OHIO JUDICIAL CONFERENCE OJC CREATED 1963

for the RECORD

NEWS FOR THE OHIO COURTS

Renewing Your Judicial Vows - A Year 250 Celebration

As you turn the page to begin a fresh year, consider a ceremony to renew your judicial vows. Renew your oath of office at home with family and friends or, even better, in your courtroom with an open invitation for your entire community to participate. If you choose to stage a community event, prepare an oath for your court-connected staff and have them participate as well.

Multi-judge courts could join together - a showing of unity in the common purpose of the compassionate, fair and impartial administration of justice. Imagine an assemblage of judges, even with strong and possibly differing opinions, mutually dedicated to honoring pledges made by your oaths of office; in this respect, today's judiciary is not unlike those debating and signing the Declaration of Independence in 1776.

There is nothing more fitting than judges launching the "America 250" celebration by publicly renewing your oaths. The act can be a tribute to your community and to the founding fathers, who listed high among their grievances with the King, "He has obstructed the Administration of Justice," and "He has made Judges dependent on his Will alone." Be creative; make it a warm and memorable occasion.

Paul
419-563-4966
paul.pfeifer@sc.ohio.gov

Finding the Tools the Legislature Misplaced: Sentencing in Felony 4 and Felony 3 OVIs

by Judge Matt Reger

Finding the right tool is axiomatic to doing the job correctly. That is something I learned growing up the son of a mechanic. Whatever the job – from a simple oil change to a cam shaft replacement – the right tool makes the job easier, but more importantly, it makes the job done right. Although I did not follow my father in the vocation of car repair, I found the rule about tools to be true in the law. As a judge I discovered that even though we may have the right tools, sometimes they are hidden, particularly in sentencing OVI offenses.

Operating a vehicle while under the influence of alcohol or drug of abuse or a combination of both – or OVI as it is commonly called – has some wonderful tools for the common pleas judge sentencing on such an offense. But like a teenager who used dad's tools to replace brakes on his jalopy, when the tools were put back there was no care in where to place them. When dad subsequently tries to find them, he discovers the tools are spread out everywhere and had never been put away correctly.

Although I have been using a mechanics analogy, my experience with OVIs has been honed over a 20-year career as a municipal prosecutor before coming to the common pleas bench. As a prosecutor, I saw the same development and complication in the law of OVIs over my career as my father saw in an over 50-year career working on cars that began with carbureted engines and ended with electronically fuel-injected computers on wheels. In making all the so-called advancements in OVI law, the legislature has provided a unique set of tools; but like that teenager, they just have not put them away in an organized manner.

I present the following as an attempt to map the multiple statutes that work together to provide a unique set of sentencing options for felony 3 and 4 OVIs. Although the wonderfully created, updated and nurtured bench card – the result of the tireless work of Judge Jennifer Weiler – provides a comprehensive overview of what can be accomplished through felony OVI sentencing, there are some other aspects of felony OVI sentencing that provide unique rehabilitation resources. If judges solely follow the bench card, they will be imposing a correct sentence but might miss out on the opportunity to use all the tools available in OVI sentencing and maybe help the defendant on the road to rehabilitation.

Fourth- and third-degree felony OVIs are serious offenses that are the result of multiple convictions for OVI where the defendant has been subject to an increasing mandatory punishment but has also been given a multitude of resources for treatment and rehabilitation. Whatever has been tried before has just not worked in separating the offender from intoxicants and operating a vehicle. In the case of fourth degree felonies the types of offenses that are usually contained in the indictment are: 1) three or four prior violations of R.C. 4511.19 in the last 10 years[i] (fourth or fifth overall including new offense); 2) five or more prior violations of R.C. 4511.19 in the last 20 years (sixth overall including new offense); 3) having a previous conviction under R.C. 2941.1413, the special OVI specification. A third-degree felony OVI is simply a second lifetime felony OVI offense.

Although sentencing on felony OVIs involves multiple provisions of the Revised Code, the place to begin when imposing a sentence is R.C .4511.19(G)(1)(d) and (e).[ii] That section references the specification section in R.C. 2941.1413 which provides for a mandatory prison term when a person is convicted of the underlying OVI offense and the specification. If properly pled in the indictment, an offender is guilty of a R.C. 2941.1413 specification if: a) the offender, within twenty years, has been previously convicted or pled guilty to five or more offenses under R.C. 4511.19(A)(1) or b) has been previously convicted of a specification under R.C. 2941.1413.

If the offender is convicted of this offense the court will have the option of a mandatory prison term of 1, 2, 3, 4, or 5 years to be served prior and consecutively to any prison term imposed on the underlying OVI offense. If the court imposes the mandatory term under the specification, it is not required to impose either the 60- or 120-day mandatory term under either the fourth or third degree felony.[iii] It may, however, impose an additional prison term on the fourth or third degree OVI that must be served consecutively to the term imposed under the specification and any other mandatory term imposed in relation to the offense. But, in addition to the prison terms that can be imposed the Code also allows the unique option of a consecutive term of community control that is served after the prison term has been completed.[iv]

The specification under R.C. 2941.1413 is the first place to look in preparing for a sentencing because it includes mandatory sentencing. If a specification is not included in the indictment, then the judge can move on to finding different tools provided for sentencing either a fourth- or third-degree felony OVI.

Fourth Degree Felony OVI Sentencing: Local Incarceration Path

Sentencing on a fourth-degree felony is like picking a path to walk. The two paths available are the local incarceration path and the other is a prison path. Both paths, though, include a term of probation if the court chooses to use the tools provided by the legislature. Like any path you choose to walk, there are warnings along the way and implications to whatever choice is made. These two paths are outlined in both R.C. 4511.19(G)(1)(e)(i) and (ii) and 2929.13(G)(1) and (2). But these two provisions are only the first stop along the path of imposing a sentence.

Beginning with the local incarceration path, the option is between 60 and 120 days of mandatory incarceration locally. Local incarceration may be in a local jail, CBCF, half-way house or other alternate residential facility. The 60-day mandatory term is for what is termed the "straight" OVI which includes the low-tier test result (.08 - .170 BAC) and does not involve a refusal. If there's a high BAC test result or refusal, then the 120-day minimum is to be imposed. In addition to the mandatory term, the court may impose an additional 300 days on the 60-day minimum mandatory or 240 on the 120-day minimum mandatory. The total amount of time that the court may impose locally is 360 days. As with any choice, if the court chooses the local incarceration path it is restricted in what other penalties it may impose at sentencing.

One such limitation is that if the court chooses to impose a local incarceration it may not impose a prison term except for what is authorized under R.C. 2929.13(A)(1), per R.C. 2929.13(G)(1) and 4511.19(G)(1)(e)(i). This can be a controversial position, but it is one that is supported by the statute. It is certainly clear that under both R.C. 4511.19(G)(1)(e)(i) and (ii) and R.C. 2929.13(A)(1), a court may impose a term of community control under R.C. 2929.16 or 2929.17, following an offender serving the mandatory minimum and any additional days imposed in local incarceration. The controversy comes not in imposing community control sanctions but in what can be done if community control is violated.

The section of R.C. 2929.13(A)(1) providing for community control following incarceration includes a section that states that if community control is violated the court may impose "any action" allowed under R.C. 2929.15, "including imposing a prison term."[v] A look at R.C. 2929.15(B) provides all the possible penalties that can be imposed through community control including extending the term of probation, adding sanctions, and imposing a prison term. But if local incarceration was imposed first, how can prison be imposed? How does the court advise the offender of this possible prison term?

The answer to these questions requires looking outside the normal sentencing paradigm of a fourth-degree felony and grasping the options provided for OVIs hidden in the Revised Code by the legislature. Many courts approach this provision and impose a term of community control with the 180-day local incarceration followed by an advisement that if community control is violated, a prison term of six to thirty months may be imposed. But with the tools provided by the legislature, a court can impose a 60- or 120-day minimum mandatory local jail sentence followed by an additional jail term of 240 to 300 days in jail, followed by a probation term and – if that probation is violated – a prison sentence between six months and thirty months. This conclusion comes from a reading of both R.C. 2929.15(B) and 2929.19(B)(4). According to 2929.15(B)(3), if a court has chosen the local incarceration path and placed the offender on probation, a violation of that probation can result in a prison term within the statutory range as long as the offender has been notified of that range at sentencing as required under 2929.19(B)(4).[vi]

Let me outline what I have explained above. If a court chooses the local incarceration path for a fourth-degree felony here are the options for sentencing:

1. Mandatory Local incarceration: 60 or 120 days minimum (the court may not grant an early release during the mandatory term).[vii] Following imposition of the mandatory sentence, the court can choose to proceed to options 2 or 4 below.

2. An additional 240 or 300 days may also be imposed for a total of 360 days, depending on the mandatory term imposed. Whatever term of local incarceration is imposed, following the mandatory term the court may also impose a term of community control (see number 4 below).

3. If the court chooses to impose local incarceration (local incarceration may be in a local jail, CBCF, half-way house or other alternate residential facility), it may not impose a prison term except for what is authorized under R.C. 2929.13(A)(1), per R.C. 2929.13(G)(1) and 4511.19(G)(1)(e)(i).

4. R.C. 2929.13(A)(1) allows for a term of community control following the offender serving the mandatory 60 days or any additional days served.

5. According to R.C. 2929.13(A)(1), the court may impose a community control term with sanctions provided in R.C. 2929.16 or 2929.17. If the court does impose community control and the offender violates community control, the court may take any action provided in R.C. 2929.15(B), including the imposition of a prison term pursuant to that provision. That would include a prison sentence within the parameters of an F4 OVI (6 – 30 months, including the 60-day mandatory term),[viii] per R.C. 2929.15(B)(1)(c) and (B)(3); R.C. 2929.19(B)(4). This is dependent on the court informing the offender at sentencing of the range of sentences that can be imposed if community control is violated and the court determines it is appropriate to terminate community control.

Fourth Degree Felony OVI Sentencing: Prison Incarceration Path

If a court chooses the prison term path, it still has the option to impose the mandatory 60- or 120-day incarceration. Following that, the court can choose to impose an additional prison term between six and thirty months followed by a term on community control. This is counterintuitive to what has been the standard approach by common pleas judges who understand that hybrid sentencing – prison followed by probation – is not allowed.[ix] But in the case of OVIs, prison followed by probation is statutorily provided.

The summation on the prison path is as follows:

1. Mandatory prison of 60 or 120 days.

2. Court may also impose 6 – 30 months in prison. The court must credit the offender for any mandatory time served so that the total sentence (mandatory plus discretionary) does not exceed the 30 months maximum.

3. Plus, an additional term of community control.

4. If a term of community control is imposed, pursuant to R.C. 4511.19(G)(1)(d) and R.C. 2929.13(A)(1), the court should notify the offender of prison time as part of the community control pursuant to R.C. 2929.15(B)(3), but whatever is imposed pursuant to

a community control violation plus any prison term imposed prior cannot exceed the maximum term allowed (30 months).

Credit for time served

Whether the local incarceration or prison path is chosen, any time served by the offender cannot exceed the 30-month maximum. If a local path is chosen and the offender serves local time, thereafter is placed on community control and violates that community control, the offender will be entitled to any time served in the local jail. Similarly, an offender who is sentenced to a prison term, is placed on probation after serving that term, and then violates resulting in termination of community control and imposition of a prison sentence, will be entitled to any credit for time previously served and cannot serve more than 30 months.[x] Therefore, in using this tool, the court will need to also use its calculator to make sure all the time adds up and that an adequate amount of time is reserved to make sure there is a stick along with the carrot of probation.

Third Degree Felony OVI Sentencing: Prison Incarceration Path is the only path

Although the third-degree felony does not provide for a local incarceration option it does not limit the court imposing a community control sanction following a prison term. That leaves a court with the decision to choose between prison followed by the possibility of post-release control or the guarantee of probation as part of a prison sentence. The other part of F3 OVI sentencing that may be unknown to most judges is the availability of 12 to 60-month sentence. Previously, the 60-month provision in the law had been eliminated by the Ohio Supreme Court in *State v. South*, 2015-Ohio-3930, but that was recently changed under 134 S.B. 288 to allow for a sentence up to 60-months, in 6-month increments beginning with a minimum of 12 months. See R.C. 2929.14(A)(3)(a)

Here is a summation of F3 felony sentencing options:

1. Court must impose a mandatory term of 60 or 120 days. The court then must choose whether to go to option 2 below followed by 3 or to go directly to option 3. Either way, the mandatory term must be served in prison.

2. Any additional time imposed by the Court must be <u>in prison</u> and up to 60 months in 6-month increments of 12, 18, 24, 30, 36, 42, 48, 54, or 60 months.

3. R.C. 2929.13(A)(1) allows for a term of community control following the offender serving the mandatory 60 or 120 days or any additional days served.

4. According to R.C. 2929.13(A)(1), the court may impose a community control term with sanctions provided in R.C. 2929.16 or 2929.17. If the court does impose community control and the offender violates community control, the court may take any action provided in R.C. 2929.15(B), including the imposition of a prison term pursuant to that provision. The offender would receive credit for any previous time served and could not serve more than the 60 months allowed. See R.C. 2929.15(B)(1)(c) and (B)(3); R.C. 2929.19(B)(4)

Why use these tools?

In explaining the different paths, I have been met with the obvious response that a judge can always take the traditional route in sentencing and there are no problems. That is true and I understand that position. But I am advocate for using these tools because they provide for a longer time to address what is a lifetime rehabilitation. Anyone who has dealt with drug and alcohol addiction understands that rehabilitation and sobriety take a long time and require a multifaceted approach. The provisions I have outlined allow for punishment under either the mandatory sentencing or additional incarceration – locally or in prison – followed by probation. The ability to follow a longer-than-normal 180-day incarceration limitation with a term on probation for up to five years allows the use of both the carrot and stick. The stick is the incarceration period followed by the carrot of probation and the many conditions that can address an offender's underlying addiction. Although the carrot is used, there is still the stick of termination of probation for violation with the imposition of a prison term.

Using all the tools allows the court the flexibility to address what, by the time the offender is in common pleas court, has been a long-term problem. For example, a third-degree felony offender could serve a 60- or 120-day mandatory sentence followed by an additional year in prison and then be placed on probation. The court could make as a condition of probation that the offender serve a term in a community based correctional facility (CBCF) and then be placed on intensive supervision probation (ISP). In this case, the court would have used up less than two years and would still have available over three years in prison to impose if the offender were to violate community control – a sizable stick if the carrot is not accepted or otherwise rejected. This probation could last up to five years. In this case, the court has used multiple tools and provided a long enough time – up to seven years – to address a problem that has taken a lifetime to develop.

It would be nice if the legislature would put all the sentencing tools in the same provision of the Revised Code, maybe a section of 2929 dedicated exclusively to felony OVI sentencing. This would make it easier for courts to access the tool and to impose sentences the legislature seems to have made available for use by the courts. But until that is done, I encourage judges to look at the different provisions of the law that allow for the kind of sentencing I have articulated in this article. The results we have with offenders will, in most cases, only be as good as the tools we use. One thing I learned in years of working on cars is that a bolt will always come off easier if it is tightened with the proper wrench. We have some good tools available to address OVIs; trying them can only help with rehabilitating offenders.

Appendix: Plea colloquy for F-4 and F-3 OVI offenders

<u>F-4 OVI Colloquy</u>

The F4 OVI sentence varies from a standard F4 offense in both length of the possible sentence and the options for sentencing.
In most cases, an F4 carries a possible prison term of 6 to 18 months, but with an OVI, the sentence range is 6 to 30 months
First, you must know that this court must impose a mandatory term of [60 or 120] days incarceration in either local incarceration or prison.
Under the local incarceration path, the court must impose the [60 or 120] days mandatory sentence in a jail, community-based correction facility, halfway house, or an alternative residential facility. The court may also impose up to [300 or 240] days of incarceration in addition to the mandatory time imposed but may not impose more than one year of local incarceration.
The court may additionally impose a term of community control up to 5 years. If you violate that community control, the court could impose additional sanctions for community control or it could terminate community control and impose between 6 and 30 months in prison. If a prison term is imposed, you will receive credit for any time previously served.
If this court, though, chooses to impose a prison sentence it will be required to impose the mandatory [60 or 120] days in ODRC.
The court may additionally impose between 6 and 30 months in ODRC. You cannot receive more than 30 months in prison with the mandatory [60 or 120] days included.
The court may also impose a term of community control up to 5 years after your term in prison is completed. If you violate that community control the court could impose additional sanctions for community control or it may terminate community control and impose between 6 and 30 months in prison. If a prison term is imposed, you will receive credit for any time served previously and, once again, you cannot serve more than 30 months in prison.
The court also must impose a mandatory fine of $1,540, minimum to $10,500.
The court must also impose a mandatory license suspension of three (3) years, minimum, to life.
The court may not grant any privileges before the first three (3) years are completed. If this court grants you privileges after the three (3) year minimum you will be required to have restrictive plates and [if alcohol is involved] an ignition interlock.
If you owned the vehicle that you were driving at the time of your arrest, it will be forfeited.

F-3 OVI Colloquy

The F3 OVI requires that I sentence you to a mandatory prison term of [60 or 120] days. The court also has the discretion to impose an additional prison term of up to 60 months in prison in 6 months increments of 12, 18, 24, 30, 36, 42, 48, 54, or 60 months, but in no event can the court sentence you to more than 60 months when both the mandatory term and the discretionary term are considered together. In other words, the [60 or 120] days must be included in the calculation for the entire term and may not exceed 60 months.
The court may also impose a term of community control up to 5 years after your term in prison is completed. If you violate that community control the court could impose additional sanctions for community control or it may terminate community control and impose up to 60 months in prison.
If a prison term is imposed, you will receive credit for any time served previously and, once again, you cannot serve more than 60 months in prison.
The court also must impose a mandatory fine of a minimum of $1,540, and up to $10,500.
The court must also impose a mandatory license suspension of three (3) years, minimum, to life.
The court may not grant any privileges before the first three (3) years are completed. If this court grants you privileges after the three (3) year minimum you will be required to have restrictive plates and [if alcohol is involved] an ignition interlock.
If you owned the vehicle that you were driving at the time of your arrest, it will be forfeited.

---

[i] Priors are calculated from date of conviction to date of violation.

[ii] The total number of provisions that must be reviewed is at least seven: R.C. 4511.19(G)(1)(d) and (e), 2929.13(B)(1) and (G)(2), 2929.13(A)(1) and (A)(2), 2020.14(A)(3)(a), 2929.14(B)(4), 2929.15(B)(3), and 2929.19(B)(4)

[iii] R.C. 2929.13(G)(2) and R.C. 4511.19(G)(1)(e)(i). See also *State v. Kennedy*, 2011-Ohio-4291, ¶ 33

[iv] R.C. 2929.13(G)(2)

[v] R.C. 2929.13(A)(1)

[vi] R.C. 2929.19(B)(4) provides: If the sentencing court determines at the sentencing hearing that a community control sanction should be imposed and the court is not prohibited from imposing a community control sanction, the court shall impose a community control sanction. The court shall notify the offender that, if the conditions of the sanction are violated, if the offender commits a violation of any law, or if the offender leaves this state without the permission of the court or the offender's probation officer, the court may impose a longer time under the same sanction, may impose a more restrictive sanction, or may impose a prison term on the offender and shall indicate the range from which the prison term may be imposed as a sanction for the violation, which shall be the range of prison terms for the offense that is specified pursuant to section 2929.14 of the Revised Code and as described in section 2929.15 of the Revised Code.

[vii] R.C. 2929.13(G)(1): Following the sentence directing the court to impose either 60 or 120 days pursuant to R.C. 4511.19(G)(1)(d) the next sentence provides that "[t]he court shall not reduce the term pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of the Revised Code."

[viii] The term imposed is whatever the offender was informed of pursuant to R.C. 2929.15(B)(3) which provides that "[t]he prison term, if any, imposed on a violator pursuant to . . . division (B)(1) . . . shall be within the range of prison terms in this division and shall not exceed a prison term from the range of terms specified in the notice provided to the offender at the sentencing hearing pursuant to [R.C. 2929.19(B)(4)]". See also *State v. Latapie*, 2023-Ohio-1505, ¶ 49 ("Thus, R.C. 4511.19(G)(1)(d)(i) *directs* a court to look at R.C. 2929.13(A)(1) to determine when prison may be imposed in a case in which the court has imposed local incarceration and community control. R.C. 2929.13(A)(1) *explains* that a prison term may be imposed only for an offender who violates community control. Therefore, R.C. 2929.13(A)(1)'s incorporation of R.C. 2929.15(B) merely explains that in a case where the offender is sentenced to local incarceration and community control, then the court may impose a prison term only upon a violation of the community control.")

[ix] According to R.C. 4511.19((G)(1)(d)(i) "if the court imposes a mandatory prison term or mandatory prison term and additional prison term, in addition to the term or terms so imposed, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction." Further, R.C. 2929.13(G)(2) provides that "[i]n addition to the mandatory prison term described in division (G)(2) of this section, the court may sentence the offender to a community control

sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve the prison term prior to serving the community control sanction." This seems to violate the Supreme Court's holding that a term of community control may not be served consecutive to a prison term, but that decision was based upon a statutory interpretation and this statute specifically provides for this sanction.

[x] R.C. 2929.14(B)(4) and *State v. Latapie*, 2023-Ohio-1505, ¶ 24

Judicial Speech After *Disciplinary Counsel v. Grendell*: What the Case Means for the First Amendment and Rule 3.2

By **Judge Eugene A. Lucci**
Court of Appeals of Ohio, Eleventh District

For the first time, the Supreme Court of Ohio has struck down a judicial conduct rule as facially unconstitutional under the First Amendment. In *Disciplinary Counsel v. Grendell*, 2025-Ohio-5239, the Court not only resolved a high-profile disciplinary matter but also fundamentally reshaped the constitutional boundaries of judicial speech in Ohio—holding that Jud.Cond.R. 3.2's restriction on voluntary legislative testimony violates the First Amendment.

Justice R. Patrick DeWine authored the 85-page majority opinion, joined by Chief Justice Kennedy and Justices Deters, Hawkins, and Shanahan. Justice Fischer, joined by Judge Edelstein (sitting for Justice Brunner), concurred in the sanction but wrote separately to argue that the Court need not have reached the constitutional question regarding Rule 3.2. This article provides a concise guide to the charges, the Court's analysis, and the practical implications of this landmark decision.

The Three Counts Against Judge Grendell

The disciplinary complaint contained three separate counts arising from unrelated events. A fourth count (Count 2) was dismissed by the panel before the hearing.

Count	Conduct	Rules Charged	Outcome
Count 4 Legislative Testimony	Voluntary testimony before House committee supporting H.B. 624 (COVID-19 data reporting); bill sponsored by his wife, Rep. Diane Grendell	3.2 (voluntary testimony limits); 1.3 (abuse of prestige)	**All charges dismissed; Rule 3.2 held unconstitutional**
Count 3 Tea Party Remarks	Speech at Geauga County Tea Party civic forum about dispute with County Auditor; described June 27, 2019 incident involving court staff	1.2 (confidence in judiciary); 1.3 (abuse of prestige); 2.10(A) (public comments)	**All charges dismissed on First Amendment grounds (as-applied)**
Count 1 Glasier Matter	Ordered two minors detained in juvenile facility over a weekend after they refused court-ordered visitation with father in contested parental-alienation case	1.2 (confidence in judiciary); 2.2 (impartial application of law); 2.11 (recusal)	**Limited misconduct found; several charges rejected as mere legal error**

The pattern is striking: no misconduct was found in the two counts involving judicial speech (Counts 3 and 4). The only sustained findings arose from Count 1, the Glasier custody matter—and even there, the Court rejected several allegations as disagreements over legal rulings rather than ethical violations.

Count 1: The Glasier Matter—Distinguishing Legal Error from Misconduct

The Glasier matter arose from a difficult parental-alienation case transferred from domestic relations court. Three teenage children refused to see their father despite an agreed judgment entry requiring reunification. After therapeutic visitation efforts failed, Judge Grendell ordered the two boys to attend visitation. When they refused, he ordered them held in juvenile detention over a weekend on unruly charges.

The Court's analysis here is instructive for all Ohio judges. The majority repeatedly emphasized that legal error—however serious—does not constitute misconduct unless committed willfully. As the opinion states, the ordinary remedy for a judge's legal error is an appeal, not discipline. The Board of Professional Conduct had premised many of its findings on disagreement with Judge Grendell's interpretation of the law and his discretionary decisions. The Court rejected that approach.

What *did* survive scrutiny were those aspects where the Court found a willful failure to follow required legal standards. The Court concluded that Judge Grendell used the threat of detention—and when that failed, actual detention—to coerce the boys to attend visitation. He used his constable to orchestrate the filing of charges and ordered the boys detained with little basis. The opinion states that he "willfully turned a blind eye to legal safeguards designed to protect the best interests of children and avoid unnecessary detentions." There was no legal basis for the unruly charges or for taking the boys into custody, as they were not in "immediate danger" as required by Juv.R. 7. The Court was particularly troubled by Judge Grendell's order prohibiting the boys from contacting their mother during detention—a direct violation of the juvenile court rule requiring detained children to be allowed to call their parents.

The sanction: an 18-month suspension with 12 months stayed on conditions, resulting in an active 6-month suspension from judicial office without pay.

The Constitutional Analysis: Striking Down Rule 3.2

The most far-reaching portion of the opinion concerns the First Amendment. The Court used Count 4 to strike down Jud.Cond.R. 3.2 as facially unconstitutional.

Rule 3.2 as a Content-Based Restriction

Jud.Cond.R. 3.2 prohibited judges from voluntarily testifying before legislative or executive bodies unless the testimony related to "the law, the legal system, or the administration of justice" or matters about which the judge acquired knowledge in the course of judicial duties. The Court held this is a categorical, subject-matter-based restriction on speech that applies "because of the topic discussed or the idea or message expressed," citing *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). As a content-based restriction, it must survive strict scrutiny—and it did not.

Why the Rule Failed Strict Scrutiny

Disciplinary counsel asserted three compelling state interests: (1) maintaining an independent, fair, and impartial judiciary; (2) public confidence in the judiciary; and (3) protecting separation of powers. The Court systematically rejected each.

On judicial impartiality, the Court followed *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), which held that a state's compelling interest in impartiality means protecting against bias for or against *parties*—not against judicial preconceptions on legal issues. Rule 3.2 was vastly overinclusive, sweeping in speech with no connection to party bias. The Court noted that as a probate and juvenile judge, there was "virtually no possibility" that legislation concerning COVID-19 data reporting would ever come before Judge Grendell. The rule was also underinclusive: it allowed testimony about the law, legal system, and administration of justice—the very topics most likely to arise in a judge's courtroom—while prohibiting testimony on unrelated matters.

The Court also found the rule unconstitutionally vague. Judges regularly talk to legislators. When do such conversations cross the line into prohibited "consult[ing]"? To avoid discipline, judges would likely avoid meaningful conversations with their elected representatives altogether—precisely the kind of chilling effect the First Amendment prohibits. On separation of powers, the Court was blunt: the United States Supreme Court has never recognized separation of powers as a compelling state interest justifying speech restrictions. Speech is not an exercise of governmental power. A judge testifying before a legislative committee "is asserting no more control over the General Assembly than the attorney general asserts over this court when he files an amicus brief."

The Court also rejected Rule 1.3's application to the legislative testimony, finding that the Board's conclusion—that there was "no other plausible reason" for Judge Grendell to testify except to advance personal interests—was simply wrong. A judge might testify because he is a concerned citizen who thinks the legislation would benefit the state and judiciary. The fact that his wife sponsored the bill did not transform public-interest testimony into self-dealing.

Count 3: The Tea Party Remarks—An As-Applied First Amendment Victory

While the Court struck down Rule 3.2 on its face, it used a different approach for Count 3, involving Judge Grendell's speech at a Geauga County Tea Party meeting. There, the Court held that while Rules 1.2, 1.3, and 2.10(A) remain valid, applying them to punish Judge Grendell's remarks would be unconstitutional *as applied* to the facts of this case.

The Court characterized the Tea Party speech as core political speech entitled to the strongest First Amendment protection. The context was political: civic-minded voters had invited Judge Grendell and the County Auditor to explain a public dispute reported in a local newspaper. The content was political: Judge Grendell discussed "the manner in which

government is operated," including his court's relationship with the auditor's office. The Court quoted *Meyer v. Grant*, 486 U.S. 414, 425 (1988): this was speech "in an area in which the importance of First Amendment protections is 'at its zenith.'"

The Board had found Judge Grendell's remarks "baseless," "reckless," and "filled with inaccuracies." But the Court held that even erroneous or misleading speech is protected unless the speaker knowingly lied or acted with reckless disregard for truth—and disciplinary counsel pointed to no evidence of that. The First Amendment protects speech that turns out to be mistaken; the remedy is counter-speech, not discipline.

The Court also rejected the alleged violations for conduct before and after the Tea Party meeting. Judge Grendell's explanations of his intended administrative order and potential § 1983 liability were not "threats"—accurately describing legal consequences is protected speech. Asking law enforcement whether a special prosecutor had been appointed, receiving an answer, and disengaging did not constitute abuse of judicial prestige.

Key Takeaways for Ohio Judges

1. Rule 3.2 Is Unenforceable

Because the Court held Rule 3.2 unconstitutional on its face, it cannot support discipline in future cases unless rewritten in a constitutionally permissible form. Ohio judges may now voluntarily testify before legislative committees on any subject. Previously, a judge wishing to testify about education policy, mental health funding, or infrastructure—topics unrelated to the legal system—risked discipline. That restriction is gone. Any replacement rule must be narrowly tailored and consistent with First Amendment standards.

2. Political and Civic Speech Remains Fully Protected

Judges do not surrender First Amendment rights by taking office. Speech about the operations of government, criticisms of other officials, and commentary on local disputes qualifies as core political speech unless it concerns a pending matter, commits the judge to a future outcome, or misrepresents judicial authority. The Constitution—not public perception—sets the limits. Speculative concerns about "appearance of impropriety" cannot justify punishing otherwise protected speech.

3. Accurate Legal Statements Are Not Threats

Describing legal consequences accurately is constitutionally protected. Informing someone that violating a court order would constitute contempt, or that certain conduct could give rise to § 1983 liability, is not misconduct—it is explaining how the law works.

4. Legal Error Is Not Misconduct Unless Willful

The Court reaffirmed that the remedy for legal error is appeal, not discipline. For a judge's ruling to constitute misconduct, there must be a showing of willful failure to follow the law. The Board's disagreement with legal conclusions or discretionary decisions is insufficient. This standard protects judicial independence while still permitting discipline where a judge consciously disregards legal safeguards.

Conclusion

Disciplinary Counsel v. Grendell establishes several durable principles. Political and civic speech by judges is entitled to full First Amendment protection absent a direct, case-related commitment or conflict. Ethics rules cannot be used to discipline speech based on content or viewpoint. And Jud.Cond.R. 3.2, as written, is unconstitutional and unenforceable.

At the same time, the Glasier matter findings remind us that judicial independence has limits. A judge who willfully disregards procedural requirements or statutory protections—particularly those designed to protect vulnerable populations like children—will face discipline. As the Court observed, Judge Grendell may have taken on the case with the best of intentions, but "over the course of the case, he lost his objectivity to such an extent that he could no longer be impartial."

The majority closed its Rule 3.2 analysis with a note of caution that merits repeating: striking down the rule "does not mean that we endorse testimony by judges at public hearings on matters not connected with their judicial roles. There are good reasons why judges should tread with caution before embroiling themselves in the day-to-day workings of the state legislature. But whether we may discipline someone for engaging in constitutionally protected conduct is a far different question than whether such conduct is a good idea."

Ohio judges now have clearer constitutional protections for public engagement—and clearer boundaries on the exercise of judicial power.

Judicial College Offerings

The Judicial College CLE schedule is available online. To view the calendar and sign up for courses, please visit this site

Visit The Ohio Judicial Conference Website!

WWW.OHIOJUDGES.COM

Contact Justin Long at the Ohio Judicial Conference for login assistance

justin.long@sc.ohio.gov

Ohio Judicial Conference Staff

Executive Director
Hon. Paul Pfeifer, Retired 419-563-4966
Paul.Pfeifer@sc.ohio.gov

Legislative Counsel
Marta Mudri, Esq. 614-387-9764
Marta.Mudri@sc.ohio.gov

Deputy Legislative Counsel
Joshua Williams, Esq. 614-387-9767
Joshua.Williams@sc.ohio.gov

Deputy Legislative Counsel
Shawn Welch, Esq. 614-387-9765
Shawn.Welch@sc.ohio.gov

Fiscal/HR Officer
Aleta Burns 614-387-9757
Aleta.Burns@sc.ohio.gov

Legislative Services Specialist
Justin Long 614-387-9756
Justin.Long@sc.ohio.gov

Judicial Services Program Manager
Trina Bennington 614-387-9761
Trina.Bennington@sc.ohio.gov

Judicial Services Program Manager
Jennifer Whetstone 614-387-9766
Jennifer.Whetstone@sc.ohio.gov