed the decision of the lower court, holding that Title VII's bar on "discrimination 'because of... sex'" did not prohibit sexual orientation discrimination. In light of the importance

of the issue, a majority of the judges on the Seventh Circuit voted to rehear the case en banc.

The *En Banc* Seventh Circuit Decision

On appeal, the en banc Seventh Circuit was charged with the task of ascertaining the proper interpretation of the phrase discrimination "because of…sex" to determine whether actions taken on the basis of sexual orientation constitute a subset of actions taken on the basis of sex. The en banc court answered that question in the affirmative, finding that discrimination on the basis of sexual orientation represents a cognizable form of sex discrimination under Title VII.

The Seventh Circuit majority based its conclusion that Title VII encompasses sexual orientation as a protected class on two lines of reasoning. First, the court concluded that Hively's claim was, at its core, an actionable Title VII gender stereotyping claim. Applying Title VII's prohibition on gender stereotyping to Hively's claim, the court found that Hively represented the ultimate case of failing to conform to female stereotypes in that she was not heterosexual, thus constituting unlawful sex discrimination.

Second, the court found that Hively had asserted an actionable claim of sex discrimination under the associational theory of discrimination, which posits that an individual who is discriminated against because of the protected characteristic of those with whom she associates is actually being disadvantaged because of her own traits. In Hively's case, she was subjected to discrimination because of sex based on her intimate association with a person of the same sex, which ran contrary to Title VII.

In addition, a separate concurrence was also written to discuss the application of the "judicial interpretive updating" approach to statutory interpretation, which the concurrence posited was the more direct path to reaching the conclusion that Title VII extended to encompass sexual orientation discrimination. Under this approach, the task of statutory interpretation focuses on giving a fresh meaning to a constitutional or statutory text that infuses the text with vitality and significance appropriate for the present time, without regard for the original meaning of the text. In the context of Title VII, the concurrence found that it was necessary to provide the federal anti-discrimination statute with a new, broader interpretation of the word "sex," which took into account homosexuality and recognized today's more expansive understanding of the term that reached beyond simply gender. As such, the concurrence concluded that pursuant to the modern, current understanding of the word "sex," discrimination based on an individual's sexual orientation constituted discrimination based on "sex."

Takeaways

To date, 10 different federal courts of appeal have all concluded that Title VII does not extend to claims of sexual orientation discrimination in the workplace.

Accordingly, the Seventh Circuit's decision in Hively is in direct conflict with the vast majority of its sister courts. Importantly, the Seventh Circuit's split from the approach taken by almost every other federal court of appeals to date sets up the issue to be settled conclusively by the U.S. Supreme Court. With that said, it may take some time for the issue to make its way all the way up to the nation's highest court, as Ivy Tech has indicated that it will not appeal the Seventh Circuit's decision. Even then, however, the circuit split that has been created by Hively will undoubtedly be leveraged at some point in the future to obtain Supreme Court review of the issue, which will allow for a definitive ruling on the matter and, in turn, consistent application of the law across all federal courts throughout the nation.

While Hively represents a momentous win for LGBT workers, the law as it relates to protections against sexual orientation discrimination in the workplace still remains in a state of significant uncertainty at the present time. Importantly, for workers residing outside of the states of Indiana, Illinois and Wisconsin, it is highly likely that claims of workplace sexual orientation discrimination litigated in federal court will continue to receive unfavorable treatment for the foreseeable future, as every federal court of appeals other than the Seventh Circuit that has considered the issue has held that such claims are not cognizable under Title VII.

With that said, outside of the federal court system the legal landscape is rapidly shifting in favor of a broader interpretation of Title VII that includes sexual orientation discrimination under its umbrella of protection. In this respect, the U.S. Equal Opportunity Commission has come out in full force in favor of Title VII protections for LGBT workers and has indicated that it will continue to vigorously pursue remedies for workplace sexual orientation discrimination for the foreseeable future. Furthermore, many states and local governments have also enacted their own statutory protections against workplace sexual orientation discrimination. Taken together—and combined with the significant shift in the cultural and social viewpoint of the nation on the issues of homosexuality, sexual orientation and gender identity in recent years—it appears to be only a matter of time before the federal courts align themselves with the overriding attitude of the present era. Ultimately, however, until a definitive ruling is handed down by the U.S. Supreme Court, LGBT employees will continue to lack comprehensive affirmative protections across the country under federal law against discrimination in the employment setting.

For a more in-depth discussion of this topic, OSBA Labor and Employment Law Section members can check out the Fall 2017 issue of Labor and Employment News. If you are interested in joining a section, please contact our Membership Services Center at osba@ohiobar.org or call (800) 282-6556.

Akron

Brian J. Moore, Roetzel & Andress, received the 2018 H. Peter Burg Community Leadership Award.

Cincinnati

David J. Heinlein, Cincinnati Insurance Company, was appointed to the Midwest Implant Institute Board of Directors.

Columbus

Frost Brown Todd was named to U.S. News & World Report's Best Law Firms list for 2018.

Cleveland

Jerry Cline, Fisher & Phillips LLP, received the 2017 Chamber Bright Star Award by the Northern Ohio Area Chamber of Commerce.

Rooney Rippie & Ratnaswamy LLP was recognized by Eaton as Supplier Inclusion and Diversity Excellence Award Winner.

Mike Rode, Reminger Co., LPA, received the Lifetime Achievement Award from Management Recruiters International, Inc.

Michelle Sheehan, Reminger Co., LPA, was named to the 2017 Irish Legal 100.

Eileen M. Bitterman, Weltman Weinberg & Reis Co., LPA, was selected to serve on the 2017-18 ACA International Member Attorney Program Committee.

Ian Friedman, Friedman & Nemecek, was elected to serve as President of the American Board of Criminal Lawyers.

Hamilton

Kelly Heile, Butler County Prosecutor's Office, received the Ohio Prosecuting Attorney's Association 2017 Meritorious Assistant Prosecuting Attorney Award.

Newark

William Weidaw, Wilson Shannon & Snow Inc., received the Everett D. Reese Award from the Licking County Foundation.

In Memoriam

2017

Loren C. Schoenberger;
97, Upper Sandusky, Jan. 22, 2017

Judge Frederick J. Shoemaker;
92, Westerville, Jan. 31, 2017

Herbert Bass; 93, Cincinnati, March 3, 2017

Loyal Edward Luikart Jr.
91, Cleveland, March 23, 2017

John P. Stockwell; 70, Sylvania, May 1, 2017

Wm. T. (Bill) Robinson III;
72, Florence, KY, May 9, 2017

Frank E. Bazler; 87, Troy, May 12, 2017

Milton L. Sprowl; 96, Scottsdale, AZ, May 12, 2017

Richard G. Snell; 88, Dayton, June 19, 2017

Jean Carter Hiestand Jr.
95, Charleston, SC, June 26, 2017

William E. Chaney; 89, Barnesville, July 2017

Joseph B. Yanity Jr.; 91, Bradenton, FL, July 5, 2017

Richard D. Messerman
71, Independence, Aug. 16, 2017

Harvey S. Minton; 83, Worthington, Aug. 16, 2017

John Thomas Brown; 86, Mansfield, Aug. 31, 2017

This column is limited to awards and civic duties. The news listed is edited from press releases that are sent to the OSBA. Other submitted member news updates, such as promotions and new positions, are featured on the OSBA website.

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Bruce Paul Chapnick
70, Sarasota, FL, Sept. 1, 2017

David B. Bailey; 85, Cleveland, Sept. 9, 2017

Robert B. Weaver; 85, Henderson, NV, Sept. 14, 2017

Joyce E. Carlozzi; 66, Willoughby, Sept. 29, 2017

Irving Barkan; 95, Columbus, Oct. 8, 2017

Douglas Bryce Brown; 64, Chardon, Oct. 12, 2017

Steven Howard Slive
67, Beachwood, Oct. 19, 2017

Thomas O. Ruby; 60, Gahanna, Oct. 21, 2017

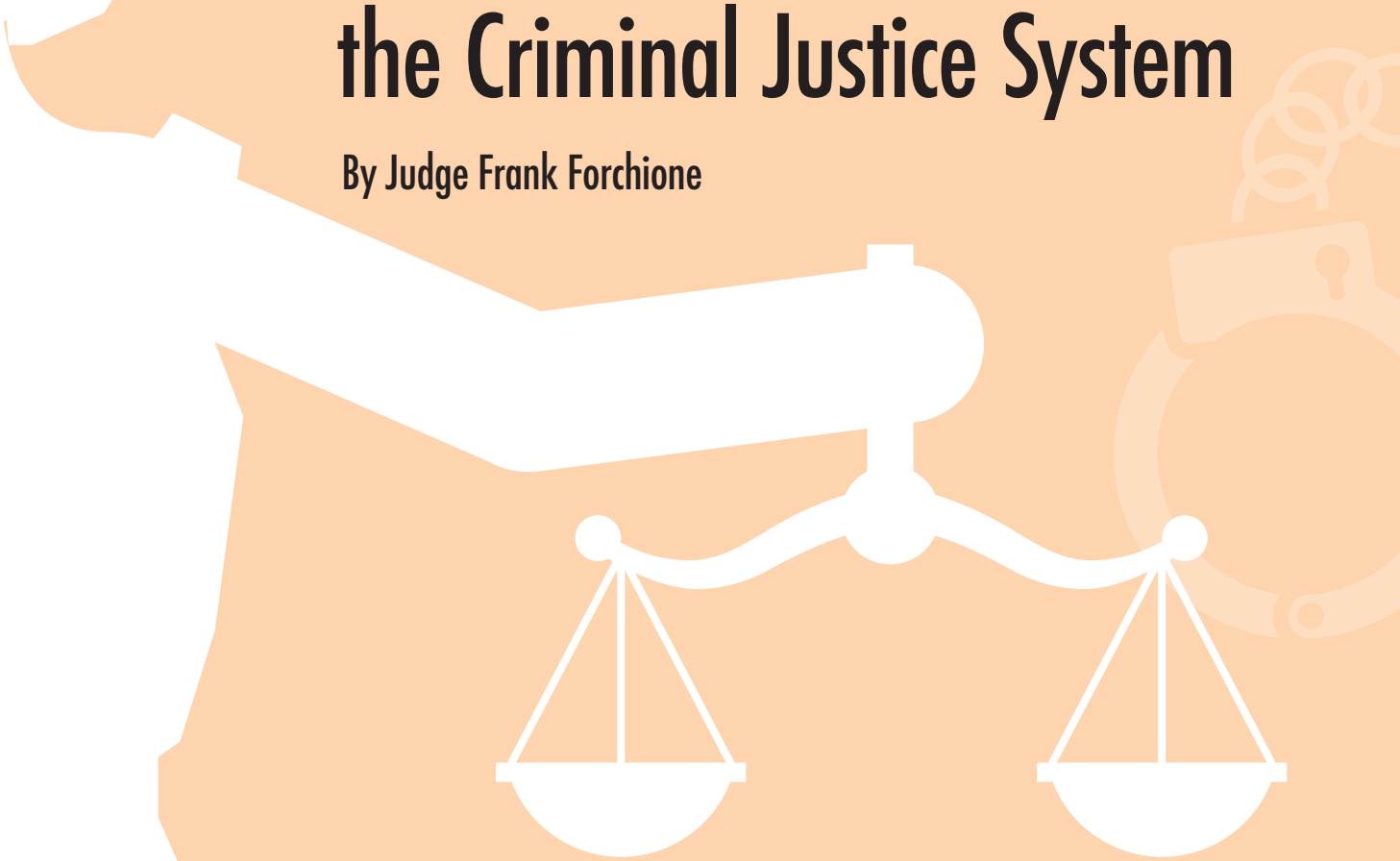
John W. Maurer; 76, Hilliard, Nov. 5, 2017

Judge Richard L. Powell
89, Steubenville, Nov. 10, 2017

Lloyd D. Cohen; 64, Grove City, Nov. 25, 2017

How Marsy's Law May Affect the Criminal Justice System

By Judge Frank Forchione



On Nov. 8, Ohio voters overwhelmingly passed Issue 1, titled Marsy's Law, which added additional protections for crime victims to those previously outlined in the state constitution in 1994. Under those prior provisions, victims were granted rights such as reasonable notice and respect for their role in criminal proceedings. Later, state legislators passed supporting laws to protect victims, such as the right to be notified when the accused is arrested or released from incarceration, or the right to provide contact information to the prosecutor and investigator overseeing the case. Marsy's Law is part of a national effort to enhance protection for crime victims. Versions have already been passed in California, Illinois, Montana, North Dakota and South Dakota.

Over the past 23 years, it has been clear to many that the 1994 amendment has not provided the results originally intended. Victims felt their rights were neither strong enough nor enforceable. Prosecutors forgot or failed to notify them of hearings, victims were unaware the accused was being released or had violated court orders, and others felt they had no voice in sentencing. Supporters pointed out that although the accused acquired numerous rights within the constitution, like the right to a speedy trial, to bail, to counsel, to confront witnesses, to not incriminate themselves, and to be free of cruel and unusual punishment, the victims were not furnished similar options that would balance the scale. Most will agree that Marsy's Law now provides compassionate language with the intent of treating victims with dignity and respect. Marsy's Law is based on four core needs: safety, healing, justice and restitution. The amendment to the Ohio Constitution that was approved now guarantees the following:

1. To fair and respectful treatment for the victim's safety, dignity and privacy.

2. Upon request, to notice of, and the right to be present at, all proceedings involving the criminal or delinquent conduct against the victim.

3. To be heard in any public proceeding involving release, plea, sentencing, disposition or parole in which the victim's rights are implicated.

4. To reasonable protection from the accused or person acting on behalf of the accused.

5. Upon request, to reasonable notice of any release or escape of the accused.

6. To refuse discovery requests made by the accused, except as authorized by Article I, Section 10 of the Ohio Constitution.

7. The full and timely restitution from the criminal or juvenile offender.

8. To proceedings without unreasonable delay and a prompt conclusion of the case.

9. Upon request, to confer with the government's attorney.

10. To written notice of all rights in the Amendment.

How Will This Work?

It is anticipated that when law enforcement officers make initial contact with a victim, they will provide a pocket sized "Marsy's" card that lists a summary of a victim's new rights under the law. It could be something similar to the "Miranda cards" presented to accused offenders that outline their Fifth Amendment rights. Officers would be required to inquire whether the victim wants to invoke Marsy's Law rights; the decision should be included in the officer's paperwork. One issue that remains unclear is whether victims must actually verbally elect to adopt these new rights to be protected by them. Since Marsy's Law is now a constitutional right, it would appear the government needs to protect it, whether a victim asks for that protection or not.

Who Is the Victim?

One of the biggest questions that the new law presents is who is the victim? Under the amendment, "victim" is designed as "a person against whom the criminal offense or delinquent act is committed, or who is directly and proximately harmed by the offense or act, but does not include, the accused or a person the court finds would not act in the best interests of the deceased, incompetent, minor, or incapacitated victim." This law broadens the definition, which now would include family members, guardians, or others with a relationship to the victim. This ambiguous description could also extend the branch of victims to larger corporations, insurance companies and other nonhuman entities.

For example, if a defendant goes into a service station and shoots an individual, and fires other shots that cause damage which requires the owner of the service station to file an insurance claim, are both the corporation and insurance company now considered a victim? Many are concerned that this unbridled expansion of "victim" could make the notification process overburdensome, leading to conflicts with the accused's right to a speedy trial and delays in presenting the case, all to the detriment of the victim(s).

Where Do the Requirements to Notify End?

The Amendment mandates that victims have the right to "reasonable and timely notice" and "to be heard in public proceedings," especially involving "release, plea, sentencing, disposition, or parole…." Some believe this will create an administrative quagmire which will clog the courts. For instance, in most cases, bond is usually set for an accused immediately after their first appearance with counsel. Under the new law, prosecutors, law enforcement and court officials would have to track down all victims before the judge could even consider bond. This would hamper the efforts of pre-trial release programs or signature bonds until a victim can be located. Meanwhile, the accused will sit in jail until all proper victims can be identified, notified, and given reasonable opportunity to attend the bond hearings. This procedure would remain in effect for other individuals who have been charged, incarcerated and waiting for their own bond hearing.

Is Victim's Right to Not Participate a Challenge to the Sixth Amendment?

The law now allows victims to refuse to participate in "an interview, deposition, or other discovery requests made by the accused, or any person on behalf of the accused." Defendants are alarmed by this obstacle and argue it is in conflict with the accused's rights to due process under the Sixth Amendment rights to confront an accuser. Defense attorneys claim this language could allow victims to withhold critical information, such as a portion of a diary, a Facebook post or a relevant medical diagnosis. They contend if the accused is denied this information, it creates immediate grounds for appeal. This could drag out the case even longer, defeating the purpose of the amendment.

What Is the Role of the Victim's Attorney?

Victims now have the right to have "an attorney" or "lawful representative" to assert their rights and "petition the Court of Appeals" for additional relief. However, the law is silent as to the role of the "victim's attorney." Is the attorney permitted to sit separately at trial or join the prosecutor? Also, should this attorney be allowed by the court to give his or her own opening and closing arguments? Will the attorney be allowed the opportunity to conduct his or her own examination of witnesses? Is the

attorney authorized to offer his or her own views as to recommendations on sentencing, oppose the prosecutor's plea offer, appeal a judge's decisions on probation or treatment for addiction? If the attorney disagrees with any of these decisions, can he or she be immediately appealed?

A major concern is who pays for the attorney? If they are required to pay the costs themselves, doesn't that traumatize victims even more? Also, does Marsy's Law give the victim a right to a state appointed attorney? The amendment is silent on that point. However, those accused of crimes are explicitly entitled to "effective assistance of counsel" under the Sixth Amendment of the constitution. Remember, the court is required to appoint indigent defendants counsel. At some point, an attorney will argue that victims should receive the same treatment.

How Do We Pay for the Law?

The implementation of the new law will more than likely create additional financial burdens to already strapped county commissioners, prosecutor's offices, sheriffs and perhaps the courts themselves. All the members of the criminal justice system will be ordered to provide the support and response necessary to uphold and defend these changes. With such vague definition of "victim," law enforcement officers and prosecutors will have to widely expand their notification procedures.

In addition, "Marsy's cards" will need to be printed. Victims' rights' advocates, first responders and prosecutors would need to distribute these cards, which is a critical component of notifying the victim about these rights. There will be new costs for administrative assistants to research addresses of victims and provide immediate notification. Finally, updated computer software will need to be purchased to keep up with the new requirements. If it is concluded tax-funded counsel would be required for victims, the costs could skyrocket!

How Do We Enforce Marsy's Law?

One obvious flaw is that the new law does not address the problem of enforcement, nor does it create a cause of action for damages or compensation against the state or a political subdivision if the government violates the law. So, what does a victim do if the government is not complying? If they attempt to file a lawsuit for damages, the amendment lends no support.

This leads to another dilemma: Law enforcement officers, prosecutors and judges all enjoy immunity for their actions performed in the scope of their duty. Thus, the state retains its traditional sovereign immunity. In turn, it would appear that the only remedies available are two-fold:

(1) if the right is about to be violated—it must have stopped—in most instances by filing a motion with the court; and

(2) proceedings and hearings would have to be redone, presuming double jeopardy does not apply. One wonders how effective compliance can be without some enforcement provisions for liability specified in the amendment. The best option for frustrated victims may be to request a hearing before an appeals court.

Conclusion

Equal rights for the victims is the central theme of Marsy's Law. It only ensures that victims have the same rights as the accused—nothing more, nothing less. The amendment guarantees that victims have a say and that their rights are clear, enforceable and permanent. Yet opponents will argue victims should not be given the same considerations as the accused. They argue that the new law tramples the accused's constitutional rights which are already granted and will cause unnecessary delays. After all, it is the accused who faces a loss of liberty.

Nevertheless, there are still many questions left unanswered as to how the law will be implemented and enforced. It may actually trigger further litigation to sort it all out. At this point we are all a bit unsure about how Marsy's Law will affect the criminal justice system—except that victim's rights will be more sufficiently protected.

Author Bio

Judge Forchione is currently serving his second term in the Stark County Court of Common Pleas. He is a graduate of the University of Akron School of Law. He is the president of the Stark County Community Corrections Board and chair of the Stop Heroin from Killing Committee.

Getting the Call

TODD BOOK

Todd Book is the OSBA's Assistant Executive Director for Policy and Public Affairs.

Recently, I found myself transported to 1983, reliving a critical conversation. Like most important talks, it took place on a golf course. I was a 15-year-old kid trying to figure out what I was going to be when I grew up. Being a professional golfer was the obvious first choice, with dreams of flying F-16s a close second. Being an old soul, I wanted a plan C—just in case the first two options didn't pan out.

Fate would have it that while playing nine at the Portsmouth Elks Country Club, I caught up with Howard Harcha, Jr. on the fourth hole. Howard, always the gentleman, invited me to play along. I knew Mr. Harcha was a well-respected attorney in the community, so I took advantage of the remaining five holes to find out what being a lawyer was all about. At the fifth hole, we discussed the best undergraduate degree to obtain before attending law school (FYI - Howard recommended accounting because, as he explained, "in the end, almost all issues come down to money"). Over holes six, seven, and eight, he educated me on "the call" and what that meant to the lawyer. Howard said the only true professions are the clergy, medicine, and the law. What makes them true professions is that they involve being "called" to the work. The solemnness in his voice made it clear he wasn't talking about any old call involving the telephone.

He explained that people choose these professions because they have a need to serve people and to fix problems. While it's true you can make a good living in the legal profession, as a motivator, money is a distant second to taking care of people. "You must follow a higher calling when you take on the troubles of your fellow man," Howard said. On the ninth green, I thanked Howard for the education. Over the next few years, I mused about that conversation several times as the PGA tour disappeared from my view and the F-16s crashed and burned.

Three decades later, I realized that the conversation with Howard *was* my call to the legal profession. And now that I have practiced for more than 20 years and fought the pillow countless nights while agonizing over client matters, I see the importance of getting that damned call! Being a lawyer is not easy. Like it or not, we take on our clients' problems. They become a part of our world and have a direct impact on our physical and emotional well-beings. I wouldn't change what I did, but I recognize it isn't for everyone. In fact, I would venture to say that most of today's unhappy lawyers choose the law instead of being chosen by the law, and for many college graduates, going to law school isn't so much of a calling as it is the next best option.

At a time when the cost of law school has risen so dramatically (the average Ohio law school graduate carries more than $98,000 in debt), and when there are fewer job prospects available to new attorneys, I believe that we veterans should counsel those who are thinking about entering the legal profession to carefully weigh all of these factors against the reasons they want to be lawyers. Is someone/something calling them? Maybe you can help them find out! We also have a responsibility to support new lawyers in any way we can, and there are a number of recommendations for ways we can do that (individually and as an Association) in the pages of the OSBA Futures Commission Report, which you can read at www.OhioBar.org/futuresreport.

Incidentally, Howard Harcha, Jr. was recently honored by the OSBA at the District 8 annual meeting for dedicating more than 65 years of service to the profession. I sure hope they don't revoke his certificate when they find out he played such a significant role in bringing me to the show!

I want to hear from you: For those of you already happily engaged in the practice, what do you think about this whole notion of a call? Did you get a calling for the law? Do you think it is true that a call is needed? Email me at tbook@ohiobar.org.

Withdrawal of Representation in a Contingent Fee Case

By Rick E. Marsh

If you were to ask a plaintiff's personal injury lawyer having a contingent fee contract whether counsel can withdraw as counsel for the contingent fee plaintiff when there is a dispute between the client and the lawyer as to the value of the case when the client has rejected a settlement offer, I think most lawyers would indicate that they have a right to withdraw.

That may or may not be the case and a lawyer who withdraws as counsel risks being faced with the argument that he has breached his contractual attorney-client relationship and, thus, has abandoned the client and forfeited any right to a fee.

Ohio law on this issue is not of recent vintage. In W. Wagner & G. Wagner Co., LPA v. Florence J. Block[1], the client who was sued by his former lawyer for fees, argued that under Ohio law an attorney is not entitled to compensation for services rendered if he withdraws without just cause and that Attorney Wagner did not have cause to withdraw from the case. The court stated, at page 3 of the decision,

> It is generally held that when an attorney agrees to represent a client it is implied that he agrees to see the matter through to its conclusion. See, generally, Annotation Circumstances under which Attorney Retains Right to Compensation Notwithstanding Voluntary Withdrawal from Case (1978), 88 A.L.R.3d 246; 7 Amer. Jur.2d (1980), Attorneys At Law Section 262; and 6 Ohio Jur. Pru.3d (1978), Attorneys At Law, Section 164. If the attorney does not see the matter to conclusion and voluntarily withdraws without just cause, then a breach has occurred, and this result is the same whether the contract's payment terms were for an hourly wage or a contingent fee. (Citation omitted.) This rule follows general contract law which states that 'where a party has partially but not substantially performed as promised, contained in an entire contract, and the failure to perform the balance of the contract is not excused, no recovery can be made upon the contract or upon quantum meruit.

The court went on to state: "This court finds that notwithstanding the hourly rate of compensation in this contract, appellee cannot recover fees for the time it spent on appellant's case before the voluntary withdrawal unless the withdrawal was for just cause."

In the Wagner case, it was uncontroverted that the law firm received the trial court's permission to withdraw from representing the appellants and appellants did not oppose the motion to withdraw.

The court of appeals, in the Wagner case stated, concluding the decision,

> At that time, however, appellants were not put on notice that their acquiescence in the withdrawal of the law firm would preclude them from raising "unjustified withdrawal" as a defense to a subsequent action against them for attorneys' fees. Additionally, they cannot be charged with the responsibility of knowing the consequences of their acquiescence since they were without representation at the time. Therefore, the argument that the time for appellants to raise objections and contend that appellee did not have just cause to withdraw was when the withdraw was litigated, does not provide a just result in this case. This is especially true when it is clear from the motion to withdraw and the order granting that motion that the question of whether the law firm had just cause to withdraw was not addressed. There was simply a vague and general statement that counsel wished to withdraw because he "had been unable to effectively communicate with his clients and therefore cannot render effective legal representation," and a cursory order granting the motion but saying nothing about whether the withdrawal was with just cause.

Sandler v. Gossick[2] held that an attorney withdrawing from a case may not recover for the services rendered when he

"Where the original contingent fee contract does not contain any provision as to post judgment or appellate services, the parties can subsequently make a new contract providing for additional compensation for such services. "

voluntarily withdrew and without just cause.

It is generally held that an attorney, who does not at all times represent the client with undivided fidelity is not entitled to compensation for legal services, even though the attorney's conduct was not intentionally prejudicial to the client's interests. An attorney who is guilty of actual fraud or bad faith toward the client, or who seeks to secure personal advantage to the prejudice of the client, is not entitled to any compensation for services. Numerous courts have held that the fact that an attorney may have made a "bad bargain" with a client will not justify the attorney from either asking for additional compensation or from withdrawing from the case upon a refusal of the client to agree to such request.

In Quarture v. Allegheny County (1940)[3], after an award of $1,600, the client wished to appeal, feeling that the award was inadequate. The lawyer refused to take an appeal unless he was paid additional compensation, the client orally agreed to do so and then refused to pay the lawyer one-third of the $3,000 that was ultimately awarded.

The court held that if the parties had intended to provide for additional compensation in the case of an appeal, it would have been a simple matter to have so provided in the original contract and since the services to be rendered under the contract for additional compensation were no different than those required by the original contract, the second contract was void for lack of consideration.

Similar holdings in Ohio are found in Douglass v. Downend, et al.[4], and Ivins v. Elbinger Shoe Manufacturing Co.[5] In Ivins, the court stated that if the lawyer had abandoned his client, which was a factual issue in that case, he was not entitled to any attorney fees.

An interesting article, contained in 13 ALR 3d 673, contains a section dealing with an attorney's obligation to handle a matter from beginning to end without renegotiating the fee contract. At page 3 of that article, it is stated:

> The attorney employed under a contingent fee contract will be allowed to recover additional compensation for appellate services if he subsequently procures a valid agreement for such compensation. However, it should be particularly noted that such a subsequent agreement is not enforceable for lack of consideration if the attorney is bound to perform appellate services under the terms of the original fee agreement.

The article goes on to state that,

> Where the original contingent fee contract does not contain any provision as to post judgment or appellate services, the parties can subsequently make a new contract providing for additional compensation for such services. However, a fee contract made during the existence of a relation of attorney and client is construed most strongly against the attorney and is closely scrutinized by the courts. The attorney relying on such a subsequent contract, therefore, must be prepared to establish that the contract was not induced by any undue influence or other inequitable conduct on his part, and that the services to be compensated for thereby, were not intended to be covered by the original fee contract.

The article goes on to state, at page 4,

> In a number of cases, it has been held either explicitly or by necessary implication that in the absence of an express provision to the contrary a contingent fee contract entered into between an attorney and his client covers services rendered by the attorney in prosecuting or defending an appeal from a judgment in the case for which he was employed and, therefore, the attorney is not entitled to any additional compensation for said services.

In Salinger v. Mason[6], the court stated that an attorney has to be familiar with the law, which gives the right of review to a defeated party and if the attorney had attempted to limit compensation to services rendered in the trial court, he should expressly limit it in drafting the agreement.

In Pocius v. Halvorsen (1963)[7], it was held that notwithstanding that provision that the attorney's "legal services are completed" and his fee payable, upon entry of a decree of a recording of the master deed, he was still obligated to handle, without additional compensation, any appeal that would prove necessary to the prosecution of the client's claim to a conclusion under the clause providing that he was employed to perform such legal services as are necessary.

In Estate of Falco[8], a client's rejection of a settlement offer recommended by the client's attorney was not good cause for the attorney's withdrawal from the case. The attorney did a partial investigation of the claims of his client and after which the attorney concluded that the likelihood of prevailing at the trial was negligible and the attorney therefore contacted his clients and advised them

that only a fool would not see the handwriting on the wall and reject settlement negotiations when confronted with this type of evidence and testimony and told the clients that if they were not willing to accept any settlement that he could put together that he would be forced to withdraw from the case. The clients refused to settle and the attorney filed a motion to withdraw as attorney of record. The case was later settled and the attorney filed an action to seek his fees.

The court held that the attorney was not entitled to a recovery of fees pointing out that a client's right to reject settlement is absolute and to hold otherwise would deprive the client of the due-process right to proceed to trial on the merits. The court actually held that the exercise of the right to reject settlement is implicit in the contract between a client and an attorney and cannot constitute a breach of the contract. The court also rejected the attorney's argument that the client's failure to take his advice regarding settlement constituted a failure to cooperate, the court reasoning that since it was the client's absolute right to refuse a settlement it would be anomalous to hold that their refusal to settle constituted a lack of cooperation sufficient to awarding the withdrawing attorneys' fees on a quantum meruit basis.

In Ausler v. Ramsey (1994)[9], the court held that since an attorney is bound to abide by the client's decision whether to accept the settlement offer, the client's purported uncooperativeness, including disagreement over the settlement value of the case, would not justify the attorney's withdrawal from the matter or an award of quantum meruit compensation for the services rendered by the attorney prior to his withdrawal.

The court pointed out that the record in the case revealed that the attorney and client disagreed over the value of the lawsuit and as to whether it should be arbitrated or tried. However, the court stressed that Rules of Professional Conduct require an attorney to abide by the client's decision whether to accept the settlement or not. Therefore, the attorney was not forced out of the case by his client's recalcitrance, nor was he constructively fired. Rather, the court concluded that without sufficient justification, the attorney voluntarily withdrew from the case before the contingency contracted for was realized as a result of which the attorney waived his fee.

> A contingent fee agreement has an element of risk for any attorney who undertakes representation of a client and the agreement may ultimately be unrewarding even if the client is successful in his action but it imposes upon the attorney the duty to carry the client's claim through litigation. The attorney forfeits his right to recover under the contingent fee agreement if the attorney declines to litigate an action because of expense. An attorney here, without justifiable cause, withdraws from the case before its termination loses all right to compensation for services rendered.

If the attorney has a contingent fee contract, the client is not deficient with regard to expenses, and the attorney and the client have a disagreement as to whether or not an appeal should be taken or whether or not a settlement offer should be accepted, the lawyer should be very careful in attempting to renegotiate the fee contract or withdrawing as counsel. The cases cited indicate that unless a lawyer actually has a factual basis for withdrawal rather than simply stating "good faith issues exist" "for the proposed withdrawal," the lawyer may be in jeopardy of losing his fee in its entirety. The fact that the trial court may have permitted the withdrawal is not going to be a bar to the client's claim that the lawyer abandoned the client and forfeited the fees. Thus, lawyers should be cognizant of the fact that their initial fee contract needs to include the possibility that an appeal will be taken and, thus, a need for a change in the fee structure and that courts will closely scrutinize the reasons that the lawyer inserted into the memorandum in support of the motion to withdraw as counsel. If those reasons are not supported by the facts, and the lawyer has abandoned the client, then the client may not owe any fees to the withdrawing lawyer.

Author Bio

Rick E. Marsh is an attorney with Lane Alton in Columbus and concentrates his practice in the defense of negligence claims against attorneys and law firms.

Endnotes

[1] 107 Ohio App.3d 603; 669 N.E.2d 272; 1995 Ohio App. LEXIS 5261.

[2] 87 Ohio App.3d 372; 622 N.E.2d 389; 1993 Ohio App. LEXIS 2077.

[3] 141 Pa. Super 356, 14 A.2d 575.

[4] 1908 Ohio Misc. LEXIS 218; 11 Ohio C.C. (ns) 390.

[5] 14 Ohio App.289; 1921 Ohio App. LEXIS 225.

[6] (1912, CA 8 Iowa) 194 F.382.

[7] 30 Ill.2d 73, 195 N.E.2d 137, 113 ALR 3d 662.

[8] (1987, 2d Dist.) 188 Cal. App.3d 1004, 233 Cal. Rptr. 807.

[9] 73 Wash. App. 231, 868 P.2d 877.

Special Delivery?

Ohio Civil Rule 45 and the Service of Subpoenas in Civil Cases

BY JUDGE JAMES L. KIMBLER

Recently I conducted a jury trial in which a governmental employee whose office is in Franklin County and who resides in Franklin County was subpoenaed to appear. The Ohio Attorney General's office had filed a motion to quash the subpoena on the grounds of what is referred to as an executive process privilege. I did find that the governmental official did not have to honor the subpoena but not for the reasons asserted by the Assistant Attorney General's who had filed the motion to quash.

My reasoning was based on the language found in Ohio Civ. R. 45 (B) which reads as follows:

(B) Service. **A subpoena may be served by a sheriff, bailiff, coroner, clerk of court, constable, or a deputy of any, by an attorney at law, or by any other person designated by order of court who is not a party and is not less than eighteen years of age.** Service of a subpoena upon a person named therein shall be made by delivering a copy of the subpoena to the person, by reading it to him or her in person, by leaving it at the person's usual place of residence, or by placing a sealed envelope containing the subpoena in the United States mail as certified or express mail return receipt requested with instructions to the delivering postal authority to show to whom delivered, date of delivery and address where delivered, and by tendering to the person upon demand the fees for one day's attendance and the mileage allowed by law. The person responsible for serving the subpoena shall file a return of the subpoena with the clerk. When the subpoena is served by mail delivery, the person filing the return shall attach the signed receipt to the return. **If the witness being subpoenaed resides outside the county in which the court is located, the fees for one day's attendance and mileage shall be tendered without demand. The return may be forwarded through the postal service or otherwise.** (Emphasis added.)

During a hearing outside of the presence of the jury, the party who was seeking the testimony of the governmental official stated that the party's vice president, who is also an attorney, had sent the subpoena by Federal Express to the office where the official conducted his work and had not included one day's attendance and mileage.

As can be seen from the sections highlighted above, there were potentially two problems with the service of the subpoena upon the governmental official. One was whether it was appropriate to serve the official by using a service like Federal Express and the other was whether it was appropriate not to have included the funds representing one-day's attendance and mileage.
I have to admit that when I analyzed the situation at trial I focused on the second issue more than the first issue. Off the

top of my head I reasoned that since an attorney could serve a witness under Civ. R. 45 without a court order and since the attorney had placed the subpoena in the Federal Express and then arranged the subpoena to be delivered to the official that such a procedure was good service. For reasons that appear below, however, I believe that such a procedure was not appropriate under Civ. R. 45.

Therefore, my focus was on the failure to include a check or other payment for one-day's attendance and mileage. I found that failure to include those funds rendered the service invalid. My reasoning was that the requirement that one-day's attendance and mileage be included "without demand" when the person being served lives out of state was necessary to perfect service since that requirement appears under the section of Civ. R. 45 dealing with service.

Ever since I have been a judge, my philosophy has been that if a party wants me to exercise contempt powers as a sanction against a witness, then that party has to show 100 percent compliance with the requirements of Civ. R. 45. Since that wasn't done, I was not going to either compel the official to appear or sanction him if he did not.

I now also think, however, that my opinion that the attorney placing the subpoena into the hands of Federal Express for delivery to the official also did not comply with Civ. R. 45. In such a case, the person delivering the subpoena is not the attorney but the driver for Federal Express who would not be one of the people listed under Civ. R. 45 (B). My reasoning is the same as the Court of Appeals for the Second Appellate District in its 2006 decision GZK, Inc. v. Schumaker[1], when it held that mail service was not sufficient under Civ. R. 45 for the reason that the postal employee who delivered the subpoena was not listed in Civ. R. 45.

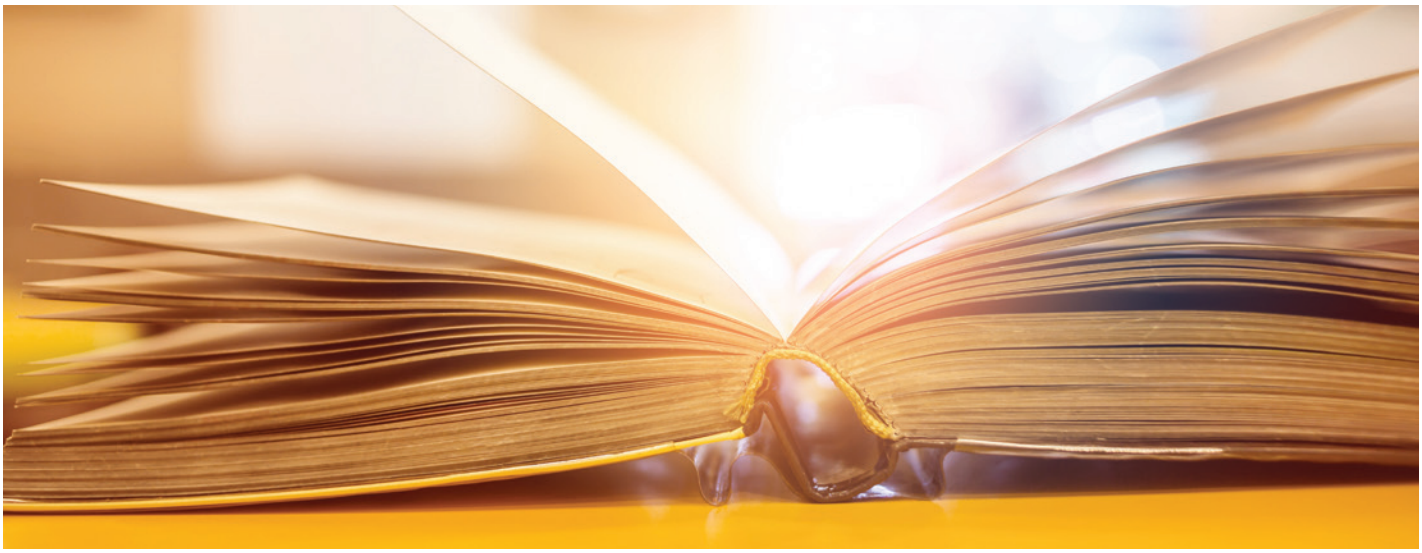
The bottom line for attorneys seeking to subpoena witnesses is that they need to make sure they comply with all the requirements of Civ. R. 45(B). Those include who may serve the witness, how the witness may be served and whether funds need to accompany the service of the subpoena.

Author Bio

Judge James L. Kimbler has over 30 years experience as a trial judge in Ohio. He served on the Wadsworth Municipal Court and then on the Medina County Common Pleas Court. Since his retirement, he has served as a visiting judge assigned by the Ohio Supreme Court Chief Justice Maureen O'Connor.

Endnote

[1] 168 Ohio App. 3d 106, 2006 Ohio 3744, 858 N.E.2d 867, 2006 Ohio App. LEXIS 3696.



New biography explores America's recollection of JFK

In his new book, *The Afterlife of John Fitzgerald Kennedy*, Columbus author Michael J. Hogan analyzes the days after JFK's assassination and the influence Jacqueline Kennedy had on preserving her husband's memory. The biography focuses primarily on the afterlife of Kennedy in American memory rather than his life, proposing a new and original path through history, literary studies, and social sciences. Hogan is a Distinguished Professor of History at the University of Illinois, Springfield and Emeritus Professor of history at The Ohio State University. A leading historian of the American presidency, Hogan has authored and edited 10 books, notably his prize-winning history *The Marshall Plan* and *A Cross of Iron*, his book on the origins of the national security state.

Essential apps and cloud services to make your life easier

Document-sharing apps are essential for collaboration within the office and with clients. Reputable options include Dropbox, Box, Google Drive and OneDrive. QuickBooks Online is a bookkeeping and accounting application that can send and track invoices, create and manage estimates, manage and pay bills. Clio is a web-based legal practice management system that can schedule meetings, organize cases, track time and invoice clients and sync with Dropbox, QuickBooks Online and Office 365. OSBA members receive a 10% lifetime discount on Clio. Calendly helps you schedule meeting times that work for everyone without the back-and-forth of email and works with your Google, Outlook, Office 365 or iCloud calendar. OSBA member benefit provider LawPay is a credit card processing program that offers reduced processing rates, personalized service and multiple features for the client-attorney transaction.

Re-entry court provides Allen County man a fresh start

The Allen County Re-entry Court acts as a support system for individuals with a lengthy criminal record or who are on judicial release. The 14-month program serves those who have a moderate to high risk of repeating past criminal behavior. Brad Dietrich is the "poster boy" according to Doug DeWeese, his probation officer. In his book, *Methancholy*, Dietrich reflects on his struggles with addiction, incarceration, and accepting his sexual orientation. Dietrich used the resources offered by the court and is currently employed, recently purchased a car, and plans on moving into his own apartment in the coming months. Seven years sober and continuing to make steady progress, he dedicated his book to his mother, who struggled alongside him.

Review of *Business and Commercial Litigation in Federal Courts*

The ABA Section of Litigation and Thomson Reuters recently published the Fourth Edition of *Business and Commercial Litigation*, a treatise a practice guide for litigators in the federal courts. Over 17,143 pages, it covers every aspect of a commercial case, from the initial investigation and assessment, to the pleadings, discovery, motions, trial, appeal, and enforcement of judgement. Unlike any other federal practice publication, great emphasis is placed on strategic considerations specific to commercial cases. Authors from Ohio include Chief Judge Solomon Oliver, Jr. of the U.S. District Court for the Northern District of Ohio, Ohio lawyer Thomas J. Collin and Matthew D. Ridings of Thompson Hine LLP, and Kim K. Burke and Gregory P. Rogers of Taft Stettinius & Hollister LLP. The breadth of coverage and focus on strategic issues make this publication an essential and comprehensive resource for a commercial litigation practice.

Experience counts

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Since 1985

Here's what OSBA members are doing to advance the legal professi

INNOVATE.

Columbus law firm Luper Neidenthal & Logan connected with Habitat for Humanity of Ohio in a first-of-its-kind statewide partnership to provide legal counsel for all 51 Habitat for Humanity affiliates in Ohio.

In response to its bar exam passage rate, the University of Dayton Law School implemented an early alert system to flag troubled students and has changed the structure of its bar exam preparation course. It also now requires students to take the prep-class. The university also executed a new five-year program, which shortens by two years the length of time typically required to earn both a bachelor's degree and law degree.

How is your firm or practice innovative? Let us know at membernews@ohiobar.org.

LEAD.

The following firms received perfect scores from the 2018 Corporate Equality Index issued by the Human Rights Campaign Foundation, the educational arm of the nation's largest lesbian, gay, bisexual, transgender and queer civil rights organization: Frost Brown Todd LLC, Cincinnati; Squire Patton Boggs, Cleveland; Thompson Hine LLP, Cleveland; and Vorys, Sater, Seymour and Pease LLP, Columbus.

The Benchmark Litigation 2018 Guide ranked Faruki Ireland Cox Rhinehart & Dusing P.L.L. as one of Ohio's preeminent litigation firms, naming it one of only 11 firms statewide to receive Benchmark's highly recommended classification. The 2018 edition of Benchmark Litigation includes OSBA members Charlie Faruki, Jeff Ireland, Jeff Cox and Erin Rhinehart on its list of the 100 Ohio "state litigation stars."

EDUCATE.

Past OSBA President Ron Kopp, Roetzel & Andress, Akron, leads his firm's diversity and inclusion initiative and has put on training sessions at the firm for associates and partners.

Thanks to the following OSBA members for writing articles for the Law You Can Use series:

- Jill McQueen, Day Ketterer Ltd.: "Political Activism and the Workplace"

- Marc Fishel, Fishel Hass Kim Albrecht Downey LLP: "Understand Duties and Rights Regarding Sexual Harassment"

- Emily Haynes, Albeit Weiker LLP: "Ohio's Standards for Gifted Student Education"

Kevin Braig, OSBA member and partner of Shumaker, Loop and Kendrick, LLP, who specializes in sports regulations, was featured on ABC6 to talk about the Columbus Crew lawsuit.

OSBA member Carrie Gutowski, Isaac Wiles, Columbus, co-developed and presented a training series intended to educate police officers on behaviors commonly associated with autism spectrum disorder.

ion. Join the movement!

ADVOCATE.

The OSBA Traffic Law Committee worked closely with Senator John Eklund and Chairman Nathan Manning to pass Senate Bill 33, bipartisan legislation that ensures defendants have access to the same information regarding their record of convictions from the Law Enforcement Agencies Data System database as the prosecution.

The OSBA Taxation Law Committee, which worked closely with Representative Gary Scherer, the Ohio CPAs, and the Ohio Department of Taxation, passed HB 292, which restores clarity to Ohio tax law and provides a more definitive framework to follow when determining Ohio residency for income tax purposes.

With little fanfare (but highly anticipated strong feelings from family law and real property practitioners), Representatives Jonathan Dever (R-Maderia) and Representative Bill Seitz (R-Cincinnati) introduced House Bill 407, legislation that would abolish the estate by dower, which currently grants the spouses of property owners an interest in the property though they are not on the title. The bill would not affect the dower interest of a surviving spouse whose interest vested before the effective date of the bill should it be adopted.

COLLABORATE.

The OSBA and the Ohio Women's Bar Association presented a private screening and panel discussion of Balancing the Scales, a look at the experiences of women lawyers in America by Sharon Rowen. The documentary examines discrimination and work/life balance and what it takes to become a partner in today's law firms.

OSBA committees and sections highlights

Jan. 12, 2018
Senior Lawyers: Lifelaunch Consulting will cover financial planning and insurance, succession planning, and work reorientation.

Criminal Justice: A panel discussion on Marsy's Law

Jan. 19
Judicial Administration/Legal Reform: Guest Speaker Chief Justice O'Connor

Education Law: A panel will discuss the logistics, practical considerations and benefits of using robots and similar technology for the students, teachers, administrators.

Feb. 2, 2018
Juvenile Law: Representative Jeffery S. Rezabek will provide invaluable information regarding pending legislation.

Go to ohiobar.org for a complete schedule.

VOLUNTEER.

The Ohio Center for Law-Related Education needs volunteers to facilitate, judge, and write materials for the following programs:

- **Jan. 26**: High school Mock Trial district competition (30+ sites)
- **Feb. 2**: High school We the People state competition
- **Feb. 16**: High school Mock Trial regional competition (10+ sites)
- **March 8-10**: High school Mock Trial state competition
- **April 5-6; 19-20**: Middle school Mock Trial state showcase
- **May 4**: High school Moot Court state competition
- **May 11**: Middle school We the People state showcase

To learn more, go to oclre.org, email oclre@oclre.org, or call (614) 485-3510.

JUDGE EDWARD O'FARRELL

Common Pleas Court General Division Judge

YEARS IN PRACTICE:

42

MEMBER SINCE:

1975

CITY/COUNTY:

New Philadelphia/ Tuscarawas

Want to nominate someone for the member profile checkout? Send an email to **editor@ohiobar.org**

What led you to a career as an attorney?

Instead of going to college after high school, I went to a Jesuit monastery and studied to be a Jesuit priest for five years. I knew, essentially, about a week after I was there that I didn't want to be a priest, but it took me five years to get the courage to tell my parents. I come from a large, Catholic family with five boys and a girl, so you know one of them has to be a priest. I guess that was going to be me.

I had an incredible experience as a young Jesuit. I lived on Indian Reservations in South Dakota, the Pine Ridge and Rose Bud Indian Reservations. I buried the dead, ministered to the poor and sick, and taught children. That's where the genesis of my desire to serve, as a lawyer, and then ultimately as a judge was born.

I left the Jesuits and went to Spring Hill College in Mobile, Alabama, and then Notre Dame law school before taking my first law job with the Attorney General's office in Columbus in the environmental section in 1973. I was at that office until 1975, and then became a legal aid lawyer in New Philadelphia in 1976. I ran for the municipal bench as an independent candidate against a democrat and a republican in the election and was successful, and served for nine years. I've been a judge here in the common pleas court for 27 years.

What is the best advice you have received as an attorney?

I didn't seek a lot of advice before I decided to run for the bench. As a legal aid lawyer, I saw a number of judges with whom I had strong disagreements in terms of their manners for conducting proceedings, the way they treated lawyers, and the way they treated parties in the courtroom. I thought, given that this is the most powerful position in the law (in my opinion), it can affect many people. I wanted to get in and be a part of that so I could change the landscape, at least in my little corner of the world.

I saw what needed to be done in my local environment, felt I had the capability to do that, and I had some innovative ideas about how to handle a courtroom. I don't wear a robe. I don't have a bailiff. I don't do a lot of the conventional things that judges have done, because I find all of that to be a barrier between the people who come here and me. I'm a lawyer. I'm no different than the lawyers in my courtroom. I just have a different role in the procedures. I think that was very important for me to make the environment lawyer-friendly. I want lawyers to be able to come here and not be concerned about how they are going to be treated or worried about some irrational conduct or decision that the judge would make. The reception has been really positive in that regard.

What was your proudest moment as a lawyer?

I failed the bar examination the first time I took it in 1973 by a half of a point. At that time, you had to accumulate 270 points between the essays and the multi-state. I got 269 and a half. The bar examiners graded me low on two questions for good reason. I had no interest in business law or tax law, and those were the two questions where I scored low. So, I visited both of those bar examiners, but neither would increase my score by a half a point to give me a passing grade.

I took the bar exam again in February 1974, and failed it by six points. I was going through a divorce and had two children—one born in the first year of law school and the second born in the third year of law school. I was afraid of losing my children and the normal relationship I would have as their father. At this time in Ohio, the Supreme Court rule was that if you failed the bar three times in Ohio, you could not take it again. I skipped the next two bar examinations because

of the fear of failing and not being a lawyer. Ultimately, I was convinced by my father and some of my friends that I owed it to myself to take it again. They knew me so well at the Supreme Court that I had a person call me with the results. On that morning, I got the call that I had passed. That's the proudest first moment I ever had as a lawyer, and it'll probably be the proudest I ever have.

As far as a judge, though, I'm very proud of how I have conducted proceedings in this court or the municipal court and treating the people who come here with respect and dignity. I treat the lawyers correctly, and I'm very proud of the outcomes that occur in this courtroom. I hope it has something to do with the approach that I've taken.

Fun fact

After I failed the bar examination twice and thought I would never take it again, I got a job as an assistant manager at a beauty school in Columbus. I had my JD, all of these aspirations to be a great trial lawyer and I hadn't even thought about being a judge. Yet, there I was, walking into a beauty salon, smelling permanent wave solution. When I think of it, it's just hilarious. It was so far from where I thought I was going to be when I was in law school. I have no expertise in the beauty culture, but I do have that experience of being employed there.

For more on Judge O'Farrell, watch his OSBA Member Profile video on www.ohiobar.org/ofarrell.

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