2023 SPRING/SUMMER VINDICATOR

THE MAGAZINE OF THE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

THE FOX HAS REDECORATED THE HENHOUSE - THE DIRECTOR OF HEALTH'S REACTIVE AND RESULTS-ORIENTED MODIFICATIONS TO OAC CHAPTER 3701-53

MARSY'S LAW AND OHIO'S BROAD EMBRACE OF THE VICTIM'S RIGHTS MOVEMENT

VIRTUAL TESTIMONY. VIRTUAL JUSTICE.

THE FUTURE OF INDIGENT DEFENSE IN OHIO IS NOW

BOOK REVIEW • TECHNOLOGY REPORT • NOTES FROM THE SENIOR COMMITTEE

CONTENTS

MISSION STATEMENT

- To defend the rights secured by law of persons accused of the commission of a criminal offense;
- To educate and promote research in the field of criminal defense law and the related areas;
- To instruct and train attorneys through lectures, seminars and publications for the purpose of developing and improving their capabilities; to promote the advancement of knowledge of the law as it relates to the protection of the rights of persons accused of criminal conduct;
- To foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited continuing legal education programs;
- To educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the bill of rights and individual liberties;
- To provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

BENEFITS OF THE OACDL

LISTSERV - The OACDL listserv is our most popular member benefit. This on-line forum joins over 500 members from around the state. If you have a question, post it on the listserv and usually within minutes you have responses from some of the most experienced legal minds in Ohio.

AMICUS BRIEF - OACDL members provide amicus support for criminal cases.

CLE SEMINARS - The most up-to-date topics presented by nationally-recognized experts are available at incredible savings to OACDL members - including the annual Death Penalty and Superstar Seminars.

STRIKE FORCE - With OACDL, you never stand alone. OACDL members are here to aid.

LOBBYING - The OACDL actively lobbies state government by providing testimony on pending bills and working with other organizations with similar interests.

LEGISLATION - The OACDL monitors pending legislation and government activities that affect the criminal defense profession.

MENTOR AND RESEARCH PROGRAMS - OACDL offers a mentor program for new attorneys and resource telephone access for the assistance of all members.

NETWORKING - Networking functions allow current OACDL members and prospective members to interact. These functions are not only entertaining, but very valuable for old and new members alike.

LETTER FROM THE PRESIDENT

DAN J. SABOL
President, OACDL

We are fortunate to make a living helping fellow human beings in need. Every day we get to use our skill, empathy, and tenacity to guide and protect others. There is no higher calling. And to me, at least, trial is the pinnacle of our practice. But trial may bring stress and the fear of failing the person you are charged with defending. I suspect some of the angst associated with trial is inevitable; however, I wonder if there is one factor we could eliminate to simultaneously increase effectiveness and decrease distress: stop obsessing over winning.

Blasphemous, I know. But hear me out.

You cannot control "winning."[1] Everyone wants to win. It is intrinsic in our nature—my six-year-old twins want to win the race to story time every night, and when they prevail, lord do I hear it.[2] We want to win, the prosecutor wants to win—but that wish carries no real power. The verdict will be rendered by eight or twelve strangers as you stand and await the result. Yes, the desire to win may motivate you to put in the work but make no mistake: it was the preparation that carried the day, not closing your eyes and really hoping for an acquittal.

While the naked goal of winning accomplishes little, it can have a negative effect. Putting an emphasis on a goal you do not have full control over leads to anxiety and fear.[3] Aligning our worth with the outcome of trial robs us of the excitement and joy we should be experiencing when defending difficult cases.[4] We are in a rare business where we can utterly destroy the opposition and still have a verdict go against us; and, of course, the opposite is also true—just because the jury gave you two words doesn't mean you did an excellent job.[5]

If not winning, what to focus on? The variables we control that lead to winning. The resources available to help us become better lawyers are staggering—forensic training, trial skills workshops, endless CLEs, and advice from our brothers and sisters are at our fingertips. And for the specific case, pouring yourself into discovery review, witness preparation, and developing a theme of innocence are all well within our control. As is the enthusiasm and fire we give to our client and their cause.

And let's not forget the pursuit of mastering our craft. We are immersed in an environment of ever-changing law which forces us to perpetually learn. The nature of trial practice allows us to be dynamic and fluid with each fact pattern and lesson learned. We are afforded the luxury of never being stagnant and can be excited for the challenge of personal growth on every one of our cases. What a gift.

This is not a novel tenet. Olympians in solitary sports embrace the process and the love of competition without regard for the outcome—and this has proven to result in peak performance. The same applies to us. Being the last line of quality control for the justice system is an awesome responsibility. Embracing our passion for trial preparation and practice without concern for the ultimate outcome benefits both ourselves and our clients.

1. Which for the purposes of this discussion I'm defining as prevailing in trial. There's an argument that you win every case by putting the government to their burden, but that's a discussion for another day.
2. I still beat them more often than not.
3. I've seen an exceptionally strong trial lawyer advise a plea where, while the odds were long, there wasn't much (if anything) to lose by putting the matter to the jury. A trial winning streak remained intact though.
4. If all you care about are wins and losses, prosecute in municipal traffic court with pro se litigants. Try not to forget ID and venue.
5. We can't assume a win means we did everything correctly—for all we know the jury acquitted because they wondered what a competent attorney would have done.

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LETTER FROM THE PRESIDENT - ELECT

JOSEPH HADA

OACDL

As criminal defense lawyers, we understand the complexities and challenges of our profession and the daunting task it is to stay updated with legal developments in order to effectively represent our clients. I wanted to express my gratitude for the invaluable support and resources that our organization provides to its members. Over the course of this past spring, we were inundated with a multitude of changes that seemed to fall on us at nearly the same time.

For me, it started with the Ohio Administrative Code Changes and corresponding changes in breath machine training materials, but that was just the start. Soon, the new NHTSA manuals were published for the SFST's, ARIDE, and DRE programs, but for the larger realm of the criminal defense, House Bill 288 brought sweeping changes to keep up including changes to record sealing, hands-free driving, strangulation, felony speedy trial, and many more. There were also changes with Senate Bill 16, Mary's Law, and Criminal Rule 46 just to name a few more all taking effect in short order. While I am probably missing some notable mentions, there are also the anticipated changes to the funding of indigent defense in Ohio.

The listserv has proven to be an exceptional tool for fostering communication and sharing knowledge among our members. It allows us to remain current on significant changes in the law especially in times of sweeping changes. I want to extend a big thank you to all of the members for answering questions and bringing issues to light through your emails. The collective knowledge is truly invaluable. In addition, the CLE seminars and content produced by our organization by Ashley Jones and the CLE Committee have been vital for all of us as we attempt to stay current with all of the changes. We hope that if you cannot attend the seminars on the scheduled day that we can also get the content to you through our On-Demand options and our new Exclusive Content page for our members.

In conclusion, I would like to express my deep appreciation for the irreplaceable role that the OACDL plays in my practice. Having the support of the organization and help in navigating the changing legal landscape makes the job easier and reduces stress and worry if I am missing something. I look forward to continuing this collective effort to survive the daily stresses of this profession and staying current with all of the changes and updates with all of you.

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DIRECTOR'S DIALOGUE

AMY NICOL
EXECUTIVE DIRECTOR, OACDL

Dear Readers & Membership:

As we shake off the dust of the last 2 years and return to 'normal' life, we are excited to see a slight trend towards in-person attendance at our seminars, but it is undeniable that virtual options are here to stay. In an effort to provide the best and most convenient options for our members and attendees, OACDL is committed to providing seminars and webinars to fit everyone's preferences and our 2023 CLE schedule proves it! We have presented webinars, seminars, and hybrid events. We have had seminars span an hour, half-days, full days, and multiple days. Topics have covered Current Issues, Advanced DUI, beginner/intermediate DUI, Sex Crimes, Concealed Carry Weapons, important legislative updates, and a Beach Bash that covered various topics resulting in good old fashioned brain storming sessions.

February saw the launch of our inaugural Forensics webinar series that covered a different topic every Friday for the entire month. The best part about all of this? We are only half way through what we have planned for the year! Over the next 6 months you can expect to see seminars on Death Penalty, Expungement, Hot Topics, Attorney Wellness, Steps to Close Your Practice, Super Star (at an exciting new venue!) and so much more.

Additionally, our On Demand catalog is up and running! We are consistently adding to our library of offerings that can be found on our website under the seminar tab. The On Demand option allows for complete control over when and where you acquire your CLE credit making it an extremely convenient alternative when you cannot attend the live presentation. This year has also seen the addition of free Members' Only Exclusive Video Content on our site. While not available for CLE credit, there are numerous videos spanning a wide array of topics that we are confident will serve as a valuable resource.

The benefits of OACDL membership do not stop at seminars! Blaise Katter, our Secretary and Public Policy Chair, has been working diligently with legislators, representing the voice of criminal defense attorneys across the state. He presented a legislative update highlighting imperative updates and changes that are imperative to know. (If you missed it, you can find it on that Exclusive Content tab on our site.) Not surprisingly, the listserv is one of the most popular benefits of membership – where else can you reach hundreds of your peers ready to assist and offer advice with the click of a button?

As always, thank you all for your continued support of OACDL. We exist to support YOU and are honored to do so. Please feel free to reach out to me with any questions, concerns, or just to say hello – I look forward to one day meeting each of you!

Amy Nicol

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2023 CLE SCHEDULE

July 28, 2023
Closing Your Practice: What To Do Now So You Are Ready Then
Webinar

August 25, 2023
Expungement
Webinar

September 8, 2023
Attorney Wellness: Mental, Physical, and Financial Health, Ohio Supreme Court
Columbus

September 15, 2023
Defense Toolbox
Location TBD

October 13, 2023
Super Star Seminar
Top Golf, Columbus

November 16-17, 2023
Death Penalty Seminar
Nationwide Hotel & Conference Center, Lewis Center

December, 2023
Hot Topics with Professional Conduct Hours

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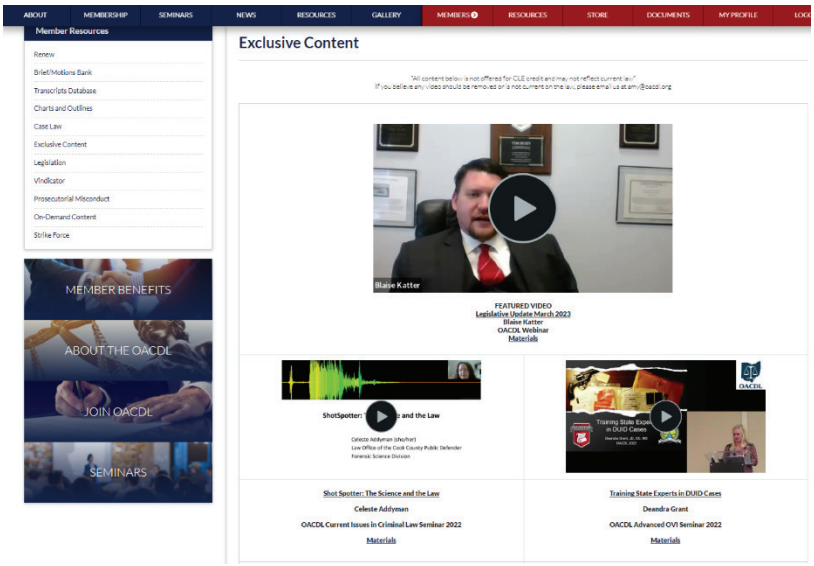
TECHNOLOGY REPORT

JOE HADA
BRAD WOLFE

It is *respectfully submitted* that the OACDL's technological presence continues to lead the industry amongst relevant legal organizations and associations. Attending a virtual CLE produced by the OACDL continues to truly be a one-of-a-kind experience. This is due to the implementation and fine-tuning of green-screen equipment that makes both the speaker and the presentation more visible, improved audio features for in-person and remote speakers, broadcasting software, and even a convenient countdown clock on breaks. Our virtual CLE's also feature submitted questions from the audience appearing on-screen with live mixing and editing by OACDL President-Elect and Tech Co-Chair Joe Hada. Presenters are provided with wireless microphones, a presentation remote with pass-through digital highlighting visible to the people attending in-person and virtually, a dedicated monitor to preview their PowerPoint, and soon a touchscreen monitor on the podium for controlling media. The Technology Committee is always looking to improve our product, and we take pride in offering one of the best virtual CLE experiences in the country.



In addition to facilitating live, virtual CLE's, the Technology Committee maintains its focus on increasing the OACDL's online database of On-Demand content for CLE credit. To that end, we are excited to FINALLY announce the availability of the Member's Only Exclusive Content video library! Championed by Joe Hada, the Exclusive Content video library features approximately 25 videos from previously recorded CLE's. The amount of available content will only grow and Members are always encouraged to consider creating and donating relevant presentations.

To further inquire on all things Technology Committee related, please feel free to contact Joe Hada at hadalaw@gmail.com or Brad Wolfe at brad@bradwolfelaw.com.

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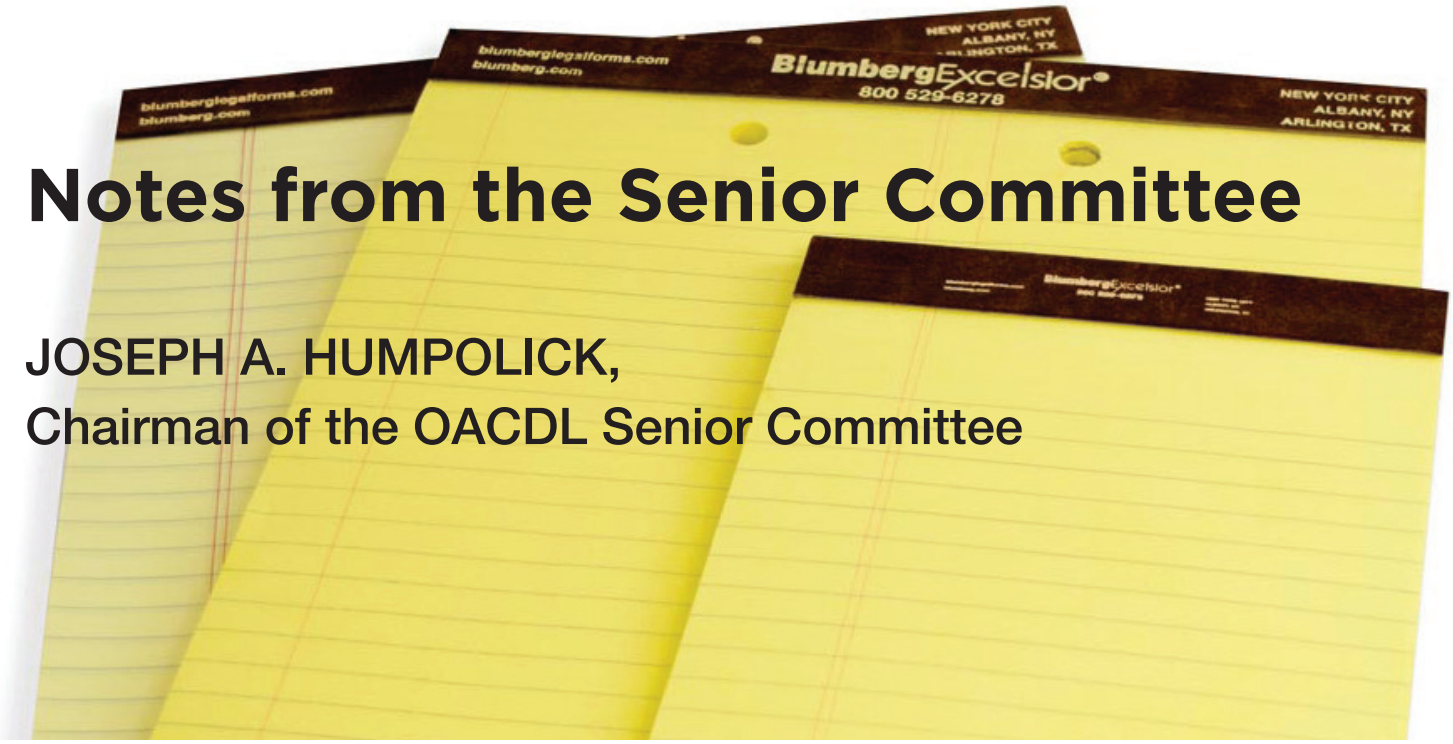


Notes from the Senior Committee

JOSEPH A. HUMPOLICK, Chairman of the OACDL Senior Committee

The senior committee of the OACDL is composed of over a dozen members who are retired, semi retired or thinking about retirement. It is also open to everybody else. In other words it is open to everyone because eventually every one of us will retire, semi retire or think about retirement.

We meet once a month and sometimes more often than that to socialize, tell war stories and talk about issues that are germane to lawyers like us and to lawyers who will be like us over time. We also plan seminars and webinars on issues that are germane to us all. Our meetings are open to all OACDL members regardless of age. So you are encouraged to participate in a meeting once notice of it is posted on our list serve.

On July 28th we will be sponsoring a one hour webinar on how to close a practice. Notice of that should be forthcoming in the near future. It should be interesting to anyone who may be thinking of retiring in the future.

On September 8th we will also hold a seminar / webinar from 1pm to 4pm at the Ohio Supreme Court building. We will cover topics that cover issues that should be of interest to every practitioner of every age. These include financial planning, health and wellness and mental health.

Financial planning should be important to every lawyer because it is never too soon to plan ahead for retirement. You should plan early to retire early. The consensus of our committee is that lawyers by and large do a terrible job at that. Failure to plan well may explain why many lawyers continue to practice long after their better trial skills have left them. They feel that they really have no other option to pay their bills. So don't allow that to happen
to you.

Money will be tight as it is when you retire and you will need all that you can get. So the sooner you begin to save and the better you plan the more options you will have when you advance into the later years of your practice and the more you will have on hand to meet your needs when your days of advocacy are over. On September 8th we will have a speaker who will give you some advice and direction.

Financial planning aside another problem for lawyers of all ages is health and wellness. The consensus of our committee is that lawyers by and large do a bad job of taking care of themselves. Maybe it's because of the stress we have as trial lawyers and maybe it's because good health habits were never required of us as practitioners. Maybe it's because we hardly find the time to exercise or take the time to make a healthy meal or even find the time to get a good night's sleep. In any case we burn our candles at both ends day in and day out as we zealously represent our clients and we overlook our needs for exercise, healthy nutrition and
adequate sleep.

Eventually however a lack of exercise and years of bad nutrition and a consistent lack of sleep that goes with a lifestyle of stress and bad health habits catches up with you. As you get older you may have to face the challenges of diabetes, heart disease, asthma, CKD

and other chronic conditions that could have been prevented had you taken better care of yourself when you were actively practicing law.

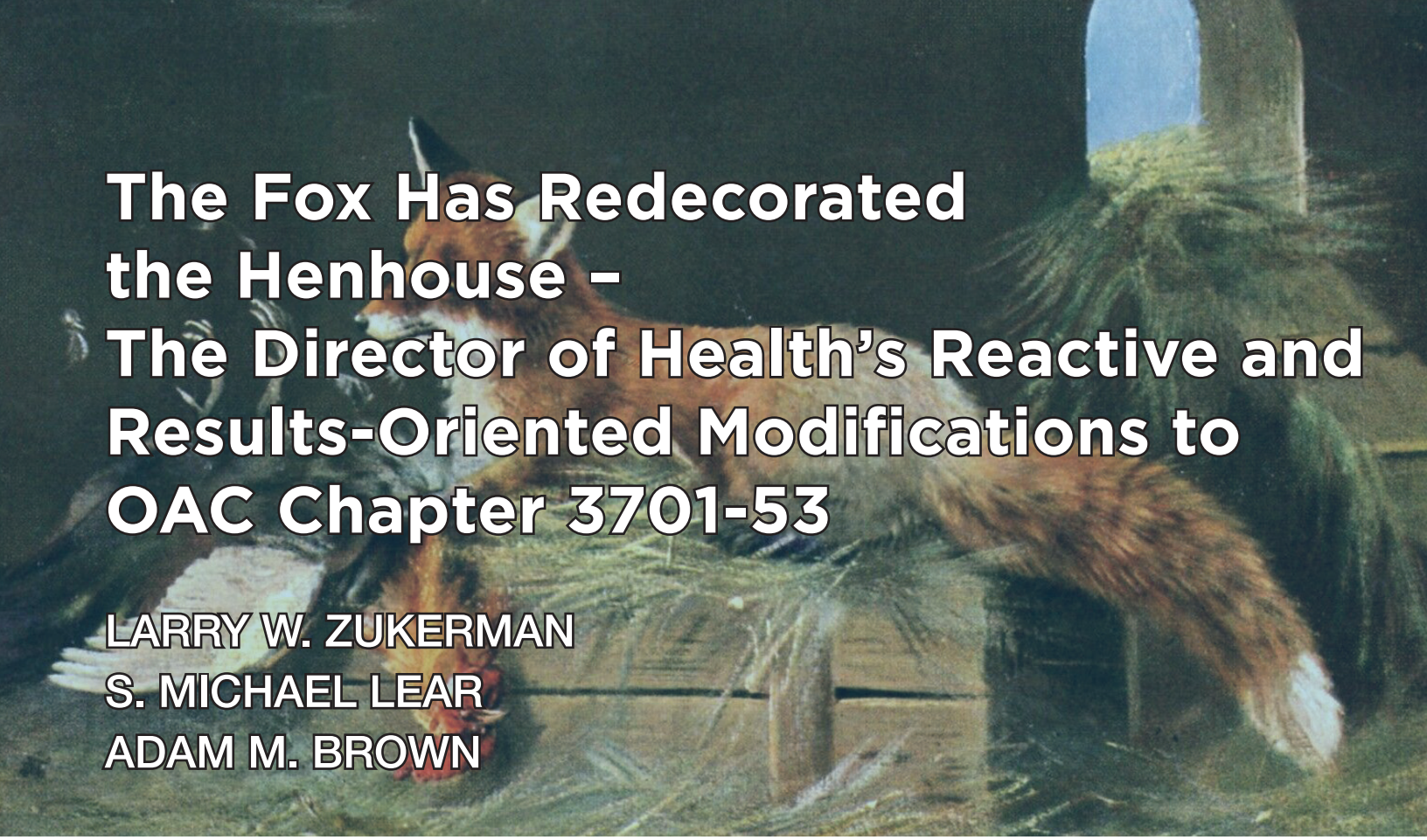
On September 8th maybe we can save your life by giving you some ideas on health and wellness that will you can use now that will pay off later as you get older. Maybe some of you have known a number of lawyers who died in their offices because they didn't take care of themselves, do you want that to happen to you?

Along with good financial planning and good health habits another problem that lawyers face are mental health issues. A lawyer is only as good as his mind is sharp. However over time our minds tend to slow down and it takes moments to remember what used to come instantly. If you need an iPad to help you remember something in court that used to come instantly then maybe it's time to reassess whether you should continue to practice law.

Eventually you have to ask yourself whether you are the lawyer you would want were you any of your clients and be honest about it. We have all seen lawyers who didn't do that and made avoidable mistakes that their clients paid for dearly. Do you want that to happen to you? Is this how you want to be remembered by your clients and colleagues? And what should we do whenever we see a lawyer who should give serious thought to retirement for the good of his clients but can't make himself do it?

On September 8th you may learn when you should be asking yourself these questions and what you should look for when deciding whether you should cut back your hours of practice or maybe consider retiring altogether.

So this is what we have planned for September 8th. More details will be released as we get closer to that date. Consider this a service to the entire membership from The OACDL and the senior committee. What you learn will help you in the years to come. A good turnout and lots of interest will encourage us to put on seminars that are like this for all of you, not just for senior lawyers. So for all of these reasons we encourage you to mark your calendars and join us on that day and we also encourage you to participate in one of our meetings.



The Fox Has Redecorated the Henhouse – The Director of Health's Reactive and Results-Oriented Modifications to OAC Chapter 3701-53

LARRY W. ZUKERMAN
S. MICHAEL LEAR
ADAM M. BROWN

In the Spring, 2022 edition of The Vindicator, we authored an article entitled *The Fox is Guarding the Henhouse – Is There an Ongoing Abuse of Discretion by the Director of the Ohio Department of Health in Issuing and/or Renewing BAC DataMaster Operator and Senior Operator Permits?* In that article, we identified a critical issue relating to the scientifically invalid custom and practice of the ODH conducting "proficiency examinations" on BAC DataMaster permit holders without using alcohol simulation solutions with known target values. In apparent response to that article and/or our successful attack on this practice through a *Motion to Suppress*, on June 17, 2022, Jeanna Walock, the Program Administrator for the Alcohol and Drug Testing Program posted for public comment proposed rule changes relative to OAC Chapter 3701-53.

In relevant part, the stated purpose of the proposed rule changes was "to add a definitions and record retention rule, to amend the list of breath alcohol test instruments approved by the Director of Health, to include oral fluid as an approved specimen for OVI testing, and to clarify rule language for law enforcement and laboratory stakeholders."

The proposed rule changes to OAC Chapter 3701-53 went into effect on January 23, 2023. Most of the pre-existing rules in this chapter have been renumbered, a definitional section (OAC 3701-53-01) has been added, and, significantly, has revised the *"Surveys and proficiency examinations"* rule to specify that "[d]uring proficiency examinations senior operators, operators, and applicants accept samples **or test their own breath or breath samples** from a volunteer, perform tests and report all results to a representative of the director". See, OAC 3701-53-09(D) (emphasis added).

Below is a summary of the changes made to OAC Chapter 3701-53 that went into effect on January 23, 2023:

Rule 3701-53-01, entitled, *Definitions and record retention periods:*

This new rule includes definitions for words and/or phrases used in Chapter 3701-53, including the new phrase "[o]ral fluid", as well as a more robust rule relating to record retention, requiring the retention of results of "breath alcohol tests", "laboratory tests", "certifications and weekly checks for breath alcohol testing instruments", and "[r]ecords of repairs and maintenance for breath alcohol testing instruments and laboratory testing instruments" for "no less than three years" from the applicable test date, performance, and/or service or maintenance. See, OAC 3701-53-01(B).

Rule 3701-53-02, entitled, *Expression of results:*

This rule is, essentially, retitled

and renumbered from the previous Rule 3701-53-01.

Significantly, this new rule now specifically includes "oral fluid" (defined by OAC 3701-53-01(A)(7) as "a type of bodily substance collected from the mouth consisting of saliva and other oral secretions") as a "bodily substance".

Further, the previous requirement that "[a]t least one copy of the written procedure manual required by paragraph (D) of rule 3701-53-06 of the Administrative Code for performing blood, urine, or other bodily substance tests shall be on file in the area where the analytical tests are performed" has been removed.

Rule 3701-53-03, entitled, *Breath tests:*

This rule is, essentially, renumbered from the previous Rule 3701-53-02.

Significant changes in this new rule include the addition of "Intox DMT (OH)" and "Intoxilyzer model 9000 (OH)" as approved evidential breath testing instruments (OAC 3701-53-03(A)(4) & (5)).

Further, OAC 3701-53-03(B) heralds the apparent phasing out of BAC DataMaster and Intoxilyzer model 5000 breath testing instruments as approved evidential breath testing devices in Ohio. This section reads:

> (B) Approval for instruments listed under paragraphs (A)(1) [BAC DataMaster, BAC DataMaster K, BAC DataMaster cdm] and (A)(2) [Intoxilyzer model 5000 series 66, 68, and 68 EN] of this rule will expire two years from the effective date of this rule, unless an exemption is requested by a law enforcement agency and approved by the director. (Brackets added).

Rule 3701-53-04, entitled, *Blood, urine, oral fluid and other bodily substance tests:*

This rule is, essentially, renumbered from the previous Rule 3701-53-03.

Significant changes in this new rule include the additional, "catch-all" "[a]pproved technique" "for the analysis of alcohol in blood, urine, oral fluid and other bodily substances" of "[o]ther techniques or methods, that have documented sensitivity, specificity, accuracy, precision, linearity and are based on procedures which have been published in peer reviewed or juried scientific journal or thoroughly documented by the designated laboratory director may be approved by the director". See, OAC 3701-53-04(A)(3). This new rule is a re-wording of the previous description of the approved techniques or methods (gas chromatography and enzyme assays) that remain approved techniques or methods, but appears to permit the director to approve any such technique or method on an ad hoc basis.

Relative to techniques for the analysis of "controlled substances", "metabolites of controlled substances", and, now "impairing substances and drugs of abuse as defined in" R.C. 3719.011, the new rule adds the following techniques as approved:

- Liquid chromatography-mass spectrometry (OAC 3701-53-05(B)(7))
- Gas chromatography-mass spectrometry (OAC 3701-53-05(B)(8))
- Other techniques or methods that have documented sensitivity, specificity, accuracy, precision, linearity and are based on procedures which have been published in a peer reviewed or juried scientific journal or thoroughly documented by the designated laboratory director may be approved by the director.

Rule 3701-53-05, entitled, *Breath instrument checks, controls and certifications:*

This rule is, essentially, renumbered from previous Rule 3701-53-04.

Significant changes to the old rule include:

- BAC DataMaster and Intoxilyzer 5000 instrument checks: Under the old rule, if an instrument check was outside the range specified (at or within 0.005 grams per 210L of target value) was to be "confirmed by the senior operator using another bottle of approved solution" and if that test was also out of range, the instrument was to be shut down until serviced or repaired. Under the new rule, an instrument with check results outside the range "will require the issue to be identified, remediated and a successful check completed" and "[i]f a second instrument check result is also out of range, the instrument shall not be used until the instrument is services or repaired". See, OAC 3701-53-05(A)(3).
- Intoxilyzer 8000: The language "instrument certification" has been removed from previous OAC 3701-53-04(B), relative to the automatic dry gas control test before and after every subject test. With respect to instrument certifications by the representative of the director, the new rule adds language from numerous decisions defining the meaning of "calendar year" as "beginning on the first day of January, and ending on the thirty-first day of December". Further, under the old rule, if a certification result was outside of the range specified (again, at or within 0.005 grams per 210L of target value), the instrument was required to be removed from service until

the instrument was serviced or repaired. Under the new rule, an outside of range certification result only requires "the issue to be remediated and a successful certification completed, or the instrument be removed from service until the instrument is serviced or repaired". See, OAC 3701-53-05(B)(5).

- Newly approved Intox DMT (OH) and Intoxilyzer 9000 devices are subject to very similar rules as are Intoxilyzer 8000 devices, with the exceptions that instrument certifications for these devices are to be performed by "senior operators". Additionally, these instrument certifications are to be performed "no less frequently than once every three hundred sixty-five days or when the dry gas standard on the instrument is replaced, whichever comes first". Further as to these devices, "[i]nstruments may be networked by law enforcement agencies if the software is purchased from the instrument manufacturer". See, OAC 3701-53-05(C) & (D).
- This rule now also provides that "[r]epresentatives of the director, senior operators, or persons employed by law enforcement agencies who have successfully completed an instrument operation, calibration, maintenance, and repair course conducted by the manufacturer of an approved breath alcohol test instrument may perform such repairs, maintenance, and calibration as covered by the relevant training for that instrument." See, OAC 3701-53-05(G).

Rule 3701-53-06, entitled, *Collection and handling of blood, urine and oral fluid specimens:*

This rule is, essentially, renumbered from previous Rule 3701-53-05.

For the most part, the previous use of mandatory words such as "shall" and "must" have been replaced by more passive words such as "will", throughout this new rule. Significant changes to the old rule include:

- Relative to collecting blood samples using a "non-volatile antiseptic", and not using "alcohols", the word "shall" has been replaced by the word "will", i.e., "an aqueous solution of a non-volatile antiseptic will be used on the skin".
- Likewise, as to blood drawing, the word "shall" has been removed and replaced with the phrase "is to", i.e., "[b]lood is to be drawn . . .". See, OAC 3701-53-06(B).
- Further as to blood drawing, the new rule replaces "solid anticoagulant" with the newly specified "anticoagulant according to the laboratory protocol as written in the laboratory procedure manual based on the type of specimen being tested". It is now also specified that "[a]nticoagulent coated vacuum tubes include standard purple, blue, green, pink, tan, gray, yellow and white topped tubes." See, OAC 3701-53-06(C).
- Relative to collection of urine samples, again, the use of the word "must" in the previous rule has been replaced with "will" as to witnessing the collection of a urine sample. The new rule now states that collection of a urine specimen "will be witnessed", as opposed to "must be witnessed". Likewise, the old rule language that urine "shall be deposited into a clean glass or plastic screw top container" has been replaced by language that urine "is to be deposited into" such a container. See, OAC 3701-53-06(D).
- Newly defined "oral fluid specimens" are to be collected "according to the sample collection device instructions". See, OAC 3701-53-06(E).
- Finally, again relative to sealing blood, urine, and now oral fluid containers, the previous use of the word "shall" has been replaced by "are to be", i.e., "[b]lood, urine, and oral fluid containers are to be sealed . . ." See, OAC 3701-53-06(F).

Rule 3701-53-07, entitled, *Laboratory requirements:*

This rule is, essentially, renumbered from previous Rule 3701-53-06.

Significant changes to the old rule include:

- With respect to laboratories successfully completing national proficiency testing programs, the new rule now requires the "designated laboratory director or designee" to "submit a copy of the proficiency test results to the director or their designee". See, OAC 3701-53-07(B).
- Like the revisions to OAC 3701-53-06, the new rule has been softened by replacing the word "shall" with the word "will" throughout the rule, relating to requirements that the "designated laboratory director" have a written procedure manual for all analytical techniques or methods (OAC 3701-53-07(C)); and review, sign, and date the procedure manual (OAC 3701-53-07(D).
- A new rule now requires that "[e]ach testing day, the analytical techniques or methods used in Rule 3701-53-04 of the Administrative Code will be checked for proper calibration". See, OAC 3701-53-07(D)(7).
- Further, new subsections (essentially ported over from previous OAC 3701-53-07) now state that tests for alcohol in blood, urine, and other bodily substances and tests for drugs of abuse in blood, urine, oral fluid and other bodily substances "shall be per-

formed in a laboratory by a laboratory director or by a laboratory technician" and "Laboratory personnel shall not perform a technique or method of analysis that is not listed on the laboratory director's permit". See, OAC 3701-53-07(F) & (G), respectively.

Rule 3701-53-08, entitled, *Qualifications of personnel:*

This rule is, essentially, renumbered from previous Rule 3701-53-07.
This rule is significantly re-worded from its previous counterpart.

In relevant part, the previous rule has been revised as follows:

- Removes the previous previous requirements that, as part of the qualifications for laboratory director permits and laboratory technician permits for laboratory alcohol analysis and laboratory analysis of drugs of abuse, controlled substances or metabolites of controlled substances in blood, urine, and now, "oral fluid" or other bodily substances, that the applicants must be employed by a laboratory that has successfully completed a proficiency examination administered by a national program for proficiency testing "for the approved technique or method of analysis for which the permit is sought", i.e., the new language only requires that the applicants "[b]e employed by a laboratory that has successfully completed a proficiency examination administered by a national program for proficiency testing".
- Removes the previous language that a laboratory technician permit holder can perform blood, urine and other bodily substance tests for alcohol or drugs of abuse under the "general direction" of an individual with a laboratory director's permit.
- Removes the previous "grandfather clause" relative to qualifications for a laboratory technician's permit for laboratory alcohol analysis, by removing the previous "[i]s a high school graduate or equivalent and was permitted on or before July 7, 1997" as a possible qualification criteria. See, OAC 3701-53-08 (A)(2).
- Relative to breath test device "senior operators", removes the old qualification for senior operators that required demonstration that the applicant could "properly care for, maintain, perform instrument checks upon and operate the evidential breath testing instrument", and now just requires the successful completion of "the department of health senior operator training course for the type of approved evidential breath testing instrument for which he or she seeks a permit". See, OAC 3701-53-08(D)(3).
- Relative to breath test device "operators", likewise removes the old qualification that required demonstration that the applicant could properly operate the evidential breath testing instrument, and now just requires the successful completion of "the department of health operator training course for the type of approved evidential breath testing instrument for which he or she seeks a permit".

Rule 3701-53-09, entitled, *Surveys and proficiency examinations:*

This rule is, essentially, renumbered from previous Rule 3701-53-08.

Significant revisions to the old rule include:

- As with other revisions, the word "shall" as used in the previous incarnation of this rule has been replaced with more passive wording, such as "will".
- Relative to "once per calendar year" proficiency examinations for Intoxilyzer 8000 operator access card holders, the phrase "calendar year" has been defined to mean "the period of twelve consecutive months, as indicated in section 1.44 of the Revised Code, beginning on the first day of January, and ending on the thirty-first day of December". See, OAC 3701-53-09(D).
- As noted at the outset of this article, proficiency examinations for breath testing device senior operators, operators, and applicants are now described as follows:

> (E) During proficiency examinations senior operators, operators, and applicants accept samples or test their own breath or breath samples from a volunteer, perform tests and report all results to a representative of the director. Operators, senior operators, and law enforcement agencies will grant the director's representatives access to all portions of the facility where the permit is used or is intended to be used, and to all records relevant to compliance with this chapter.
> (Emphasis added).

Further as to this rule, the old provision that such proficiency examinations could be administered by "a national program for proficiency testing" has been removed.

Rule 3701-53-10, entitled, *Permits:*

This rule is, essentially, renumbered from previous Rule 3701-53-09.

Significant revisions to the old rule include:

- The requirement in the old rule requiring laboratory directors and/or laboratory technician permit holders to "successfully complete proficiency examinations by representatives of the director using the techniques or methods

for which they have been issued permits" has been removed.
- The requirement in the old rule that the laboratory where the permit holder is employed shall have successfully completed a proficiency examination from a national program for proficiency testing using the applicable techniques or methods, and provide the representatives of the director all proficiency test results has been removed (this old requirement is found within the new OAC 3701-53-08, albeit worded differently).
- Intoxilyzer 8000 operator permits (referred to as operator access cards) previously did not expire, unless revoked. Now, Intoxilyzer 8000 permits "do not expire unless the permit holder fails to successfully complete a proficiency examination as outlined in paragraph (D) of rule 3701-53-09 of the Administrative Code or the permit is revoked by the director" or if the permit is "voluntarily surrendered". See, OAC 3701-53-10(E).
- The old rule's requirement that individuals seeking a renewal of operator or senior operator permits were required to satisfactorily complete "an in-service course for the applicable type of evidential breath testing instrument which meets the requirements of paragraph (B) of this rule [previous OAC 3701-53-09], which includes review of self-study materials furnished by the director" has been removed.

Rule 3701-53-11, entitled, *Revocation, suspension and denial of permits or operator access cards:*

This rule is, essentially, renumbered from previous Rule 3701-53-10.
Significant revisions to the old rule include:

- Relative to senior operators, language in the old rule that included that the director could deny, suspend or revoke a senior operator permit to a permit holder who failed to "demonstrate that he or she can properly care for" the breath testing instrument has been removed. See, OAC 3701-53-11(C).
- Now provides that the director may deny an application or suspend or revoke a permit in accordance with Chapter 119. of the Revised Code. See, OAC 3701-53-11(G).
- Now provides that the director may close an incomplete permit application after 120 days from submission. See, OAC 3701-53-11(H).

As can be seen, rather than addressing the pre-existing and scientifically invalid customs and practices of conducting proficiency examinations without using alcohol simulation solutions with known target values, the Director of Health saw fit to essentially legitimize this practice by revising OAC 3701-53-09(E) to modifying the language to state "[d]uring proficiency examinations senior operators, operators, and applicants accept samples or test their own breath or breath samples from a volunteer".

As in our previous article, we once again site to Sterling Drugs, Inc. v. Wickham (1980), 63 Ohio St. 2d 16, for the proposition that "[a] rule adopted by an administrative agency may be invalid by being unreasonable or unlawful for various reasons", and to State v. Vega (1984), 12 Ohio St.3d 185, 465 N.E.2d 1303, wherein the Ohio Supreme Court noted that there was no assertion therein that the Director of Health abused his discretion in promulgating rules set forth in OAC Chapter 3701-53.

It has never been more apparent that the Ohio Department of Health's continued efforts to "dumb down" the OAC regulations are in response to challenges thereto advanced by the defense bar, rather than scientifically-based efforts to ensure and "approve satisfactory techniques or methods" for chemically analyzing a person's whole blood, blood serum or plasma, urine, breath, or other bodily substances to ascertain the amount of alcohol, drugs of abuse, or metabolites of a controlled substance therein.

As always, it falls to the defense bar to call out the Director of Health for these knee-jerk, reactive, and results-oriented revisions to the Ohio Administrative Code.

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Marsy's Law and Ohio's Broad Embrace of the Victim's Rights Movement

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In 2017, Ohio voters adopted an initiative known as Marsy's Law, which amended Article I, Section 10a of the Ohio Constitution. Also called Issue 1, the language informed voters that the proposed amendment would "expand the rights of victims" and "require that the rights of victims be protected as vigorously as the rights of the accused." Ohio Secretary of State, Ballot Board: 2017. The ballot language also explained that the purpose of the amendment was to secure for victims "due process, respect, fairness, and justice" in the criminal legal system.

The law went into effect on February 5, 2018. Since then, the new law has given rise to many definitional questions, procedural issues, and constitutional challenges. In a possible attempt to address and clarify some of these concerns, the General Assembly recently passed HB 343. Effective as of April 7, 2023, the law recodifies much of the law's constitutional provisions. The new law is expansive in its length (150 pages) and scope (altering dozens of Revised Code provisions).

It is hard to tell what impact Article I, Section 10a, and its codification under HB 343 will have on Ohio's criminal justice system in the long term. This article explores some recent court efforts to provide some definitional and practical guidance regarding the law's application. Predicting what aspects of the law will or should withstand constitutional scrutiny is difficult, at best. As with many things, the devil is in the details; and here details abound. As Ohio Public Defender Tim Young pointed out at a recent seminar, "it will be at least a decade before we know how this law" is all going to shake out. But protecting the accused's constitutional rights in the process will require defense counsel to be vigilant in the face of criminal complainant's' efforts to push the boundaries of this new law.

What is it?

Marsy's Law expressly states that its purpose is "[t]o secure for victims justice and due process throughout the criminal and juvenile justice systems." Article I, Section 10a(A). The constitutional amendment lists the following rights to which it affords those deemed to have been victims of crimes:

1) to be treated with fairness and respect for the victim's safety, dignity and privacy;

2) upon request, to reasonable and timely notice of all public proceedings involving the criminal offense or delinquent act against the victim, and to be present at all such proceedings;

3) to be heard in any public proceeding involving release, plea, sentencing, disposition, or parole, or

in any public proceeding in which a right of the victim is implicated;

4) to reasonable protection from the accused or any person acting on behalf of the accused;

5) upon request, to reasonable notice of any release or escape of the accused;

6) except as authorized by section 10 of *Article I of this constitution*, to refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused;

7) to full and timely restitution from the person who committed the criminal offense or delinquent act against the victim;

8) to proceedings free from unreasonable delay and a prompt conclusion of the case;

9) upon request, to confer with the attorney for the government; and

10) to be informed, in writing, of all rights enumerated in this section.

Almost all these rights already existed before 2017. When 83% of Ohio's voter decided to adopt the amendment, they became enshrined in the Ohio Constitution.

Victims seeking to enforce these rights do so under Section 10a(B), which provides that they may be enforced 1) by the victim, 2) by the attorney for the government upon request of the victim, or 3) by the victim's other lawful representative, in any proceeding involving the criminal offense or in which the victim's rights are implicated. If the relief sought is denied, the victim or the victim's lawful representative may petition the court of appeals for the applicable district, which shall promptly consider and decide the petition.

Court scrutiny of Article I, Section 10a

Marsy's Law has given rise to numerous definitional and constitutional concerns. As these rights have been aggressively pressed in criminal proceedings[1] at the trial court level, Ohio courts have gradually weighed on some of these issues.

At first glance the amendment seeks to put the alleged victim in any criminal prosecution on equal footing with the individual accused of criminal misconduct. But what happens when the alleged victim's rights conflict with those of the accused? Section 10a (6) seems to say – at least where discovery and, likely, most aspects of the actual criminal trial is concerned – that the accused's rights, under Article I, Section 10, of the Ohio Constitution and the Sixth Amendment of the US Constitution, should prevail. Specifically, Section 10a(6) says that, so long as the defense request is "authorized" by Article I, Section 10, a trial court can enforce it over a victim's objections. *State ex rel. Thomas v. McGinty*, 164 Ohio St. 167, 2020 Ohio 5452, 172 N.E.3d 824.[2]

The Ohio Supreme Court has also clarified that Marsy's Law did not make victims, or those alleged to be victims, parties to criminal proceedings. See State v. Brasher, Slip Opinion, 2022 Ohio 4703, ¶ 6; citing, *State v. Hughes*, 2019 Ohio 1000, ¶ 20. In *Hughes*, the 8th District said this:

{¶ 12} Under Ohio law, the parties in a criminal case are the defendant and the state, not the victim [citations omitted]. Additionally, the state constitution specifically provides that all prosecutions shall be conducted by and in the name of the state of Ohio. Ohio Constitution, Article IV, Section 20. Thus, the appropriate parties in a criminal proceeding are the state and the defendant. Victims are not parties. [*State v.]Williams* [7th Dist. Mahoning No. 09 MA 11, 2010-Ohio-3279, 2010 WL 2749598] at ¶ 30. "It is not the victim's interests that are being represented in a criminal case, but rather those of the people of the State of Ohio." *Id.* at ¶ 31.

* * *

{¶ 14} "Marsy's Law does not make a victim a party to a case. The victim's role in a criminal case will not change, they are simply a person with certain rights. The prosecutor remains in control of the case and handles all decision-making in the prosecution of the crime." (Emphasis sic.) Marsy's Law for Ohio, L.L.C., Marsy's Law for Ohio Facts, https://www.supremecourt.ohio.gov/Boards/Sentencing/Materials/2017/March/marsysLawFactSheet.pdf (accessed Feb. 12, 2019). Thus, while Marsy's Law expands the rights

of victims, the law does not make a victim a party to a criminal action.

Speaking of victims – Section 10a does not define them. But, at this point we know for sure that a victim is *not* a municipality, corporate entity, or government body. *City of Centerville v. Knab*, 2020-Ohio-5219, ¶ 31.

One of the rights Marsy's Law affords victims is the entitlement "to full and timely restitution from the person who committed the criminal offense or delinquent act against the victim." The Ohio Supreme Court characterizes this as a broad guarantee to the full amount of restitution established in the trial court. But the Court also recognized that the Marsy's Law amendment operates in conjunction with state law except when there is a conflict between the amendment and a statute, in which case the amendment controls.[3] Since there was no conflict between R.C. 2929.18, which governs restitution proceedings, and Section 10a(7), the revised code could inform restitution proceedings.

The Court further held that the victim may seek to enforce the right to restitution by way of a timely appeal. *State v. Brasher*, Slip Opinion 2022 Ohio 4703. In *Brasher,* the Supreme Court concluded that, because the two victims seeking restitution for a vehicle damaged in the underlying crime did not timely appeal the trial court's failure to award the restitution, they had forfeited the right. *Id.* at ¶ 27.

In *State ex rel. Summers v. Fox*, 2020 Ohio 5585, the Ohio Supreme Court observed that the victim's right to privacy set forth under Section 10a(1) does not provide an exception to the Public Records Act. Since the litigation involved was and is a civil dispute over the release of public records relating to a closed criminal matter, the applicant seeking the records under R.C. 149.43, was entitled to them.

Section 10a(2) reiterated the fact that alleged victims possess the right to be present for all criminal proceedings involving the accused. Nevertheless, the constitutional amendment does not permit the prosecutor to designate the alleged victim as a personal representative of the state and have them sit with the prosecutor at counsel table. In State v. Montgomery, 2022-Ohio-2211, the Ohio Supreme Court found that this practice violated the accused's right to a fair trial and constituted structural error.

Provisions and Changes under HB 343

While perhaps intended to bring clarity to the sweeping nature of Section 10a, HB 343's detail and scope appear extremely broad. Here are some, but not all, of the significant changes of which to be aware.

Victim's right to timely notice upon request

To begin, the changes make clear that the victim has a right to be notified of any developments in a case at any time. See R.C. 2929.20(I), R.C. 2930.04, R.C. 2930.051, R.C. 2930.06; R.C. 2930.12, R.C. 2930.15, R.C. 2930.16, R.C. 2930.162, R.C. 2930.17, R.C. 2953.32(B) (Although many of these notices only need to be provided at the victim's request).

In addition, the court must provide the prosecutor with oral or written notice of any court proceeding not less than 10 days prior to the court proceeding unless the parties agree that a shorter notice period is reasonable under the circumstances. R.C. 2930.06(D). Further, the prosecutor must (upon request of the victim) provide notice of any proceedings (scheduled or otherwise) not less than 7 days prior to the criminal proceeding unless the parties agree that a shorter notice period is reasonable under the circumstances. R.C. 2930.06(E). Once a pro se victim or victim's attorney files a notice of appearance in a case, the pro se victim or victim's attorney must be served copies of all notices, motions and court orders in the same manner as the parties. R.C. 2930.191.

Victim's right to legal representation

Although not enumerated under Section 10a, R.C. 2930.19 provides that victims have the right to representation by retained counsel during criminal proceedings. If a victim has counsel, they are entitled to all the same notices as the parties and must be included in all bench conferences, meetings in chambers, and sidebars with the trial court that directly involve a decision implicating that victim's rights. One shudders to imagine the slowdown, complications, and confusions this provision alone could produce,

even in comparatively ordinary criminal litigation.

Under R.C. 2930.06, victims also have the right to confer with the prosecutor. The prosecutor must also provide notice to the victim within 14 days after the prosecutor has commenced. The trial court is also required to inquire of the prosecutor whether the victim requested to confer with the prosecutor and whether the prosecutor did confer with the victim before any of the following occurs:

- Pretrial diversion is granted.
- An indictment is modified or amended.
- A negotiated plea is agreed to.
- Prior to trial or adjudication for a juvenile.

If the Court finds that reasonable efforts were not made to confer with the victim, the court cannot rule on any substantive issues that implicates a victim's rights, accept a plea, or impose a sentence and must continue the proceeding to provide required notice. R.C. 2930.06(A)(3).

Victim's right to be present – Includes standing to participate in proceedings.

The victim also has the right to be present and play a role in plea and sentencing hearings. Under HB 343's codification of Section 10a's constitutional amendment, the victim's right to be present now includes any public proceeding (regardless of whether it is on the record). Further the victim may not be excluded even if that exclusion was necessary to protect the defendant's right to a fair trial. R.C. 2930.09. The victim also has the right to be accompanied by chosen supporters, a victim's advocate, and the victim's representative.

The victim, the victim's attorney, or the victim's representative has the right to be heard orally, in writing, or both if present. R.C. 2930.09. Section (A)(2)(a) of this provision places upon the trial court a duty to affirmatively ask the prosecutor the following when a victim or victim's representative is not present at a court proceeding in which a right of the victim is at issue:

- Whether the victim (if the victim requested notifications) was advised of the time, place, and purpose of the court proceeding;
- Disclosure of any and all attempts made to give each victim and victim's representative notice;
- Whether the victim and victim's rep were advised that they had a right to be present at the hearing;
- Whether the prosecutor conferred with the victim.

If the Court finds that timely or adequate notice was not made or the prosecutor failed to confer with the victim, the court may not rule on any substantive issues that implicates a victim's rights, accept a plea, or impose a sentence and must continue the proceeding to provide required notice. R.C. 2930.09(A)(2)(b)

R.C. 2930.09(B) also expressly gives the victim the right to be heard at any proceeding involving a negotiated plea (orally, in writing, or both) prior to the acceptance of the plea by the court. The Court may not accept a negotiated plea if the victim or victim's representative is absent unless all the following apply:

- The prosecutor advises the court that he or she conferred with the victim (if requested by the victim);
- The prosecutor made reasonable efforts to give the victim notice of the plea proceedings and their right to be present and heard;
- The prosecutor discloses any and all attempts made to give each victim notice of the plea agreement and the terms of any sentence or disposition agreed to as part of the negotiated plea;
- The prosecutor informs the court of any objection by the victim to the plea; and
- The prosecutor advises the court that to the best of the prosecutor's knowledge the notice requirements have been complied with.

R.C. 2930.09(C).

The victim also has the right to be present and heard at any probation revocation, termination or modification proceeding. R.C. 2930.09(E) and (F). The victim may weigh in on the trial court's decision to seal a defendant's record. R.C. 2930.171(B). The victim also has a voice in the court's determination with respect to the amount and conditions of the accused's bond. Pursuant to R.C. 2930.05(B)(1), the victim's attorney may file a petition asking the court to reconsider conditions of bond if the defendant is alleged to have committed or threatened to commit acts of

violence against the victim, the victim's family, or the victim's representative (if the prosecutor does not file such a motion).

Victim's right to privacy and dignity expanded to impact the accused's ability to prepare for trial and present evidence at that proceeding.

The victim and victim's representative have the right at any court proceeding not to testify regarding the victim's address, phone number, place of employment or other locating information unless the victim specifically consents or "fundamental demands of due process in the fair administration of criminal justice prevails over the victim's rights to keep information confidential." R.C. 2930.07(B). This places the burden on the accused to demonstrate that due process requires the disclosure of this information.

A defendant who seeks to subpoena records of or concerning the victim must now serve the prosecutor, the victim, and the victim's attorney (if applicable). The prosecutor must ensure that the defendant has the information necessary to effect service. R.C. 2930.071(A)(1). A victim may ask the court to quash or modify the subpoena if they maintain compliance would be unreasonable or oppressive. When a motion to quash is filed, the proponent of the subpoena must prove the following:

- The documents are evidentiary and relevant;
- The documents are not otherwise procurable reasonably in advance of trial by the exercise of due diligence;
- The party cannot properly prepare for trial without such production and inspection in the advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial;
- The application is made in good faith and is not a violation of the Ohio Rules of Criminal Procedure.

If the court refuses to quash the subpoena, the court must conduct an *in camera* review of any records to which a right of privilege has been asserted. If the court determines any of the records are privileged or constitutionally protected, the court must balance the victim's rights and privileges against the constitutional rights of the defendant. Of particular concern, R.C. 2930.071 provides that the disclosure of any of these records to the prosecutor does not make the records otherwise discoverable, unless the material is covered by Brady.

The prosecutor has an obligation to notify the victim of defense counsel's identity and advise the victim that they possess the right to refuse to submit to an interview by defense counsel or their agents. And defense counsel or their agents must specifically identify themselves when contacting the victim. R.C. 2930.72(A) and (B). Moreover, if defense counsel comments at trial on the victim's refusal to be interviewed, the court must instruct the jury that the victim has the right to refuse an interview or deposition unless the deposition was ordered by the court. R.C. 2930.072(D).

Victim's speedy trial rights

Under R.C. 2930.08(A), the alleged victim has the right to proceedings free from unreasonable delay and a prompt conclusion of the case. The court and all participants must endeavor to complete the case within the time frame provided by the Rules of Superintendence. If the victim, their representative or their attorney objects to a delay in the prosecution of the case, the court may grant the continuance only if the party seeking it demonstrates the delay is "reasonable" or is "otherwise in the interest of justice. If granted over the victim's objection, the court may only continue the matter for the amount of time necessary to serve the interests of justice and must announce on the record or in a journal entry the specific reason for the continuance. R.C. 2930.08(C). More disturbing, R.C. 2945.72(J) tolls the accused's speedy trial period "during any period that an appeal or petition for an extraordinary writ to enforce victim's rights is pending." Under these changes, the victim now has it both ways.

Victim's right to restitution

This too has been amplified under HB 343. For instance, the victim's estate may now seek restitution if the victim is deceased. The previous language simply provided that the victim's survivor was eligible. Under R.C. 2929.18(A), though, the victim has the right not to seek restitution—if you think that will happen a lot, you're invited to my next poker night. R.C. 2929.18(A). R.C. 2929.281 establishes a new framework for determining how restitution should be calculated. Under this provision, the victim is en-

titled to restitution for "any expenses related to a victim's economic loss due to the criminal offense" minus any "payments to the victim for economic loss made or due under a policy of insurance or governmental program."

Economic loss includes, but is not limited to:

- Full or partial payment for the value of the stolen or damaged property. The value of stolen or damaged property shall be the replacement cost of the property or the actual cost of repairing the property when repair is possible;
- Medical expenses;
- Mental health counseling expenses;
- Wages or profits lost due to injury or harm to the victim as determined by the court – lost income includes commission income as well as base wages;
- Expenses related to making a vehicle or residence accessible to the victim if the victim is partially permanently disabled or totally permanently disabled as a direct result of the crime.

Upon receipt of notification, any money owed by the state or city to the defendant (including tax refunds) must be assigned to outstanding restitution obligations.

The Court may not suspend payment of restitution if the victim objects. For juveniles, restitution orders may be reduced to a civil judgment and obligation to pay continues after the child turns 21 and after community control sanctions are terminated. R.C. 2152.203(F) and 2929.281(E). Upon request of victim and if the court determines it is appropriate and victim is not coerced, a victim may accept a settlement that is less than the full restitution order. R.C. 2928.281(F).

Victims have a right to appeal trial court orders with which they disagree.

Pursuant to R.C. 2930.19, the victim, victim's representative, victim's counsel, or the prosecutor (on request by the victim) has standing to assert or challenge an order denying the rights of the victim provided by law in any judicial or administrative proceeding. Once the victim asserts one of their rights, the trial court must hold a hearing on the matter within 10 days of that assertion.

If the trial court denies relief, it must do each of the following:

- Clearly state the reasons on the record or in a judgment entry;
- Provide the victim, victim's rep, victim's attorney, and parties with notice of the decision and a copy of the JE; and
- Provide the victim et al. with specific notice that they may appeal or petition the court of appeals for an extraordinary writ.

The victim may appeal or, if there's not an adequate remedy on appeal, petition the court of appeals or the Supreme Court for an extraordinary writ. (Although, as noted above the Ohio Supreme Court has weighed in on this and indicated that an appeal is preferable. See Brasher.)

The victim's interlocutory appeal must be filed within 14 days after receiving notice. The appeal divests the trial court of jurisdiction over the portion of the case implicating the victim's rights while the appeal is pending. A few things to note here:

- The *very* short briefing timeline: Once the transcript is received, the victim has 8 days to file merit brief, and the appellee has 8 days to respond.
- The court of appeals must decide the case in 35 days unless the parties agree to a different time.
- If the court of appeals does not decide the issue in 35 days, the victim is entitled to publicly shame them through a public notice to the Supreme Court (I am not kidding).
- The victim also has a right to pursue an interlocutory appeal to the Ohio Supreme Court – and that appeal must be decided in 60 days after the appeal is filed.

Incredible stuff. Moreover, the victim may also file an appeal post-sentencing and follow the regular appellate timeframes. Where sought, extraordinary writs must be decided in 45 days. Thankfully, a defendant has the right to respond and be represented by an attorney when the victim, their representative or the prosecutor seeks an extraordinary remedy. But these are, to put it mildly, big changes.

Conclusion

There is more, if you can believe it, and most of it is astonishingly bad for the constitutional rights of the criminally accused. Time and space limit this article

to a mere summary of the changes that will be coming. Section 10a's constitutional amendment and HB 343, the law that undertook to flesh it out, give rise to more questions than answers.

No one seriously objects to the notion that alleged victims should be treated with fairness, respect, and dignity. This law, however, does way more, all but elevating these individuals to party status. Yet we know, and the Ohio Supreme Court has made clear, that the victim of an alleged crime is not a party to the criminal proceedings against the defendant. State v. Montgomery, supra, at ¶ 16; citing *State v. Yerkey*, 2020-Ohio-4822, ¶ 25 (7th Dist.).

In many cases the provisions discussed herein create genuine conflicts with the rights that those accused of crimes have been guaranteed under the State and Federal Constitutions. Some of the provisions discussed are not likely to survive constitutional scrutiny, but only if we challenge the offending provisions on our client's behalf. For many of us that will require a deep dive into HB 343.

1. An organization known at the Ohio Crime Victim Justice Center (OCVJC) maintains a staff of attorneys who provide free legal representation to alleged crime victims throughout Ohio. You will be seeing more of them soon enough.

2. In McGinty, the Ohio Supreme Court also held that an alleged victim may challenge a trial court's order overruling their objection to a particular ruling under Section 10a (6). The question then becomes – what happens to the accused's right to a speedy trial while that appeal is pending? The defendant accused in the matter the McGinty writ complaint addressed is currently litigating that very issue because, during the time it took to resolve the alleged victims' objection to the discovery order over 900 days had elapsed. On May 11, 2023, the trial judge dismissed this prosecution on speedy trial grounds, the State of Ohio has appealed. State v. Counts, 8th Dist. CA 112715.

3. Ohio Constitution, Article I, Section 10a(E) (providing that the amendment "shall supersede all conflicting state laws").

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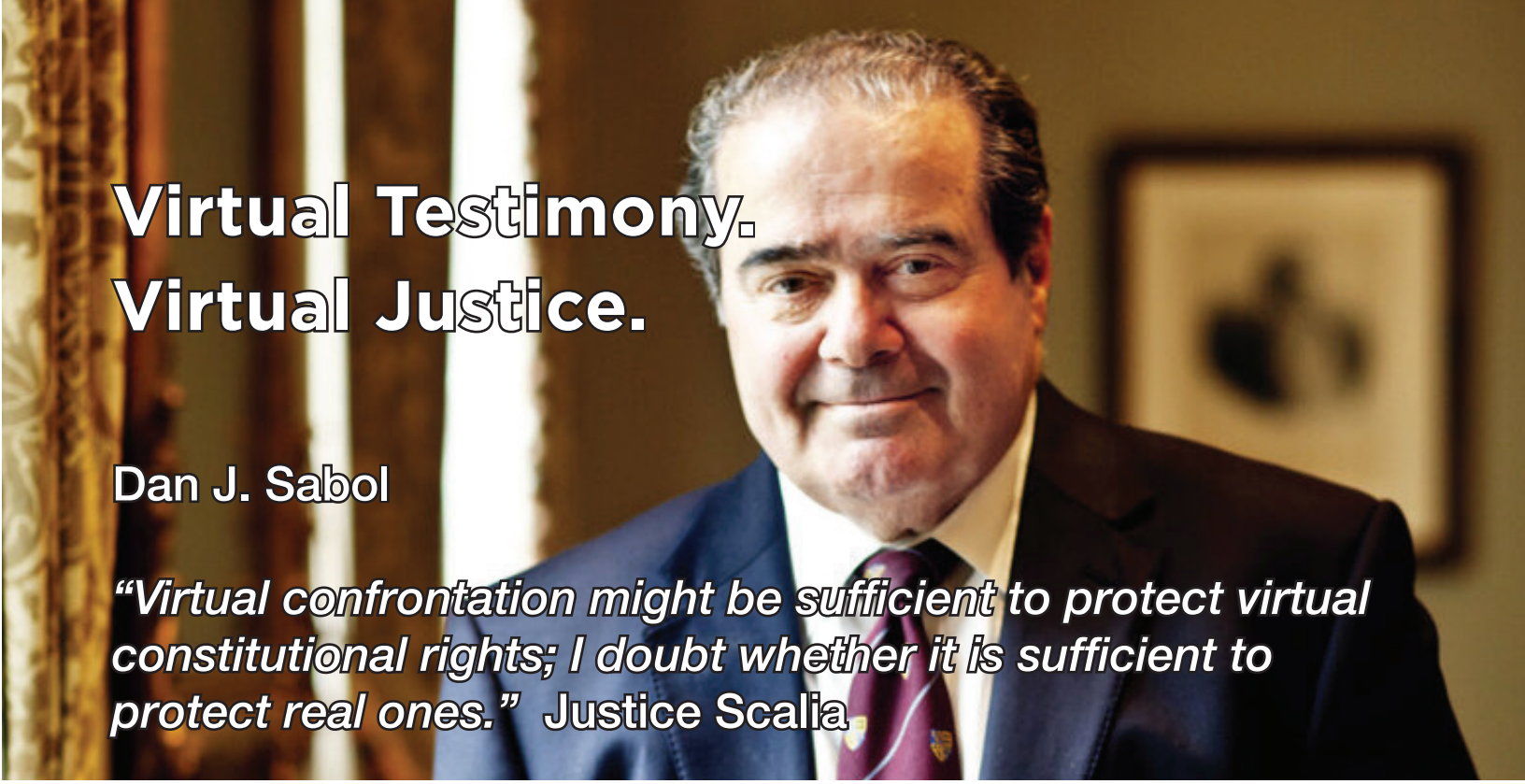

Virtual Testimony. Virtual Justice.

Dan J. Sabol

"Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones." Justice Scalia

Following the pandemic, the criminal justice system was forced to adapt and utilize technology to hold certain hearings. We get that. We held arraignments, pleas, bond hearings, and sentencing, among others, from the comfort of our homes. But as the pandemic wanes, many courts have adopted virtual options to increase efficiency. They do it to ensure the process is convenient and accessible for all. Many defendants, for strategic or expedience reasons, have taken advantage of remote testimony by waiving their right to confrontation. This is a good thing.

But the influx of remote testimony has led some courts to test the constitutional limits of confrontation. The pandemic has raised the question, yet again, of when virtual testimony is constitutionally permissible over a defendant's objection. Further, a new rule has been filed with the General Assembly which, if approved, may be interpreted to give courts broad discretion to permit witnesses in criminal cases the ability to testify without setting a foot in court. The proposed Criminal Rule 40 reads as follows:

Rule 40. Taking Testimony

(A) In open court. Except as provided in division (B) of this rule, at trial or hearing, the witnesses' testimony shall be taken in open court.

(B) Remote testimony.

(1). With the agreement of the parties or for good cause shown, the court may permit the remote presence and participation of a witness, including that of a defendant, for any proceeding if all of the following apply:

(a) The court gives appropriate notice to all parties;

(b) The court finds that the remote appearance of the witness is based on important state interests, public policies, or necessities of the case;

(c) The witness is administered the oath or affirmation using live two-way video and audio conference technology that allows the person authorized to administer the oath to verify the identity of the witness at the time the oath is administered;

(d) The witness is subject to full cross-examination;

(e) The video arrangements allow the witness to speak, and to be seen and heard by the court, all parties, and the jury if applicable.

(2) Every witness testifying remotely, even those outside this state, in a trial or other proceeding in open court in Ohio shall affirm on the record that they have submitted to the jurisdiction of

the Ohio court for the purpose of enforcement of their oath or affirmation, including any consideration of perjury charges arising from such testimony.

This proposed rule largely restates the holdings of Craig and its progeny while ignoring the context in which the cases were decided.[1] This gives short shrift to the analysis that led to their holdings—namely, that circumstances necessitating remote testimony are extraordinarily rare and jealously guarded. The plain reading of the rule gives courts broad discretion in allowing virtual testimony. But constitutional jurisprudence holds otherwise. The proposed Rule offers little more than confusion. It invites intrusion into an accused's rights and subsequent appellate reversals. The Rule should not be approved. And if it does go into effect, it is important we remember that the Confrontation Clause is not easily skirted.

*****

Perhaps revisiting the Confrontation Clause's origins is in order. The right to confront one's accusers is ancient. It was present in the time of Cicero, who invalidated convictions where either the accuser or the accused was absent for trial.[2] The Trial of Paul ("It is not the manner of the Romans to deliver any man up to die, before that he which is accused have the accusers face to face") and the unjust trial of Sir Walter Raleigh ("let my accuser come face to face"). These are a few of many historical accounts that shaped our right of confrontation. It was well settled in the common law by the time America was on the precipice of revolution.

Of course, confrontation was cemented in the United States Constitution in 1791. The Confrontation Clause guaranteed defendants the right "to be confronted with the witnesses against him." Though face-to-face confrontation is not referenced explicitly, the Clause has been found to "guarantee the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[3] The Ohio Constitution, which has alternatively been read to provide more or identical rights than its federal counterpart,[4] at a minimum explicitly guarantees the accused is to "meet witnesses face to face" in a criminal trial.[5]

*****

Exceptions to this axiomatic rule are rare and narrowly drawn. The seminal case discerning when face-to-face confrontation may be abridged is *Maryland v. Craig*.[6] The continuing validity of Craig is questionable—the *Craig* court justified its procedure because it "adequately ensures the accuracy of the testimony," the very reliability analysis *Ohio v. Roberts* was premised on and later dispatched with in *Crawford v. Washington*.[7] Still, *Craig* currently remains the touchstone across the country when analyzing the admissibility of two-way virtual testimony.[8]

Craig itself noted face-to-face confrontation "may not easily be dispensed with." To meet the *Craig* standard of admissibility, the state must prove two conditions: (1) that the denial of face-to-face confrontation is necessary to further an important public policy, and (2) that the reliability of the testimony is otherwise assured.

Turning to the "necessity" prong, addressed in proposed Crim.R. 40(B)(1)(b), courts have been reluctant to dispense with physical confrontation in all but a few limited instances. The circumstances in *Craig*—protecting child victims from the trauma of testifying in front of their abusers with testimony to support the specific circumstance—is one instance confrontation may not be face-to-face. Another has been where illness makes travel dangerous or impossible for the witness.[9] A third may be residence in a country that will not extradite a witness.[10]

Importantly, what is universally held to be insufficient to meet the necessity prong of the *Craig* test is "mere convenience, efficiency, and cost-saving considerations." *State v. Rogerson*, 855 N.W.2d 495 (Iowa 2014). See also *State v. Thomas*, 2016-NMSC-024, 376 P.3d 184 (Distance, cost, and efficiency are insufficient to overcome Sixth Amendment rights); United *States v. Yates*, 391 F.3d 1182 (11th Cir.2004) (Witnesses' unwillingness to travel from Australia insufficient to outweigh right of physical confrontation); *Commonwealth v. Atkinson*, 2009 PA Super 239, 987 A.2d 743 (inconvenience and cost of prisoner transport does not trump right of confrontation); *United States v. Carter*, 907 F.3d 1199 (9th Cir.2018), citing *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (The court should have continued case where a pregnant woman was suffering from temporary disability and would be able

to testify in person at a later point because "a criminal defendant's constitutional rights cannot be neglected merely to avoid 'added expense or inconvenience'").

Even in the rare case where the necessity is met, the second *Craig* prong should not be glanced over. *Craig* identified four elements of the confrontation clause: (1) presence, (2) oath, (3) demeanor, and (4) contemporaneous cross-examination. An evidentiary hearing is needed to ensure the remaining elements besides presence are met; otherwise, remote testimony may not constitutionally occur. While administering a proper oath where consequences exist for perjury is necessary, so, too, is the ability to observe the witness and their environment to ensure that "the witness is not being coached or influenced during testimony, and that the witness is not improperly referring to documents." [11] [12] Crim.R.40 addresses some of these factors, but it is merely superfluous to existing law.

Finally, let's not conflate "unavailability" with "necessity." It is not difficult to imagine forthcoming arguments that remote testimony is necessary and furthers public interest because a witness is unavailable.[13] But the right of confrontation is a rule of procedure—not evidence—and "the Confrontation Clause's protections do not turn on 'the vagaries of the rules of evidence."[14] The Confrontation Clause's mandates are on a higher plane than evidentiary rules concerning hearsay. The command of the Confrontation Clause "do[es] not simply 'evaporate when [the] testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.'"[15]

*****

This road has been traveled. A similar proposed change to Federal Rule of Criminal Procedure 26, which would have permitted unavailable witnesses to testify via two-way video in "exceptional circumstances" with "appropriate safeguards," was considered by the United States Supreme Court—and rejected.[16] In a statement accompanying the rejection, Justice Scalia stated he agreed, along with the rest of the majority, that the proposed rule "is of dubious validity under the Confrontation Clause." He continued:

> *As we made clear in Craig, a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations in the defendant's presence—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones."*[17]

It is for these reasons that Crim.R. 40 should be disapproved. At best, it gives a cursory starting point for a trial court to initiate a much more thorough analysis—one that would have occurred regardless of the Rule's existence. At worst, it invites courts to stretch virtual testimony beyond constitutional limits. And no matter what happens with the Assembly, we must remember "[t]he simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation…[t]he two are not constitutionally equivalent."[18]

There is undeniable air of gravitas thrust upon witnesses as they enter the courtroom, take an oath, and testify in the presence of the jury and the accused. The solemnity of this encounter withers when a witness merely jumps on a computer in their living room. Demeanor, eye contact, juror's ability to utilize emotional intelligence are all diminished or lost. [19] Both cross and direct suffer from communicating through a digital medium. When freedom is on the line, defendants have the right to physically confront their accusers absent very limited exceptions—we should be wary of rules that encroach upon this right.

1. Proponents of Crim.R. 40 may argue it is necessary to ensure out of state witnesses succumb to Ohio's jurisdiction for perjury considerations. All well and good; though trial lawyers may be dubious of its impact when prosecutors are loath to bring perjury charges against local witnesses proven to be dishonest.

2. Cicero, The Second Speech Against Gaius Verres: Book 1 (70 B.C.E.), reprinted in 1 Cicero, The Verrine Orations 382, 391-401 (L.H.G. Greenwood trans., 1928. For an in-depth discussion of the origins of the right to confrontation, refer to Frank R. Herrmann and Brownlow M. Speer, "Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause," Virginia Journal of International Law 34, (1994): 481-552.

3. *Coy v. Iowa*, 487 U.S. 1012, 1016 j(1998).

4. See, *e.g., State v. Storch*, 66 Ohio St. 3d 280 (1993) (SCOTUS interpretation of the Sixth Amendment right to confrontation pro-

vides less protection for the accused than the protection provided by the Sixth Amendment as traditionally construed and by the express words of Section 10, Article I of the Ohio Constitution) contrasted with *State v. Arnold*, 2010-Ohio-2742 (there is no greater right of confrontation in Ohio than that provided by the Sixth Amendment).

5. Section 10, Article I, Ohio Constitution.

6. This was a 5-4 decision.

7. See the Supreme Court of New Mexico's decision in *State v. Thomas*, 2016-NMSC-024 ("*Crawford* may call into question the prior holding in *Craig* to the extent that *Craig* relied on the reliability of the video testimony.")

8. The lone exception seems to be United *States v. Gigante*, 166 F.3d 75, 81 (2d. Cir. 1999), a case where the court formulated a test based upon the federal standard for when depositions may be used and held that"[u]pon a finding of exceptional circumstances…a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice." This decision has been widely criticized, and no Ohio court has adopted it.

9. See *Bush v. State*, 193 P.3d 203, (Wyo. 2008) (remote testimony necessary to further important policy of preventing further harm to witnesses already serious medical condition of congestive heart failure which rendered him unable to travel from out of state).

10. See *Harrell v. State*, 709 So. 2d 1364 (Fla. 1998) (Sick witness from Argentina beyond the court's subpoena power met the Craig necessity prong).

11. *Harrell v. State*, 709 So.2d 1364 (Fla.1998).

12. *United States v. Hamilton*, 107 F.3d 499 (7th Cir.1997).

13. My witness can't get a ride, your honor.

14. *Carter*, citing *Crawford*.

15. *Id.*, citing *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

16. Order of the Supreme Court, 207 F.R.D. 89, 92 (2002).

17. *Id*. (emphasis added).

18. *Yates* at 1315.

19. As Chase Mallory has argued, no one would rely on facetiming a potential spouse they met on a dating application prior to popping the question—you'd want to meet in person.

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THE FUTURE OF INDIGENT DEFENSE IN OHIO IS NOW

DAN SABOL
President

BLAISE KATTER
Public Policy Chair

The structure of indigent defense in Ohio is at a crossroads and significant discussions on the future of indigent defense in Ohio are afoot. As some of you know, the OSBA has been leading an advisory task force over the past year studying various options for restructuring the indigent defense system. Past President Shawn Dominy and current Erie County Public Defender Doug Clifford have been OACDL representatives on this committee.

Currently, the only consensus seems to be that the current system is not working as intended. The County Commissioners (generally) want out of the business of providing for indigent defense. The State wants to have predictability of expenses. Judges want to ensure the continued operability of their systems without significant upheaval with some currently having difficulty finding attorneys to cover necessary appointed cases. This has led to widespread discussions among the stakeholders as to how to reform the system to ensure a constitutional and stable system of providing indigent defense. OACDL is working closely with the stakeholders on the future of indigent defense in Ohio, and we need feedback from you—our members in the field—to ensure that your perspectives and concerns are brought to the table.

Current Practice

Currently, each county is responsible for determining the method by which indigent defense will be provided. There are five different methods currently used in Ohio:

1. The first method is to create a county public defender office. This is the method used in 31 counties, including Franklin, Hamilton, and Cuyahoga.
2. The majority of counties (38) use the court appointed counsel system, where all counsel for indigent defense are appointed on a case-by-case basis, with the hourly fee determined by county.
3. Ten counties contract directly with the State Public Defender's office, where the county and OPD negotiate the terms and OPD controls indigent defense.
4. Eight counties contract with a private non-profit organization.
5. One county incorporates a hybrid county and non-profit system.

It is important to note that, even in counties with a county public defender's office, there are still privately appointed counsel due to conflict cases with the county office. It is estimated that

a county public defender can only handle between 70 and 85% of the indigent defense cases and appointed counsel are needed to fill the remainder.

The Problem – Funding

The difficulty with the current system is the budgeting practice towards reimbursing counties for the cost of indigent defense. Historically, regardless of the model that the counties chose, the responsibility for paying the cost of indigent defense was split between the counties and the State, with the State's share sometimes falling far short of even 50% reimbursement. Through negotiations with Governor DeWine's office, the OPD was able to secure a historic increase in spending the last two budgets, which covered 75% reimbursement in FY '20 and '21 and 100% reimbursement in FY '22. (Note: In Ohio, the fiscal year begins on July 1 of the preceding calendar year. FY '24 will therefore begin July 1, 2023).

This historic increase in funding led the OPD (alongside the OACDL) to work with individual counties to raise their appointed counsel rates to a minimum of $75/hour, which many did.[1] Even with the higher rates, OPD was able to reimburse counties 100% in FY '22.

Unfortunately, that prediction was not met for FY '23, due to an unprecedented increase in the requests for reimbursement which far exceeded historical norms. Reimbursement in FY '23 is estimated to be around 80%.

This has understandably frustrated the stakeholders in the County Commissioners and General Assembly, who had intended full reimbursement for the counties. As a result, there are some radical changes in the current budget to try to get costs under control.

Imminent Change – the Budget

There are two major provisions relating to indigent defense in the House-passed version of the 2024/2025 budget (that is due to be finalized no later than June 30, 2023). The two provisions are what has been termed a "spending freeze" and a so-called "pilot program" seeking to incentivize counties to switch their model of indigent defense.

The "spending freeze" is straightforward. It would prohibit any county from raising their court appointed hourly rates above $75 while the future of indigent defense is debated. Originally, the plan was to put a hard cap of $75/hr on all court appointed rates, but the OSBA, with support from the OACDL, was able to negotiate away from a hard cap to this "freeze" to prevent counties which are already exceeding the $75/hr to continue to pay their more generous rates.

The more concerning element in the budget is a so-called "pilot program" that would place financial pressure on counties to switch their model to contract directly with the OPD. Although only 10 counties currently adopt this model, the budget would incentivize counties to switch by promising them 100% reimbursement if they switched to the contract model. All other counties that did not make the switch would

split whatever money was remaining after the 100% reimbursement was made. We, alongside the OSBA, have significant concerns about such a shortsighted effort be made to switch models without the benefit of discussion and consideration. We are strongly opposing the inclusion of this language in the budget.

Where Do We Go from Here?

This is where we need feedback from **YOU**, our members. There are intense conversations happening among all the stakeholders about the best way to reform the system, and these conversations are gaining intensity. It certainly appears that discussions on reforming the system are gaining traction and decisions may soon be made.

Further, a formal legislative committee has been established to study the issue and report back on recommendations by April of 2024. Therefore, it is high time for OACDL to come together to prepare our position to ensure that our members' voices are heard in these critical discussions. To that end, please watch the listserv and your email in the coming weeks and months for town hall opportunities to come together and share your perspectives and concerns as we navigate the future of indigent defense together.

1. To see a complete map with all court appointed rates, go to: https://opd.ohio.gov/county-resources/county-rate-cap-maps

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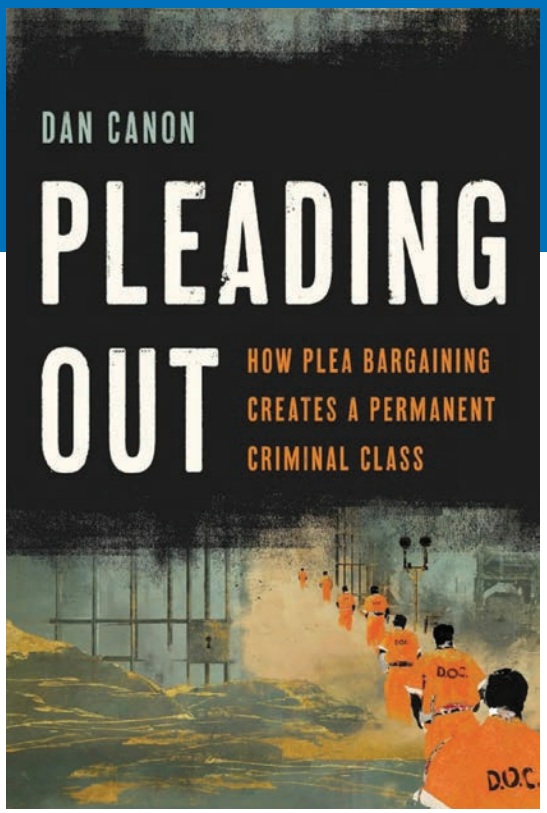
Book Review: Pleading Out: How Plea Bargaining Creates a Permanent Criminal Class

JEFFREY M. GAMSO



We all know that too many people take the deal and plead out when they ought to go to trial. And we know too that many people go to trial when they ought to have taken the deal. In *Pleading Out: How Plea Bargaining Creates a Permanent Criminal Class*, author Dan Canon argues that there shouldn't be any deals.

It's not that Canon thinks everyone should go to trial . Lots of folks should just plead to the indictment and then argue to the court about sentencing (which, he repeatedly claims, can't be done after a plea bargain). Others should (and would, he says) have their cases dismissed because prosecutors will just naturally have to screen cases carefully to determine whether they can win at trial and whether they ought to bother even if they can. (Prosecutors will have to do that because they can't try everyone the cops bust; and in time the cops will bust fewer people and violate fewer of their rights because . . . . . Well, I'm not exactly sure why.)

Canon's central thesis is something like this: From the founding, the country was designed by and for the benefit of land-owning, rich, white men (RWM) and it ensured that the law would always protect them. By the 1830s, other sorts of folks were both growing in number and starting to show some muscle. To prevent those they thought slobs and deadbeats from organizing, the RWM needed to make them hate each other. And the way to do that was to make as many of them as possible criminals. Fairness be damned. Justice be damned. Honesty be damned. Arrest 'em, plead 'em out, lock 'em up (or not – probation's OK, too, they're still criminals who can be hated and forced into the streets because of the collateral consequences of their unreviewable pleas).

Buy that thesis or not (and its surely oversimplified even if you do), the end – 95% or so of cases ending in pleas – is real and problematic. Canon tells story after story of folks who shouldn't have been

arrested, shouldn't have been prosecuted, surely shouldn't have been coerced into pleading guilty (or in some cases refused the offer and suffered outrageous trial taxes). The result is our current unjust system: cases merely processed, mass incarceration, and vast overcriminalization.

So do away with it all. Pleas, yes. Plea bargains, no. Will the system crash? It doesn't have to if everyone (especially prosecutors) acts honorably and with compassion. No overcharging, no prosecutions on trumped up charges or when evidence should have been suppressed or when confessions were obtained through deceit or coercion or for trivial offenses. And, oh yeah, abolish all those annoying collateral consequences.

Canon knows the value of good stories, and as I said, Pleading Out is filled with them. Folks who believe our system works just fine will learn otherwise from the book. For those of us in the trenches, it's a good bit too neat.

The thing is, as the legislatures crank up sentences, and slap on mandatory minimums right and left, as prosecutors overcharge, and as courts almost routinely impose trial taxes, it's often going to be in the best interests of our clients to negotiate and take a deal. Not as often as they do, perhaps, but often. Canon's basically a civil rights lawyer (and a law prof). He wants a pure system and makes a fair case for what it might look like. We'd like a pure system, too, of course. But mostly we want, and ethically we're bound to want, what's best for this client, in this case, this day. As the old union song goes, "You'll have pie in the sky when you die."

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