

CNO REVIEW

February 2013



GREAT *Emancipator*

A special anniversary in 2013 offers an opportunity to examine one of the most important events in U.S. history. It's a 150-year-old presidential order that changed the course of our nation, and legal scholars to this day study its legal underpinnings. (See story, page 4).

About Court News Ohio

Court News Ohio is a service of the Office of Public Information of the Supreme Court of Ohio and Ohio Government Telecommunications. Court News Ohio includes a website (courtnewsOhio.gov), a monthly print publication (CNO Review), a television program (CNO TV), a Facebook page (facebook.com/courtnewsOhio), and a Twitter feed (@courtnewsOhio).

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On the Cover

First Reading of the Emancipation Proclamation of President Lincoln, 1864

Francis Bicknell Carpenter (1830-1900)

Oil on Canvas, "108 x 180"

Currently hangs in the Senate Wing of the U.S. Capitol.



PICTURED FROM LEFT: Edwin M. Stanton, secretary of war; Salmon P. Chase, secretary of the treasury; President Abraham Lincoln; Gideon Welles, secretary of the navy; Caleb Blood Smith, secretary of the interior; William H. Seward, secretary of state; Montgomery Blair, postmaster general; and Edward Bates, attorney general.

Cases

Visit courtnews.ohio.gov for the most current decisions from the Ohio Supreme Court, Court of Claims, and courts of appeals.

Supreme Court of Ohio

Oil and Gas Commission Lacked Jurisdiction to Hear Drilling Permit Appeals

On January 30, the Supreme Court of Ohio ruled that the state's Oil & Gas Commission acted without jurisdiction when it heard and decided a 2012 appeal of a drilling permit that had been issued by the chief of the Ohio Division of Oil and Gas Resources Management. Based on its finding that the commission patently and unambiguously lacks jurisdiction over such appeals, the court issued a writ of prohibition barring the commission from taking any further action in the case, and vacated the commission's actions in the appeal.

Chesapeake Exploration LLC
v. Oil & Gas Commission
Slip Opinion No. 2013-Ohio-224

Cincinnati Attorney Disbarred

The Supreme Court on December 12 permanently revoked the law license of Cincinnati attorney Robert Leon Schwartz for misconduct that resulted in his convictions on felony counts of mail fraud and filing a false income tax return. Schwartz, whose law license was under an interim suspension since the court was informed of his June 2010 felony convictions, was sentenced to a four-year term in federal prison.

Disciplinary Counsel v. Schwartz
Slip Opinion No. 2012-Ohio-5850

Court of Claims

Partial Payment Sent to Controlling Board for Wrongfully Imprisoned Cleveland Man

The State Controlling Board on January 28 approved a partial judgment of nearly \$380,000 to a Cleveland man wrongfully imprisoned for 16 years. The Court of Claims awarded Darrell Houston a preliminary judgment on January 10 and ordered the Controlling Board payment. Mark H. Reed, clerk of the Court of Claims, said this is the first wrongful imprisonment case to be processed for half the mandated judgment total within 60 days of the individual's release from prison since the state statute was amended in the 128th General Assembly.

Darrell Houston v. State of Ohio, Case No. 2012-08516 WI

Former ODNR Employee Receives Damages in Age Discrimination Case

Previously finding that the Ohio Department of Natural Resources discriminated against a former employee because of his age, the Court of Claims on January 15 awarded Richard W. Warden more than \$500,000 in damages. The court awarded Warden a total of \$507,656.75, which included \$157,411 in back pay. He also received costs and attorney's fees as part of the total award.

Richard W. Warden v. Ohio Department of Natural Resources
Case No. 2011-01232

Court of Appeals

Tenth District Upholds Health Department Finding of Smoking Ban Violations, \$2,500 Fine

On December 31, the Tenth District Court of Appeals upheld smoking ban violations against a Dayton bar in a ruling that clarifies the application of the law. The court of appeals found that the Franklin County Court of Common Pleas did not abuse its discretion when it upheld a citation and \$2,500 fine imposed by the Ohio Department of Health against Enterman Enterprises LLC, which owns and operates Ziggy's Ritz Night Club in Dayton.

Enterman Enterprises LLC v. Ohio Dept. of Health, 2012-Ohio-6230

Second District Reverses Trial Court Over Deficient Search-Warrant Affidavit

On January 18, the Second District Court of Appeals found probable cause did not exist to execute a 2010 search warrant on a suspected Springfield drug house. The court ruled unanimously that the trial court erred in denying a suspect's motion to suppress the evidence found during the search because the facts presented for the search warrant "did not provide a substantial basis for finding probable cause to believe drugs likely were present when the warrant was issued."

State v. Terrell, 2013-Ohio-124

Action of the

GREAT *Emancipator*

Celebrated 150 Years Later

On New Year's Day, communities across the United States marked the 150th anniversary of the signing of the Emancipation Proclamation by President Abraham Lincoln.

Preceding the ratification of the Thirteenth Amendment to the U.S. Constitution that outlawed slavery and involuntary servitude by more than two years, the Emancipation Proclamation did not free all slaves, just those being held in the states in rebellion during the Civil War.

The day before this year's sesquicentennial, President Barack Obama issued his own proclamation noting the anniversary of the Emancipation Proclamation. In it he encouraged Americans to celebrate and "reaffirm the timeless principles it upheld."

Sharon Davies, a law professor and executive director for the Kirwan Institute for the Study of Race and Ethnicity at The Ohio State University, said it's not hyperbole to characterize the Emancipation Proclamation as "the most important Executive Order to be signed in the history of the American presidency."

She also said that "the fact that the proclamation did not in fact free all of the slaves 'with a stroke of Lincoln's pen' does not make it inconsequential. Anything but. In fact, I think it is fair to say that it changed the course of the war, and was at minimum the beginning of the end of slavery.

"After its signing, tens of thousands of slaves in the rebel states were freed by Union troops as they marched through the south, and thousands more blacks 'self-liberated' themselves upon hearing of it," she continued. "The proclamation also made it clear that freed black men could enlist in the Union army, which they did

in the thousands. In a very real sense the Emancipation Proclamation broadened the purpose of the war, from restoring the Union to liberating the slaves and defending principles like freedom and unity.”

OSU Moritz College of Law Professor Peter Shane noted that Lincoln based the Emancipation Proclamation on his war powers, which is why it only extended to slaves in rebellion states. He said one of the legal aspects in play at the time was whether the United States could treat the Confederacy as a hostile nation or whether – legally speaking – the Civil War was a domestic law enforcement operation.

Interestingly, Shane said, in cases involving the seizure of ships, “the Supreme Court held later in 1863 that the president, in responding to the rebellion, indeed was exercising the war powers of a commander in chief, and not just law enforcement powers.”

Davies said the reach of a president’s war powers “has often been the source of disagreement, and we can’t be sure that the U.S. Supreme Court would have agreed with Lincoln that the proclamation was in fact a lawful exercise of his war powers. That was never tested, thanks to the passage of the Thirteenth Amendment prior to the war’s end.”

Lincoln had doubts as to whether the proclamation would hold up in court if challenged, even while insisting it was irrevocable, according to author James Randall in his book “Constitutional Problems Under Lincoln.”

“He thought that it was a war measure and would be inoperative at the close of war, but he was not sure,” Randall wrote. “His attitude toward the Thirteenth Amendment showed how conscious he was of legal deficiencies in the proclamation, and these doubts were reflected in Congress where proposals to incorporate the proclamation into Federal Law were presented by supporters of the administration.”

In a 2001 lecture, University of Texas School of Law Professor Sanford V. Levinson addressed the constitutional legitimacy of the Emancipation Proclamation and said there are three options when assessing its constitutionality.

It was constitutional because it was limited in reach. It was constitutional because of Lincoln’s unlimited power

“in waging a successful war to save the Union.” It was unconstitutional, but “no harm, no foul” in light of the later ratification of the Thirteenth Amendment.

Levinson then went on to address whether the public cares if the Emancipation Proclamation met constitutional muster.

“When all is said and done, we place far greater emphasis on whether we substantively like the outcomes, than on their legal pedigree,” he said. “If we applaud Lincoln, it is, I believe, because we applaud his values and his political vision, not because we venerate him for any particular devotion to the idea of fidelity to law as a primary norm.”

Davies also considered the legality of the Emancipation Proclamation.

“Pick a side,” she said. “I say yes: it was a lawful wartime measure against a determined enemy combatant whose continued belligerence and protection of the institution of slavery was prolonging the war. So we are right to celebrate it.

“But we should also remember that even after the signing of the Emancipation Proclamation there were gradations of freedom that we don’t always think about hard enough. Blacks may have been freed through the combination of the Emancipation Proclamation and the Thirteenth Amendment, but black freedom looked distinctly less valuable than the freedom of white Americans. Achieving social and political equality for black Americans would be a long, hard process.”

Lincoln, for his part, had to postpone signing the proclamation twice on January 1, 1863, according to Doris Kearns Goodwin in her book “Team of Rivals.” First, Lincoln noticed a technical error in the format that needed to be corrected. Then, after shaking hands for three hours with hundreds of guests who arrived at the White House for the traditional New Year’s reception, he noticed his hand trembling as he was about to sign the corrected document. He stopped and put the pen down.

“If my hand trembles when I sign the Proclamation,” Lincoln said, “all who examine the document hereafter will say, ‘He hesitated,’” Kearns Goodwin wrote. “So the president waited a moment and then took up the pen once more, ‘slowly and carefully’ writing his name.”

“That on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free; and the Executive Government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom.”

— First paragraph of the Emancipation Proclamation

Happening Now

News and notes from
courthouses around the
Buckeye State.

Unauthorized Practice Board Elects Officials

Two Ohio attorneys will lead the Board on the Unauthorized Practice of Law (UPL) of the Ohio Supreme Court and help make recommendations on cases where those not authorized to practice law in Ohio violate the rules prohibiting such practice. **Curt Sybert** of Powell and **John Chester Jr.** of Columbus were elected as chair and vice chair of the 2013 board respectively.

The board consists of 13 members who are appointed to three-year terms by the Supreme Court. The board conducts hearings, preserves the record, and makes findings and recommendations to the Supreme Court in cases involving the alleged unauthorized practice of law. The board is also authorized to issue informal, nonbinding advisory opinions on matters concerning the unauthorized practice of law.

Sybert is serving his third term on the board, and has been the board's liaison with the Attorney General's Office for collection efforts of the civil penalties imposed by the Supreme Court upon individuals who have been found to have engaged in the unauthorized practice of law. He is an attorney at Scherner & Sybert LLC and served as the board's vice chair in 2012.

"I have had the privilege of serving on the Board on the Unauthorized Practice of Law since January of 2008. I am excited and humbled to be chosen chair for 2013," Sybert said. "I know I have some big shoes to fill and feel that with the help of Vice Chair John Chester and Minerva Elizaga, UPL Board Secretary, we should be in good hands. I am looking forward to this opportunity, and it is my privilege to serve the Supreme Court of Ohio."

Chester is an attorney at Taft Stettinius & Hollister LLP in Columbus and specializes in corporate and business law matters, real estate, and civil litigation. The two will serve in their positions until December 31, 2013. The immediate past chair is **Kevin L. Williams** of Columbus.



Attorneys Curt Sybert (left) and John Chester Jr. will lead the Board on the Unauthorized Practice of Law of the Supreme Court of Ohio this year as chair and vice chair respectively.

Opinion Covers Ethical Considerations for Non-Recourse Civil Litigation Advance Contracts

Ohio lawyers cannot forget their ethical obligations if a client pursues a non-recourse civil litigation advance, according to an Ohio Supreme Court Board of Commissioners on Grievances & Discipline advisory opinion.

Opinion 2012-3 notes that multiple Rules of Professional Conduct require lawyers to provide "candid" and "competent" advice to their clients, including what impact an advance may have on a potential settlement.

The board's opinion cites several additional ethical considerations, including, maintaining "independent professional judgment" free from influence from an alternative litigation finance (ALF) provider, and securing the client's informed consent before revealing his or her identity to the provider or sharing a case evaluation.

The question submitted to the board concerned R.C. 1349.55, which regulates non-recourse civil litigation advance contracts. The opinion described ALF as the "provision of capital (money) by nontraditional sources to civil plaintiffs, defendants, or their lawyers to support litigation-related activities."

Read the opinion on the Supreme Court website: www.sc.ohio.gov/Boards/BOC/Advisory_Opinions/2012/Op_12-003.pdf.

Advisory Opinions of the Board of Commissioners on Grievances & Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary of Ohio, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.

Information Helps Courts Prepare for Specialized Docket Certification

In less than a year, Ohio courts operating specialized docket programs will be required to be initially certified by the Ohio Supreme Court.

Specialized dockets include drug courts, veterans courts, and other sessions of a court designed to offer a therapeutically oriented judicial approach to providing court supervision and appropriate treatment to individuals.

To help courts prepare for certification, the Supreme Court compiled several step-by-step guides on its website. Click the “Specialized Dockets Certification” button on the court’s home page at sc.ohio.gov to access the guides.

The guides include a flowchart overview that lists the steps necessary for certification, a certification application, and several templates to adopt local rules, prepare handbooks, and execute participation agreements.

The Supreme Court adopted specialized docket rule amendments in November that outline the certification procedures. The certification requirement will be effective January 1, 2014.

Under the certification amendments, courts operating specialized dockets are required to submit an application, undergo a site visit, and submit specific program materials to the Specialized Docket Section as part of the certification process.

“While the standards seek to create a minimum level of uniform practices for specialized dockets, they still allow local specialized dockets to innovate and tailor their specialized docket to respond to local needs and resources,” the rules state.

Interpreter Resource Available to Courts

To assist Ohio courts with an obligation under Sup.R. 88 to use a certified interpreter when available, the Ohio Supreme Court has made available on its website a roster of interpreters certified in American Sign and certain foreign languages.

Organized by geographic region, the list includes court interpreters based in Ohio and elsewhere, but available for work here, and also lists those individuals who are provisionally certified in a foreign language and those who are ASL-qualified interpreters. Using certified interpreters enables courts to provide the most qualified individuals without having to guess at their qualifications.

The Supreme Court adopted the rule in June 2011, but decided to delay it to allow courts sufficient time to prepare. The rule, effective January 1, 2013, is designed to help ensure the meaningful participation of deaf and limited English-proficient parties in court proceedings. The rule also requires courts to use “all reasonable efforts” to avoid appointing an interpreter who may have a conflict of interest.

ON THE BENCH



Transition Complete

With the swearing-in ceremony of new Justice **Judith L. French** (1) on January 23, a period of transition is complete on the Ohio Supreme Court. Justice French took office on January 1. Returning Justice **Terrence O'Donnell** (2) took the oath of office for his second, full six-year term on January 10. Justice **William M. O'Neill** (3) was sworn in to his first six-year term on the court on December 27. The term began on January 2. Justice **Sharon L. Kennedy** (4) took her oath on December 7 to fill out the final two years of an unexpired term.

For complete coverage of these ceremonies, including video from the events, go to courtnewsOhio.gov. For additional coverage of the transition for other courts around the state, see back issues of the CNO Review at courtnewsOhio.gov/CNOReview/default.asp.

WINTER CONFERENCES

February 6 - 8

**Association of Municipal
& County Judges of Ohio
Winter Conference**

www.oamccc.org
Judges, Dublin

February 28 - March 1

Intercourt Conference
intercourtconference.org
Juvenile Court Personnel
Columbus

Ohio Center for Law Related Education

High School Mock Trial
Competition Dates

www.ocle.org

February 1

District Competition

February 22

Regional Competition

March 7 - 9

State Competition

Ohio Supreme Court

sc.ohio.gov

February 4

**Certified Court Interpreter
Ceremony**

February 5 & 6

Oral Arguments

February 26 & 27

Oral Arguments

The Agenda

Upcoming events, training opportunities, and conferences for judges and court staff. For more information, contact the event sponsor at the web address provided.

Judicial College Courses

judicialecademy.ohio.gov

February 5

**Guardian ad Litem Continuing
Education Course: Substance Use**
Guardians ad Litem, Mansfield
1 to 4:30 p.m.

February 6

**Guardian ad Litem Continuing
Education Course: Substance Use**
Guardians ad Litem, Mansfield
8:30 a.m. to Noon

Judicial Candidates Seminar

Judicial Candidates, Dublin
3:45 to 5:45 p.m.

February 20

**Guardian ad Litem
Pre-Service Course**
Guardians ad Litem, Columbus

February 22

**Video Teleconference:
Receiverships for Municipal
& General Division**
Judges, Magistrates, Acting Judges
Multiple Locations
1 to 3:45 p.m.

February 28

Appellate Judges Seminar
Judges, Columbus

March 5

**Ohio Guardian ad Litem Education
Program, Psychiatric Disorders
in Children**
Guardians ad Litem, Cincinnati
1 to 4:30 p.m.

March 6

**Ohio Guardian ad Litem Education
Program, Psychiatric Disorders
in Children**
Guardians ad Litem, Cincinnati
8:30 a.m. to Noon

March 6 - 8

**Court Management Program, 2013
Level II, Module 5: Leadership**
CMP Participants 2013 II, Columbus

March 8

Judicial Candidates Seminar
Judicial Candidates, Dayton
1:30 to 3:30 p.m.

Dispute Resolution Training

sc.ohio.gov/JCS/disputeResolution

February 28

**Basic Mediation & Uniform
Mediation Act, Cincinnati**