GEAUGA COUNTY BAR ASSOCIATION VOLUME 44, ISSUE 1, MAY, 2021

Ipso Jure

Cover: Members of the New Leaf Program, Geauga County Common Pleas Court's drug court program, congratulate and celebrate Justin Brown's graduation from the program on April 22, 2021.

Inside this issue:

President's Page

Todd C. Hicks,

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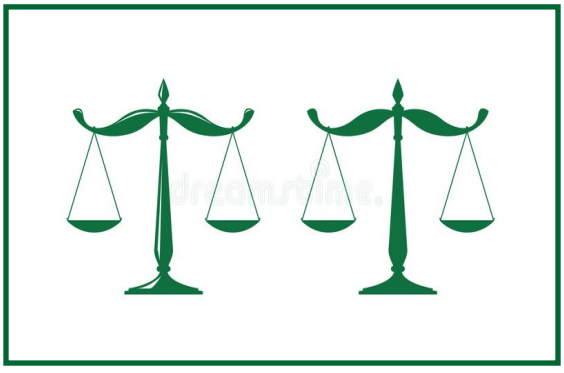
When Robin reminded me that one duty of the Bar President is to write a piece for Ipso Jure, her only admonishment was "please don't make it controversial." I have no idea what she meant but I will avoid any controversy!

The last year has certainly been a strange trip. I never imagined I would be "attending" depositions and court hearings via Zoom wearing a shirt and tie along with shorts and slippers. That really seemed fun until I realized that my dog has a habit of viciously barking whenever someone pulls into the driveway. There is nothing like a Judge asking you to quiet your dog.

As spring arrives, it seems we are on the cusp of returning to some level of normal. I give credit to our past president, Susan Weiland and Krystal Thompson for keeping things going during a difficult 2020. We pivoted to meetings via Zoom. While we did not have many of our events (Law Day and the Annual Dinner), we managed to have a very successful food drive at Chagrin Falls Park and an ice cream social for our bar members.

My hope is that we can get back a full slate of events this year. As of now, we plan to move forward with Law Day and we are planning a regular bar meeting outside, possibly on Chardon square.



I look forward to seeing you all soon. Fingers crossed.

Ipso Jure is a publication of the **Geauga County Bar Association.**

Legal and Other Musings

Judge David L. Fuhry,
Retired

I. More 404(B) "Other-Acts" Developments

"All the world's a stage."
–Wm. Shakespeare

Evidence Rule 404(B) Other Crimes, Wrongs or Acts:
"Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to use at trial."

Evidence Rule 404 reflects our legal system's policy to admit into evidence only that evidence which is relevant to the current issues in controversy. This is why a person charged with a criminal offense may ordinarily rely on our rules of evidence to prevent the introduction of past crimes or other (usually "bad") acts being entered into evidence as probative of the person's guilt in the current case.

Why Not Allow Other-Acts Evidence?

In determining the issue of guilt our legal system does not care about a defendant's past acts or crimes even though they may speak volumes about his or her character. The defendant's character is not on trial. It is the defendant's conduct, in this particular indictment only, that is relevant. Past conduct and character may be relevant in sentencing if the defendant is convicted. It is generally not relevant in determining guilt or innocence.

Evidence Rule 404(B) contains exceptions to the rule. "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

A check on the use of the foregoing exceptions is found at Evid. R. 403(A): "Exclusion mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."

In a past issue of Ipso Jure, I wrote at length about the dangers of allowing evidence of other crimes, wrongs or acts into evidence. See *Ipso Jure, Volume 41, Issue 1, January 2018.* To summarize, admitting such evidence can result in putting the person's character on trial. In the case of past crimes, it tends to suggest to the jury that the person is a bad person, who then has a propensity to act "badly" or consistently with his or her flawed character. It distracts the jury from the real issues in the case. The defendant can be relegated to defending against charges or claims for which he or she is not on trial.

The *Hartman* Case

The law of Ohio (and many other jurisdictions) has often times been confusing concerning the application of Rule 404(B). Indeed, it is the most litigated rule of evidence.

On September 22, 2020 the Ohio Supreme Court released its decision in *State v. Hartman* with the avowed purpose to: "…help clear up some of the confusion that exists regarding the use of other-acts evidence. Thus, we endeavor to provide trial courts with a road map for analyzing the admission of other-acts evidence and guidance as to appropriate instructions for the jury when such evidence is admitted." *State v. Hartman*, Slip Opinion No. 2020-Ohio-4440.

(Continued on page 4)

Legal (from page 3)

Hartman: The "Road Map" Case

Hartman is refreshing because it: 1) defines the test for admissibility of other-acts evidence clearly *and* uses examples; 2) clarifies why it ruled as it did in particular cases where the basis of the ruling was obscure; 3) discusses in blow-by-blow style each of the usual permissible bases for allowing such evidence, i.e., identity (*modus operandi*); common scheme or plan; motive; intent and absence of mistake; and, 4) clearly details what is expected of the trial court with respect to limiting instructions.

An added bonus is that the decision is a unanimous one.

Conclusion as to *Hartman*

If you encounter a case where other-acts evidence is important do not neglect dealing with it early on. It can be a challenge. The grounds cited above for allowing admission of evidence seem simple, but they are anything but. Read up on the issue and identify with *exactitude* which grounds for admission of the evidence applies to your situation. Review one of the evidence rule books that contains squibs of appellate cases dealing with the issue that is similar to your own. *

Importantly, be prepared to argue why you need admission of the evidence and, if there is another way to prove the issue, why the court should not summarily deny the other-acts evidence.

In short, be prepared.

*One good source, especially in sex offense cases, is an exhaustive 1994 law review article reproduced by the UC Hastings Scholarship Repository, "Other Crimes" Evidence in Sex Offense Cases, by Park & Bryden, 78 Minn. L. Rev. 529, (1994). Over 50 pages of discussion and examples.

II. Pandemic Cautionaries and Court Appearances

On December 10 of last year Chief Justice Maureen O'Connor wrote a letter to, among others, retired assigned judges dealing with how courts should operate while the pandemic persists: **"Hearings, proceedings, pretrials, status conferences, etc.**

First and foremost, we must operate with a *strong presumption toward remote proceedings*. (Emphasis added). Courts will leverage technology to conduct all trials and proceedings remotely to the extent possible…".

The message is thus clear: as long as the pandemic persists get used to not interfacing directly with opposing litigants, or congregating at the courthouse.

We are urged by a multitude of celebrities, news people, athletes and even car sales people in their TV commercials to do something worthwhile while we are in pandemic mode. This suggestion reminded me of a factoid (or is it myth?) regarding Shakespeare. It is "said" that during one of the many plague-stricken periods that England was forced to endure in Shakespeare's time, he penned *King Lear*.

King Lear has gained stature in recent years among Shakespearian scholars and critics. In some quarters it is now regarded as his greatest play, surpassing even *Hamlet* and *MacBeth*. Certainly the character of King Lear is regarded as one of the most difficult roles to master.

I looked into the nature of the plagues that Shakespeare himself survived. Turns out in sixteenth century England one was lucky to survive ordinary maladies connected with infancy, let alone the recurrent plagues. Mortality of the newly born was high. Nine percent died within a week of birth and a further eleven percent before they were a month old. In the decade of Shakespeare's own birth in 1564, there were in his birthplace (the small town of Stratford-population approximately nineteen hundred, located just over 100 miles from London) 62.8 average annual baptisms and 42.8 average annual child burials.

Once one survived childhood there were further difficulties. The average lifespan of an adult male was forty-seven years. Shakespeare himself lived to age fifty-three. In London (at the time population 200,000 – a stupendous concentration of humanity for the era) life expectancy was but thirty-five years in the affluent parishes, and twenty-five years in the poorer areas. Half of London's population was under the age of twenty; as one historian characterized it, London itself was "perpetually young".

Life expectancy outside urban

(Continued on page 5)

Legal (from page 4)

areas was much greater. Waves of epidemic illness swept away urban dwellers. In 1593 more than 14 percent of the population of England died of plague, and twice that number were infected. Even in small town Stratford, in the year Shakespeare was born, in a period of six months 237 of its residents died (more than a tenth of its population). It was common for city dwellers and even small town residents to escape to the countryside to avoid the perils of the plague. The plague was a frequent visitor, especially in summer. The playhouses were closed down at the time of plague.

If your interest in Shakespeare and his times ever rises to more than a passing thought, try out Peter Ackroyd's *"Shakespeare-The Biography",* first published in Great Britain in 2005. I bought it in a discount book seller's shop in Stratford, Ontario for four dollars in 2014, hardcover, soft cover was half the price.

"He was not of an age
but for all time!"
–Ben Johnson, Playwright and Contemporary
expressing his sentiment on Shakespeare's death in 1616.

III. Worth Remembering: You Can't "Back Door" Hearsay into Evidence

Hearsay is hearsay even if it comes repackaged with a different label.

State v. Freddy Lewis, 2005-Ohio-2699, a Seventh District (Mahoning County), Court of Appeals case provides a telling example of this principle.

Lewis appealed his aggravated murder and aggravated robbery convictions on several grounds. One such ground concerned the court's denial of a request by Lewis (who elected not to testify) that his video tape interrogation/confession (which had not been played or entered into evidence) should have been played so the jury could hear his claims that a codefendant forced him to participate in the crimes. The state did not seek to introduce the video tape, which consisted of his interrogation by a Detective Kelly. It elected instead to question the detective to testify as to what Lewis told him, which statements are admissible non-hearsay as it was offered against a party, and is his own statement. Evid. R. 801(D)(2)(a).

Lewis argued Evid. R. 106 required introduction of the recording. That rule provides that when a part of a recording is introduced by a party, the adverse party may require introduction of any other part otherwise admissible and which ought to be considered.

The appeals court rejected this argument. First, it reasoned that Rule 106 applies to writings and recordings, not conversations. Secondly, and citing precedent, the rule is limited to other parts of the recording that are "otherwise admissible".

Here, no part of a recording was offered into evidence. Further, Lewis' statements on the recording are not "otherwise admissible" because they are hearsay *when not offered by the adverse party.* Appellant's statements to police in the recording, unless offered by the state, are inadmissible hearsay unless some exception applies. There being none, it is not admissible. The defendant did not take the stand and the state, while it had the right to introduce the tape into evidence, elected only to question the detective about the conversation he had with Lewis.

IV. Victim at Sentencing Hearing Not Limited to Commenting on Conduct Which Relates to Crimes of Which Offender was Convicted

In *State v. Kittelson, 2016-Ohio-8430* the Eleventh District Court of Appeals, citing a Mahoning County case, *State v. Mayer, 2008-Ohio-7011* ruled the Lake County Common Pleas Court was not limited at sentencing to considering information strictly related to the conviction offense.

In *Kittelson* the defendant pleaded to Unlawful Sexual Conduct with a Minor, and to an attempt to commit the same offense.

At sentencing the victim's account of his conduct claimed the defendant engaged in sexual *intercourse* with the victim, not simply engaging in the lesser offense of sexual conduct.

The defendant argued on appeal that the sentencing court's consideration of the victim's statement wasn't proper.

Held: The court in sentencing is

(Continued on page 6)

Legal (from page 5)

entitled to consider the victim's version as reported in a presentence report, or information beyond that strictly related to the conviction offense. The holding applies even where the elements of the conviction offense are at odds with the indicted one.

May Defense Counsel Cross Examine Victims at Sentencing?

In a recent case defense counsel requested my permission to cross examine a victim who elected to speak at sentencing. The request was based on the theory that victims are "adverse witnesses" or "accusers" whom the defendant is entitled to confront and question.

This judge informally advised defense counsel prior to sentencing that it would prohibit the planned questioning because, after pleading and being found guilty, the defendant is no longer an "accused."

At the actual sentencing defense counsel never sought to question the speakers.

V. Court May Exercise Discretion and Recognize Otherwise Inadmissible Evidence in Considering a Motion for Summary Judgement

Held: Where movant for summary judgement submits documents in support of the motion which are not objected to by the opposing party, the court may consider them in ruling on the motion even though they are not strictly admissible. Any objection to those documents is waived.

In the subject case, plaintiff ignored defense requests for admission. The trial court considered the matters addressed therein as admitted even though the admissions should have been either filed separately with the court with a motion for admission, or accompanied by an affidavit, per Civ. R. 56 (C) and (E). *Kanu v. George Development, Inc., 2002-Ohio-6356, 6th Dist. COA.*

Exception: While such materials submitted can be properly considered if not denied or objected to, the materials relied upon, "… must still be in the record [of the trial court] for review or the waiver rule will not apply." See: *Threatt v. White, (Not Reported), 1996 WL 684141, 10th Dist. COA.*

In Threatt, plaintiff Michael A. Threatt filed a personal injury claim against Charles White arising out of an accident which occurred in 1992. He then had another accident in 1994 involving Kevin L. Brown. He filed an amended complaint in the White action adding Brown as a defendant. Later Threatt filed a second amended complaint naming State Farm as an additional defendant. State Farm insured the Threatt vehicle. Threatt claimed in the second amended complaint that as a result of the 1992 accident State Farm might be liable to him under the uninsured/underinsured motorist clause of the policy covering him on the car he was driving.

State Farm moved for partial summary judgement against Threatt. State Farm alleged failure on the part of the plaintiff to bring suit or demand arbitration within two years of the date of the accident as required by the policy.

The trial court granted State Farm's motion. However, State Farm never entered a copy of the policy into the record. While its motion in support contained excerpts purportedly taken from the policy, the policy was never submitted as evidence or otherwise in the record of the case. Simply citing to it in a memorandum of counsel does not trigger the waiver rule.

In this circumstance State Farm's failure to attach the policy is not waived, as it leaves *no* evidence in the record to support the granting of the motion. Cases such as *Kanu, supra,* were distinguished by the 10th District by quoting an 8th District case, "…[w]hile a failure to object to improper material submitted with a summary judgement pleading may constitute a waiver…the material must still be present in the record for review." *St. Vincent Charity Hosp. v. Eget (March 26, 1987) Cuyahoga App. No. 52242, unreported.*

"Do as adversaries do in law, strive mightily, but eat and drink as friends."
–Wm. Shakespeare, The Taming of the Shrew, Act I, sc. 2.

When is a Decedent Entitled to A Stimulus Payment?

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Stimulus payments, also referred to as advance tax credits or Economic Impact Payments ("EIPs"), have been the unfortunate subject of misinformation and confusion. A prime example originates with the CARES Act, which stipulated that an *estate* was not an "eligible individual" to receive an EIP, but did not address the treatment of a deceased individual (which is a separate taxable entity). As an EIP is effectively a tax refund (not income), this caused a gap in guidance regarding the eligibility of a deceased individual.

Due to the IRS's use of 2018 and 2019 tax returns in determining EIP eligibility, the receipt of EIPs by individuals who died in 2019 or early 2020 is understandable. Still, the lack of clear legal guidance as to the return (or retention) of an EIP received by such a decedent has been the cause of significant debate. Happily, this gap has been bridged by the Consolidated Appropriations Act, 2021 (which authorized the second EIP), and was effectively mirrored in the American Rescue Plan Act of 2021 (which authorized the third EIP).

Impact of Date of Death

In most situations, the issue will be decided by date of death (assuming that all other eligibility requirements are met). If an individual died prior to 1/1/2020, they will be ineligible for all three EIPs. If they survived to 1/1/2020, they will be eligible for the first and second EIP. If they survived to 1/1/2021, they will be eligible for all three EIPs. This is true, even if the individual was deceased by the time the EIP was actually received.

Why is this the case? Title II, subtitle B, section 2201 of the CARES Act served to amend title 26 of the U.S. Code (subtitle F, chapter 65, subchapter B) by inserting a brand-new section 6428, entitled "2020 Recovery Rebates for Individuals." However, it did not end there. Division N, title II, subtitle B, section 272 of the Consolidated Appropriations Act, 2021 (aka the "COVID-related Tax Relief Act of 2020") then inserted Section 6428A just after Section 6428. This was followed more recently by Title IX, part 4, subtitle G, part 1, section 9601 of the American Rescue Plan Act of 2021, which inserted Section 6428B just after Section 6428A.

In short, while section 6428 did not specifically address the eligibility of deceased individuals, section 6428A(f)(2)(A) provides for a specific cutoff date, stating in part that "any individual who was deceased before January 1, 2020, shall be treated for purposes of applying subsection (g) in the same manner as if the valid identification number of such person was not included on the return of tax for such taxable year." Subsection (g) then states in part that "[i]n the case of a return other than a joint return, the $600 amount in subsection (a)(1) shall be treated as being zero unless the taxpayer includes the valid identification number of the taxpayer on the return of tax for the taxable year", with subsection (a)(1) being the section that authorizes the second EIP of $600. Similar language appears in 6428B(g)(2)(B)(i), which provides for the specific cutoff date of January 1, 2021 (regarding the third EIP of $1,400).

In plainer English, an individual must have a valid identification number (aka, a Social Security Number) to be eligible for an EIP. If the individual survived to the date of 1/1/2020, they have a valid identification number for the 2020 taxable year and are therefore eligible for the second EIP. Though debate continues, it is this author's personal opinion that a decedent who survived to 1/1/2020 is also eligible for the first EIP, as *both* of the 2020 EIPs could be claimed as a recovery rebate credit on the decedent's 2020 tax return. (See next page.) If the individual survived to the date of 1/1/ 2021, they have a valid identification number for the 2021 taxable year and are therefore eligible for the third EIP.

(Continued on page 8)

Stimulus (from page 9)

Tax Refund

An EIP is simply a tax refund that has been paid in advance. It is not income. The tax refund itself is called a recovery rebate credit ("RRC"). An RRC can be claimed on the individual's 2020 Form 1040 or 1040-SR, so long as the individual has not *already* received their full RRC amount in the advance form of an EIP. Though the same calculation is used for both EIPs and RRCs, the underlying tax information the calculation is based on does differ. (Due to timing, the EIP calculations were based on tax returns from 2018 or 2019, whereas the RRC calculations are based on actual 2020 tax returns.)

As EIPs (and RRCs) are tax refunds, the provisions of 26 USC §6409, OAC 5160:1-2-02(C)(3), and OAC 5160:1-3-05.14(B)(2)(j) do apply. An EIP is not to be counted as income (at all), and is not to be counted as a resource (for a period of 12 months from receipt), when determining eligibility for benefits or assistance under any Federal program, or State or local program, financed in whole or in part with Federal funds. That includes the Supplemental Security Income (SSI) program and the Medicaid program.

Deceased at Time of Receipt

If an individual survived to the date of 1/1/2020, but died prior to actually receiving the first or second EIP, it has no impact on their eligibility. The corresponding RRC could still be claimed on the decedent's 2020 Form 1040 or 1040-SR, and the EIP is simply an advance payment of that RRC. This was confirmed in the 1040 and 1040-SR instructions for 2020 (regarding Line 30), which state in part:

> *The recovery rebate credit was paid out to eligible individuals in two rounds of advance payments called economic impact payments. The economic impact payments were based on your 2018 or 2019 tax year information. The recovery rebate credit is figured like the economic impact payments except that the credit eligibility and the credit amount are based on your 2020 tax year information. If you didn't receive the full amount of the recovery rebate credit as economic impact payments, you may be able to claim the recovery rebate credit on your 2020 Form 1040 or 1040-SR. Generally, you are eligible to claim the recovery rebate credit if in 2020 you were a U.S. citizen or U.S. resident alien, weren't a dependent of another taxpayer, and have a valid social security number. This includes someone who died in 2020, if you are preparing a return for that person.*

No Return of Excess EIP Required

If an individual received an EIP amount that exceeded the amount they should have received (based on their actual 2020 tax return), the IRS has provided the following explicit guidance as of 3/22/2021[1]:

> *No, there is no provision in the law that would require individuals who qualify for a payment based on their 2018 or 2019 tax returns, to pay back all or part of the payment, if based on the information reported on their 2020 tax returns, they no longer qualify for the payment or would qualify for a lesser amount of the payment.*

Nuances Apply

Lastly, it should be noted that nuances do apply to each of the legislative acts. This includes the eligibility of adult dependents, certain creditor protections, and special rules for members of the armed forces (regarding joint tax returns).

1. First Economic Impact Payment Questions and Answers, Q J3, https://www.irs.gov/newsroom/first-economic-impact-payment-questions-and-answers-topic-j-reconciling-on-your-2020-tax-return (accessed 3/30/2021).

Date of Death	EIP	Eligible?
Before 1/1/2020	Any EIP	No
On or after 1/1/2020	1st or 2nd EIP	Yes
On or after 1/1/2021	3rd EIP	Yes

Cases of Interest

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Important Note:
Dinn, Hochman & Potter, LLC has moved:
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Ross v. Ross, (11th Dist. 2020) 2018-Ohio-1244.
Attorney fees. In dissolution action where wife sought enforcement of husband's obligation to make payments pursuant to separation agreement, trial court did not err in awarding attorney fees to wife under R.C. 3105.73(B) but did err in its calculation of the fees related to preparation, filing and litigation of wife's motion since a portion of the fees arose from work performed prior to the filing of the motion.

Hanamura-Valashinas v. Transitions by Firenza, L.L.C., (11th Dist. 2020) 2020-Ohio-4887.
Fraudulent transfer. In plaintiffs-homeowners' breach of contract action against defendants-construction company and individuals, trial court did not err in awarding plaintiffs damages for fraudulent transfer where defendants transferred assets to their LLC from their corporation, which had entered into a construction agreement with plaintiffs, and under the Uniform Fraudulent Transfer Act, the LLC-transferee is not required to also be a debtor, so judgment was consistent with a valid claim under the Act, R.C. 1336.04(A).

Maas v. Maas, (1st Dist. 2020), 1st Appellate District
Fiduciary duty. In plaintiff's action for breach of fiduciary duty against his brothers and other outside directors of family business arising from disagreements over business expansion, charitable giving programs and alleged gross mismanagement by one brother, summary judgment in favor of defendants was not error since the company's failure to meet short-term profitability goals did not rise to the level of breach of fiduciary duty, plaintiff's evidence consisted of personal opinions and conclusions, and the court properly applied the business-judgment rule, R.C. 1701.59(F).

Am. Express Natl. Bank v. Bush, (11th Dist. 2020) 2020-Ohio-4424.
Credit card debt. In bank's action against cardholder for defaulting on credit card obligations, resulting in judgment for the bank, the trial court did not err in denying the cardholder's motion for relief from judgment where the cardmember agreement and account statements admitted into evidence showed that there was a binding agreement between the parties even in the absence of a signed agreement, and check payments to the account endorsed by cardholder are probative of her acquiescence to the cardmember agreement.

From Schraff Thomas Law:

Schraff Thomas Law is pleased to announce the addition of attorney Claudia Rose Brown to our team. Claudia is experienced in long term care and Medicaid planning and will primarily work out of our Willoughby Hills and Chagrin Falls offices.

Introducing Chardon Municipal Court's New Magistrate

Magistrate Justin Madden

Chardon Municipal Court,

jmadden@justinmaddenlaw.com

I like to say that my wife Anita, my son Connor, my son Brendan, and I graduated from Ohio Northern University Law School in 1993. I was the only one in law school, but we all had to work together to make it happen.

To show you what a small world it is, in my second year of law school, I argued in a Moot Court competition in Dayton. In the first round my opponent was Cincinnati Law School student, Lisa Carey. Lisa won. Three years later, we find ourselves in the Geauga Bar Association.

I am the one and only lawyer in both sides of our family, which makes for a lot of free legal advice. Graduating from law school with a wife, two infant sons, and a chunk of law school debt, I was ready to take any paying job anywhere I could find. I had immense luck and good fortune to have hit it off with the late Jack Liber in a chance job interview and became primarily his associate in what was then Spangenberg Shibley Traci Lancione & Liber. We practiced closely for twelve years together. Jack Liber was an extraordinary lawyer and mentor and emphasized the right way to be a practicing lawyer.

Approaching 28 years of litigation, I have been blessed to have opportunities to step outside a strictly litigation law practice to experience extra-curricular assignments in the law. Most recently, Judge Terri Stupica invited me to a terrific opportunity of serving as a part-time Magistrate.

Many trial lawyers wonder what it is like to handle a trial from the bench; I feel really fortunate to have the chance to find out. A magistrate merely recommends. I don't decide cases or make rulings—that's for our Judge. I make recommendations on Default Motions, Revivor Motions, and Summary Judgment Motions. I hold civil hearings in the Small Claims Division on Thursdays in the Municipal Court Room, and make recommendations for the Judge. Occasionally, I will conduct pretrials on the docket on Thursday afternoons. It has only been three months on the job but it is certainly interesting to step out of the advocate role and into the quasi-arbiter role.

So, having been asked to offer some suggestions from my short experience for this article, I would present three:

The first is to encourage any party, lay or professional, to make it clear in the opening of your case what it is that you want and why you should get what you want. Then, go ahead and make your record. Usually the Court's file for a hearing has a sparse description of the dispute and it can be difficult to appreciate what is important in the testimony if a party just launches into testimony and starts piling up exhibits.

The second suggestion, again to lay or professional participants, is please do not hesitate to acknowledge a weak or negative point if it's out there. Credibility is always a factor in how a case is received. When participants have the confidence in their case to call a weak point a weak point, the credibility you sustain in doing so will often embolden the strong points you make in your case.

And finally, as my former mentor taught me over and over, "less is more." Especially in the Small Claims Division, where it is not uncommon to have five or six hearings set in a morning, a focused, concise and direct presentation of your case will always be an asset in seeking the right outcome for your case.

"And the Survey Says…": Returning to In-Person Appellate Arguments

Judge Mary Jane Trapp,
Presiding & Administrative Judge, Ohio Court of Appeals, Eleventh Appellate District, mjtrapp@11theappealohio.us

To quote a popular game show host, "And the survey says…," an overwhelming number of appellate practitioners want to return to in-person oral arguments, and more than half want to return immediately or within the next month.

Early in the pandemic, the Eleventh District Court of Appeals, which serves the five most northeastern counties in Ohio, moved all oral arguments to the Zoom® platform. With almost a year's worth of experience conducting virtual oral arguments and the increasing number of fully vaccinated practitioners and judges, the court decided to survey frequent appellate practitioners in the district to better understand the efficacy of and preference for virtual oral argument and the Zoom® platform; the willingness to and timing of a return to in-person arguments; and whether practitioners would opt for a virtual oral argument if the court offered a hybrid of in-person and virtual appearances post-pandemic.

The survey was conducted via email during the week of March 15 through March 19, 2021. The survey was sent to members of each bar association in the five-county district, as well as the bar associations in Mahoning and Summit counties and to the litigation and appellate sections of the Cleveland Metropolitan Bar Association. Surveys were also directed to each prosecuting attorney and public defender office in the district, along with the Ohio Attorney General and the Ohio Public Defender's offices.

Sixty-seven responses were received, and as noted, the court learned that most appellate lawyers want to argue their cases in person. The observations from the respondents validated our court's decision to go to a videoconference platform at the start of the pandemic.

- 67% of the respondents preferred in-person oral arguments.
- 22% preferred remote arguments,
- 11% responded that their choice depended on the case.

Wishing **Linda Kostelnik** a Wonderful and Happy Retirement!

The New Leaf Program

Greg Potts

Geauga County Common Pleas Drug Court Probation Officer

It is no secret that many families have had to deal with the pain and destruction that comes with the ugly faces of Drug and Alcohol addictions. It can be a very dark place not only for those who are struggling with substance abuse, but also for their family, friends, and community members who get unfairly damaged along the way. How do we break the cycle of addiction?

One way the Geauga County Common Pleas Court is attempting to "break the cycle" of addiction, is by the implementation of the New Leaf Program. The New Leaf Program is Geauga County Common Pleas Court's drug court program which was started in 2019 by the honorable Judge Carolyn Paschke. The Mission is:

> *To help participants suffering from addiction and combined addiction and mental illness, by providing resources, support and requiring accountability; with the goals of assisting participants in becoming productive members of our community, reducing recidivism, providing treatment instead of incarceration where appropriate, and improving the safety of the public and participants.*

Over the past several months, there have been several articles written about the program, brief descriptions of how it is run, and the New Leaf Program even celebrated its first graduation. One of the key components to the success of this specialized drug court docket, is to make sure the local legal professionals are informed of who would make ideal participants for the program, the advantages of being in the New Leaf Program, and ultimately how does someone get into the program.

Who is an ideal candidate for the program? When looking at new participants for the program, the ideal candidate must have a substance abuse problem and have a pending felony criminal case or probation violation. Further, does the person have past involvements with substance abuse treatment/ counseling? Has their past substance abuse led to health concerns/ overdose? Has the person's substance abuse led to an inability to maintain consistent employment and establish positive pro-social relationships? For a person to be eligible for the New Leaf program, the participant must meet the criteria of being someone who is High Risk/ High Needs. The state of Ohio uses the Ohio Risk Assessment System (ORAS) to help determine risk level of individuals facing felony, criminal sentencings. This assessment is conducted prior to sentencing, providing vital information for courts to make appropriate sentencings. The earlier individuals can be identified with having High Risks/ High Needs and who are struggling with major substance abuse issue, the better the chances are for them to take hold of their recovery and engage to living a positive pro-social life. Offenses of Violence and Sex Offenses are not eligible for The New Leaf Program.

What makes the New Leaf program different than just having someone on Community Control alone? Community Control is an opportunity for individuals to have prison sentence suspended and instead of going to prison, have the opportunity to complete special conditions, pay back restitution, etc. Often times, individuals placed on community control, work with their probation officers, and are able to navigate back to being a productive member of our community without having to have much intervention. The New Leaf program is a much more intense form of supervision. Participants are required to adhere to a much more regulated drug screen schedule, attend regular drug court hearings, and engage regularly with a treatment team that will help to navigate the participant through an individualized treatment plan. The length of the program ranges from 16-24 months.

Although the New Leaf

(Continued on page 13)

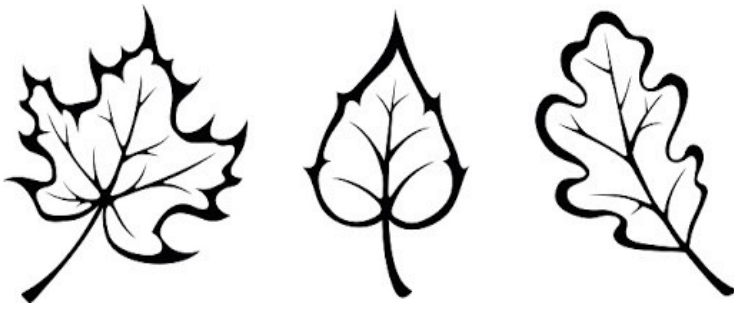
New Leaf (from page 12)

Program may sound like quite the commitment (and it is), the program also has the ability to help reduce so many barriers that may have hindered an individual's success in the past. Rent assistance, car repairs, financial assistance with education, utilities, medication, medical needs, gas cards/ transportation etc., have been areas the New Leaf Program has been able to assist the participants with thus far. The Court conducts weekly treatment team meetings to discuss rewards consequences and makes sure treatment needs are being addressed. The Program also provides a positive, encouraging environment that helps to motivate and build up the participants while simultaneously promoting a culture of honesty and accountability. The road to sobriety is not always a smooth one, and the New Leaf Program has built in a system to address consequences based on non-compliance of program expectations with the goal to ultimately work with the participant to re-engage with their individual and program goals.

How does one get linked to the New Leaf Program? First off, enrollment into the New Leaf program is a voluntary program. Our Common Pleas Court Judges will not sentence someone to complete the program unless they voluntarily wish to enter the program. While representing clients, if attorneys have a High Risk/ High Needs client struggling with substance abuse issues and could benefit from the New Leaf Program, the first step would be to submit an application to the program. Applications are in the courts of both Judge Paschke and Judge Ondrey, as well as at the Drug Court office located on the first floor of the Geauga County Court of Common Pleas. Handbooks about the program are also made available to the potential participant at the time of application and they information about the New Leaf Program can also be found on the Court's website. (https://co.geauga.oh.us/commonpleas/NewLeafProgram). Once an application is made, Special Dockets Coordinator Maureen Maruna, will set up an interview with the potential participant. After the interview is complete, the application will be brought to Judge Paschke and the treatment team to determine if the individual qualifies for the New Leaf Program. If the participant is accepted into the program, the next step is to present the request at the Defendant's sentencing hearing. The sentencing Judge (Paschke or Ondrey) will then have the option at this point to enroll the individual in the program.

Our legal community here in Geauga County is such an amazing resource and can ultimately add to the success of the New Leaf Program. Years of substance abuse can cause so much damage to our participants lives and once they have established a period of sobriety, they don't know where to start putting their lives back together. As the program continues to grow, we have identified many areas in which our legal community can help. We need to have legal partners who have the expertise that can help participants resolve credit/ debt issues, experienced with medical billing, or who may be willing to help with issues of foreclosure. Many times we have participants who don't know where to start with getting their license back, establishing visitation with children, establishing paternity, and navigating child support issues. A lot of our participants work manual labor jobs and need assistance with worker's compensation claims, establishing unemployment benefits, or even filing taxes. As you can see, it is not just criminal matters we thrive to help with, but we want help equip our participants in any way possible. Everyone deserves a life worth living and your services/ expertise might just be the help a participant needs to turn over a "New Leaf".

If you would like more information or want to help in anyway, please feel free to reach out to our drug court team.



Judge Carolyn Paschke
Special Docket Coordinator
Maureen Maruna
(440) 279-1874
Drug Court Probation
Officer Greg Potts
(440) 279-1871

Geauga Park District

John Oros

Executive Director, joros@geaugaparkdistrict.org

Greetings,

I hope you and your families are well. It's exciting for me to have this platform to talk to you, our local legal community, about your Geauga Park District. The Park District was established in 1961 under Chapter 1545 of the Ohio Revised Code by Geauga Probate Judge Robert B. Ford, who had been petitioned earlier that year by the Geauga League of Women Voters. In doing so, he established a system that now encompasses 27 parks and 10,614 acres. The statutes associated with 1545 further formulate our creation, formation and various provisions for operating. Allow me to touch on just a few portions of 1545 that define our success.

One of our keys to success is the commitment of our Board of Park Commissioners. Starting in 1962, Judge Ford appointed three commissioners under the provisions found in 1545.05 of the code. Fast forward to 2021 when Judge Timothy J. Grendell appoints five commissioners under the same statute. A search of Ohio parks established under ORC 1545 show some have three-person boards while others have five. Many of my peers speak to the commitment and diligence of their hardworking boards.

ORC 1545.05 also establishes criteria for commissioners. Before entering upon the performance of their duties, each commissioner must take an oath to perform those duties faithfully. Each also gives bond for faithful performance in the sum of $5,000, and proceeds to serve without compensation. In my time as Executive Director, I have been grateful for the time and commitment of commissioners both past and present. They serve selflessly for the betterment of your parks on behalf of all Geauga County residents.

Another key to success lies in 1545.09 and 1545.11 of the code, which distinguish your Geauga Park District from other public park and recreation agencies in the state. ORC 1545.09 and 1545.11 clearly define our makeup.

In 1545.09, commissioners are directed to adopt bylaws and rules as the board considers advisable for the preservation of good order within and adjacent to parks and reservations of land, and for the protection and preservation of the parks, parkways and other reservations of land under its jurisdiction and control, and of property and natural life therein.

In 1545.11, commissioners may acquire lands either within or without the Park District for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged lands and swamplands, and to those ends may create parks, parkways, forest reservations and other reservations, and afforest, develop, improve, protect and promote the use of the same in such manner as they deem conducive to the general welfare.

Both sections are lengthy descriptions, and for good reason. As an organization, our mission is to preserve, conserve and protect the natural features of Geauga County and to provide outdoor recreational experiences to our residents of every age, every ability and at all times of the year. Placed alongside the foresight of Ohio legislators past, it is rewarding to see our mission and bylaws aligns so closely to the 1545 statute.

As your Executive Director for the past seven years, I have repeatedly touted accessibility to our mission. Access to nature and recreational opportunities is paramount. It is key to our success. I'm so grateful to work for an organization that serves all its residents through such well-crafted statutes.

The Board of Park Commissioners, park staff and I consider it a privilege to provide you with some of the very best parks in the business. I hope you and your families are able to enjoy your Geauga parks now and for many years to come. Enjoy the wonder that is your Geauga Park District.

John Oros, can be reached directly at 440-279-0833.

www.geaugaparkdistrict.org

My Trip to NYC in a "Post-COVID?" World: Can the Legalization of Marijuana Really Turn Things Around for New York?

Robin L. Stanley
Ibold & O'Brien, rstanley@peteribold.com

About three weeks ago, I headed to New York City for a work/vacation trip. April 18-21, 2021 turned into a great time to visit New York City, because the city had just opened up after COVID. We were able to see sights and visit restaurants without lines and with very few other people.

For less than $110.00 a night, we were able to book a room in China Town near Little Italy with a full city view including both the new World Trade Center, the Empire State Building, the Chrysler Building and all buildings in between.

On Monday, we walked between 15-16 miles. We walked past the Probate Court and the federal courts, and Wall Street, took the ferry to the Statute of Liberty and Ellis Island, toured the 911 Memorial Museum, and came upon the African Burial Ground National Monument.

Right next to our hotel, we were able to enjoy dinner at a Chinese restaurant. After dinner, we walked down and up to the first stone tower of the Brooklyn Bridge, took the subway to Grand Central Station, and walked around Times Square.

The next day, we took the subway to Union Station, Madison Square Gardens and walked to walked on the Highline. We visited Chelsea Market, walked down Fifth Avenue to Central Park, took a carriage ride around the park, drawn by a horse from Amish in Pennsylvania and with a guide from Ireland. Later, we headed to Little Italy for dinner, two blocks from our hotel. Both days, we were able to experience all the diversity and normality that New York City has to offer, but on a smaller than usual scale.

Everywhere we went, we asked how people were affected by COVID-19. It was clear that many people were still working from home. I would estimate there were only about one third of the amount of people that would normally be walking around downtown. The subway wasn't crowded, and when we went into the Main Concourse of Grand Central Station, we were the only people there besides the ticket-sellers at around 10:00 pm.

Museums and attractions were only open part of the week. None of the churches were open, so you had to be sure to check ahead and plan accordingly.

On our carriage ride of Central Park, our driver told us on

(Continued on page 16)

NYC (from page 15)

a normal day, he would do 10-15 rides a day. We were his second ride, and we were there at 3 p.m.

Times Square was minimally crowded. This, of course, was probably due to the closures of everything on Broadway. The 911 Memorial Museum offered free entry for people on Mondays.

Some places were under construction like Rockefeller Center and the stone towers at the Brooklyn Bridge, but with no crowds, you could see things more closely and easily.

Overall, we found that the restaurants appeared to be the hardest hurt by COVID. Restaurants on side-streets were begging people to come into their establishments. Some of them were still only open on weekends. The interior areas had just re-opened. Most restaurants on the side-streets had outdoor "huts" with dividers set up to seat more people outside. We were told that on weekends, they added tables in the streets, and blocked off the side streets. Surprisingly, they didn't seem to be doing a lot of take-out orders either.

The Italian restaurant where we ate only had about 4 tables in the two hours that we were there. It was almost hard to believe that we were in New York City. The owner told us that he closed down for two months in the winter as did almost all of the restaurants on his block. Lucky for him, he and his father had an apartment under rent-control for which they only paid about $200.00 per month, while their neighbors above them paid $6000.00 per month. They tried to keep paying their employees even when the restaurant was closed,

(Continued on page 17)

NYC (from page 16)

because they didn't want to lose their employees. They also found that many people didn't want to return to work because they made more money on unemployment by staying home...those who were eligible for unemployment. In NYC, unemployment is not available to many due to lack of immigration documentation.

All of the people and many of the statutes wore masks, a sight that was certainly strange for a trip to NYC, but not in these times. (Luckily, Lady Liberty did not have one). The weather for us could not be better, and the prices were fantastic. The hotel staff, the employees at the restaurants we visited, and the workers at all of the attractions we enjoyed were friendly and really bent over backwards to make our trip enjoyable (which isn't always the case in NYC). It was the best trip! I would highly recommend visiting before people realize that New York has just lifted all or most of its COVID restrictions. Already the prices are going up, but you can lock them in now at rates that are reasonable.

Marijuana

As we were walking along, on nearly every street, the scent of marijuana wafted through the air. We discovered that New York had just legalized recreational use of marijuana and certain New Yorkers definitely took advantage of it, especially the homeless, particularly ones with mental illness issues. They were all over searching for used cigarettes on the chance that one was filled with weed. Often, it appeared that they were successful. The good thing was that they really did not seem interested in tourists and were not aggressive, though I am sure COVID has affected their income, too.

When I returned home, I looked more into the legalization of marijuana in New York. On March 31, 2021, Governor Andrew Cuomo signed a bill passed by the New York legislature to legalize recreational marijuana in New York state for adults over 21. New York is the fifteen state, along with the District of Columbia, to have legalized the drug for recreational use.

Gov. Cuomo tweeted, "I just signed legislation legalizing adult-use cannabis. This bill creates automatic expungement of previous marijuana convictions that would not be legal. This is a historic day."

He also said in a statement, "For too long the prohibition of cannabis disproportionately targeted communities of color with

(Continued on page 13)

NYC (from page 17)

harsh prison sentences and after years of hard work, this landmark legislation provides justice for long-marginalized communities, embraces a new industry that will grow the economy, and establishes substantial safety guards for the public."

Under the new law, the smell of marijuana is no longer probably cause for a search by law enforcement. Marijuana is prohibited among drivers, and the state plans to research methodologies and technologies for the detection of cannabis-impaired driving and come up with a test for the presence of cannabis in drivers.

It is basically legal to smoke marijuana anywhere in public wherever tobacco smoking is allowed, but not inside cars, schools, or workplaces. Places that do not want marijuana usage would place signs stating "no smoking of any kind" in their windows. These were also popping up in parks across New York.

The legislation allows for possession of up to 3 ounces of cannabis and 24 grams of cannabis concentrate. Separately, in 2022, it allows for the growth of up to six plants (3 mature and 3 immature) and/or up to 12 plants per household (6 mature/6 immature).

The legalization of the plant is effective immediately, but legal recreational sales are not expected to begin for one or two years, so it was clear that the marijuana being used was either purchased elsewhere or illegally. While use of cannabis in public may be subject to certain civil penalties, the police showed no interest in dealing with marijuana users.

CNN shared: The NYPD has instructed officers not to stop and arrest people if they see them smoking pot in public or if they smell it. Under the new policy, officers can only search vehicles if a driver appears to be under the influence of marijuana, and there is probably cause to believe that they have been smoking it, or if the driver is seen smoking or vaping marijuana while operating or inside a vehicle. However, the trunk may not be searched unless the officer develops separate probably cause to believe the trunk contains evidence of a crime. New guidance also states that officers "may not approach, stop or detain a parolee based on their use or possession of lawful amounts of marijuana unless the terms of their parole specifically prohibit it."

Through the bill, an Office of Cannabis Management was created to be an independent agency operating with the New York State Liquor Authority. The agency will be in charge of regulating the recreational cannabis market and the existing medical cannabis pro-

(Continued on page 19)

NYC (from page 18)

gram. Medical marijuana was legalized in 2014. The legislation also sets up an equity program to provide loans and grants to people including small farmers to legally grow marijuana.

CNBC shared the following statistics: Black and Latino New Yorkers combined made up 94% of marijuana-related arrests by the New York Police Department in 2020, even though the city's statistics show that the proportion of white New Yorkers using marijuana is considerably higher than that of either Latino or Black residents. According to a New York City health department survey, 24% of white residents reported using marijuana, compared with 14% of Black residents and 12% of Latino residents, over the two-year period of 2015-2016.

Under this new legislation, people with certain marijuana-related convictions for activity that is no longer criminalized will have their records automatically expunged. This had occurred previously in New York in 2019. More than 150,000 people with some low-level marijuana convictions were cleared from their records.

An office in the New York court system, the Office of Court Administration, is responsible for sorting through the tens of thousands of convictions eligible for expungement. The process is considered automatic, because the convicted person does not need to file any petition to start the process, but the changes won't be immediate. A team of programmers and analysts (not lawyers!) are tasked with finding each record, and the new law gives them two years to complete the job. The office is aware of at least 108,000 convictions that have a top charge of marijuana and they have yet to count those where marijuana is not the top charge, but estimates total number of eligible convictions could add up to more than 150,000.

Another crime eligible for expungement is what is known as a "controlled substance" possession, but in cases that involve that charge, the court record system does not specify which drug was involved, so those cases have not been counted, and the office does not yet know how they will find and expunge those records.

It is my opinion that the real reason for legalization was to bring more funds to New York and to try to pull up the economy, in light of COVID-19. The legalization is expected to eventually rake in billions of dollars in revenue for the state and for New York City in particular, which has a 13% tax (9% state and 4% local). The legislation also includes a potency tax of as much as 3 cents per milligram of THC, the natural psychoactive component of cannabis that delivers the plant's high. Cuomo's office estimated that annual tax revenues from legal weed sales could bring upwards of 350 million a year and 60,000 jobs to the state when the industry is fully established.

Over the next few months, state officials will be writing regulations that will affect what kind of marijuana can be purchased, where it can be consumed, and who can sell it. For now, it seems to be a free-for-all!

At Left: From Wikipedia: *William Tecumseh Sherman*, also known as the Sherman Memorial, is a sculpture group honoring William Tecumseh Sherman (from Ohio), created by Augustus Saint-Gaudens and located at Grand Army Plaza in Manhattan, New York. Cast in 1902 and dedicated on May 30, 1903, the gilded-bronze monument consists of an equestrian statue of Sherman and an accompanying statue, *Victory*, an allegorical female figure of the Greek goddess Nike. The statues are set on a Stony Creek granite pedestal designed by the architect Charles Follen McKim.

Court Appointment Announcements

To the Geauga County Bar Association:
In the recent Ohio Supreme Court opinion *In re Adoption of Y.E.F.*, 2020-Ohio-6785, indigent parents who are facing the termination of their parental rights in an adoption proceeding are entitled to appointed counsel. Due to this recent holding, the Geauga County Probate Court is seeking attorneys to add to their appointed counsel list for parents who are facing termination of their parental rights in adoption proceedings.
If you are interested in being added to this appointed counsel list for adoption proceedings, please **contact *Michael Hurst at 440-279-2188.***

From the Court of Common Pleas
County of Ashtabula

Geauga County Bar Association
P.O. Box 750
Chardon, OH 44024

Dear Colleagues,

We would like to invite all members of the Geauga County Bar Association who may be willing to accept appointments as counsel for criminal matters, to complete the Court Appointed Counsel Qualifications Form and return it to our Court Administrative Assistant, Wendy Stainfield. The current rate of pay for attorneys accepting felony court appointments is $50/hour out of court and $60/hour in court. In order to be added to our list, we requires that you review Ohio Administrative Code 120-1-10, and inform the Court what level of offenses you are able to handle based on your substantial compliance with OAS 120-1-10. The code can be found by going to the following link: http://codes.ohio.gov/oac/120-1-10v1.

Upon receipt and approval of any request, your name will be added to a rotating court appointment list. The Public Defender's Office will continue to be the first appointed as counsel, absent any conflict of interest.

Thank you,
Kathleen Thompson,
Court Administrator

Geauga County Bar Association

Announcements

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

Or Call:
440-286-7160

Upcoming Executive Committee Meetings
2nd Wednesday of each month at 12:00 noon
Next Meetings:
May 12, June 9
at Chardon Municipal Court
R.S.V.P. to the G.C.B.A. Secretary

Upcoming General Meetings
4th Wednesday of each month at 12:00
Next Meetings:
May 26
Ice Cream Social on the Chardon Square
**Note this is early!
R.S.V.P. to the G.C.B.A. Secretary

Condolences:

The Geauga Bar Association extends their condolences to Bar member, **Lisa Carey** on the loss of her mother, Lila June Bungard, and **Judge Carolyn Paschke** on the loss of her father, Donald Paschke.
Additionally, the Geauga Bar Association recognizes with sadness the loss of past sheriff, Daniel McClelland, and father of Bar member, **Kelly Slattery.**

Welcome, New Members:

Carolyn Brakey, *Brakey Law LLC*
Austin Enger,
Nager, Romaine & Schneibert Co., L.P.A.
Regina Frank,
Geauga County Prosecutor's Office
Ashley Kirk, *Thrasher Dinsmore & Dolan*
Ashely Lockemer
Kyleigh Weinfurtner,
Zashin & Rich Co., L.P.A.
April Woodward,
Law Office of April L. Woodward, LLC

We look forward to getting to know you more at an upcoming meeting!

Geauga County Bar Association

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Ipso Jure Deadlines:

Mark your calendars and turn in an article!

June 15, 2021

September 15, 2021

Quick Reminders

Next Executive Committee Meeting:

May 12 at 12:00 noon

At Chardon Municipal Court

Next General Meeting:

May 26 at 12:00 noon

Ice Cream Social

Place: Chardon Square

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