

MEDINA COUNTY BAR ASSOCIATION

93 Public Square
Medina, Ohio 44256
Medina County Bar Association

www.medinabar.org

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Upcoming MCBA Events

- ❖ September 6, 2019: Third Quarter Meeting, Santo Suossos: 11:30 a.m. – 1:00 p.m. (includes 30 minute CLE)
- ❖ September 26, 2019: Domestic Relations CLE, University of Akron, Medina Campus: 10:30 a.m. – 3:30 p.m.
- ❖ October 11, 2019 at 11:30 a.m. – 1:30 p.m.: 1-hour lunch CLE (pending approval) on juvenile sealing & expungement, Medina Library
- ❖ December 6, 2019: Fourth Quarter Meeting, Williams on the Lake

Domestic Relations CLE – New Laws & Settlement Devices

The MCBA is sponsoring a Domestic Relations CLE on Thursday September 26, 2019 from 10:30 a.m. to 3:30 p.m. (4.5 General CLE Hours). The seminar will be at The University of Akron, Medina Campus. Scheduled Topics include:

- John Zoller of the Zoller Biacsi law firm in Cleveland Heights, Ohio will present on the new, 2019 child support laws enacted through HB 366 and revising R.C. § 3119.
 - Brian Urban of the Urban & Pozzuto law firm in Cleveland, Ohio, will present on collaborative family law as manifested through the Ohio Collaborative Family Law Act (R.C. §§ 3105.41–3105.54) & its other legal relations.
 - Magistrate John Mascolo of the Medina County Domestic Relations Court will present on mediation in the domestic relations context.
 - Magistrate Kimberly Oliver of the Medina County Domestic Relations Court will present on services & programs of the Medina County Domestic Relations Court.
- Cost is \$50.00 for members and \$75.00 for non-members. RSVP by September 9, 2019 by emailing Gina Hotchkiss at ghotchkiss@medinaco.org**

Medina County Bar Association

Our 2019 Executive Team:

President – Monica Russell, Esq.
President-Elect Bradley J. Proudfoot, Esq.
Vice President – Matthew Ameer, Esq.
Treasurer – Michael Callow, Esq.
Secretary – Melissa J. Piszczek Esq.
Executive Secretary – Gina Hotchkiss

Ninth District Judge Hears Supreme Court Case

By Anne Yeager | July 9, 2019



Ninth District Court of Appeals Judge Jennifer Hensal

Ninth District Court of Appeals Judge Jennifer Hensal served as a visiting judge on the Ohio Supreme Court today and heard oral arguments in a case on whether an owner can collect damages from a pawnshop that sold her stolen jewelry.

Judge Hensal replaced Justice R. Patrick DeWine, who recused himself from *Irene Danopulos v. American Trading II LLC*, Case no. 2018-1157. The case is out of the First District Court of Appeals in Hamilton County.

According to the Ohio Constitution, in the event of a recusal by a justice, the chief justice can select any of the 69 sitting Ohio appellate court judges to sit temporarily on the Supreme Court.

This was Judge Hensal's second time serving as a visiting judge on the Ohio Supreme Court.

Judge Hensal began her term with the Ninth District in February 2013. Prior to sitting on the bench, Judge Hensal served as the assistant law director in Wadsworth and as an assistant prosecutor in Medina and Wadsworth. She also represented other municipalities including the villages of Seville and Lodi in Medina County. After receiving her law degree from the University of Toledo College of Law in 1993, Judge Hensal began her legal career in private practice.

The Ninth District Court of Appeals serves four counties in northern Ohio, and hears cases from county, municipal, and common pleas courts as well as original actions in habeas corpus, mandamus, prohibition, procedendo, and quo warranto.

Article appeared on Ohio Supreme Court Website at: http://www.courtnewsOhio.gov/bench/2019/VJHensal_070919.asp#.XS89W-hKhPa

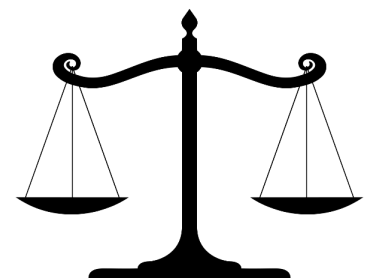
Message from our President

Greetings! Your executive committee has been busy this summer. We recently presented three pictures of the square (including the old and new courthouses and the gazebo) to the Ninth District Court of Appeals to hand in their new courthouse.

We have been attending the numerous meetings concerning the planned renovation of the County/Municipal Courts. We have asked the taskforce in charge of this project to allow our President-Elect Brad Proudfoot to participate and, by doing so, hope to be able to provide you with the latest developments.

We have several CLEs coming up – see our events listing on Page 1. And we hope to see you at the September 6 Quarterly Meeting. It will be a busy meeting as OSBA President-Elect Judge Linda Teodosio will be there to greet our members and we will have a 30 minute Legislative Update from OSBA's Director of Policy and Government Relations.

Sincerely,
Monica E. Russell
2019 MCBA President
General Counsel, Erie Title Agency, Inc.



COPYRIGHT REGISTRATION NEEDED

By Pat Walker, Walker & Jocke Co., LPA

Have you had a client come to you complaining that they have been accused of copyright infringement or a client complain that someone stole their copyrighted material?

If your client has been accused of copyright infringement ask the accuser if they have a Copyright Registration from the U.S. Copyright Office (www.copyright.gov) for the material that was allegedly copied unlawfully. If the accuser does not have a Copyright Registration, most likely they cannot sue for copyright infringement. The same, most likely, goes for your client that complains that someone stole their copyrighted material. The material usually must be protected by a U.S. Copyright Registration before a lawsuit for copyright infringement may be filed.

The U.S. Supreme Court recently decided a split in the decisions of the Courts of Appeals. The Court ruled in *Fourth Estate Public Benefit Corp. v. Wallstreet.com, LLC*, 586 U.S. ____ (2019) that a Copyright Registration was a prerequisite to the filing of a copyright infringement lawsuit.

However, a Copyright Registration Application may be filed and obtained after the alleged infringement. After the Copyright Registration is issued by the Copyright Office a lawsuit may be filed. There is a three year statute of limitations for copyright infringement claims.

Pat Walker
Walker & Jocke Co., LPA

YEARS OF SERVICE AWARDS

Please note that the Medina County Bar Association will be awarding attorney members who have been practicing for 40 years or more. The Medina County Bar Association is keeping a running list for members that have been practicing for 40 years or more. Please contact Gina Hotchkiss by email (ghotchkiss@medinaco.org) with any attorney names which you believe have had 40 years or more of practice so that we don't miss out on awarding them!



VIEWS FROM THE BENCH



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

Greetings from the Medina County Juvenile Court and the Juvenile Law Committee. We hope everyone is enjoying the sunshine and milder weather these summer days. We are planning a Lunch & Learn CLE on the topic of Juvenile Records Sealing and Expungement soon. Our goal is to provide valuable and clear information on this topic so that mistakes made by children in their youth don't remain on their records into adulthood where appropriate. There have been a number of law changes and updates in this area throughout the years. Considering these changes, and the vast differences between Juvenile and Adult rules, a seminar would help practitioners answer the age old question of "Will this remain on my record past 18?" Look for an email with registration information coming soon from the Bar Association.

We also wanted to update you on new laws that affect the Jurisdiction of the Juvenile Court in Custody matters pursuant to HB 595. Specifically, R.C. 2151.233, eff. 3/22/2019. The new statute limits the Juvenile Court's Jurisdiction to hear and determine custody or support regarding a child if any of the following apply:

- (A) The child's parents are married (to each other).
- (B) The child's parents are not married (to each other) and there is an existing order for custody or support regarding the child or the child's sibling over which the juvenile court does not have jurisdiction.
- (C) The determination is ancillary to the parents' pending action for divorce, dissolution of marriage, annulment, or legal separation.

There's a cleanup bill pending to clarify some of the confusion in the statute. I've included some of the cleanup language proposed in parenthesis above. Click here for the new laws regarding custody jurisdiction. [ORC - 2151.233](#), [ORC - 2151.234](#), [ORC - 2151.235](#), [ORC - 2151.236](#).

On the topic of custody, keep in mind the option of a Grandparent Power of Attorney in certain cases. Grandparents commonly approach the Juvenile Court to acquire custody of their grandchildren based upon parental impairment, such as mental health needs, substance abuse, incarceration, or other concerns. In some cases (not all) a simple Grandparent Power of Attorney form can be used. This process is relatively easy and free. Forms are available on the Supreme Court website and at the Court. A Grandparent POA is revocable at any time, which is both good and bad depending on the situation of each child. This is not the appropriate method in every case, but may offer immediate protection for children in certain cases. Only grandparents can use this option. Please feel free to contact me if you have any questions. See link below.

<http://codes.ohio.gov/orc/3109.53v1>

A great gangster story with a lesson on leadership

By Paul Camacho

Good stories usually have five key elements: a likable protagonist that selflessly rises to the occasion; a malevolent antagonist seeking to oppress others; an impactful event that sets the characters in motion; a conflict that creates seemingly insurmountable challenges; and a climactic resolution so pleasing it serves to inspire us. This is the stuff of blockbuster movies. When all five elements can be encapsulated in the events of a real person's life, then you have a really great story. Such is the story of Elmer Lincoln Irey.

Irey was the first chief of the intelligence unit, a law enforcement branch of the U.S. Department of the Treasury created in 1919 to attack the growing problem of tax evasion occurring after WW1. Income tax rates had been significantly hiked to help pay for the mounting debts incurred during the Great War. But there were those of an unpatriotic ilk that had no interest in handing over larger portions of their income. It was Irey's job to establish and oversee a band of investigators to tediously follow the money and build criminal tax evasion cases on the nation's biggest tax dodgers. Irey's unit was commonly referred to as the "T-MEN" to differentiate them from the famed "G-MEN" of the Federal Bureau of Investigation.

On the surface, the work of Irey's intelligence unit may sound a bit mundane — laboriously combing through ledgers, bank records and receipts — but that was not how Congressman John Cochran saw it. In his speech to congressional colleagues in 1940, Cochran told them, "If the true story of his [Elmer's] activities could be put in book form it would be classed as one of the best sellers in the United States. There is not a section of the country they have not invaded."¹ *Life* magazine amplified the Congressmen's assessment, proclaiming that Irey's T-MEN "involved themselves in some of the greatest cops-and-robbers escapades in history."²

The antagonists

The evil villains in Irey's story are gangsters. Not run of the mill gangsters but T-Rex-sized violent crime bosses of comic book proportions that flourished during Prohibition era. Their vast criminal enterprises earned millions of dollars through the sale of alcohol, prostitution, illegal gambling and commerce extortion rackets. If you wanted to do business, well... you better pay them. By the mid-1920s, nearly every major city had a kingpin crime overlord.

Yes, violence and intimidation played a role, but what really empowered the gangsters was a culture of corruption that permeated the 1920s. When you line the pockets of councilmen, judges, police officials, prohibition agents and governors, you become untouchable. Because of corruption, the honest cops were hamstrung in dealing with the organized crime wave. Famed journalist and author, Marquis Childs, explained the Gotham-like atmosphere of the time: "In city

¹ PROCEEDINGS AND DEBATES OF THE 76 CONGRESS, THIRD SESSION

² *Life*, September 2, 1946, 46-47.

after city, in communities large and small, crime was licensed, subsidized. Decent people despaired.” Along with the gangsters, corrupt officials were also the evil villains.

The impactful event

What set Irey in motion with his antagonists was the St. Valentine’s Day Massacre. On Valentine’s Day 1929, seven people were lined up against a wall in a Chicago warehouse and gunned down execution style with submachine guns. The reigning theory was that the infamous kingpin, Al Capone, ordered some of his 1,000-plus army of gangsters to make the hit. The victims were members of a rival criminal enterprise known as the Northside Gang led by the kingpin George “Bugs” Moran. Capone was bent on violently taking over Moran’s territory. To Capone, it was just business.

The St. Valentine’s Day Massacre received mass media attention and ignited a public outrage toward the violence and corruption engulfing the nation. In response to outcries, President Herbert Hoover made it his priority to rid the country of crime bosses and at the top of his list was the infamous Capone.

At the time, there were few federal laws specifically designed to combat organized crime. Even though the Bureau of Prohibition made thousands of arrests, they had been frustratingly ineffective in roping in the ringleaders. Out of desperation, President Hoover ordered Irey to get Capone. As *Life* magazine put it, “When gangsters and crooked politicians defied the local laws, the T-MEN nabbed their men for the federal crime of tax evasion.”³

Seemingly insurmountable challenges

The task at hand for Irey was definitely not a simple and safe walk in the park. When Capone learned that the T-MEN were on his case, witnesses mysteriously turned up missing or dead. It was a dangerous assignment and Irey regularly received death threats. Irey was unfazed by the threats on his own life but obsessively worried about the well-being of his agents.

Using tax laws to bring down crime overlords was a novel approach. Like Louis and Clark, Irey was headed down uncharted waters. Capone paid cash for everything, kept no books and records in his name and had extremely loyal minions secretly handling his financial affairs. Capone claimed he was a professional gambler on a losing streak. On paper, Capone appeared to be flat broke.

Going after Capone’s money trail would undoubtedly lead to the exposure of corrupt officials. Capone paid about 20 cents on every dollar he earned to graft. Like other major city kingpins, Capone made generous political cash contributions to politicians. Irey could have stepped on big, influential toes, the toes of those that could have toppled his career or cut funding for his unit. The astute Director of the FBI, J. Edgar Hoover, acknowledged the hazards of such investigations and avoided organized crime cases altogether.

³ Ibid.

To build cases on entrenched crime bosses you first need intelligence on the inner-workings of the organization and that meant long-term undercover operations. Only the most experienced undercover agents would stand a chance blending in with hardened gangsters. At the time, Hoover would not take the risk of letting his agents do such undercover work for fear they would succumb to the vices of the gangsters. However, Irey's top undercover agent infiltrated the Capone organization and lived with Capone's gang for over a year without compromise.

Even if Irey's team put together a prosecutable case there was still the demoralizing realization Capone would bribe and intimidate the jury (which Capone later attempted). There was also the risk of an agent capitulating to a bribe. A corrupt prohibition agent could earn thousands of dollars by merely letting a truckload of whiskey pass by. Capone tried to bribe Irey with a million dollars, which he summarily declined.

In order to have a fighting chance, Irey needed a top notch team of seasoned criminal investigators skilled at following the money, unencumbered by fear with unassailable integrity and honesty. The team would have to be so steadfastly loyal to the mission they would be willing to work excruciatingly long hours for months on end under dangerous conditions, ever motivated to follow the slightest financial lead.

The climactic battles and victories

On October 18, 1931, the front headlines of all major newspapers reported the conviction of Capone on tax evasion, making Irey and his T-MEN instant folk heroes. The conviction was such a motivating factor that lines of mobsters formed at IRS offices to file tax returns. Tax collections in the Chicago area more than doubled.

Without a rest, Irey and his T-MEN went to New York and took on infamous gangsters Waxey Gordon, Dutch Schultz and Capone's mentor, Johnny Torrio. They then applied their investigative prowess on the Huey Long Gang of Louisiana; Kansas City's political boss Tom Pendergast; and Atlantic City's Lord of Atlantic City, Nucky Johnson, who was the inspiration for HBO's *Boardwalk Empire*. Irey and his T-MEN were invading so many crime bosses and corrupt officials they earned the nickname The Giant Killers. The T-MEN even saved Hollywood by stopping Capone's remaining gang, led by ruthless killer Frank Nitti, in their tracks from controlling the motion picture industry.

So impressed with his leadership, U.S. Secretary of the Treasury Henry J. Morgenthau appointed Irey to be the coordinator of all Treasury law enforcement agencies which included the Secret Service, U.S. Customs, Bureau of Alcohol, Federal Bureau of Narcotics and Coast Guard criminal investigators. *Life* magazine stated, "64% of all peacetime criminals in federal prisons are there because of Elmer Irey and his T-men." The Director of the Bureau of Prisons called Irey "his best talent scout."⁴

In 1942, when the nation was heavily reliant on income tax collections to fund WW2, President Franklin Roosevelt (FDR) sent Irey a personal letter of appreciation on White House stationery

⁴ Letter to Elmer Irey from James Bennett, dated August 1946, original in possession of Mob Museum

that stated, “Over the years the Intelligence Unit has become not only a shiny mark of incorruptibility but also A-1 Service.”⁵

In 1945, Westbrook Pegler, a popular conservative columnist who wrote extensively on professional sports scandals was asked by the baseball industry what he thought of Irey as a candidate for the new baseball administrator. Pegler responded by saying he did not know what Irey knew about baseball but if Irey was not honest, “there weren’t no God.”⁶

Irey served in a senior law enforcement position from 1919 to 1946, retiring due to a failing heart. Upon his retirement, Irey received numerous letters of praise from well-wishers, colleagues and former staff. The Chairman of the Import Export Bank wrote Irey, “Your record as a public servant cannot be exceeded. It is without a blemish, and there has never been a scintilla of criticism directed against you notwithstanding the thousands of cases investigated and prosecuted under your personal direction.”

Homer Cummings, the U.S. Attorney General under FDR, wrote to Irey: “As you are aware, I have been familiar with your public service over a long period of time, and in my judgment no one has rendered more distinguished public service than you have.” Interestingly, Cummings, as the attorney general, was Hoover’s boss and an early supporter of the famous FBI director.

Marquis Child — the first to win a Pulitzer Prize for distinguished commentary —wrote Irey, “Your long and distinguished service is an occasion for pride not alone to your family and wide circle of friends but to everyone who believes in effective, honest government.”

Arguably, Irey was one of the most respected and accomplished law enforcement leaders in the history of the United States. So how did he do it?

The power of character

In his letter to Irey, U.S. Attorney and later Federal Judge William T. McCarthy eloquently described what enabled Irey’s success. “The worth-while satisfaction, Elmer, that one can get out of public service can only be measured by the attributes of honesty, integrity, forbearance, sound judgment, patience, and charity, the latter attribute not misapplied, but exercised in conformity with the standards of simple justice. These attributes are a part of the Golden Treasury of life and you have been blessed by having them as your treasured possessions.” Simply put, McCarthy was telling Irey it was his character.

Alf Oftedal— the agent that led the fight to save Hollywood — said in his letter to Irey, “Emerson has observed that men of character are the conscience of the society to which they belong. How true this is, as evidenced by your outstanding influence among special agents. They, quite naturally, considered it a great honor to have been selected for important duties under your direction.”⁷

⁵ Letter to Elmer Irey from President Franklin Roosevelt dated March 1942, original in possession of Mob Museum

⁶ Letter to Elmer Irey from Westbrook Pegler dated August 28, 1946, original in possession of Mob Museum

⁷ Letter to Elmer Irey from Alf Ofteda dated August 1946, original in possession of Mob Museum

Those who choose to lead with honesty, integrity, forbearance, sound judgment, patience, charity and “simple justice” are leaders of character. They lead by example and by doing so, foster a culture of character that inspires others to mirror their attributes. This is how Irey made his unit a “shiny mark of incorruptibility.”

Agent Tom Henry said in his letter to Irey “Above all you have shown every man who has worked for or with you that true value of integrity, loyalty and sound common sense.”⁸ Agent E.C. Palmer wrote, “The Unit carries and will jealously safeguard the enduring stamp of your character and integrity”⁹

Leaders of character work toward a higher purpose than themselves. They strive to be selfless, humble and never self-aggrandizing. Stephen Spingarn — the assistant general counsel for the U.S. Treasury who also served as special counsel to FDR and President Truman — wrote Irey, “I have particularly admired the selflessness with which you have carried on your work, avoiding the notable opportunities which it might have afforded another sort of man for self-glorification, and concentrating only on doing the job.”¹⁰ Reading between the lines, the “another sort of man” Spingarn alluded to was Hoover. When Spingarn was the assistant attorney general, he worked closely with Hoover. By Hoover’s edict, every FBI press release only bared the name “J Edger Hoover” and the FBI director reveled in the spotlight.

Leaders of character are not obstinate taskmasters. They understand the value of encouraging others to achieve “A-1 service.” Agent Muray Dengler said to Irey, “You drove your teams with an easy rein which gave them more confidence in themselves and made all of them give their best to you.”¹¹ Paul Synder — one of the agents that brought down crime boss Nucky Johnson — told Irey, “On many occasions your confidence in our ultimate success represented the only incentive to continue in the face of obstacles which appeared insurmountable.”¹²

However, Irey was not a pushover unwilling to give stern direction. Agent Donald Bircher wrote Irey, “I pleasantly recall the trying days in the investigation of the New Orleans cases when we all sat around on a bed in a hot, stuffy hotel room and you really grilled me as to progress being made in the Governor O.K. Allen case. Your pointed questions and comments spurred us to our best efforts and effectively guided me in all of my subsequent investigations.”¹³

Leaders of character care for their people. In a group letter to Irey signed by six members of the secretarial pool, they told him, “Not one of us can recall a day when you weren’t always willing to lend a helping hand; nor can we recall that you have ever been anything but our smiling Mr. Irey.”¹⁴ Former agent and U.S. Director of Procurement Clifford Mack perhaps best summed up Irey’s compassion for his people. “I have always had a very pleasant recollection of the number of

⁸ Letter to Elmer Irey from Tom Henry dated August 1946, original in possession of Mob Museum collection

⁹ Letter to Elmer Irey from Special Agent in Charge E.C Palmer dated August 15, 1946, original in possession of Mob Museum

¹⁰ Letter to Elmer Irey from Stephen J. Spingarn dated August 21, 1946, original in possession of Mob Museum

¹¹ Letter to Elmer Irey from Muray M. Dengler dated August 1946, original in possession of Mob Museum Collection

¹² Letter to Elmer Irey from Paul Snyder dated August 14, 1946, original in possession of Mob Museum collection

¹³ Letter to Elmer Irey from Donald Bricher dated August 16, 1946, original in possession of Mob Museum

¹⁴ Letter to Elmer Irey from six members of Treasury secretarial staff dated August 1946, original in possession of Mob Museum

young folks who stopped by to visit with you and I noticed particularly that they invariably called you, 'Uncle Elmer.' I soon learned it was an expression of close friendship and desire to feel free to discuss their personal problems with you."¹⁵

Out of a sense of fairness, leaders of character ensure their people are credited justly for their hard work. James Olive — one of the Capone agents— told Irey, "Few men can look back upon achievements comparable to yours. Fewer still can do so with the satisfying realization that they gave full credit to all members of their organization who had a part in those achievements."¹⁶ To Irey, this was just "simple justice."

Indeed, character alone will not give you complete competence. Like Hoover, Irey was a brilliant administrator with an attention to detail and noteworthy political savvy. But business acumen alone will not breed the fierce loyalty Irey generated. In his letter to the retiring Irey, Mike Malone — the ace undercover agent who gained the confidence of Capone and his henchmen — summed up the deep indebtedness many felt toward Irey: "Please do not hesitate to call upon me if I can be of service to you or your family at any time."

Irey's inspiration

Irey was not shy about who his inspiration was: the person who emancipated the slaves and successfully fought to hold the Union together, President Abraham Lincoln. According to Irey's granddaughter, Irey's home was filled with pictures of Lincoln. He even handed out pictures of Lincoln to his staff to inspire others.¹⁷ When *Life* magazine came to photograph Irey for a featured article related to his retirement, Irey deliberately posed next to several pictures of President Lincoln that adorned his office.

President Lincoln said that, "No man is good enough to govern another man without the other's consent." Through his unwavering character, Irey earned the consent to lead others. Lincoln also said, "Nearly all men can stand adversity, but if you want to test a man's character, give him power." Irey was given the immense power to topple giants. However, he never abused it to build an empire, destroy his enemies or seek glorification. Instead, he judicially and fairly worked for a greater cause, which was the betterment of the nation. As the Governor of Illinois and former Capone prosecutor, Dwight Green, put it, "I feel that the people of our country owe you a great debt of gratitude."¹⁸

Irey did harness one power: the power of his character and with it he played a critical role in dissipating the culture of corruption and lawlessness that plagued the country during the 1920s. The Greek philosopher, Heraclitus, once said, "Character is destiny." Heraclitus believed — and history continually bears this out — that your destiny is not so much predetermined by fate but more so your character.

If you choose to be a leader of character you will define your leadership success. Your character is your destiny. However, character is not easily manifested overnight. It takes constant diligence

¹⁵ Letter to Elmer Irey from Director of Procurement Clifford E. Mack dated August 12, 1946 from Clifford E Mack

¹⁶ Letter to Elmer Irey from James Oliver dated August 14, 1946

¹⁷ Letter to Elmer Irey from Arcellus Shield dated August 16, 1946

¹⁸ Letter to Elmer Irey from Governor Dwight Green dated September 2, 1946

to maintain your reputation of character. Doing the right thing sometimes is a lot more effort than the easy way out. But thanks to Irey we have a motivating tale of success. Who would have thought a climatic tale involving gangsters would have such a great leadership lesson?

Paul Camacho, is the retired Special Agent in Charge of the IRS Criminal Investigation Las Vegas Field office and a currently serves on the Board of Directors for The Mob Museum.

LEA ONE Blue Flash Case Summary(s)
By: Bruce-Alan Barnard, JD, LLM

United States v. Belakhdhar 6thCIR 28MAY2019

Issue: Does driving in tandem with a vehicle suspected of drug trafficking satisfy reasonable suspicion to allow for a Terry Stop of that vehicle?

Work with a reliable confidential informant led DEA agents to believe occupants of a specific Toyota Camry were involved in drug trafficking on I-94. While conducting surveillance on the Camry, agents noticed a RAV4 with temporary tags that was following the Camry and would change lanes every time the Camry would change lanes. This led LEOs to believe that the two cars were traveling in tandem. The defendant in this case (Belakhdhar) was driving the RAV4.

LEOs stopped both the Camry and the RAV4 on the suspicion of drug trafficking. Belakhdhar consented to a search of the RAV4 but nothing was found and he was released. Determining that Belakhdhar lacked immigration status, LEOs asked Border Patrol to re-stop the vehicle. At this stop, a LEO walked a drug K9 around the car. The K9 alerted on the trunk and a warrantless search under the automobile exception yielded two kilograms of heroin was found in a microwave in the trunk.

Belakhdhar sought to have the evidence excluded arguing that tandem driving alone could not form reasonable suspicion such that the RAV4 could be seized (Terry Stop) along with the Camry. The Sixth circuit disagreed. **Noting that reasonable suspicion “does not present a particularly high bar” the court held that under a totality of the circumstances, the officer’s observation of apparent tandem driving created reasonable suspicion to stop the RAV4 along with the Camry.**

Unites States v. Huskisson 7thCIR 5JUN2019

In this case, DEA was working with a confidential informant that led to information that made them believe that the defendant was involved in the distribution of drugs. Using the CI, the agents learned that the drugs were in the house. When they moved in (without a warrant) to arrest the occupants, they found methamphetamine in plain view. Subsequent to the arrests, a warrant was obtained to search the defendant’s house and evidence was seized.

The defendant sought to have the evidence excluded, arguing the initial warrantless entry was an unlawful search. **The court acknowledged that the initial entry was a Fourth Amendment violation, but concluded that the requirements for the *Independent Source Doctrine* were met for the warrant application and therefore the exclusionary rule was not imposed.**

Editor’s Note: This case is a good reminder that the purpose of the exclusionary rule is to deter police misconduct and the exclusionary rule will not always be imposed for a Fourth Amendment violation. As a Senior Legal Instructor at FLETC, I was not a big fan of teaching all the exceptions to the exclusionary rule to LEOs because it would often make them think it was okay to commit

Fourth Amendment violations in certain situations. Actually, the opposite is true. If a prosecutor is making an argument for an exclusionary rule exception, he or she is “against the ropes” trying to save the evidence. The Fourth Amendment violation has already been conceded at that point! If you make proper Fourth Amendment decisions, you will never need to worry about the exceptions to the exclusionary rule.

***Thurairajah v. Cross* 8thCIR 3JUN2019**

An Arkansas Trooper pulled over a van for a traffic infraction. As he was talking to the driver, another car drove by and a person in the car (Thurairajah) yelled “F**k You” to the officer. The officer then terminated the traffic stop and pulled over and arrested Thurairajah for violating Arkansas’ disorderly conduct statute. Charges were dropped and Thurairajah sued for First and Fourth Amendment violations. Officer Cross sought qualified immunity for both claims, but the Eighth Circuit affirmed the District Court’s denial of qualified immunity. The court ruled that yelling out of a window of a moving car did not constitute “disorderly conduct” as defined by the Arkansas statute. Furthermore, the court held that shouting “F**k You” at a police officer was protected speech and the arrest was made in retaliation for the statement.

***United States v. Brown* 9thCIR 5JUN2019**

Police officers received a 911 call indicating that an unidentified resident of the YMCA reported that a black man was carrying a gun in Seattle, Washington. This is not a criminal act in the state of Washington. The officers saw Brown, who was walking, and they activated their lights and pursued him. Brown ran for about a block before stopping when the officers drew their weapons on him. The officers handcuffed Brown and frisked him, and found a firearm in his waistband as well as drugs. Brown sought to have the evidence excluded.

The court noted that this neighborhood was not a high crime area and the only fact that could be articulated in support of the seizure was that Brown fled when the officers first approached. The report was made by an anonymous person with no indicia of reliability and the activity reported was not presumptively unlawful. **The court held that avoiding the officers, and nothing more, could not create a reasonable suspicion that Brown was engaged in criminal activity.** The court noted: “At best, the officers had nothing more than an unsupported hunch of wrongdoing.”

Editor’s Note: Significant changes in “open carry” and “concealed carry” laws over the last 20 years have led to jurisdictions where people can (and often do) lawfully carry firearms in public areas. Back in 1963 when Detective McFadden conducted the now famous “stop and frisk” on Terry, Chilton and Katz, it was illegal to carry firearms concealed in Cleveland. This was very typical in that day and age. But in many jurisdictions today, just because someone is carrying a firearm doesn’t necessarily give rise to presumption of unlawful conduct like it might have in the past. This presents a heightened risks to law enforcement officers because the Fourth Amendment does not allow for a seizure (stop) or a search (frisk) based on a hunch.

JUVENILE RECORDS SEALING & EXPUNGEMENT LUNCH & LEARN

Sponsored by the Medina County Bar Association
Friday, 10/11/2019, 11:30am - 1:00pm
1.0 General CLE Hours
Medina Library
210 South Broadway Street, Medina, Ohio, 44256
Medina community rooms A & B (combined)

Seminar Agenda

11:30am-12:00pm: Registration, Opening Introduction by attorney Matthew Ameer & Magistrate Susana Lewis

12:00pm-12:30pm: Lauren Hammersmith, an Assistant State Public Defender, will discuss the collateral legal consequences of juvenile records, the benefits of sealing & expunging juvenile records, & related processes.

12:30pm-1:00pm: Heather Pugh, the Re-entry Program Administrator for the Juvenile Department of the Ohio Public Defender, will discuss the importance of sealing & expunging, & the collateral consequences of system involvement from the perspective beyond legal representation.