

# MEDINA COUNTY BAR ASSOCIATION

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Medina County Bar Association  
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1<sup>st</sup> Quarter 2017



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## Upcoming Events

- April 6:** Community Legal Aid Open House
- April 11:** Medina County Court of Common Pleas Seminar regarding the Mental Health Intervention Program
- May 4:** Medina County Domestic Relations Court Guardian Ad Litem Seminar
- May 5:** Annual Law Day Luncheon
- June 9:** Second Quarter MCBA Meeting
- June 14:** Bankers v. Barristers Blood Drive
- June 15:** Deadline for Submissions for 2nd Quarter Newsletter

## Message from our President: Alanna Arnold

Dear Members of the Bar,

The Executive Committee has met and is busy with new and traditional projects. Please email me at [aswarnold@gmail.com](mailto:aswarnold@gmail.com) if you would like for us to discuss any ideas that you have for a project for the Bar Association or if you would like to become more involved. Our **Vice President Michael Ash** is planning the Law Day luncheon and the annual essay scholarship contest. Our **President-Elect Brian Kerns** is assisting Michael. We are hoping to institute frequent CLEs sponsored by our committees. Be thinking of topics, venues, and possible presenters.

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## Medina County Bar Association

### Our 2017 Executive Team:

- President - Alanna Arnold, Esq.  
President-Elect – Brian Kerns, Esq.  
Vice President - Michael Ash, Esq.  
Secretary – Monica Russell, Esq.  
Treasurer – Bradley Proudfoot, Esq.  
  
Executive Secretary - MaryAnn Lapina  
Newsletter Editor – Monica Russell, Esq.

*Continued from Page 1, Message from Our President*

**Secretary Monica Russell** is not only taking notes at executive committee meetings, but she is also our newsletter editor. We are asking each committee to submit one article or pass on any changes in rules or statutes in your committee's area of law to Monica this year for inclusion in the quarterly newsletter. If anyone else is interested in writing an article, contact Monica at [russell@ccj.com](mailto:russell@ccj.com). Young lawyer **Treasurer Brad Proudfoot** is keeping the financial books for the Bar Association and Chairing the Bar's Young Lawyers Division. The Young Lawyers are very active and will take the lead on some activities that will include all members of the Bar.

Other activities this year will or may include the following: We will reinstate a welcome cocktail hour for new bar admittees. We will have our Law Day luncheon on May 5th and introduce the winner of our \$5,000 scholarship. The Young Lawyers Division is planning a mini-golf outing in June. In the next newsletter, there will be information about a summer event for families. By partnering with an appropriate social agency, we hope to have law firms/attorneys act as Secret Santas at the end of the year to fulfill some otherwise unmet wishes. And, we'll have our traditional holiday party at the end of the year.

Please check out our new Facebook page. Make comments. Ask legal questions. Start discussions. Be interactive. Share information. Like the Association's page so you will get the most recent information about CLEs and upcoming events. Finally, all committees and sections are expected to meet at least once or twice this year, to contribute to the newsletter, and to make a very short report at the year-end meeting. Some committees have not met for years and may be disbanded as they will be deemed to be unnecessary.

We hope to make this an active year so that we can get more of you involved while being informative and occasionally having fun. We hope you'll take time from your busy schedule to join us.

## **Character & Fitness: Rob Skidmore, Chair**

The character and fitness committee consists of approximately 16 local attorneys who meet in panels of 2 or 3 to review each applicant before they sit for the bar examination. The members of this committee take their roles very seriously, often giving as much as 2 hours or more for a single interview. It's an essential role that the local bar association helps to assist the Ohio Supreme Court with this vetting process. There will be a CLE this fall put on by the Ohio Supreme Court's office of bar admissions. When we have that information, I'll be sure to forward to Pres. Alanna Arnold for potential new members of the committee as well as existing members. Typically the recent Ohio Supreme Court decisions with regard to admissions are reviewed at this seminar with bar admission committees across the entire State of Ohio.

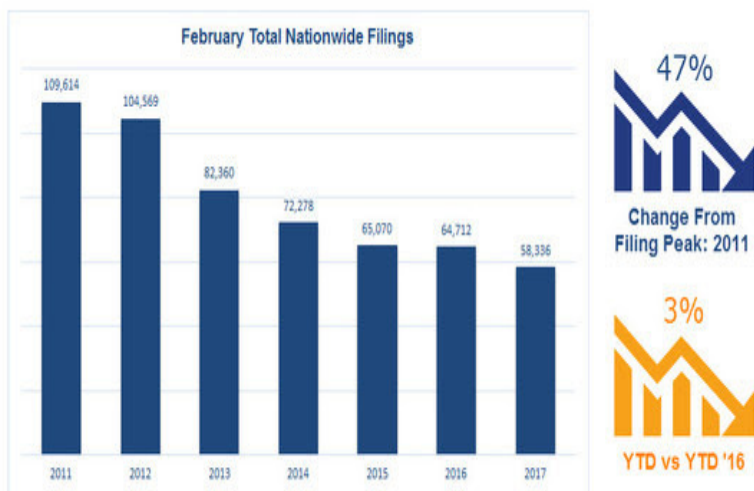
In fulfilling its obligations for investigating whether an applicant possesses the requisite character, fitness and moral qualifications for admission to the practice of law, the Board of Commissioners on Character and Fitness considers the following to be essential eligibility requirements for the practice of law: 1. The cognitive capacity to learn, to recall what has been learned, to reason and to analyze; 2. The ability to communicate clearly with clients, attorneys, courts, and others; 3. The ability to exercise good judgment in conducting one's professional business; 4. The ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations; 5. The ability to conduct oneself with respect for and in accordance with the law and the Ohio Rules of Professional Conduct; 6. The ability to avoid acts that exhibit disregard for the health, safety and welfare of others; 7. The ability to conduct oneself diligently and reliably in fulfilling all obligations to clients, attorneys, courts, and others; 8. The ability to use honesty and good judgment in financial dealings on behalf of oneself, clients, and others; 9. The ability to comply with deadlines and time constraints; and 10. The ability to conduct oneself professionally and in a manner that engenders respect for the law and the profession.

## Bankruptcy: Lisa Barbacci, Chair

As chairperson of the bankruptcy section I am fortunate to know the fine members of the Medina Bar Association who practice bankruptcy law. I am happy to share the following bankruptcy news.

### Bankruptcy Filings

Bankruptcy filings are in decline and have been for the past several years. The February 2017 bankruptcy filings continue the trend as shown below:



Source: Monthly Bankruptcy Statistics by AACER™ / Epiqsystems.com

### Bankruptcy Judge Pat E. Morgenstern-Clarren to retire

Judge Morgenstern-Clarren presides at the Bankruptcy Court in Cleveland and will retire effective May 1, 2017. Judge Morgenstern-Clarren has served since 1995 and will be greatly missed. This position will not be filled due to the low bankruptcy case filings.

Judge Morgenstern-Clarren recently wrote a memorandum called “(One Last Set of) Tips” for the bankruptcy practitioner. The memo provides practical tips from the day you meet a potential client to the day of trial. Her tips for the solo practitioner include “You do not have to take every case that comes through the door. And in fact you shouldn’t take every case.”

She warns to beware of a potential client who has:

- 1) unreasonable expectations;
- 2) wants revenge;

- 3) has had two or more lawyers on the same matter before coming to you; and
- 4) has an imminent deadline that will force you to make rushed decisions.

If you encounter this situation and feel there may be problems with the case, there likely will be. She suggests you decline the case and put it in writing.

Here is the link to read the full memo. <https://www.ohnb.uscourts.gov/content/one-last-set-tips>

### Bankruptcy Seminars

Here are some upcoming bankruptcy seminars members may be interested in:

**The 21st White Williams Bankruptcy Seminar on April 21, 2017 - in Hartville, Ohio and The William J. O’Neill Bankruptcy Seminar on May 3 and 4, 2017 - in Cleveland, Ohio.**

Both seminars address interesting topics in bankruptcy and commercial law and have excellent speakers.

For more information please visit: [www.akronbar.org/calendar](http://www.akronbar.org/calendar) and [www.clemetrobar.org](http://www.clemetrobar.org) and click "View our full calendar"

Thanks for this opportunity to share some bankruptcy information. Please remember to contact me with any bankruptcy questions you may have – my office phone is 330-722-4488.

*Lisa M. Barbacci practices in Medina and is a Chapter 7 bankruptcy trustee appointed in the Canton Bankruptcy Court. She also served as law clerk to the Honorable Harold F. White, U.S. Bankruptcy Judge in Akron, Ohio (deceased) and the Honorable Arthur I. Harris, U.S. Bankruptcy Judge in Cleveland, Ohio.*



## Complex Litigation: Patricia A. Walker

### ***Help Your Clients Avoid A Trademark Scam***

Many U.S. Trademark Registration owners have received urgent demands for money from the U.S. Trademark Compliance Bureau, the International Trademark Office, Trademark Renewal Service, Patent & Trademark Agency LLC, TM Publisher (Register of Protected Trademarks) or similar dubious entities. These letters are similar to the attached at the end of this newsletter.

You can safely tell your clients to ignore such letters. These scam letters ask for money because the trademark will expire soon or because the trademark needs to be included in an important registry. Do not believe it. The U.S. Patent and Trademark Office just recently started to send out reminder letters about upcoming maintenance requirements, but legitimate letters from the U.S. Patent and Trademark Office do not ask for money.

Be aware of the facts. Filings periodically must be made to keep a U.S. Trademark Registration in force. A Declaration of Use must be filed to maintain a U.S. Trademark Registration between the 5th and 6th year after a Trademark Registration is issued. If the trademark validity has not been challenged, a Declaration of Incontestability may be filed at the same time to increase the strength of the mark covered by the Registration. Between the 9th and 10th year after the Trademark Registration is issued, another filing must be made to keep the Registration in force. Another Declaration of Use and a Request for Renewal must also be filed. Thereafter, in order to keep the Registration in effect, every 10 years another Declaration of Use and Request for Renewal must be filed to keep the Registration in effect. This may go on indefinitely as long as the trademark is in use.

What if the scam notice offers to file the Declaration of Use, Declaration of Incontestability and/or Request for Renewal? It is best that your client not employ these scam artists because:

1. Their fees are usually much higher than what trademark attorneys charge;
2. You are not sure they will correctly complete the necessary Trademark Office paperwork; and
3. Generally the forms they file are of dubious legal value as they often falsely represent that their agent is an officer or employee of your client.

Do not let your clients be ripped off. When in doubt, contact a trademark lawyer.

*Pat Walker was the first woman President of the Medina County Bar Association. A trademark lawyer, she is past Chair of the Ohio State Bar Association Intellectual Property Law Section and currently co-editor of its newsletter. She is also a member of the International Trademark Association.*

## Community Legal Aid Open House

Community Legal Aid is hosting an Open House on **Thursday, April 6, 2017 from 4:30 p.m. to 6:30 p.m.** at 50 South Main Street, 8th Floor, Akron, Ohio 44308. CLA will introduce the community to their new Executive Director. The event is free and will feature hors d'oeuvres, wine & beer, a welcome by the Board President, and a brief presentation from the new ED. Most of the time will be open for networking, meeting staff, and seeing their office space. People can RSVP online or by emailing [jconnolly@communitylegalaid.org](mailto:jconnolly@communitylegalaid.org).

## Certified Grievance Committee: Melissa J. Piszczek

Hello all, my name is Melissa J. Piszczek. I am honored and privileged to be the Chairwoman of the Medina County Certified Grievance Committee for the 2017-2018 term. I'd like to direct attorneys to the following helpful resources concerning attorney ethics:

1. Forms and information relating to filing a Grievance with the Medina County Certified Grievance Committee can be found at: [www.medinabar.org](http://www.medinabar.org).

2. Instead of contacting the Medina County Certified Grievance Committee regarding a grievance you can also contact the Board of Professional Conduct: <http://www.supremecourt.ohio.gov/Boards/BOC/default.aspx>

This site also contains useful information such as:

- Advisory Opinions
- Ethics Guides
- OLAP
- Financial Disclosure
- Ethics and Conduct rules for Judges
- Ethics and Conduct Rules for Lawyers
- Ohio Disciplinary Decisions
- Ohio Disciplinary Processes

If you have any questions regarding this information or related issues, please feel free to contact the Medina County Certified Grievance Committee. We are here to help.

*Melissa Piszczek graduated Summa Cum Laude from Kent State University in 2002 with a degree in Justice Studies. From 2003 through 2012, was a Community Service Supervisor for the Medina County Juvenile Court. In this capacity, Ms. Piszczek supervised unruly and delinquent youth as they performed community service projects for nonprofit and governmental agencies. In 2004, Ms. Piszczek became the Senior Community Service Supervisor of the Community Service Program. In 2012, Ms. Piszczek graduated from the University of Akron School of Law. In 2013, Ms. Piszczek became a Member of the Ohio Bar and a member of the U.S. District Court, Northern District of Ohio. She worked as an associate attorney in her father's law firm in Medina where she concentrated heavily in domestic relations. She has served as Assistant Bar Counsel for the Medina County Certified Grievance Committee. In 2016, Ms. Piszczek began working as an Assistant Prosecuting Attorney for the Wayne County Prosecutor's Office in the Criminal Division where she prosecutes misdemeanor criminal and traffic offenses. In Ms. Piszczek's free time, she enjoys watching movies, reading, shopping and spending time with family, friends and her dog, Hershey.*

## Real Property: Monica E. Russell, Chair

Several new statutes have been passed in Ohio in the last year which affect real estate.

1. **Curative Statute:** Old R.C. 5301.07 provided for an automatic "cure" of certain defects related to the acknowledgement of recorded real property instruments if the same had been of record for 21 years or more. S.B. 257 revised this statute to reduce the 21 years to 4 years. Amended 5301.07 also provides for a rebuttable presumption of the validity of recorded instruments and constructive notice of recorded instruments, regardless of "any defect in the making, execution or acknowledgment" in the instrument.

2. **Foreclosure Proceedings:** Sub. H.B. No. 390 provides for numerous changes to Ohio's foreclosure laws. It includes (a) a method for expedited foreclosure of vacant and abandoned residential property; (b) a procedure to appoint a "private selling officer" to sell foreclosed property as an alternative to the county sheriff; (c) establishment of a method for online sheriff sales; (d) a procedure for automatically setting a property for a second sale if the first sale is unsuccessful, and potentially selling the property for less than 2/3 the appraised value at subsequent sales; and (e) a method by which the county prosecutor can order a sheriff sale if a decree of foreclosure has not been executed on within twelve months.

3. **Good Funds** (R.C. 1349.21): H.B. 463 created stricter controls over the types of funds title agents can accept in escrow. An escrow agent can only accept up to \$1,000 aggregate in cash or personal checks for a residential property sale. Any amounts over \$1,000 have to be delivered to the escrow agent by wire transfer. Potential problem: The new rules appear to prohibit intra-bank electronic transfers (for example: when the escrow company and the lender or seller have accounts at the same bank, the bank can't just transfer funds from one account to the other).

*Monica Russell is of counsel at Critchfield, Critchfield & Johnston and practices primarily in the areas of real estate and civil litigation. Ms. Russell can be reached at [russell@ccj.com](mailto:russell@ccj.com) and at @OhioPropertyLaw.*



## VIEWS FROM THE BENCH



### Judge Joyce Kimbler

Medina County Court of Common Pleas

On **April 11, 2017** the Medina County Court of Common Pleas will be hosting a continuing legal education opportunity focused on mental health services available to defendants in Medina County. Speakers will include: Gail Houk of Alternative Paths, Attorney David Brown, Judge Christopher Collier, and Judge Joyce V. Kimbler. The course will be held in Courtroom #2 from 10:00 a.m. to 12:35 p.m. It will provide 2.5 hours of CLE credit. Lunch will be provided. There is no charge, but an RSVP to Atty. Michael Callow at [attorneymikecallow@gmail.com](mailto:attorneymikecallow@gmail.com) to allow planning for the lunch is appreciated.

Having worked with individuals in my court who participate in our Mental Health Intervention Program, I have had the joy of witnessing the positive reality of recovery. Individuals who embrace recovery achieve improved mental and physical health, as well as form stronger relationships with their family, friends and neighbors. We need to make more people feel like recovery is possible.

The Mental Health Intervention Program is offered to persons who qualify for mental health services and/or specialized drug treatment programming while on community control supervision through the Medina County Adult Probation Department. This volunteer program was developed to deal with the underlying cause of some of the crimes committed in our community. By connecting individuals whose offenses were committed, directly or indirectly, as a result of their mental illness or addiction with needed treatment and other services, we hope to help them make a permanent and positive change in their lives.

Mental illness and substance abuse plays a role in many crimes and impacts countless lives. A community is a sum of all its members, and by helping Medina County residents get the treatment they need to get back on the right path to a stable, fulfilling and law-abiding life, we are enhancing the safety and wellbeing of Medina County as a whole.

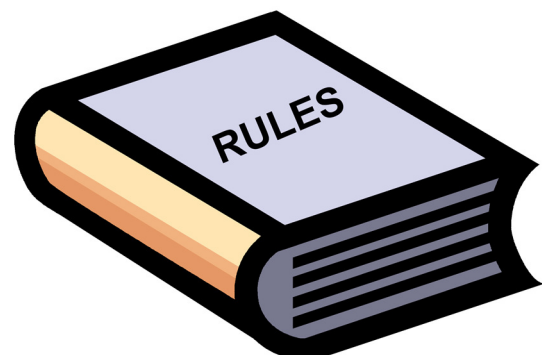
### Judge Christopher Collier

Medina County Court of Common Pleas

*Amendments and Proposed Updates to the Local Rules of the Medina County Court of Common Pleas -General Division*

The local rules for the General Division of the Medina County Court of Common Pleas were last amended on January 1, 2009. Local rules of practice promote the use of certain procedures and facilitate the expeditious disposition of cases. The Court is not permitted to adopt any local rule that is inconsistent with rules promulgated by the Ohio Supreme Court. It is important that the Court periodically reviews the local rules to determine if revisions are appropriate. Given recent amendments to the civil and criminal rules, as well as statutory amendments regarding the foreclosure Sheriff's sale process, the Court has determined that some revisions are in fact appropriate at this time.

The Court will be accepting written suggestions and proposed changes to the local rules from members of the Medina County Bar Association, as well as attorneys that practice before the Court. Any suggestions or proposed changes to the local rules should be submitted in writing to Magistrate Keith Brenstuhl or Magistrate Matthew Razavi on or before **April 28, 2017**. The Court will then publish and provide appropriate notice of any proposed changes to the local rules. Members of the Medina County Bar Association and local practicing attorneys will then have a period of time to comment on the proposed local rule changes pursuant to Sup.R. 5(A)(2).



## Judge Kevin Dunn

Medina County Court of Common Pleas, Juvenile and Probate Division

### ***New Law Seeking to Decriminalize Truancy Charges in Ohio Goes into Effect in April***

*by Magistrate Susana B. Lewis, Medina County Probate & Juvenile Court*

House Bill 410 will bring forth sweeping changes in how schools and courts respond to truancy issues in Ohio. The new changes will eliminate Chronic Truancy charges, modify Habitual Truancy laws, and require schools to implement absence intervention programs prior to court filing.

In 2016, approximately 96 Truancy cases were filed in the Medina County Juvenile Court. Of those cases, 31 were filed as Unruly/Habitual Truancy charges and 65 as Delinquency/Chronic Truancies.

A habitual truant is defined as being absent from school without a legitimate excuse for five or more consecutive days, seven or more school days in one school month, or 12 or more school days in one year. The new law changes the definition of a habitual truant as one who is absent without legitimate excuse for 30 or more consecutive hours, 42 or more hours in one school month, or 72 or more hours in a school year. A Chronic Truancy may be charged if a child is unexcused for seven or more consecutive school days, 10 or more school days in one school month, or 15 or more school days in a school year.

The definition of Chronic Truancy is contained in R.C 2152(F) which defines a Delinquent Child as any child, ...except a juvenile traffic offender, who violates any law of this state...that would be an offense if committed by an adult...and includes...*any child who is a chronic truant*. As you can see, chronic truancies, under existing law, are lumped in by definition, with all other juvenile/criminal offenses.

Delinquency charges carry the possibility of detention time, which may have been the original purpose of the distinction in the two charges. The new law, which goes into effect on April 6, 2017, repeals the Delinquency Chronic Truancy designation entirely and seeks to “decriminalize” the act of not going to school. The new Habitual Truancy law has been modified to require schools to address absences prior to court filings through the development of individualized absence intervention plans and strategies. These strategies are aimed to provide services to children struggling with school attendance prior to being charged in court.

Even when charges are filed in court, under the revised Habitual Truancy law, every effort must be made by the court to divert youth out of the juvenile justice system and consider the Complaint only as a matter of last resort. Once Complaints are filed in court, children who violate court orders could still be subject to juvenile court alternatives and even serve time in juvenile detention for a violation of a court order.

Efforts are in full swing to implement the truancy diversion portion of the Medina County Juvenile Family Resource Court program (FRC-T). With the increased availability of online schooling, and school in-house digital programs such as Wadsworth High School’s Grizzly Digital Academy among others, children and families today have many more options than they have ever had before. Although House Bill 410 passed by an overwhelming majority, some still believe that court intervention and the prospect of juvenile detention time for failing to go to school is the best method of getting kids back to school. What do you think? Whatever your opinion, we can all agree that the goal is for all children to obtain the benefit of a solid education and live productive, law-abiding lives.

Click on the link below to view House Bill 410 in its entirety. <https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA131-HB-410>



## VIEWS FROM THE BENCH



### Judge Mary R. Kovack

Medina County Court of Common Pleas, Domestic Relations Division

Dear Members of the Bar:

I recently received the following inquiry/suggestion from a member of the local bar: *I have noticed an increase of contempt motions being filed without affidavits. I checked the current local rules and an affidavit isn't required, but some area courts (e.g. Summit Rule 13, Cuyahoga Rule 20, Stark Rule 15.05, Lake County Rule 3.05) do have that requirement. [The Medina County Domestic Relations Court], Wayne County and Lorain County don't have an "affidavit rule" for contempt motions. Some practitioners I have talked to indicate that some courts put the added burden of sworn affidavits in the rules because of the potential loss of liberty. Others think it is used to weed out frivolous or harassing filings or even to provide ammunition for frivolous action/Rule 11 sanctions. Does [the Court] have any thoughts on this either way or has [the Judge] ever contemplated a rule change in that regard?*

First, I would like to thank the member of the bar for submitting this inquiry/suggestion. I would also like to thank the Medina County Bar Association, the Members of the Bar, and the Attorneys practicing in the Medina County Domestic Relations Court for reading this column.

I have been working on revisions to the Local Rules for the Medina County Court of Common Pleas, Domestic Relations Division, and hope to publish for comment the amended Local Rules soon. I do not intend, however, to amend the Local Rules to include an "affidavit rule" for motions to show cause/motions for contempt.

As you know, many of the litigants who come through the Court are self-represented. If I were to amend the Local Rules and add an "affidavit rule", this would undoubtedly increase the burden on those self-represented litigants filling motions for contempt. While I am confident that members of the bar would adapt and comply with such a rule change, I do not believe that self-represented litigants would do the same. Accordingly, I do not wish to increase the burden on self-represented parties (or attorneys for that matter) filing motions for contempt.

In addition, because motions for contempt do carry the possibility of jail as a sanction, there are several procedural safeguards in place to ensure that the person's "loss of liberty" is the last resort. From my perspective, the alleged contemnor's due process rights are fully protected. Our Court stringently requires that *all* motions for contempt must be served on the alleged contemnor, pursuant to Civil Rules 4—4.6. After service is perfected, the alleged contemnor is entitled to a full hearing on the issue of contempt. At the hearing, the alleged contemnor has an opportunity to testify, an opportunity to call witnesses in his/her defense, and an opportunity to present a valid legal defense. The Court will not hold an alleged contemnor in contempt without giving him/her an opportunity to be heard and the matter put on the record. If the alleged contemnor is found in contempt, he/she will then have an opportunity to purge the contempt. Finally, the alleged contemnor is always entitled to have counsel represent him/her, and may be entitled to have counsel appointed to represent him/her in the contempt proceedings, so long as the person qualifies for court appointed counsel.

I also would note that Local Rule 4.03(A)—the rule regarding emergency *ex parte* motions/orders—does contain an

*Continued on Page 9*





## VIEWS FROM THE BENCH



*Continued from Page 8, Judge Kovack*

“affidavit rule”. In these types of situations, I believe it is necessary and perfectly acceptable to require the party filing the emergency *ex parte* motion/order, whether represented by counsel or self-represented, to append an affidavit that states with particularity the grounds and the irreparable harm warranting an emergency *ex parte* order. Unlike motions for contempt, the party filing the emergency *ex parte* motion seeks to deprive another party of his/her due process rights. Hence, if a party wishes deprive someone of his/her due process rights, albeit temporarily and only until such time as the matter can be set for a full hearing, that party must append an affidavit in support.

For these reasons, I do not intend to amend the Local Rules to include an “affidavit rule” for motions to show cause/motions for contempt, but will retain the rule for emergency *ex parte* Motions.

I appreciate the inquiry/suggestion, and always welcome questions and input from members of the Bar.

## Judge Dale H. Chase

Medina Municipal Court

### ***OVI Law Changes***

Effective April 6, 2017, H.B. 388 modifies existing Ohio OVI law. The most far reaching change is to the OVI “lookback” periods. The current six-year lookback is increased to 10 years to determine OVI sentence enhancements. Increased mandatory misdemeanor sentences will now apply to second and third OVI offenses within 10 years. Similarly, having three or four prior OVI convictions within 10 years will become felony offenses.

H.B. 388 increases mandatory license suspensions. A first OVI within 10 years will require a 1-3 year suspension (instead of minimum 6 months as in current law). A second OVI within 10 years will have a 1-7 year suspension (now 1-5), and a third OVI within 10 years will carry a 2-12 year suspension (now 2-10).

H.B. 388 creates two classes of driving privileges: limited, as in current law, and unlimited with an ignition interlock device installed. H.B. 388 appears to require that mandatory OVI jail time be suspended pending successful completion (no interlock violations during the suspension period) when unlimited driving privileges are granted. The law mandates that the court retains jurisdiction over the offender for the entire length of the suspension and can impose the mandatory jail sentence even at the end of a suspension if there is an interlock violation. The law appears to permit this without imposition of a period of community control, which means offenders seeking unlimited privileges may place themselves under court supervision longer than the existing permitted length of community control for misdemeanor convictions. It appears that courts still retain discretion to grant either type of privilege.

H.B.388 removes the requirement that 2 in 10 OVI offenders display a restricted plate unless there was a “high tier” violation or a refusal to submit to a chemical test and a prior OVI within 20 years. Courts will be required to give specific notices to offenders with unlimited privileges outlining the consequences of interlock violations. The interlock manufacturer must inform the court of any violations.

H.B. 388 creates questions concerning application of the Modern Courts Amendment and Due Process and Equal Protection issues, particularly as it relates to judicial fact finding and sentencing discretion.



## VIEWS FROM THE BENCH



### Judge Stephen J. Mellyvaine

Wadsworth Municipal Court

#### ***Upcoming Trends in Motions to Suppress***

In many OVI cases, especially where the individual tested above the per se limit, the best defense is a Motion to Suppress. The most common issues raised in a Motion to Suppress are whether or not there was reasonable, articulable suspicion to stop the defendant, whether or not there was probable cause to arrest the defendant for operating a vehicle under the influence of alcohol and whether a Miranda Rights violation occurred. There is another issue that is gaining popularity and that's the subject matter of this article. That issue is whether or not the officer had reasonable, articulable suspicion that the defendant was intoxicated to justify asking him to do field sobriety tests. This issue falls between a lawful stop and probable cause to arrest. Does an officer have a right to have anyone conduct field sobriety tests just because he stopped them?

The continued detention of a stopped motorist "may continue beyond [the normal] time frame when additional facts are encountered that give rise to a reasonable, articulable suspicion of criminal activity beyond that which prompted the initial stop." State v. Stephenson, 12<sup>th</sup> Dist. Warren No. CA2014-05-073, ¶19, quoting State v. Batchili, 113 Ohio St.3d 403, 2007-Ohio-2204. As stated in State v. Strobe, 5<sup>th</sup> Dist. No. 08-CA-50, 2009-Ohio-3849, at ¶ 18 "It is well established that an officer may not request a motorist to perform field sobriety tests unless that request is independently justified by reasonable suspicion based upon articulable facts that the motorist is intoxicated." Requiring a driver to submit to field sobriety tests constitutes a seizure within the meaning of the Fourth Amendment. Courts have generally held that the intrusion on the driver's liberty resulting from a field sobriety test is minor, and the officer therefore need only have reasonable suspicion that the driver is under the influence of alcohol in order to conduct a field sobriety test. State v. Bright, 2010 Ohio 1111.

One of the leading cases in determining this issue is State v. Evans, 127 Ohio App.3d 56. There, in a footnote, the Eleventh District noted several factors that a court should consider when reviewing the totality of the circumstances surrounding an officer's decision to administer field sobriety tests. State v. Coates, 4<sup>th</sup> Dist. Athens No. 01CA21, 2002-Ohio-2160, ¶ 37, *citing Evans, supra.*, 127 Ohio App.3d 56, fn 2. The Court indicated it based these eleven factors in its footnote on a survey of various appellate decisions. Although Evans was decided nearly twenty years ago, that use of these specific factors seems to have increased in recent years. *See State v. Hochstetler*, 9<sup>th</sup> Dist. Wayne No. 16AP0013, 2016-Ohio-8389, ¶ 12 [mentioning that no single one factor should be determinative of this issue]: Stare v. Spitler, 5<sup>th</sup> Dist. Stark No. 2014CA00157, 2015-Ohio-2286, ¶ 18.

In Evans supra, the court stated: once the officer has stopped the vehicle for some minor traffic offense and begins the process of obtaining the offender's license and registration, the officer may then proceed to investigate the detainee for driving under the influence if he or she has a reasonable suspicion that the detainee may be intoxicated based on specific and articulable facts, such as where there are clear symptoms that the detainee is intoxicated." Based upon cases it had surveyed, Evans provided a list of the following factors: "...(1) the time and day of the stop (Friday or Saturday night as opposed to, e.g., Tuesday morning); (2) the location of the stop (whether near establishments selling alcohol); (3) any indicia of erratic driving before the stop that may indicate a lack of coordination (speeding, weaving, unusual braking, etc.); (4) whether there is a cognizable report that the driver may be intoxicated; (5) the condition of the suspect's eyes (bloodshot, glassy glazed, etc.); (6) impairments of the suspect's ability to speak (slurred speech, overly deliberate speech, etc.); (7) the odor of alcohol coming from the interior of the car, or, more significantly, on the suspect's person or breath; (8) the intensity of that odor, as described by the officer ("very strong", "strong," "moderate," "slight," etc.) (9) the suspect's demeanor (belligerent, uncooperative, etc.); (10) any actions by the suspect after the stop that might indicate a lack of coordination (dropping keys, falling over, fumbling for a wallet,

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etc.); and (11) the suspect's admission of alcohol consumption, the number of drinks had, and the amount of time in which they were consumed, if given. All of these factors, together with the officer's previous experience in dealing with drunken drivers, may be taken into account by a reviewing court in determining whether the officer acted reasonably. No single factor is determinative," *Id.*

In the Wadsworth Municipal Court, we have been addressing this issue and applying the Evans factors since 2015. Over that time period, defense attorneys have cited cases that show that there was not sufficient evidence to ask clients to take field sobriety tests. The common thread in those cases would be that while some factors were present, each case felt that there were not sufficient to form reasonable, articular suspicion that the defendant was under the influence of alcohol. Reasonable suspicion is something more than inchoate or unparticularized suspicion or hunch, but less than a level of suspicion for probable cause. When I have these types of cases, I will analyze the reasonableness based on the totality of the circumstances viewed through the eyes of a reasonable and prudent police officer on the scene.

In State v. Reed, 7<sup>th</sup> Dist. Court of Appeals, 2006-Ohio-7075, the court indicated the smell of alcohol and glassy eyes, without more is not sufficient to conduct field sobriety tests. However, the additional element of erratic driving or specifically a "strong" odor of alcohol seems to tip the scale in favor of allowing the test. State v. Downing, 2<sup>nd</sup> Dist. 2002-Ohio-1302. In State of Ohio/Village of Whitehouse v. Stricklin, 2012-Ohio-1877, the court held that a traffic violation of a de minimis nature combined with a slight odor of an alcoholic beverage, and an admission of having consumed "a couple of" beers are not sufficient to support a reasonable suspicion of operating a vehicle under the influence of alcohol. In contrast, an officer's observation that the defendant has very red and glassy eyes, a strong odor of alcohol on his breath and slurred speech is sufficient to warrant standard field tests. State v. Castle, 2007 Ohio 5165.

In the Wadsworth Municipal Court, I agree with the cases that find that there is no justification for conducting field sobriety tests based merely on slight odor of alcohol, red glassy eyes late at night and an admission from defendant he has consumed alcohol. The odor of alcohol alone cannot justify conducting field sobriety tests. The arresting officer must be able to point to reasonable and articular suspicions giving rise to believe the defendant was intoxicated. I personally find the eleven factors set forth in the Evans case to be useful.

In addition to the Evans case, law enforcement also uses non-scientific divided attention tests. The most common would be reciting the alphabet starting with a certain letter and ending with a certain letter, and counting backwards starting with a specific number and ending with a specific number. These tests results are also utilized by law enforcement to give them reasonable, articular suspicion the defendant is intoxicated in order to conduct field sobriety tests. In the Wadsworth Municipal Court, I do accept these non-scientific divided attention tests as useful tools.

When preparing your arguments for your Motion to Suppress, if there is an Evans issue, please remember and apply the eleven factors... because I will.



## The MCBA Giving Back to the Community with the *Bankers v. Barristers* Red Cross Blood Drive

The Medina County Bar Association will once again be sponsoring the Bankers vs. Barristers Donor Appreciation blood drive on **June 14, 2017**. The short amount of time it takes to donate can mean a lifetime to a patient with a serious medical condition. Your help and participation is essential to make this event a success.

Below is the calendar for this year's events:

**Medina** – Garfield Elementary School: 7:00am to 6:30pm

**Brunswick** – First Christian Church: 9:00am to 3:00pm

**Wadsworth** – Wadsworth City Hall: 10:00am to 3:00pm

For the first time, individual and corporate sponsorships are available. In addition, your logo themed items can be included in donor incentive bags. For more information regarding this program, contact Jill Trupo, Medina County Red Cross Blood Services Account Manager at 440-732-1760 or [jill.trupo@redcross.org](mailto:jill.trupo@redcross.org)

To schedule an appointment, go to [www.redcrossblood.org](http://www.redcrossblood.org) or call 1-800-RED-CROSS.

## NEW LAWYER'S COMMITTEE: BRADLEY PROUDFOOT, CHAIR

When I first began contemplating what the New Lawyer's Committee could contribute to the quarterly newsletter, it became abundantly clear to me that there should be an interview between a new attorney and a more experienced member of the bar. I felt the best way for this to be accomplished was for the interviewer to look outside of the box and interview an attorney who they didn't know, who wasn't part of their firm, and with whom they hadn't worked.

It didn't take me long to decide who to interview. I had met Robert "Bob" Bux not long after I began practicing in Medina County, but I never had the chance to really get to know him. If you look past the biographical information ... Wadsworth High School graduate; former mechanical engineer; University of Cincinnati Law School; Martindale-Hubbell Peer Review Rating AV Preeminent; and Specialist in Estate Planning, Trust, and Probate Law as recognized by the Ohio State Bar Association ... there is so much more to Bob Bux. As I spoke to him and asked questions, I realized that he is such a multi-faceted human being. He showed this incredible concern and love for our profession that was truly inspiring. He continually navigated the conversation back to the good of the profession and the good of our bar association.

I knew from my research that Bob was at one time a mechanical engineer. When asked how the transition came about he responded, "I was a mechanical engineer for three years. At one point, I was working with the company's lawyers. I was really intrigued by what they did. I thought I am young, single, and not in debt, so I should pursue this dream." Bob then enrolled in the University of Cincinnati and actually graduated in two and one half years. During his time in law school, he interned at a firm in Dayton, and then during his second year of law school he began interning at the Williams & Batchelder firm in Medina.

As Bob tells the story of landing the internship, "I was leaving for winter break when I met Bill Young (now a partner at the Williams and Batchelder firm) in the parking lot. Bill asked what I was going to do, and I said I would probably just go back to the firm in Dayton. Bill suggested that I talk to the Batchelder firm because they had an open office." As our conversation progressed I learned that the open office became Bob's office as a law school student and then for many years after as an

attorney. That was until he eventually moved to the corner office that he occupies now which was the office of the late William Batchelder, II.

When Bob discussed William Batchelder, II, he referred to him as his “mentor.” Bob elaborated on why Mr. Batchelder was a mentor as well as the need for a new attorney to have a mentor. Bob’s response was very poignant, “As a new attorney, you have to surround yourself with quality attorneys and people if you truly want to be a quality attorney and quality person. You need someone that you can not only go to with questions but also that can set the example for you.” I don’t think that I could have said it any better myself.

For anyone that knows Bob, they also know that there is a second generation Bux at the Williams and Batchelder firm, his daughter, Elizabeth Bux. Having a daughter myself, I wondered what it was like working with your daughter. When I posed the question to Bob, his response was immediate and to the point, “It is an absolute joy for me.” I could tell from his tone that it meant so much to him to have his daughter in the same firm. As an aside, Elizabeth currently occupies the office that Bob had for so many years prior to moving to the corner office. Throughout the interview, we delved more into his family life than I have room to share, but I can say that Bob is obviously a devoted family man who places the same level of importance on his family as he does his legal practice, which is saying a lot.

I closed our conversation with this question; what advice would you give to new attorneys? From our discussion, it became readily apparent to me that Bob Bux is a very introspective man. I could tell that he had given a great deal of thought to this question. He gave three bits of advice for new attorneys. First, he stated to “work hard. Financial reward doesn’t come immediately, but if you stay on task and persevere, your hard work will pay off in the end.” Bob made it clear that he believed there was direct correlation to the amount of effort you put into this profession and the amount of success you are able to achieve.

Second, Bob suggested that new attorneys should become heavily involved in learning their areas of practice. My favorite quote from him was to “expand beyond what you know today.” He spoke about the need to take CLEs in your specific areas of practice. He suggested you could become an Ohio State Bar Association Certified Specialist in your area of practice, if it is offered.

The final bit of advice that he offered was to find a mentor. We had discussed earlier in this interview the importance of a mentor and how they can shape you as an attorney as illustrated by Bob’s relationship with his mentor, William Batchelder, II. Bob reiterated that a good mentor can help you in a certain area of law, they could help you to better run your firm, or they even could be relied upon to provide advice on personal issues that arise outside of our profession.

I regret that I do not have more space in which to tell the tale of our conversation, but I will say that there is so much more that we discussed and so much more that I would love to share with you about Bob Bux. In preparation for this interview, I spoke to a number of attorneys, and everyone sang his praises as a skilled attorney and a true professional. My take away from my time spent speaking with Bob reiterates what others have said and can be best expressed twofold. First, I hope that someday I can be as professional, skilled, and conscientious about the practice of law as Bob Bux. In fact, I wish that for all of us as attorneys. Second, if our Medina County Bar Association had more people with the amount of love and dedication to this profession, we could accomplish anything as a bar association.

To read more about Robert J. Bux, please follow this link: [http://www.wblawmedina.com/service/robert\\_bux-2](http://www.wblawmedina.com/service/robert_bux-2)

#### **About the Author**

Bradley J. Proudfoot has been an associate attorney with the firm of Palecek, McIlvaine, Hoffmann & Morse Co., LPA since March of 2014. Brad’s practice focuses on civil matters including business law, personal injury, and employment law. He is the Treasurer of the Medina County Bar Association and Chair of the MCBA New Lawyer’s Committee.

To read more about Bradley J. Proudfoot, please follow the link below.

<http://www.pmhmlaw.com/attorneys/bradley-j-proudfoot/>