Fall, 2013 • Volume 8, Issue 5

Lorain County Bar Association

LCBA SOFTBALL GAME AT ALL PRO FREIGHT STADIUM

Thanks to the generosity of our fantastic sponsors, the LCBA hosted a softball game for our members at All Pro Freight Stadium (Lake Erie Crushers) on Thursday, September 19, 2013, under the lights. The weather started out a little scary but ended up being picture perfect. We had 30 members play in the game. Team Captains were Wayne Nicol and Tamie Myers. Team Nicol won the match but everyone that played had a fantastic time - even if they were mighty sore on Friday! Families and friends came to cheer on their favorite players. Stomper even joined in on the fun.

A big THANK YOU to our sponsors for making this event possible:
Nurenberg, Paris, Heller & McCarthy • Waldheger, Coyne
Giardini, Cook & Nicol • D. Chris Cook, Bar Counsel

President's Message • Barbara Aquilla Butler

Here is a quick summary of why all the cool attorneys are not just members of the Bar, but are participating in Bar functions. There is something of interest for every attorney!

COMMUNITY OUTREACH: A Committee of the Board has been selected to team up with Bar and Foundation volunteers to promote Community Outreach programs for our members. The first event will be held on Saturday, November 9, 2013 at 8:30 a.m. at the Lorain County APL for Volunteer Day at Friendship Animal Protective League. Bring your whole family for a fun morning of dog walking and networking with fellow bar association members. A tour of the facility will be given to interested members and there will be a collection taken to donate much needed supplies to the APL. Watch your e-mail or contact the Bar Association for details. You can make a donation in lieu of showing up, you can just show up, or you can do both. Donations can be dropped off at the LCBA office prior to the day of the event. Please call to tell us you will be in attendance. Thank you to Andrea Kryszak for organizing this kick-off outreach program.

MEMBER BENEFITS: We (Jeannie and Tammie) are still working hard to keep are members satisfied. We have partnered up with Aesthetic Laser Solutions, Northern Ohio Concealed Firearms Training, and American National Insurance Company, to provide to our members discounted services and opportunities for them and their employees. This partnership benefits our members as well as many local businesses who would like to serve our membership.

NEW BUSINESS OPPORTUNITIES: We are excited to announce that the Modest Means program is now expanding to Real Estate, specifically Foreclosure defense. All participating attorneys will complete their free training on November 7, 2013 and receive 1.5 general CLE credit for attending. Panel attorneys needed, please call the Bar Association for more information. Clients will complete an intake form and financial statement to determine eligibility for the program. If they qualify, they will be referred to an attorney who is a member of the program and will receive representation or have documents prepared at a reduced rate. Thank you to all the attorneys, magistrates and judges who assisted with the formation of the program and all those attorneys participating.

FUN/NETWORKING: Thanks to all the players and families that attended our first annual baseball game at the Crushers Stadium on September 19th. The attorneys played a friendly, but competitive game that was fun to watch and Stomper and the inflatables were a huge hit for the families. Attorney Graves, you are hired to sing the National Anthem at next year's game. Congratulations to team Maroon. Sweet revenge will be sought by team blue at next year's game.

MARKETING: The LCBA will show case our new Website in November, stay tuned.

Three months down, and nine to go.

Lorain County Bar Association
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News from the Recorder's Office
Judy Nedwick, Lorain County Recorder

Fall is here! The weather has been so pleasant, I thought summer would never end. The leaves have started to turn and the mornings are a tad chilly. This season of ghosts and goblins is also a special, often overlooked time to remember our veterans. I have made it a point throughout my career to take care of our veterans. I believe that the ability to stand free and tall in this country is all because of our veterans. As your county recorder, I have found, and continue to discover, ways to extend the services of my office to our veterans. In addition to recording veterans discharge papers (DD-214) and providing free certified copies, veterans can also come to my office to locate any number of forms and resources. Several years ago, I started providing veterans with a free mini DD-214. This program has been very well received. And while the mini DD-214 is not considered a legal form of identification, it has been a source of personal pride for many veterans. I have been told by many veterans that they appreciate the ability to reach in to their wallets and pull out an actual copy of the military discharge paper, laminated and protected. I've had the honor of helping many veterans locate lost documents. I encourage all of you to thank a veteran. As always, my door is open and I look forward to seeing you.

The Lorain County Bar Association Presents

Off the Record with Judge Christopher Rothgery

Another in a series of casual breakfast meetings with the Lorain County judges

Friday, November 8, 2013 • 8 A.M. - 9 A.M.

Judge Rothgery's Courtroom, 6th Floor, Justice Center

Join Judge Rothgery for an off the record discussion of current issues in the General Division.

A continental breakfast will be provided by the LCBA.

Although there is no cost to attend, please rsvp to lcba@windstream.net.

Mentorship Program:
An Opportunity to Learn and to Share

Tom Theado

In a time not so very long ago, lawyers learned the craft of the law through the mentorship of a local, older, more experienced attorney. But more recently lawyers are left to relying on their law-school experiences to learn the machinations of the practice, sometimes assisted by a one-year assignment to an attorney through the Ohio Supreme Court's mentoring program. Certainly a few new attorneys may have the benefit of a clinical experience in law school, or a placement in a larger-size firm with the opportunity for tutelage by a more seasoned practitioner. But for some the old-time local-lawyer-to-local-lawyer association was missing. It is with that concern in mind that your Lorain County Bar Association offers a voluntary MENTORSHIP PROGRAM.

Being A Mentor

A MENTOR is a member of our Bar Association with at least ten years of practice experience, who wants to help a fellow Bar member in the great tradition of teaching from experience, offering her or his mentoring services gratis like something of a big sister or brother. Don't shy away from volunteering as a Mentor simply because your practice may be narrowly focused and you're concerned that you have little to offer a new attorney whose interests are more generalized, or because you believe that your experiences may offer too little to a new attorney. A Mentor is not required to be a font of all knowledge legal nor an expert on all tasks practical. Rather, a Mentor promises-one year at a time-to be available to her or his Mentee, on a limited basis, to answer inquiries, provide suggestions, and offer advice on matters substantive, technical, and practical in her or his Mentee's practice of the law. A Mentor is neither an unpaid trial consultant nor a co-counsel. Rather, a Mentor is a resource to whom the Mentee may look for some information, advice, and counsel.

Being A Mentee

A MENTEE is a member of the Bar Association who is not yet five years away from admission to the bar, and who wishes just a bit of advice or guidance in any aspect of the practice of law-in its practices, procedures, or substance, in the navigating of its personalities, or in the strategies of its office management. A Mentee looks to her or his Mentor only for general assistance, and never for long-term counseling.

The Mentor-Mentee Relationship

Certain restrictions will help ensure that a mentoring relation remains open for fruitful dialogue. These restrictions and protections are automatic elements of any Mentor-Mentee relation, arising out of the first act of any such relation, and are deemed to be accepted by both the Mentor and the Mentee as a result of her or his participation in the Mentor-Mentee relation.

Mentees are matched to Mentors by the Bar Association's Mentorship Committee, after considering whatever requests the Mentees and Mentors may have as well as any recommendation that may come from referring judicial officers and other Bar Committees. Mentors volunteer to serve on an annual basis. A time limitation on a Mentee's participation in the program is not currently contemplated.

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A Mentor pledges never to accept a co-counseling relation with a Mentee during the term of the mentorship, or to take on representation in any matter initially handled by the Mentee. With those restrictions, the Mentee's concern for the security of her or his case load is addressed and resolved. On the other hand, Mentees acknowledge that they are solely responsible for the consequences of any advice or guidance they may obtain from a Mentor that the Mentee may use. Furthermore, Mentees warrant never to disclose to their clients their Mentor's assistance in any manner that could create client reliance on the assistance or the Mentor. In that way, the Mentor's concern with the integrity of her or his practice is treated and protected. Finally, both Mentors and their Mentees warrant that they will maintain themselves in conformance with the Ohio Rules of Professional Conduct and the Supreme Court Rules for the Governance of the Bar of Ohio.

The Lorain County Bar Association's facilitation of the Mentor-Mentee contact or relation is not, and should not be understood to be, an endorsement, guarantee, or any other comment on the level of expertise or competency of the Mentor nor on any Mentee's need for advice or counsel.

Please Join Our Mentorship Program!

For an application to be a Mentor or to be a Mentee, please contact Jeannie Motylewski at the Bar's office at 440-323-8416 or via LCBA@windstream.net, or Tom Theado at 440-244-4809 or via TomTheado@aol.com.

Pet Lovers Wanted!
Volunteer Day at Friendship Animal Protective League

Please join us on Saturday, November 9, 2013, at 8:30 a.m., at Friendship APL, located at 8303 Murray Ridge Road in Elyria, Ohio, for a fun morning of dog walking and networking with fellow bar association members. A tour of the facility will also be given to interested members.

The Lorain County Bar Association is collecting the following items to donate to Friendship APL: cat food (dry and canned pate style), cat litter (non-scoopable), laundry soap, bleach, blue Dawn dish soap, distilled water, syringes, rubbing alcohol, baby wipes, large and extra-large non-powdered surgical type gloves, shelter cleaning supplies, copy paper, ear mite and flea treatment for cats and dogs, and gift cards from any of the following stores: Staples, Office Max, Target, Wal-Mart, Tractor Supply or Rural King.

Donations can be dropped off at the Bar Association office or brought by those who volunteer. Please contact the Bar Association office if you are able to volunteer, by calling 440-323-8416 or sending an email to lcba@windstream.net. Hope to see you there!

The Impact and Echoes of the Wal-Mart Discrimination Case

by Nina Martin ProPublica, Sep. 27, 2013

When the U.S. Supreme Court issued its 5-4 decision in Wal-Mart v. Dukes in June 2011, no one needed a Richter scale to know it was a Big One. In throwing out a mammoth lawsuit by women employees who claimed that they'd been systematically underpaid and under-promoted by the world's biggest corporation, the ruling upended decades of employment discrimination law and raised serious barriers to future large-scale discrimination cases of every kind.

Employers rejoiced. Others predicted serious setbacks for women and minorities, especially in employment discrimination cases brought under Title VII of the Civil Rights Act of 1964. That landmark law had opened the way to the use of the class-action lawsuit as a potent weapon for people who could not stand up for their rights on their own.

Two years later, it's becoming clear just how much the ruling has reshaped the American legal landscape.

The Dukes decision has already been cited more than 1,200 times in rulings by federal and state courts, a figure seen by experts as remarkable. Jury verdicts have been overturned, settlements thrown out, and class actions rejected or decertified, in many instances undoing years of litigation. The rulings have come in every part of the country, in lawsuits involving all types of companies, including retailers (Family Dollar Stores), government contractors (Lockheed Martin Corp.), business-services providers (Cintas Corp.), and magazines (Hearst Corp.). The aftershocks have been felt in many kinds of lawsuits beyond the employment field, as well.

Many of the rulings since 2011 have not been surprising. Some have been relatively narrow. But others have tread into unexpected territory.

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Many of the rulings since 2011 have not been surprising. Some have been relatively narrow. But others have tread into unexpected territory.

This past August, for example, a federal appeals court in Philadelphia upheld [1] the dismissal of a $7 million settlement between the former National City Bank and 153,000 black and Hispanic borrowers who claimed that the bank had discriminated against them in how it charged mortgage points and fees during the housing bubble. Neither side had sought to revisit the 2010 accord, but the courts did so anyway, ruling that because the class action probably wouldn't have been certified under Dukes, the settlement was suspect, too

'That is pretty extraordinary,' said Gerald Maatman Jr. of Seyfarth Shaw in Chicago, one of the leading law firms in the country defending businesses and employers against class actions. 'It shows how much the standards have changed.'

Courts in prior decades had typically rubber-stamped such settlements, he said.

'It's a whole new world,' Maatman said.

One measure of that change is the difference in the size of employee discrimination settlements as reported [2] in Maatman's widely read Workplace Class Action Blog. In 2010, the year before the Dukes decision, the top 10 settlements totaled $346 million [3]; in 2012, the first year after Dukes, that total plummeted 87 percent, to $45 million [4].

Another measure, lawyers representing women and minorities say, is the drop-off in new employment discrimination class-action lawsuits being filed. Before Dukes, it was normal to see 25 or 30 such cases every year, said Jocelyn Larkin, executive director of the Impact Fund, a law firm/national litigation resource center based in Berkeley, Calif., which helped bring the Wal-Mart suit in 2001. Now, Larkin said, the number of new cases is closer to 10 or 12 a year.

Even in this new world, there have been some class-action victories. On Sept. 6, Bank of America and its Merrill Lynch unit settled a sex discrimination class action with female brokers for $39 million [5]. The week before, Merrill agreed to pay another $160 million [6] for discriminating against African-American brokers, the largest class-action settlement ever in a race-bias case. Merrill and Bank of America had tried to argue that the Wal-Mart ruling meant that the lawsuits should not be allowed to proceed as class actions an argument that, in these instances, a federal court didn't buy.

But for advocates for women and minority workers, the mood is mostly dispirited. Economic disparities between people of color and whites and between men and women have been widening and complaints of mistreatment in the workplace are common. San Francisco's Equal Rights Advocates, another firm involved in the Dukes case, has seen a tripling of calls to its nationwide hotline, said executive director Noreen Farrell. Many of the calls are from low-wage women facing discrimination on the job and elsewhere.

Even before Dukes, 'they already had many obstacles,' Farrell said. To fight these battles individually, 'it's often impossible.'

Edith Arana, now in her early 50s, was a mother of five with 10 years of retail experience when she started working at a Duarte, Calif., Wal-Mart store in the 1990s for $7 an hour. In six years, she received excellent performance reviews but never rose beyond a low-level 'support manager.' When she began pressing for a promotion, her supervisors cut her hours, she claimed, finally forcing her out of her job.

'I thought to myself, no one's going to believe you - you're just one person,' Arana said.

Eventually, though, Arana found her way to Equal Rights Advocates. The firm had heard many similar stories. Their lawsuit was filed in San Francisco in 2001.

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Wal-Mart had a written anti-discrimination policy and insisted that it 'does not condone discrimination of any kind.' It also noted that 'women hold positions of significant responsibility' at the company. But it left most employment decisions to the discretion of local managers at thousands of stores across the country. That led to systemic discrimination, the women and their lawyers claimed. Wal-Mart's own wage and promotion data [7] seemed to show pronounced, persistent wage disparities between male and female employees at every level, from hourly workers to senior managers.

'Wal-Mart has had a strong policy against discrimination in place for many years and we continue to be a great place for women to work and advance,' the company said in a statement to ProPublica.

'The opportunities left a lot of discretion to managers to make decisions based on their own personal views and predilections and idiosyncrasies and biases,' said Joseph M. Sellers, a partner at the Washington, D.C., firm Cohen Milstein who eventually helped argue the case before the Supreme Court.

It was a theory that had underpinned many successful employment discrimination cases over the last 50 years. In 2004, the federal judge overseeing the case certified it as the largest sex and employment discrimination class action in U.S. history. The Ninth Circuit Court of Appeals twice affirmed that ruling.

The Supreme Court ultimately thought otherwise. In his opinion, Justice Antonin Scalia rejected the notion that such a vast company should be held responsible for the workplace decisions of thousands of local managers exercising their own discretion, even if those actions ended up having a disparate impact on female employees.

'What the Supreme Court said is that you can't group dozens and dozens of different classes into one class action and say, - Oh everyone's an employee and everyone's fighting gender discrimination, so they belong together," said Ted Frank, an adjunct fellow with the Manhattan Institute's Center for Legal Policy.

Other experts blamed the plaintiffs for overreaching, and in the process inviting a more conservative Supreme Court to register one of its most significant pro-business rulings.

When plaintiffs seek to maximize their leverage by suing on a companywide, -mega' basis, they invite judicial reversal,'Columbia law professor John Coffee wrote soon after the decision. 'Hubris leads to disaster, and Wal-Mart presents the paradigmatic case of such a train wreck.'

Other aspects of the ruling were also far-reaching. In particular, the court rejected a 35-year-old framework for calculating monetary damages in employment discrimination class actions. Instead of using a statistical formula that assessed damages for the whole class, plaintiffs now had to have individual trials. Many lawyers didn't see this coming, especially when liberal justices joined conservatives to make that part of the ruling unanimous.

One predictable casualty was the Dukes case itself. This August, the San Francisco federal judge overseeing the lawsuit concluded that even a scaled-back version of the lawsuit, covering only Wal-Mart workers in California, could not move forward. A Texas judge said the same thing [8] last fall about a version of the suit filed there.

Arana, one of the original plaintiffs, lamented the clear implications for female workers like her.

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'It can't just be you out there,' Arana said.' No one person, no one attorney, no one support system is enough.

Wal-Mart, in its statement, said: 'The allegations from these five plaintiffs are not representative of the positive experiences that hundreds of thousands of women have had working at Wal-Mart.'

Beyond Dukes, the greatest disruption has been to what are sometimes called 'legacy cases' the sizable and often significant class-action lawsuits that began before Dukes was decided. The fate of a race discrimination lawsuit against a South Carolina steel factory owned by Nucor Corp. is one example of the ripple effects of the Dukes decision.

The lawsuit, brought by seven black Nucor employees in 2004 on behalf of more than 100 coworkers, alleged a widespread pattern of racist acts and promotion practices at the factory. White supervisors and employees reportedly referred to their black colleagues as 'yard apes' and 'porch monkeys.' Racial epithets were supposedly broadcast over the plant-wide radio system, along with 'Dixie, 'High Cotton' and monkey noises in response to the communications of black workers. The lawsuit said the Confederate flag was displayed throughout the plant and even emblazoned next to Nucor's logo on items sold in the plant's gift shop. Yet another allegation was that whites circulated emails showing black people with nooses around their necks.

In court documents, Nucor denied the allegations and said that all employment decisions were made for 'legitimate, non-discriminatory business reasons.'

In nine years, courts have weighed in at least seven times on whether the case should be certified as a class action, with the Fourth Circuit Court of Appeals in Richmond - not known for being particularly sympathetic to workers - finally deciding [9] that there was ample evidence to let the case proceed as a class action. Then, after Dukes, the class was again decertified for all claims except hostile work environment; earlier this month, Nucor's lawyers were once again in court arguing that even that limited class action should be thrown out because most of the alleged racist acts were limited to one department.

' The problem with the length of this case is that as the case goes on, the Supreme Court keeps drilling more nails into the coffin of effective civil rights law,' said Armand Derfner, a Charleston, S.C., lawyer representing the workers. 'The practical effect of decertification is that even if we win, there will not be the kind of change that Title VII was designed to create. A handful of people will win,' but the company 'won't have to make fundamental changes that they don't want to make.'

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For all of its force, the Dukes decision contained some ambiguity as well. For instance, the decision said that for a class-action lawsuit to proceed, plaintiffs would now have to show 'significant proof of a general policy of discrimination' on the part of the employer. What exactly constituted 'a general policy' was left unclear.

'The ruling used some new language which nobody quite knew what it meant,' said Joseph Sellers, the Washington lawyer who had helped argue the Dukes case. 'This has injected a new level of uncertainty into cases that were already challenging and expensive and time-consuming to bring.'

The uncertainty spawned by the Dukes decision has been compounded by other Supreme Court decisions. All of it has left plaintiffs trying to 'reboot' their various cases with new arguments, and defense lawyers responding with 'novel' theories of their own, said Maatman, the Chicago lawyer who represents employers. And many lawyers on both sides are watching to see if the Dukes decision gets invoked in major pending cases, including a class-action lawsuit brought against BP for the 2010 Deep Water Horizon drilling disaster in the Gulf of Mexico.

The explicit and enduring ramifications of Dukes, then, are still to be determined.

'We're still seeing employee class actions - those haven't died,' said Ted Frank of the Manhattan Institute. 'We're seeing consumer class actions and securities class actions - those haven't died. Certainly some bad class actions were slapped down, but the legitimate class actions are going forward.'

Indeed, in perhaps the biggest victory for workers in the post-Dukes era, the Seventh Circuit Court of Appeals in Chicago last year refused to throw out [10] the 2005 lawsuit brought by George McReynolds and other black brokers against Merrill Lynch - the case that led to the record $160 million settlement. Writing for a three-judge panel, Judge Richard Posner, a conservative who has displayed a fierce independent streak as well as a willingness to clash with Justice Scalia in a number of recent writings [11], said Merrill Lynch's pay and promotion policies were fundamentally different from Wal-Mart's in how they encouraged systematic bias.

The McReynolds ruling, then, shows one possible way forward for employees and their lawyers, Maatman said.

'You're seeing plaintiffs' lawyers recalibrate, making classes much smaller, focusing on an issue that might be doable on a classwide basis, not trying to certify, as they did in Dukes, the whole enchilada,' he said.

Perhaps the next high-profile test of this strategy will come in March 2014 in San Francisco, where Obama appointee Edward Chen - formerly an ACLU attorney specializing in discrimination cases, and now, after a two-year confirmation battle, a U.S. district judge - is set to preside in a trial against Costco and its promotion policies. Citing McReynolds, Chen ruled [12] in 2012 that the sex discrimination suit, brought by 700 of the retailer's female workers, could move forward as a class.

In the post-Dukes world, 'there's trepidation,' acknowledged Emily Martin, vice president and general counsel for the National Women's Law Center, which has been closely monitoring the case and its aftermath. 'But it's not as though everyone is rolling up their tents and going home.'

Your client cares deeply about the future.

You suggest a charitable fund through the Community Foundation.

With a contribution of $10,000, your client can establish a named fund that will stand forever as their legacy to Lorain County. No matter which type of fund your client selects, it's a great way to be remembered.

Unrestricted Fund: meets ever changing community needs, including future needs that cannot be anticipated at the time the gift is made. Foundation staff, working with community volunteers, evaluates all aspects of community well-being – arts and culture, economic development, education, environment, health and human services, neighborhood revitalization, and more. The flexibility of an unrestricted gift provides grants that respond to the community's most pressing needs both today and tomorrow.

Field of Interest Fund: addresses needs in an important area of community life – the arts, AIDS, aging, at-risk youth. Your client identifies their personal interest area when making the gift; the Foundation awards grants to local agencies and programs that are making a difference in the area your client selects.

Designated Fund: awards grants to a specific agency. Your client can help provide ongoing funding for a senior center, museum, church – any local non-profit charitable organization. Your client identifies the recipient they wish to benefit through their gift; Foundation staff manages the annual distribution of funds.

Donor Advised Fund: allows your client to have ongoing involvement in the use of their gift. They work with the Foundation program staff, identifying ways to use dollars from their donor advised fund to address the issues and needs they care about most. Your client's recommendations are submitted to the Foundation board for approval; the Foundation then distributes grant dollars.

To discuss these and other ways for your client to be remembered, call Brian Frederick at 440-984-7390.

Community Foundation
LORAIN COUNTY
www.PeopleWhoCare.org

CONNECTING PEOPLE WHO CARE WITH CAUSES THAT MATTER

Marked Lanes Violation Overturned for Lack of 'Reasonable' Suspicion

Bret Crow

An Ohio State Highway Patrol trooper did not have a 'reasonable, articulable' suspicion to stop a Paulding County woman for a marked lanes violation, the Third District Court of Appeals ruled on Monday. Accordingly, her convictions for reckless operation and failure to drive within the marked lanes were reversed.

Trooper Joe Sisco observed the right side tires of Kimberly Jo Shaffer's vehicle drive onto the white line marker one time for about three seconds on March 10, 2012 on State Route 66. He stopped her vehicle, smelled alcohol, and conducted a series of field sobriety tests. He arrested Shaffer and charged her with operating a vehicle under the influence. She entered not guilty pleas and filed a motion to suppress the evidence arguing that she didn't commit a marked lanes violation. The trial court overruled her motion, and she pleaded no contest to failure to drive within the marked lanes and an amended charge of reckless operation.

Shaffer appealed to the Third District. In the court's unanimous decision, authored by Judge Stephen R. Shaw, the court agreed with Shaffer's claims 'that Trooper Sisco's testimony that a vehicle's tires touched the white fog line on a single occasion, causing the right fender of the vehicle to extend slightly over the line for three seconds, without any other evidence in the record addressing either the practicability or safety of the circumstances, is not sufficient to establish reasonable, articulable suspicion of a violation of R.C. 4511.33(A)(1).'

Judge Shaw particularly pointed to one specific phrase in section (A)(1). 'We believe the language -as nearly as is practicable' inherently contemplates some inevitable and incidental touching of the lane lines by a motorist's vehicle during routine and lawful driving, without the vehicle being considered to have left the lane of travel so as to constitute a marked lanes violation,' Judge Shaw wrote.

'Accordingly, it is our conclusion that consideration of the statutory factors of practicability and safety is integral to any determination of a violation of R.C. 4511.33(A)(1).'

'The fact remains that in this case there is no evidence in the record from which any legitimate inference can be drawn regarding either one of these requisite statutory elements,' Judge Shaw noted.

'Accordingly without some additional evidence in the record regarding the surrounding circumstances, traffic and road conditions going to the express statutory language regarding either practicability or safety, we cannot conclude that the act of Shaffer driving onto the white fog line one time for a matter of three seconds is alone sufficient to establish the requisite reasonable and articulable suspicion to stop Shaffer for a violation of R.C. 4511.33(A)(1).'

In conclusion, Judge Shaw wrote: 'We simply believe our decision is more consistent with the specific statutory language of R.C. 4511.33(A)(1), which among other things, refers to the movement and location of vehicles, not tires.'

Judges Vernon L. Preston and John R. Willamowski concurred in the opinion.

State v. Shaffer, 2013-Ohio-3581. Opinion: http://sc.ohio.gov/rod/docs/pdf/3/2013/2013-ohio-3581.pdf. Criminal Appeal From: Paulding County Court Judgment Appealed From Is: Reversed and Remanded. Date of Judgment Entry on Appeal: August 19, 2013

State Law Cannot Be Applied Retroactively to Keep Sex Offender from Living Near School

By Stephanie Beougher

The 7th District Court of Appeals has sided with a lower court that state law cannot be applied retroactively to stop a convicted sex offender from living near a Belmont County school.

Ray Benedetta was convicted in 2001 of attempting to compel prostitution and was required to report his residence for 10 years as a sexually oriented offender. A few days after his reporting requirement ended in 2012, he moved into a house within 1,000 feet of Shadyside High School that he had a vested interest in before his criminal case. Soon after that, the county prosecutor sought a permanent injunction to keep Benedetta from living there.

Appeals Court Judge Cheryl L. Waite wrote in the 3-0 decision that the Belmont County Common Pleas Court was correct when it denied the injunction because the state law cited by the prosecutor cannot be applied retroactively under a 2011 Ohio Supreme Court case.

'R.C. 2950.034 was held to be unconstitutionally retroactive [State v. Williams, 2011-Ohio-3374] as applied to offenders like Appellee who committed their crimes before the enactment of the statute,' Judge Waite stated. 'Ohio's appellate courts are in agreement that the 1,000-foot prohibition created in 2003 by R.C. 2950.031 cannot be applied to a defendant who committed his offense prior to the effective date of the statute, regardless of the time that defendant may have acquired his property interest or began living in the residence.'

Judge Waite also denied the prosecutor's argument that in State v. Byers, the 7th District Court of Appeals ruled the state law was enforceable and could be applied retroactively: 'Our Byers opinion is factually distinct and has effectively been overruled by the Ohio Supreme Court, and does not support Appellant's argument.'

Judges Gene Donofrio and Joseph J. Vukovich joined Judge Waite in the ruling.

State v. Benedetta, 2013-Ohio-4364. Opinion: http://sc.ohio.gov/rod/docs/pdf/7/2013/2013-ohio-4364.pdf. Appeal From: Belmont County Court of Common Pleas. Judgment Appealed From Is: Affirmed. Date of Judgment Entry on Appeal: September 26, 2013

Attorney Not Admitted to the Practice of Law in Ohio Is Not Subject to Ohio Disciplinary Rules

A Sandusky attorney not admitted to the practice of law in Ohio but admitted to the practice of law in the District of Columbia and federal bankruptcy courts in this state is not subject to Ohio disciplinary rules, the Supreme Court of Ohio ruled today.

The unanimous decision, authored by Justice Terrence O'Donnell, rejects the recommendation of the Board of Commissioners on Grievances & Discipline to indefinitely suspend Donald Harris from representing Ohio citizens in the state of Ohio.

Donald Harris is not admitted to the practice of law in the state of Ohio, but as a member of the District of Columbia bar and of the bars of the United States District Court for the Northern and Southern Districts of Ohio, he practices bankruptcy law before federal courts geographically located in this state.

In August 2011, disciplinary counsel filed a complaint against Harris relating to his representation of an Ohio client in bankruptcy proceedings before the United States District Court for the Northern District of Ohio, his establishment of a limited-liability company on behalf of an Ohio client, his assistance to an Ohio client in a mortgage modification, and representations regarding the relationship between an Ohio-licensed attorney and the Donald Harris Law Firm.

The Board of Commissioners on Grievances & Discipline found that Harris had violated the Ohio Rules of Professional Conduct and recommended that he be indefinitely suspended from the practice of law in Ohio.

The Supreme Court, however, determined that the alleged misconduct relating to a client Harris represented in the U.S. Bankruptcy Court for the Northern District of Ohio did not constitute the unauthorized practice of law because he was authorized to practice before that court. The Supreme Court dismissed this matter in deference to the disciplinary authority of the bankruptcy court.

Further, the court held that the Ohio Rules of Professional Conduct, which regulate the conduct of attorneys admitted to the practice of law in Ohio, do not apply to Harris, because he is not admitted to the Ohio bar and never took an oath to abide by the disciplinary rules. As Justice O'Donnell explained: 'Harris never took that oath and never agreed to abide by our rules, and we are reluctant to impose our rules of conduct on him and other such attorneys who engage in the practice of law in our state.'

Therefore, the court dismissed the matters relating to his participation in the formation of a limited liability company, his involvement in a modification of a mortgage, and his representations regarding the relationship between himself and other attorneys in the Donald Harris Law Firm and referred them to the Board on the Unauthorized Practice of Law.

2012-1698. Disciplinary Counsel v. Harris, Slip Opinion No. 2013-Ohio-4026.

WHEN IS NOTICE NOT ENOUGH? U.C.C. ß 9-406 AND A DEBTOR'S RIGHT TO SEASONABLE AND REASONABLE PROOF OF AN ACCOUNT ASSIGNMENT.[1]

Attorney Erik Stock

INTRODUCTION

U.C.C. §§ 9-406(a)-(c) contain rules to protect an account debtor - one obligated to make payments on an account - from making double payments when the account is purportedly assigned to a third-party. The general rule is that an account debtor may continue to discharge its obligation on an account by paying the assignor until the account debtor receives sufficient notification of the assignment, either from the assignor or the assignee. Upon receiving sufficient notification, the account debtor is only able to discharge its obligation by paying the assignee. There is, however, an important exception to the general rule, triggered after an account debtor receives notification. The account debtor may request proof of the assignment from the assignee, and upon such request, the assignee "shall seasonably furnish reasonable proof that the assignment has been made." If the assignee fails to comply, then the account debtor may still continue to discharge the account obligation by paying the assignor.

This article explores the history of, and framework established by, subsections (a)-(c), and discusses the rationale for giving an account debtor the right to receive reasonable and seasonable proof. Using the two cases that squarely address U.C.C. § 9-406(c), this article addresses some real-world difficulties and potential pitfalls posed by the statute, and concludes with practical lessons that may be of some use to account debtors, assignors, assignees, and their counsel as they navigate this area of Article 9 practice.

HISTORY OF U.C.C. ß 9-406

U.C.C. § 9-406 is the result of the 2001 revisions to Article 9, which substantially revised and relocated former U.C.C. § 9-318(3). U.C.C. § 9-406(a) retains the general rule that upon receipt of a notification of assignment, authenticated by either the assignor or the assignee, an account debtor is required to make payment to the assignee. Subsections (b) and (c) then expand upon and qualify the notification procedure set forth in subsection (a).[2]

Section 9-406 creates two rights that are held by account debtors before they are required to pay an assignee of the account. The first is the right under subsection (a) to receive a statutorily sufficient notification of assignment, without which the account debtor may continue to pay the assignor after the account has been assigned.[3] The second is the right to seasonably[4] receive, upon request, reasonable proof of the assignment. Importantly, Section 9-406 expressly separates the right to receive notification of an account assignment under subsection (a) and the right to receive proof of that assignment under subsection (c).

STATUTORY FRAMEWORK AND RATIONALE

While only two reported cases directly apply an account debtor's right to proof of an assignment (both interpreting Section 9-406(c)),[5] a number of courts have discussed that right in dicta.

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These cases fall into a general fact pattern: an account debtor is sued for failing to pay an assignee after receiving reasonable notification of an assignment.[6] In upholding the assignee's right to receive payment after the account debtor receives notification of the assignment, the courts note that an account debtor that has cause not to believe a notification of assignment may request reasonable proof. The cases caution that, if an account debtor does not avail itself of the option to request proof, it is required to pay the assignee and can be forced to pay to the assignee amounts already paid to the assignor. Though not addressing directly an account debtor's right to reasonable proof of an assignment, by admonishing account debtors who doubt the validity of a notification to request proof from the assignee, these courts present the most basic rationale for the statute: the protection of account debtors from having to make double payments on the same obligation.[7]

Official Comment 4 to U.C.C. § 9-406 is clear that the burden is on the account debtor to avail itself of that protection:

'Of course, if the assignee did not in fact receive an assignment, the account debtor cannot discharge its obligation by paying a putative assignee who is a stranger... . An account debtor that questions the adequacy of proof submitted by an assignor would be well advised to promptly inform the assignor of the defects.'

In instances where an account debtor receives sufficient notification of an assignment, but fails to seek proof of the assignment, courts have not hesitated to find in favor of the assignee and place the consequences of failure to seek proof squarely on the shoulders of the account debtor.[8] These consequences range from reversal of an order dismissing a claim asserted by the assignee to collect the account[9] to requiring the account debtor to pay amounts to the assignee that it already paid to the assignor.[10]

Another rationale is raised by Official Comment 4 to U.C.C. § 9-406, which mentions a serious issue faced by account debtors: the receipt of a sham notification of assignment resulting in payment to a third-party that is not entitled to receive it.[11] It is not hard to imagine a situation where a bad actor wrongfully obtains the names and addresses of account debtors, sends them notifications executed by a putative assignee, and begins wrongfully receiving payments on account of the fraudulent assignment notices. Without the right to discharge an account obligation by paying the assignee until proof of an assignment is received, an account debtor could be forced to make double payments on an account.

THE U.C.C. ß 9-406(c) CASES: WYATT AND MARGAGLIOTTI

Only two cases have directly applied U.C.C. § 4-409(c) to reach a holding: Wyatt v. Capital One Auto Financing[12] and Interface Financial Group v. Margagliotti.[13]

WYATT: HOW MUCH PROOF IS ENOUGH?

Plaintiff Sterling Wyatt, the account debtor in the Wyatt case, purchased a minivan and financed the purchase price by executing a standard-form contract in favor of the seller.[14] Based upon a term in the contract, Wyatt understood that the contract would be assigned to Mazda American Credit, Inc., when in fact the contract was assigned by the seller to Defendant Capital One Auto Financing ("Capital One").[15] Shortly after the purchase, Wyatt received a coupon book from Capital One, which began sending him monthly account statements.[16] Sometime later, in support of the fact that Capital One was in fact the assignee of the loan account, Capital One also sent Wyatt a letter and copies of his loan documents.[17] Despite the items he received from Capital One, Wyatt sent a series of letters to Capital One stating that he was refusing to pay Capital One because it was not identified as the assignee on the original loan contract, and he had not signed any subsequent modifications to that contract.[18] Wyatt also made four payments on the loan to the seller, which returned the last two along with letters stating that the loan account had been assigned to Capital One.[19] The second letter stated that, "This retail loan has been sold to and assigned to Capital One Auto Finance. A copy of the assignment is enclosed for your information."[20] Thereafter, Wyatt altogether ceased making payments on the loan, and Capital One filed suit, repossessed the car, sold it for $11,167.22 less than the outstanding amount of the loan, and sought judgment against Wyatt for that deficiency.[21]

On summary judgment, the Texas Court of Appeals addressed Wyatt's argument that he did not receive reasonable proof from Capital One that it was indeed the assignee and entitled to receive loan payments. The court found that the form sent by Capital One in response to Wyatt's letters constituted reasonable proof because it (1)

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was printed on Capital One's letterhead; (2) clearly identified Wyatt's purchase contract; and (3) contained enough information in common with the assignment notice sent by the seller to enable Wyatt to clearly determine that his purchase contract was being assigned.[22]

In support of its holding that Capital One had provided reasonable proof, the court noted that:

'Wyatt had many other forms of proof that [Capital One] was assigned his contract. First, the title to Wyatt's car listed [Capital One] as sole lienholder. Second, [Capital One] sent Wyatt a payment coupon book and started sending him monthly account balance statements... . Third... [the seller] repeatedly returned checks to Wyatt and explained to him that it had assigned his contract to [Capital One]. In light of these facts, Wyatt could not have reasonably continue to doubt that [Capital One] had been assigned his contract.'[23]

The court went on to note that even if Wyatt had not received reasonable proof, the statute provides that his remedy was not to withhold payments altogether, but to continue to discharge his obligation by paying the seller-assignor.[24]

The Wyatt decision provides two points of a caution to account debtors. First, the right to proof is subject to an objective reasonableness standard, rather than the subjective judgment of the account debtor.[25] While Wyatt seems to present an extreme case of an account debtor refusing to accept abundant proof of an assignment, courts have yet to explore the minimum boundaries of reasonableness and provide guidelines for how much proof an assignee is required to provide to comply with the statutory requirements. Second, a request for proof of an assignment does not suspend the account debtor's obligation to continue paying on the account. The obligation must still be discharged, but the account debtor may do so by paying the assignor pending seasonable receipt of reasonable proof.

MARGAGLIOTTI: WHY CAN'T NOTICE AND PROOF BE THE SAME THING?

Defendant-Appellant Joseph Margagliotti was hired as a subcontractor on a project to build a fire station, and hired an entity called Gempel Masonry, Inc. to perform masonry work at the project.[26] Gempel thereafter sold its right to collect the money owed to it by Margagliotti to Plaintiff-Appellee Interface Financial Group.[27] At some point after the assignment, Gempel gave notice to Margagliotti that it had assigned to Interface the right to receive payment on the fire station account.[28]

After not receiving payments on the Gempel account, Interface filed a lawsuit against Margagliotti seeking a judgment for the $79,936.50 that Interface contended it was owed as a result of the Gempel account assignment.[29] Interface argued that it was entitled to summary judgment on the grounds that Gempel had provided sufficient notice of the account assignment to Margagliotti under U.C.C. ß 9-406(a), yet Margagliotti had not paid Interface.[30] Margagliotti defended by arguing that although he had requested it, Interface failed to provide proof that the account had, in fact, been assigned by Gempel.[31] There was no dispute that Interface did not provide proof of the assignment. Even so, Interface asserted that it was not required to provide any proof because the original notice of the assignment from Gempel provided sufficient information to Margagliotti that payment was to be made to Interface.[32]

The trial court granted summary judgment in favor of Interface on the grounds that the original notice provided Margagliotti sufficient notification of the account assignment under U.C.C. § 9-406(a).[33] Margagliotti appealed on the ground that, regardless of whether the original Gempel notice was sufficient notification, he was entitled to proof from Interface that the account had in fact been assigned.[34]

Margagliotti argued that, by granting summary judgment to Interface, the trial court disregarded the as-written statute and conflated notice of an account assignment with proof of that assignment.[35] As an initial matter, the Ohio Court of Appeals discussed its obligation to enforce as written the plain language of unambiguous statutes.[36] Finding the provisions of Section 9-406 to be clear and

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and unambiguous, the court turned to the statutory language. The court agreed with Margagliotti and found that, "[T]he current version of R.C. 1309.406 [U.C.C. § 9406] separates the requirement of notification and the assignee's obligation to provide reasonable proof of the assignment at the [account] debtor's request."[37] The court's decision enforces the plain language of Section 9406(c) and makes clear that an account debtor has an unqualified right to seek and obtain proof of an account assignment.[38]

In response to Margaliotti's arguments that the plain language of Ohio's adoption of U.C.C. § 9-406 was dispositive, Interface asserted that the Ohio Supreme Court's decision in First Bank of Marietta v. Roslovic & Partners, Inc.[39] was controlling.[40] Roslovic construed the former U.C.C. § 9-318 and discussed the statutory requirements for sufficiency of the initial notice of an account assignment.[41] Interface argued that, because the initial notice of assignment was more than sufficient under Roslovic, no additional proof of the assignment was warranted. The court acknowledged that Roslovic addressed the general statutory scheme at issue in the appeal, but rejected Interface's argument that the decision was binding precedent because it did not address an account debtor's rights after requesting proof of an account assignment.[42] In distinguishing Roslovic, the court made clear that the sufficiency of an assignor's initial notice and an account debtor's right to receive proof of the assignment from the assignee are separate and distinct under the statute. Regardless of whether the initial notice is sufficient, an account debtor is still entitled to further assurances that the assignment is bona fide before being obligated to pay the assignee.

The appellate court reversed the trial court's grant of summary judgment, but remanded the case for a determination of whether Margagliotti in fact had discharged his obligation by continuing to pay Gempel, the assignor.[43] As in Wyatt, although Margagliotti was entitled to continue paying Gempel in the absence of the requested proof of assignment, if he did not do so, he would still be obligated to pay the account.

While Wyatt provides some guidance to assignees as to the kinds of proof that a court may consider reasonable under Section 9-406(c), Margagliotti stands for the more basic proposition that notification of an assignment - no matter how much information it provides - does not negate an account debtor's right to request and receive separate proof.

CONCLUSION

After Wyatt and Margagliotti, it will be difficult for an account assignee to prevail on an argument disputing enforceability of the plain language of U.C.C. § 9-406(c). These cases support the plain language of the statute that the account debtor is entitled to receive upon request seasonable receipt of reasonable proof of the assignment. It remains to be seen, however, where courts will set the threshold at how much proof is reasonable. In Wyatt, the proof was so overwhelming that the question of a minimum threshold was never addressed. And in Margagliotti, the court was concerned with clarifying that notification and proof are distinct concepts. As proof was never provided, the Margagliotti court never reached the issue of how much proof is sufficient. Likewise, courts have not addressed what constitutes seasonable timing of proof after an account debtor requests it. Seasonable may either be at or before an agreed-upon deadline or, in the absence of a deadline, within a reasonable time.[44] May a notification of assignment contain a deadline by which proof must be requested? If so, must that deadline be reasonable? And in the absence of any such deadline, how long may an assignee wait to provide proof before it no longer has the ability to do so (and presumably enabling the account debtor to completely discharge the account by paying the assignor)?

Beyond the open legal questions, the cases - Wyatt and Margagliotti, as well as the other cases that discuss in dicta the right to proof - raise a number of practical considerations for account assignors, assignees, and debtors. Chief among such considerations is that an assignee cannot expect to receive payment unless and until an initial notification of the assignment, which contains all of the informa-

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tion required by U.C.C. § 9-406 for it to be effective, is provided to the account debtor. And thereafter, assignees need to be on the lookout for requests for proof, and have mechanisms in place whereby they can seasonably respond to them.

As for account debtors, they should be aware of their rights to seek proof of account assignments when they receive notifications that appear suspicious or potentially fraudulent. Account debtors, however, also need to be aware that the amount of proof to which they are entitled is subject to a reasonableness standard, and they are not entitled to hold out for an indefinite amount. As a corollary, account debtors must understand that ceasing to pay on an account while sorting out who is the current account holder is simply not an option. While waiting for proof to arrive, they must continue to pay the assignor under the terms of the account in order to avoid a default.[45]

The landscape of U.C.C. § 9-406 is one where the general Article 9 rule that the world is placed upon constructive notice of a security interest in collateral by the filing of a financing statement is modified by an account debtor's right to proof of an account assignment and an additional burden is placed upon an assignee. It is not sufficient for an assignee to turn its back after ensuring that a notification of assignment is sent to the account debtor, but rather the assignee must comply with its affirmative obligation to seasonably provide the account debtor with reasonable proof.

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Endnotes

[1]An expanded version of this article originally appeared in the UNIFORM COMMERCIAL CODE LAW JOURNAL as But What If I Don't Believe You? A Debtor's Right to Seasonable and Reasonable Proof of an Account Assignment Under U.C.C. § 9-406.
[2]The general rule regarding notifications set forth in subsection (a) is also subject to Sections 9-406(d)-(j). Notably, subsection (h) provides that Section 9-406 is subject to other law that may establish a different rule for account debtors who are individuals and who incur account obligations primarily for personal, family, or household purposes.
[3]See Novartis Animal Health US, Inc. v. Earle Palmer Brown, LLC, 424 F. Supp. 2d 1358, 1364 (N.D. Ga. 2006) ("Nothing in the U.C.C. requires that an account debtor receive notice of the assignment of its account. The failure to give notice of an assignment simply allows the account debtor to pay the assignor directly...").
[4]"Seasonably" is defined under the U.C.C. as an action being taken "at or within the time agreed or, if no time agreed, at or within a reasonable time." U.C.C. § 1-205(b).
[5]Infra notes 12 & 33.
[6]Infra note 8.
[7]See e.g. Smith v. Mallick, No. 96-02211, 2006 U.S. Dist. LEXIS 53505, *23 (D.D.C. Aug. 3, 2006) (noting that the account debtor may be entitled to a credit for his payments to the assignor, but not a release of the entire obligation); In re Apex Oil Co., 975 F.2d 1365 (8th Cir. 1992); In re Bancroft Dairy, Inc., 10 B.R. 920 (Bankr. W.D. Mich. 1981); Northwestern Nat'l Bank Southwest v. Lectro Sys., 262 N.W.2d 678 (Minn. 1977); See e.g. In re Taranto, No. 10-76041-ast, 2012 Bankr. LEXIS 1320, *35 (Bankr. E.D.N.Y. Mar. 27, 2012) (noting that New York's adoption of Section 9-406 "prevents different creditors from being paid twice for the same debt).
[8]Platinum Funding Serv., LLC v. Magellan Midstream Partners, L.P., No. CV095029911, 2010 Conn. Super. LEXIS 1120, *9 (Conn. Super. Ct. Apr. 30, 2010) (noting that § 9-406(c) "puts the burden on the account debtor to inquire as to the assignee upon receipt of a notice of assignment that the account debtor questions."); IIG Cap. LLC v. Archipelago, L.L.C., 36 A.D.3d 401, 403 (N.Y. Ct. App. 2007) ("[I]f defendants or their employees had any doubt as to the import of the assignment notices and invoices they signed for, the UCC provides a mechanism whereby the account debtor may require that the assignee further [reasonable proof] . . . . Defendants made no such request."); Hamilton Group (Del.), Inc. v. Federal Home Loan Bank of N.Y., 1 A.D.3d 973, 974 (N.Y. Ct. App. 2003) ("If Federal had any doubt whether the payment had been assigned or concerning the proper payee . . . it should have contacted plaintiff for proof of the assignment").
[9]IIG Cap., 36 A.D.3d at 401 (reversing trial court's dismissal of assignee's causes of action asserted against account debtor based on quantum meruit and unjust enrichment); Hamilton Group, 1 A.D. 3d at 974 (Because it failed to seek proof of the assignment, "Federal does not conclusively establish a defense to the asserted claims as a matter of law.").

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[10]Platinum Funding, 2010 Conn. Super. LEXIS 1120, * 10-11 (entering judgment against account debtor in favor of assignee and noting that, "The court concedes that ordering the defendant to pay its debt twice is a harsh remedy.").
[11]Official Comment 4 provides, in part, that, "Of course, if the assignee did not in fact receive an assignment, the account debtor cannot discharge its obligation by paying a putative assignee who is a stranger."
[12]No. 03-08-00019-CV, 2010 Texas App. LEXIS 563 (Tex. App. Jan. 29, 2010).
[13]No. 26217, 2012 Ohio App. LEXIS 3247, 2012-Ohio-3666 (Ohio Ct. App. Aug. 15, 2012).
[14]Id. at *1-2.
[15]Id. at *2.
[16]Id. at *3.
[17]Id. at *3-4.
[18]Id. at *4-8.
[19]Id. at *8-9.
[20]Id. at *10.
[21]Id. at *14.
[22]Id. at *19-20.
[23]Id. at *21.
[24]Id.
[25]Id. at *21 ("Wyatt could not reasonably continue to doubt that [Capital One] had been assigned his contract.").
[26]2012-Ohio-3666, π 2.
[27]Id.
[28]Id.
[29]Id. at π 3.
[30]Id. at π 4.
[31]Id. at π 9.
[32]Id.
[33]Id. at π 4.
[34]Id. at ππ 4 & 9.
[35]Br. of Appellant [1/3/2012], at 7 (on file with Author).
[36]Id. at π 10.
[37]2012-Ohio-3666, at π 10.
[38]Id.
[39]86 Ohio St.3d 116, 712 N.E.2d 703 (1999).
[40]Br. of Appellee [1/19/2012], at 7-8 (on file with Author).
[41]86 Ohio St.3d at 118-19.
[42]2012-Ohio-3666, at π 11.
[43]2012-Ohio-3666, at ππ 13-14.
[44]See U.C.C. § 1-205(b).
[45]Official Comment 4 to U.C.C. § 9-406.

Frequently Asked Questions about Legal Advertising

Q: Who regulates lawyer advertising in Ohio?
A: The Supreme Court of Ohio regulates the conduct of lawyers who practice in Ohio, including lawyer advertising.

Q: May lawyers send unsolicited communications by mail?
A: Yes. However, unsolicited communications sent within 30 days of an accident or other disaster must include a comprehensive section titled "Understanding Your Rights" that complies with all of the Supreme Court's requirements and includes information you may need after you have suffered an accident or other disaster.

Q: What must be included in the "Understanding Your Rights" section of an unsolicited communication?
A: There are nine points in this section, including commentary about:
1) obtaining and keeping useful records such as police reports, names of witnesses, photographs and receipts;
2) how and when to use your signature, and the possible effect of any statements made to others because statements you make can be used against you;
3) the conflict between your interests and the interests of other parties, including insurance companies;
4) time limits for insurance claims and lawsuits because you would not be able to make a claim or bring a lawsuit after a certain amount of time has passed;
5) the benefits of getting offers of settlement or other promises in writing, because oral promises can be difficult to enforce;
6) the possible need for legal assistance;
7) lawyer referral programs and other information about how to find a lawyer;
8) lawyer qualifications; and
9) lawyer fees and costs.
In addition to these nine points, the lawyer solicitation must state that the Supreme Court of Ohio neither promotes nor prohibits lawyer solicitation.

Q: Why does the Supreme Court of Ohio neither promote nor prohibit lawyer advertising?
A: Early in our nation's history, the practice of law was largely unregulated. In the late 19th Century, state courts and state and local bar associations began to regulate the legal profession, and they generally restricted lawyer solicitation and advertising. For most of the 20th Century, many state courts and many state and local bar associations banned most lawyer solicitation and advertising. Then, in the 1970s, the United States Supreme Court made a series of rulings giving freedom of speech protection to commercial advertising and advertising by professionals such as lawyers. In response, some professionals, including lawyers, began to solicit and advertise. Since then, state courts and state and local bar associations have established rules and guidelines regulating lawyer solicitation and advertising.

Q: May a lawyer solicit potential clients by telephone?
A: No. A lawyer may not solicit clients by live telephone or real-time electronic contact in Ohio--nor may a lawyer solicit employment in a face-to-face meeting with a prospective client in Ohio. However, potential clients may telephone or initiate a meeting with a lawyer, and the lawyer may respond.

Q: What about other forms of solicitation and advertising?
A: In Ohio, lawyers may advertise services through the Internet, television, radio, and printed media, provided they follow the advertising standards set by the Supreme Court of Ohio. However, lawyers may not use in-person, live, telephone or real-time electronic means to solicit employment.

Let's talk about sex……classification

Adam Bryda • Assistant Lorain County Prosecutor

Introduction

Sex classification in the juvenile court is different from sex classification in the adult court. It has its own quarks and nuances that are unique from the adult system. This article will provide a succinct, but thorough overview of sex classification in the juvenile court. It will provide a background on how sex classification works, the timing of when a juvenile must be classified, and the juvenile's right to have a review hearing upon completion of the juvenile's disposition, along with the court's ability to reclassify the juvenile at the review hearing.

Background – Classification

Before diving into the area of sex classification, it should be noted that unlike in adult court, juveniles are not "convicted;" instead, juveniles are "adjudicated." Juveniles are also not "sentenced;" instead, juveniles go before a judge or magistrate for a "disposition." Even though the terms are different, their meanings are similar: adjudication is like a conviction, and a disposition is like a sentencing. My juvenile law professor described the terms as follows: the adjudication is the "what happened" and the disposition is the "what are we going to do about it."

If a juvenile is fourteen years old or older, commits a sexually oriented offense, and is adjudicated for the offense, the juvenile becomes subject to juvenile offender registration (JOR)—i.e. s/he may be classified as a sex offender.[1] There are three categories in which a juvenile may be classified: Tier I Classification which requires registration every year for ten years, no community notification and no internet publication; Tier II Classification which requires registration every six months for twenty years, no community notification, and no internet publication; and Tier III Classification which requires registration every ninety days for life, and the judge decides whether to impose a community notification.[2]

When a court initially classifies a juvenile, there are two inquires: first is whether to classify a juvenile as a juvenile offender registrant, and second is if the juvenile is to be classified, what tier classification shall be imposed.[3]

Inquiry 1: Whether to Classify

If the juvenile was fourteen or fifteen years old at the time of the offense, the judge has discretion whether or not to classify. The judge will look at factors such as: 1) the nature of the offense; 2) whether the child has shown genuine remorse or compunction for the offense; 3) public interest/safety; 4) factors set forth in R.C. 2950.11(k); and factors set forth in R.C. 2929.12 (B) and (C).

If the juvenile was sixteen or seventeen years old at the time of the offense OR was fourteen or fifteen years old at the time of the offense and has a prior adjudication where the juvenile was classified, then classification is mandatory, meaning the judge must classify the juvenile.[4]

Inquiry 2: What Tier to Classify

In adult court, tier classification is based solely on the offense in which the defendant has been convicted; however, in juvenile court, tier classification is not determined by the sexual offense in which the juvenile has been adjudicated. Instead, the judge has discretion to determine which tier classification shall be imposed, regardless of the adjudicated offense of the juvenile.[5]

When to Classify

If a juvenile is adjudicated for a sexually oriented offense, the court can classify a juvenile only at one of two times: 1) if the juvenile is not placed in a secured facility[6] then classification must occur at the dispositional hearing. If the juvenile is placed in a secured facility at the dispositional hearing, then classification must occur at the time of the juvenile's release from the secured facility.[7]

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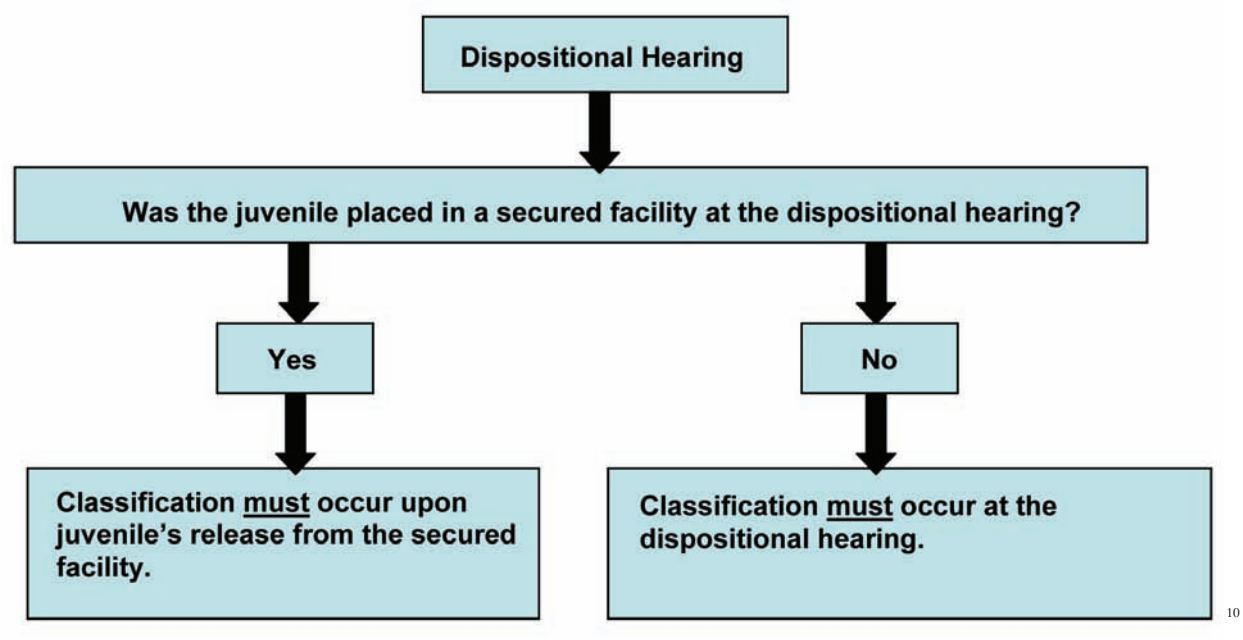
A court does not have discretion to classify at any time outside the requirements provided in R.C. 2152.83(A). This means a judge cannot classify at the dispositional hearing if the juvenile is placed at a secured facility; the judge must wait until the juvenile is released from the secured facility.[8] Conversely, if the juvenile is not placed in a secured facility at the dispositional hearing, the judge must classify the juvenile at the dispositional hearing.

What is a Secured Facility?

A secured facility is defined as "any facility that is designed and operated to ensure that all of its entrances and exits are locked and under the exclusive control of its staff and to ensure that, because of that exclusive control, no person who is institutionalized or confined in the facility may leave the facility without permission or supervision.[9]" Differentiating between secured and non-secured facilities is simple. Basically, the following are secured facilities: the Department of Youth Services (DYS); The Northern Ohio Juvenile Community Corrections Facility (NOJCCF), and the Lorain County Detention Home (LCDH). All other facilities are not secured (i.e Hittle House, Boys Village, Stepping Stone, Pathways, etc.)



[10]

Review Hearing

Once the juvenile completes all of his/her dispositional terms, the court must hold a review/reclassification hearing. The review hearing is to evaluate 1) the effectiveness of the disposition, 2) the risk of the juvenile re-offending, and 3) to decide whether to continue, modify, or terminate the juvenile's classification, including the tier designation.[11]

If the juvenile was subject to mandatory classification, then the judge has discretion to either continue the current tier classification, or to reduce the juvenile's tier classification, but the judge does not have the ability to eliminate the juvenile's tier classification altogether.

If the juvenile was subject to discretionary classification, the judge has the ability to continue, reduce, or eliminate the juvenile's tier classification altogether (unlike with mandatory classification).

Lastly, regardless of whether the juvenile was subject to mandatory or discretionary classification, the judge may not elevate the juvenile to a higher tier classification at the review hearing. So for example, if the juvenile was originally classified at a Tier II level, the judge cannot reclassify the juvenile at a Tier III level.[12]

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Conclusion

Sex classification for juveniles is different from sex classification for adults. Juveniles under the age of fourteen are not subject to sex classification. If the juvenile was fourteen or fifteen years old at the time of the offense, the juvenile is subject to discretionary classification. If the juvenile was sixteen or seventeen years old at the time of the offense, or had a prior adjudication where the court classified the juvenile, then the juvenile is subject to mandatory classification.

If discretionary, the court has two initial decisions to make: 1) whether to classify and 2) what tier to classify. If mandatory, the court has one initial decision to make: 1) what tier to classify the juvenile. If the juvenile is going to be classified, the timing of the classification is important. If the juvenile is not placed in a secured facility, then classification must occur at the dispositional hearing. If the juvenile is placed in a secured facility, then classification must occur upon release from the secured facility.

After the juvenile completes all of his/her dispositional terms, the court is required to hold a review hearing. At the review hearing, the court may continue or reduce the tier classification for a juvenile who was subject to mandatory classification. The court may continue, reduce, or terminate tier classification for a juvenile who was subject to discretionary classification.

Endnotes

[1] Giannelli, Paul. Ohio Juvenile Law. 2012. Rochester, NY: Thomas Reuters, 2012. 61-66. Print.

[2] Id.

[3] See In re Antwon C., 182 Ohio App. 3d 237, 240

[4] Giannelli at 66-68

[5] Id.

[6] "Secured Facility" is defined in R.C.2950.01(O) as a facility that is designed and operated to ensure that all of its entrances and exits are locked and under the exclusive control of its staff and to ensure that, because of that exclusive control, no person who is institutionalized or confined in that facility may leave the facility without permission or supervision.

[7] R.C. 2152.82(A)

[8] In re K.S.R., 2012 Ohio 6217,¶ 19, states " The clear language of R.C. 2152.83(A)(1) does not give a juvenile court any discretion as to the timing for classifying a juvenile sex offender registration. Multiple districts in this state have ruled accordingly. See also In re P.B., 2007 Ohio 3937, ¶ 8, stating that "although a juvenile court has discretion as to the type of disposition it makes, the court apparently does not have discretion to determine when the delinquent child can be adjudicated a sexual predator."

[9] See foot note 6.

[10] See "Registration Eligibility and Timing of Classification Hearing Flow Chart" prepared by the Ohio Public Defender, for a more detailed breakdown of classification of juveniles: http://www.opd.ohio.gov/Juvenile/JV_FlowChart.pdf

[11] R.C. 2152.84 and Giannelli at 68-69

[12] Id.

The General Division of the Lorain County Common Pleas Court is proposing revisions to Local Rules 7(III)(E) & (F) and is accepting comments until November 29, 2013. Unless otherwise modified, the revised rules will be effective December 2, 2013. Comments should be directed to tlubbe@loraincounty.us.

RULE 7

THE ASSIGNMENT SYSTEM

I. IN GENERAL

Except as otherwise provided, all cases shall be assigned to a Judge by a random computer selection process. Civil cases shall be assigned at the time and in the order of filing or transfer from another Court. Criminal cases shall be assigned following preparation of the arraignment list by the Clerk of Courts. Secret indictments shall be assigned following service upon the Defendant.

II. CIVIL REFILING AND CONSOLIDATION

A. Refiling – Civil Rule 41

When a previously dismissed case is refiled, the attorney or party shall so indicate on the case designation sheet, whereupon the Clerk of Courts shall assign the refiled case to the Judge assigned at the time of the original dismissal. Any case filed beyond the guidelines established by Civil Rule 41 is a new action not subject to this rule.

B. Consolidation

When actions involving a common question of law or fact have been filed as separate cases, a motion for consolidation shall be filed with the Court to whom the lowest case number has been assigned. If the motion is granted, the cases shall be consolidated and go forward under the lowest case number.

C. Civil Forfeiture

Civil forfeiture cases shall be assigned or transferred to the Judge presiding over any related criminal case. The party seeking forfeiture shall inform the Court and file a motion to transfer whenever the underlying civil matter relates to any pending criminal case.

III. CRIMINAL COMPANION AND CAPITAL CASES

A. Pending Case

When a Defendant has a pending case, any new case shall be assigned to the judge with the pending case.

(continued on following page)

B. Multiple Defendants

When cases involving multiple Defendants are related, all cases shall be assigned to the Judge with the lowest pending case number.

C. Dismissal and Re-indictment

When an individual is indicted for offenses that were pending in a case that was previously dismissed, the new case shall be assigned to the Judge who was presiding over the original matter.

D. Capital Case

All capital cases shall be assigned randomly through a process where each Judge, after receiving an assignment, is excluded from the assignment pool until all Judges have received a capital case. With respect to capital cases, the assignment process specified herein shall supersede all other local criminal assignment rules. The other assignment provisions of Local Rule 7(III) shall apply when not in conflict with this rule.

~~E. Probation, Intervention in Lieu, Diversion, Good Behavior and Community Control Violation~~

~~When a Defendant has a criminal case pending and is alleged to be in violation of probation, intervention in lieu, diversion, good behavior or community control, the case with the violation shall be assigned to the Judge with the pending case. This rule shall not apply to criminal nonsupport cases transferred to a different division of the Common Pleas Court.~~

E. Community Control Sanction (CCS)(f.k.a. Probation), Intervention in Lieu, Diversion

i) When a Defendant is on CCS, intervention in lieu, or diversion and has a new case, and the new case may constitute a violation of the defendant's CCS, intervention in lieu, or diversion (i.e., a violation case) the new case shall be assigned or transferred to the Judge who placed the Defendant on CCS, intervention in lieu, or diversion;

ii) If the new case does not constitute a "violation case" the new case shall be assigned by a random computer process as set forth in Rule 7(I);

iii) If a defendant who is on CCS in more than one case and with more than one judge has a new case that constitutes a "violation case" of more than one CCS case, the new case shall be assigned to that judge with the lowest case number for "CCS";

iv) This rule shall not apply to multiple Defendants with related cases or to criminal nonsupport cases transferred to a different division of the Common Pleas Court.

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F. Specialized Dockets

Specialized Dockets of the General Division shall be in accordance with the Rules of Superintendence for the Courts of Ohio and any procedures established by the Specialized Dockets Section of the Ohio Supreme Court

Modest Means Program Expands to Foreclosures

In July, the LCBA introduced its Modest Means Program to assist individuals that cannot afford to pay market rates for legal services. The program started with domestic relations matters only. We are now ready to expand the program to foreclosure matters.

We are excited to be able to offer this much-needed service to our community and to our members. The clients will complete an intake form and financial statement to determine eligibility for the program. If they qualify, they will be referred to an attorney who is a member of the program and will receive representation or have documents prepared at a reduced rate - determined by the MMP. Clients who do not qualify will be referred out through the Lawyer Referral Service (LRS) as a normal procedure of the service.

By joining the Modest Means Referral Program as a foreclosure panel attorney, you will not only assist people who would otherwise have nowhere else to turn, but you will also:

- Gain valuable experience
- Expand your client base
- Establish yourself in the legal community
- Maintain a work flow at non-peak times

There is an orientation/training course being held on Thursday, November 7, 2013, which is required in order to be placed on our attorney rotation list for this program. This is a FREE training and you will receive 1.5 of general CLE credit for attending. If you cannot attend on this date, contact the LCBA to schedule a viewing of the DVD of the program.

If you have any questions regarding this program, feel free to call.

LCBA Annual Welcome Reception for Newly Admitted Attorneys

Hosted by the Lorain County Bar Association

Sponsored by:
Wickens, Herzer, Panza, Cook & Batista
PNC Bank

*

Friday, November 15, 2013 • 4:30pm - 7pm

*

Cork's & Stubby's
209 South Main Street • Amherst, OH 44001

Announcements

Congratulations to Freddie Springfield for being named one of Lorain County's Women of Achievement by the YWCA. The award honors the accomplishments of women who live and/or work in Lorain County. Freddie will be recognized along with 15 other women at a luncheon held on November 12, 2013 at Avon Oaks Country Club.

Attorney Amanda Buzo has joined the firm of Wegman, Hessler & Vanderburg, 6055 Rockside Woods Blvd., Suite 200, Cleveland, Ohio 44131. Telephone 216-642-3342; email ambuzo@wegmanlaw.com.

The LCBA would like to welcome the following new members:
Louis Grube, Matthew Mishak, Lauren Perko, Erin Poplar, Jeremy Samuels

If you haven't paid your membership dues yet, please do so at your earliest convenience. Members whose dues are not paid by November 15 will be removed.

Sheffield Village - Office Sharing or Possible Associate Relationship

Well-established Sheffield Village law firm is seeking a self-motivated, experienced attorney, with a book of business, for its estate planning, estate and trust administration, elder law, real estate and small business practice, to share space and possibly for an associate relationship. While a book of business is required, there is additional firm work available to the applicant. Please email resume to: akryszak@lessingandkryszak.com

Office Sharing Available

Office Sharing Available at Lorain National Bank Building, 124 Middle Avenue, 6th Floor, Elyria, Ohio 44035. Very convenient to Elyria Municipal Court and the Lorain County Common Pleas Court. 2 private offices; 1) approx.. 15 x 15, $400/month; 2) approx. 9 x 9, $300/month. Price includes sharing reception area and kitchen as well as off-street parking. Additional arrangements can be made for secretarial/reception services, copy machine, fax, DSL, and/or conference room. Contact Attorney Randolph Roth at 440-284-3896.

Office Sharing Available at the Executive Building, 300 4th Street, Elyria.

Share conference room, reception area and kitchen. Arrangements can be made to share copy machine, fax, DSL and whatever additional cooperation you can think of. $100/month for conference room privileges; $175/month cubicle; $300/month small office; $400/month larger office. The prices include off street parking for you and your clients. If needed, there is space for your staff. Contact Jim Deery at a440-323-9500.

Have an announcement you want to share with the members of the LCBA? Contact the office with the information.

If you have a change in your contact information, please let the LCBA know so that we may keep your information current.

New Membership Benefits

The LCBA is always working on increasing your benefits of membership. We have recently added two new business partners to our membership benefits program. These fine establishments are offering you discounts simply because you are a Lorain County Bar Association member. If you have suggestions of businesses that might be interested in this program, please contact the LCBA.

Aesthetic Laser Solutions

Laser hair removal is one of the fastest growing procedures in the country. The treatments are quicker and easier than waxing, more effective on large areas than electrolysis. The experts at Aesthetic Laser Solutions have performed over 100,000 treatments, are licensed by the Medical Board of Ohio since 2003, and are supervised by a Board Certified Plastic Surgeon. They combine technical expertise with caring support and are committed to sensitively and professionally catering to individual client needs. Aesthetic Laser Solutions provides Permanent Hair Reduction with one of the industries most trusted lasers, Candela GentleLASE Alexandrite laser which is extremely effective for permanent hair reduction. As a member of the LCBA, you will be offered a free treatment to any area you like with the purchase of a package. They are located at 1997 Healthway Drive, Suite 203, in Avon. Please contact them at 440-623-2700.

Northern Ohio Concealed Firearms Training

Northern Ohio Concealed Firearms Training is offering LCBA members and their families a 30% discount on their rates for all of their classes. They have training scheduled each and every month for individuals that wish to apply for their Concealed Handgun Permit here in Ohio and other states. They also teach the NRA course on personal protection in the home, which teaches and trains people how to defend themselves in their home and ways to set up their home so as not to be a target of crime. Contact NOCFT through email-nocft@yahoo.com or by phone @ 440-822-7241.

Calendar of Events

Seminars

11/01/13	**3.00**	**1:00 p.m.**	**Children's Services Law** **Miller Nature Preserve**
11/07/13	**1.50**	**1:00 p.m.**	**How to Represent Defendants in a Foreclosure Action** **LCBA**
11/12/13	**3.00**	**12:15 p.m.**	**Appellate Court Update** **Elyria Country Club**
11/13/13	**1.00**	**11:30 a.m.**	**Lunchbox - Elyria Municipal Court Programs for Defendants** **Judge Locke Graves' Court**
11/14/13	**6.25**	**8:30 a.m.**	**Annual Probate Seminar** **Elyria Country Club**
12/5/13	**2.50**	**9:00 a.m.**	**Annual Ethics, Profess. & Substance Abuse Seminar** **Spitzer Conference Center**
12/06/13	**3.50**	**9:00 a.m.**	**Deconstructing the Car Accident Injury Case** **LorMet Community Federal Credit Union**
12/13/13	**1.00**	**11:30 a.m.**	**Lunchbox – SB 337** **LorMet Community Federal Credit Union**

Social Events

Friday, November 8, 2013	**8:00 a.m.**	**Off the Record Breakfast** **Judge Rothgery**
Friday, November 15, 2013	**4:30 p.m.**	**Annual Welcome Reception** **Cork's & Stubby's**
Saturday, March 22, 2013	**5:30 p.m.**	**LCBA Foundation's Charity Ball**

Meetings

Tuesday, November 19, 2013	**4:45 p.m.**	**Juvenile Section Meeting** **Quaker Steak & Lube**
Thursday, Novemer 21, 2013	**4:30 p.m.**	**Domestic Relations Section** **Wood & Wine**
Thursday, December 12, 2013	**5:30 p.m.**	**Criminal Section Meeting** **Location will be determined**