

**IN THE SUPREME COURT OF OHIO
2016**

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

RAYMOND MORGAN,

Defendant-Appellant.

Case No. 2015-0924

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 13AP-620

MERIT BRIEF OF PLAINTIFF-APPELLEE

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STATEMENT OF THE FACTS

I. After a two-day crime spree, three juvenile complaints are filed against Morgan, and Morgan's mother attends all hearings through the probable-cause stipulation.

This case stems from a crime spree occurring over a two-day period in the German Village area in Columbus. The crime spree started on February 8, 2012, when Craig Youngman reported two guns and a camera had been stolen from his home. 8-9-12, Tr., 7; 4-30-13, Tr., 4. That night, Bruce Sedlock was shot in the leg as he was entering his home, and about 30 minutes later and a few blocks away Eric Hayes was shot in the back as he was exiting his car. 8-9-12, Tr., 8-7; 4-30-12, Tr., 5.

The following night, defendant Raymond Morgan, Rashod Draper, and Morgan's brother Joshua were walking on Whittier Street when Joshua held up Jimmie White at gunpoint. 8-9-12, Tr., 10; 4-30-12, Tr., 5-6. But White fought back. He stabbed Joshua in the neck with a utility knife and grabbed Joshua's gun. 8-9-12, Tr., 10; 4-30-12, Tr., 6. During the affray, the gun accidentally discharged and hit White in the leg. 8-9-12, Tr., 10-11; 4-30-12, Tr., 6. Nonetheless, White gained control of Joshua's gun and used it to shoot Draper, who at this point was coming at White with a gun. 8-9-12, Tr., 11; 4-30-12, Tr., 6. Morgan then hit White on the head with a heavy object, causing White to let go of Joshua's gun. 8-9-12, Tr., 11. Joshua retrieved his gun, and he and Morgan left the scene. 8-9-12, Tr., 11; 4-30-12, Tr., 6. Draper was later found at the scene. 4-30-12, Tr., 6.

The investigation revealed that Morgan and Draper were involved in all of these offenses. 4-30-12, Tr., 6. The gun used in the shootings was one of the guns stolen from Youngman's home. *Id.*, 7. Youngman's camera and White's cell phone were both found in Morgan's home. *Id.*; 10-24-12, Tr., 8. Morgan states that the "evidence * * * demonstrated" that Morgan did not shoot either Sedlock or Hayes. App.Br., 1. This is not true. While Morgan later admitted that

he was “with the shooter,” the evidence did not “establish” one way or the other whether Morgan or Draper shot Sedlock and Hayes, so the State’s theory was that Morgan “was complicit and/or the shooter” in these shootings. 8-9-12, Tr., 9.

Morgan was born November 7, 1995, making him 16 years old at the time of the offenses. Three delinquency complaints were filed against Morgan in juvenile court. Collectively, the complaints charged Morgan with three counts of felonious assault, one count of aggravated robbery, one count of robbery, one count of kidnapping, and one count of receiving stolen property—with all but the receiving stolen property count carrying a firearm specification. 12JU-2947, R. 1, 19; 12JU-3513, R. 1; 12JU-4138, R. 1.

In all three cases, the State moved the juvenile court to relinquish jurisdiction and transfer the cases to the general division of the common pleas court. 12JU-2947, R. 14; 12JU-3513, R. 7; 12JU-4138, R. 10. Because it was unclear whether Morgan ever personally possessed a gun, the State sought discretionary bindover under R.C. 2152.12(B). Over the next several months, the juvenile court held several hearings, and Morgan’s mother attended each hearing. In August 2012, the juvenile court held a probable-cause hearing, and—with Morgan’s mother present—the parties stipulated to probable cause in all three cases. 8-9-12, Tr., 2-3.

II. Morgan’s mother passes away before the amenability hearing, but a close family friend attends the hearing in her place, and the juvenile court binds over Morgan.

Sometime after the probable-cause stipulation, Morgan’s mother passed away, and the amenability hearing was continued to allow Morgan to attend the funeral. 12JU-2947, R. 77. At the amenability hearing, Morgan’s counsel noted the death of Morgan’s mother and also mentioned that Morgan’s father had passed away in January 2012. 10-24-12, Tr., 11. Morgan’s counsel told the juvenile court that a “very close friend of the family who’s taken over the role of

mom” was present in the courtroom. 10-24-12, Tr., 12. The woman—who identified herself as Morgan’s “godsister”—wanted counsel to “point her out to the Court.” *Id.*

After hearing argument from both sides on amenability, the juvenile court found that Morgan was not amenable. *Id.*, 15-17. In reaching this conclusion, the juvenile court “significantly discount[ed]” the psychological evaluation’s recommendation against transfer and found that the factors weighing in favor of transfer under R.C. 2152.12(D) “far outweigh” the factors against transfer under R.C. 2152.12(E). *Id.*, 17. The juvenile court accordingly granted the State’s motions to transfer jurisdiction. *Id.*

III. Morgan pleads guilty in common pleas court, and the Tenth District affirms his convictions but remands for resentencing.

Morgan was therefore indicted on 13 counts: one count of aggravated robbery, one count of attempted aggravated robbery, one count of attempted aggravated burglary, two counts of robbery, one count of burglary, three counts of felonious assault, three counts of theft, and one count of tampering with evidence. 12CR-5458, R. 8. All 13 counts carried either a one-year or three-year firearm specification. *Id.* Morgan eventually pleaded guilty to four counts: one count of burglary (with no firearm specification), two counts of felonious assault (both with a three-year firearm specification), and one count of aggravated robbery (with a three-year firearm specification). 12CR-5458, R. 65-67. The common pleas court sentenced Morgan to a total of 18 years in prison. 12CR-5458, R. 78-82.

Morgan appealed to the Tenth District, claiming—among other things—that the juvenile court at the amenability hearing failed to appoint a guardian ad litem (GAL) under Juv.R. 4(B)(1) and R.C. 2151.281(A)(1). The Tenth District held that the juvenile court erred in not appointing a GAL. App.Op. ¶ 23. But because there was no request for a GAL, the court held that the GAL argument was subject to plain-error review and that Morgan was required to

demonstrate prejudice. *Id.* at ¶ 21. And the court held that Morgan was not prejudiced by the lack of a GAL. *Id.* at ¶¶ 24-26. The court agreed with the State’s argument that a GAL probably would have advocated against binding Morgan over, which was exactly what Morgan’s counsel argued. *Id.* at ¶ 24-25. The court also noted that, because there was no way of knowing what a GAL would have argued, Morgan failed to show specifically how the failure to appoint a GAL prejudiced him, considering that Morgan was represented by counsel who argued against bindover, and considering that Morgan had a “comprehensive and favorable” psychological evaluation. *Id.* at ¶25.

Also significant to the Tenth District was the presence of the godsister at the amenability hearing. *Id.* at ¶ 26. The fact that Morgan received support from a family friend instead of a parent, guardian or legal custodian did not undermine the basic fairness of the hearing or affect its result. *Id.* The court concluded: “While we are sympathetic to the fact that appellant faced the amenability hearing without a parent, guardian or legal custodian, we are reluctant to find plain error where appellant does not articulate how the juvenile court’s error resulted in any prejudice to appellant.” *Id.*

The Tenth District affirmed Morgan’s convictions, but remanded for resentencing due to the lack of consecutive-sentence findings. *Id.* at ¶ 62. Morgan sought reconsideration and to certify a conflict, and the Tenth District denied both requests. Memo.Dec., ¶ 20. After initially declining discretionary review, *12/02/2015 Case Announcements*, 2015-Ohio-4947, this Court reconsidered and accepted jurisdiction over Morgan’s first and second propositions of law only, *02/10/2016, Case Announcements*, 2016-Ohio-467.

ARGUMENT

Response to First and Second Propositions of Law: If not properly preserved, a failure to appoint a guardian ad litem under Juv.R. 4(B)(1) and R.C. 2151.281(A)(1) is subject to plain-error review, which requires a showing of prejudice.

Juv.R. 4(B)(1) requires a juvenile court to appoint a GAL “to protect the interests of a child or incompetent adult in a juvenile court proceeding when * * * [t]he child has no parents, guardian, or legal custodian.” R.C. 2151.281(A)(1) requires a GAL “to protect the interest of a child in any proceeding concerning an alleged or adjudicated delinquent child or unruly child when * * * [t]he child has no parent, guardian, or legal custodian.”

Morgan “ha[d] no parents” at the time of the amenability hearing. His father passed away in January 2012, and his mother passed away before the amenability hearing. The record does not reveal whether anyone else (*i.e.*, the godsister) was acting as Morgan’s “guardian” or “legal custodian” at the amenability hearing. Nonetheless, the Tenth District assumed that the juvenile court erred in not appointing a GAL but applied plain-error review because there was no request for a GAL. The court refused to find plain error, because Morgan failed to show any prejudice from the absence of a GAL.

Morgan argues that appellate courts applying plain-error review must “presume prejudice” from a GAL error and that a GAL error qualifies as a “structural error.” App.Br., 5. Although Morgan phrases these arguments as alternatives, they are in reality the same argument. *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, ¶ 9 (type of argument that is “per se prejudicial” is “more properly characterized as ‘structural error’”). But even viewing the arguments as alternatives, each lacks merit. First, there is no such thing as a presumptively prejudicial error in plain-error review. Second, a GAL error does not satisfy the strict criteria for structural error. In short, a GAL error does not warrant automatic reversal, particularly where—

as here—the error was not preserved for appeal and is reviewed for plain error. The Tenth District’s judgment should be affirmed.

I. There is no constitutional right to a GAL in juvenile delinquency proceedings.

A recurring theme throughout Morgan’s brief is that the appointment of a GAL at an amenability hearing is required as a matter of constitutional due process. It is of course true that an amenability hearing “must measure up to the essentials of due process and fair treatment.” *In re D.M.*, 140 Ohio St.3d 309, 2014-Ohio-3628, ¶ 11, quoting *Kent v. United States*, 383 U.S. 541, 562 (1966). From this truism, Morgan’s constitutional argument proceeds in two steps: (1) every “procedural protection” afforded at an amenability hearing is constitutionally required, and (2) the appointment of a GAL is a “procedural protection.” Ergo, according to Morgan, the appointment of a GAL is constitutionally required. Morgan’s argument fails.

A. The Due Process Clause does not incorporate every statutory or procedural requirement.

Simply saying that a juvenile is entitled to due process at an amenability hearing does not mean that every “procedural protection” applicable to amenability hearings is incorporated into the Due Process Clause. The meaning of “fundamental fairness” “can be as opaque as its importance is lofty.” *In re C.S.*, 115, Ohio St.3d 267, 2007-Ohio-4919, ¶ 80, quoting *Lassiter v. Dept. of Social Servs. of Durham Cty.*, 452 U.S. 18, 24-25 (1981). Once it is determined that “some process is due,” the “due process doctrine recognizes that ‘not all situations calling for procedural safeguards call for the same kind of procedure.’” *In re C.S.* at ¶ 81, quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Thus, “[a] court’s task is to ascertain what process is due in a given case.” *In re C.S.* at ¶ 80, citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 553 (1971).

Historically, juvenile courts have afforded fewer procedural protections than adult courts. *State v. Hanning*, 89 Ohio St.3d 86, 89 (2000). Over time, courts have recognized several due process requirements applicable to juvenile delinquency proceedings, including “the juvenile’s right to be represented by counsel and to have counsel appointed if his family cannot afford an attorney, the right not to be forced to incriminate himself, the right to written notice of the specific charges against him, and the right to confront and cross-examine witnesses.” *In re C.S.* at ¶ 72, citing *In re Gault*, 387 U.S. 1, 31-56 (1967). Due process also requires the State to prove beyond a reasonable doubt the charges against a juvenile. *In re C.S.* at ¶ 80, citing *In re Winship*, 397 U.S. 358, 367-368 (1970). And this Court has held that *Brady v. Maryland*, 373 U.S. 83 (1963), applies to delinquency proceedings. *State v. Iacona*, 93 Ohio St.3d 83, 91 (2001).

These rights mirror various constitutional rights applicable in adult courts. *Hanning*, 89 Ohio St.3d at 89 (“juveniles were given many of the same procedural protections as adults”). But by arguing that there is a constitutional right to a GAL, Morgan does not seek to incorporate another adult constitutional right into juvenile courts. Rather, he seeks to create a constitutional right that is wholly unique to the juvenile system, relying on nothing more than that a GAL is a state-created “procedural protection” applicable to amenability hearings. But in asking “what process is due” at an amenability hearing, “[t]he answer to that question is not to be found in the Ohio statute.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). After all, “errors of state law do not automatically become violations of due process.” *Rivera v. Illinois*, 556 U.S. 148, 160 (2009).

Juvenile courts are legislative creations. *In re C.S.* at ¶ 66, citing *In re Agler*, 19 Ohio St.2d 70, 72 (1969). There is no constitutional requirement that juvenile courts exist at all, let alone a constitutional requirement that a juvenile court afford the “procedural protection” of a

GAL in delinquency proceedings. A state-law procedure cannot give rise to a substantive right to life, liberty, or property. *Loudermill*, 470 U.S. at 541. “Process is not an end in itself. * * *

The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right.” *Olim v. Wakinekona*, 461 U.S. 238, 250-251 (1983), citing *Hewitt v. Helms*, 459 U.S. 460, 417 (1983). Ohio’s decision to provide for the appointment of GALs in delinquency proceedings is a “salutary development,” but “[t]he adoption of such procedural guidelines, without more, suggests that it is these restrictions alone, and not those federal courts might also impose under the Fourteenth Amendment, that the State chose to require.” *Hewitt*, 459 U.S. at 471.

B. A GAL is an independent “arm of the court,” and so the appointment of a GAL is not a personal “right” held by the juvenile.

While there is a constitutional right to appointed counsel in delinquency proceedings, a GAL serves a role distinct from counsel. “The role of guardian ad litem is to investigate the ward’s situation and then to ask the court to do what the guardian feels is in the ward’s best interest. The role of the attorney is to zealously represent his client within the bounds of the law.” *In re Baxter*, 17 Ohio St.3d 229, 232 (1985). Whereas counsel must advocate for a juvenile’s stated interests, Prof.Cond.R. 1.2(a), a GAL must “provide the court with relevant information and an informed recommendation regarding the child’s *best* interest,” Sup.R. 48(D) (emphasis added); *see also*, Juv.R. 2(O) (defining GAL as “person appointed to protect the interests of a party in a juvenile court proceeding”). In doing so, a GAL must “maintain independence, objectivity and fairness.” Sup.R. 48(D)(2). In addition to attending hearings and filing appropriate pleadings, Sup.R. 48(D)(4) & (6), a GAL must prepare a written final report that includes recommendations to the juvenile court, Sup.R. 48(F).

Given the unique the role of a GAL, a juvenile has no personal “right” to a GAL in delinquency proceedings. A GAL is an “arm of the court.” *Lovejoy v. Cuyahoga Cty. Dep’t of Human Serv.*, 76 Ohio App.3d 514, 517 (8th Dist.1991), citing *Penn v. McMonagle*, 60 Ohio App.3d 149 (6th Dist.1990) (GALs possess absolute judicial immunity); *see also*, Sup.R. 48(D)(3) (describing GAL as “officer of the court”). As such, a GAL’s duties are owed to the court—not to the juvenile. Indeed, no less so in delinquency proceedings, GALs frequently advocate *against* the juvenile’s stated interests. In such a scenario, a juvenile may view a GAL as an unwelcome adversary rather than a personal—much less constitutional—right. Plus, when there is no conflict between a juvenile’s stated interests and best interests, the same person may serve as both counsel and GAL. Juv.R. 4(C)(1); R.C. 2151.281(H). This further belies the notion that a separate GAL is a personal right held by the juvenile. (The State leaves open the question whether a juvenile has a personal right to a GAL in non-delinquency proceedings, *i.e.*, abuse, neglect, and dependency proceedings.)

C. Even if considered a personal “right,” such right is not constitutionally required as a matter of due process.

Even if a GAL is considered a personal right to the juvenile—as opposed to simply an independent investigator/advisor to the juvenile court—such right is not constitutionally guaranteed. Notably, Morgan has not cited a single case stating that a juvenile has a due process right to a GAL in delinquency proceedings. In fact, this Court’s cases cut the other way. In a related context, this Court refused to adopt an “independent advice/interested adult” standard “absent legislative action.” *In re C.S.* at ¶ 99, n. 3. With respect to a juvenile waiving rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court has refused to require that “the parents of a minor shall be read his constitutional rights along with their child, and that, by extension, both parent and child are required to intelligently waive those rights before the minor

makes a statement.” *In re Watson*, 47 Ohio St.3d 86, 88-89 (1989), quoting *State v. Bell*, 48 Ohio St.2d 270, 276-277 (1976), *overruled on other grounds*, *Bell v. Ohio*, 438 U.S. 637 (1978). The Due Process Clause does not require that a juvenile consult with an attorney before waiving constitutional rights. *In re C.S.* at ¶ 99, n. 3. If a juvenile can waive *Miranda* rights without consulting with an attorney, parent, or any other interested adult, then it is difficult to see how the Due Process Clause requires the appointment of a GAL in delinquency proceedings.

None of this is to diminish the “vital role a parent can play in a delinquency proceeding.” *Id.* at ¶ 102. While parents or guardians “do not always represent the child’s best interests and are sometimes adverse thereto,” *In re Agler*, 19 Ohio St.2d at 78, “parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions,” *In re C.S.* at ¶ 103, quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979). To this end, a juvenile may not waive counsel unless advised by a parent, guardian, or custodian in considering waiver. *In re C.S.* at ¶¶ 95, 98, citing R.C. 2151.352. But even parents have limited involvement, because a parent has no authority to waive the constitutional right of a juvenile in a delinquency proceeding. *In re C.S.* at ¶ 100.

Without question, parents are important in delinquency proceedings. But while the absence of a parent, guardian, or legal custodian is one of the triggers for appointing a GAL, Juv.R. 4(B)(1); R.C. 2151.281(A)(1), this does not at all mean that a GAL is a substitute for the personal, trust-based relationship that a juvenile receives from a parent, guardian, or custodian. Again, a GAL’s role is to conduct an independent investigation and advise the juvenile court as to the juvenile’s best interests. A GAL does not share wisdom, experience, and support with the juvenile. Whatever constitutional rights a juvenile has to parental involvement in delinquency

proceedings are unique to *parents* and do not carry over to GAL. A GAL simply does not have the same practical or legal status as a parent, guardian, or legal custodian.

In short, if juveniles really do have a personal “right” to a GAL, it is purely a state-law right under Juv.R. 4(B) and R.C. 2151.281(A). It is not a constitutional right under the Due Process Clause.

II. A failure to preserve a GAL error subjects the error to plain-error review, which requires a showing of prejudice.

A. To establish plain error, an appellant must show at a minimum that an obvious error affected the outcome of the trial.

“No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, ‘may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.’” *United States v. Olano*, 507 U.S. 725, 731 (1993), quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944). “It is a well-established rule that an appellate court will not consider any error which counsel for a party complaining of the trial court’s judgment could have called but did not call to the trial court’s attention at a time when such error could have been avoided or corrected by the trial court.” *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, ¶ 15, quoting *State v. Awan*, 22 Ohio St.3d 120, 122 (1986), quoting *State v. Childs*, 14 Ohio St.2d 56 (1968), paragraph three of the syllabus (internal quotation marks omitted).

The plain-error doctrine, however, “tempers the harsh consequences of failing to object” by granting appellate courts limited authority to review forfeited errors. *State v. McKee*, 91 Ohio St.3d 292, 298 (2001) (Cook, J., dissenting); *see also*, *State v. Wolery*, 46 Ohio St.2d 316, 326 (1976) (plain-error doctrine “alters [the] practice” of precluding appellate review of forfeited claims). Under Crim.R. 52(B), “[p]lain errors or defects affecting substantial rights may be

noticed although they were not brought to the attention of the court.” An appellate court may notice plain error in a criminal case if the appellant shows three prongs: (1) an error, *i.e.*, a deviation from the legal rule; (2) that the error was “plain,” meaning an “obvious” defect in the trial proceedings, and (3) that the error affected “substantial rights,” meaning that the error “affected the outcome of the trial.” *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002); *Olano*, 507 U.S. at 732-735. It is the appellant’s burden to show plain error. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 17.

On the third prong, the appellant must show that “but for the error, the outcome of the trial clearly would have been otherwise.” *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, ¶ 11, quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph two of the syllabus. This Court has also phrased this prejudice prong as requiring the appellant to show a reasonable probability that the error resulted in prejudice. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, ¶ 22. But even after *Rogers*, this Court has continued to apply the “clearly would have been otherwise” prejudice standard. *State v. Arnold*, ___ Ohio St.3d ___, 2016-Ohio-1595, ¶ 65; *State v. Dean*, ___ Ohio St.3d ___, 2015-Ohio-4347, ¶ 191; *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, ¶120.

Even if a forfeited error satisfies these three prongs, Crim.R. 52(B) does not demand that an appellate court correct it. *Barnes*, 94 Ohio St.3d at 27; *Olano*, 507 U.S. at 735. Appellate courts have discretion to recognize plain error and should do so “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Barnes*, 94 Ohio St.3d at 27, quoting *Long*, 53 Ohio St.2d 91, paragraph three of the syllabus. The standard “guid[ing]” the appellate court’s discretion under Crim.R. 52(B) is that the appellate court “should correct a plain forfeited error affecting substantial rights if the error ‘seriously affect[s]

the fairness, integrity or public reputation of judicial proceedings.” *Olano*, 507 U.S. at 736, quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936).

The plain-error standard also applies in civil cases. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121 (1997). Although juvenile delinquency proceedings are civil in nature, *In re S.B.*, 121 Ohio St.3d 279, 2009-Ohio-507, ¶ 10, citing *In re Anderson*, 92 Ohio St.3d 63, 66 (2001), this Court has cited to criminal cases in describing the plain-error standard applicable to delinquency proceedings, *Quarterman* at ¶ 16; *see also*, *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, ¶ 25 (delinquency proceedings “feature inherently criminal aspects that we cannot ignore”).

Ultimately, however, the civil plain-error standard “tracks” the criminal standard. *State v. Gowdy*, 88 Ohio St.3d 384, 400 (2000) (Cook, J., dissenting). The civil plain-error standard “provides for the correction of errors clearly apparent on their face and prejudicial to the complaining party even though the complaining party failed to object to the error at trial.” *LeFort v. Century 21-Maitland Realty Co.*, 32 Ohio St.3d 121, 124 (1987), citing *Reichert v. Ingersoll*, 18 Ohio St.3d 220, 223 (1985). An appellate court may recognize plain error in civil cases “only with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *LeFort*, 32 Ohio St.3d at 124, citing *Cleveland Elec. Illum. Co. v. Astorhurst Land Co.*, 18 Ohio St.3d 268, 275 (1985). “In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.” *Goldfuss*, 79 Ohio St.3d 116, syllabus.

Morgan claims that Crim.R. 52(B) creates “competing versions” of the plain-error standard, one examining the error’s impact on the fairness of the proceedings, the other focusing

on whether the error impacted the outcome of the proceedings. App.Br., 17. Not so. The standard of “seriously affect[ing] the fairness, integrity or public reputation of judicial proceedings” refers to the appellate court’s discretionary power to recognize plain error. *Olano*, 507 U.S. at 736; *see also, Barnes*, 94 Ohio St.3d at 97 (quoting *Olano*). This discretionary inquiry occurs only *after* the appellant has established that the error affected his substantial rights—*i.e.*, that the error affected the outcome of the trial. In other words, the inquiry into “fairness of the proceedings” is in addition to the prejudice inquiry, not instead of it.

B. Unpreserved GAL errors are subject to plain-error review, including the prejudice prong.

Throughout this appeal, Morgan has offered no evidence as to how he was prejudiced by the lack of a GAL. Indeed, Morgan has not even bothered to *speculate* as to what a GAL could have done or said that would have even *possibly* resulted in him not being bound over to common pleas court. Rather than offer any specific evidence or argument on prejudice, Morgan argues that GAL errors should be subject to a special type of plain-error review, one in which the appellate court is required to “presume prejudice.” App.Br., 5. But this Court has “never recognized” a “hybrid type of plain error” whereby “forfeited error is presumptively prejudicial and is reversible error per se.” *Rogers* at ¶ 24; *see also, State v. Hill*, 92 Ohio St.3d 191, 203 (2001) (“plain error per se” approach “is inconsistent with the concept of plain error and has no support in our precedents”). Adopting a “presumed prejudice” approach for plain error is exactly the type of “unwarranted expansion” of Crim.R. 52(B) that would “skew the Rule’s ‘careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.’” *Hill*, 92 Ohio St.3d at 199, quoting *Johnson v. United States*, 520 U.S. 461, 466 (1997). This Court should reject any special “presumed prejudice” plain-error rule for GAL errors.

1. The word “shall” in Juv.R. 4(B) and R.C. 2151.281(A) does not exempt a GAL error from plain-error review.

To start, Morgan is mistaken in arguing that the word “shall” in Juv.R. 4(B) and R.C. 2151.281(A) obviates the need to preserve GAL errors. App.Br., 13-16. The word “shall” or other mandatory language (*i.e.*, “shall not,” “must,” “must not,” “require,” “is not,” *etc.*) in a statute, rule, or constitutional provision does not exempt an error from plain-error review. Such mandatory language merely establishes a rule. Without such mandatory language, there can be no legal rule to deviate from, and therefore no error. But establishing error is only the “threshold inquiry” of plain-error review. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶ 6, citing *Fisher* at ¶ 7. Establishing error is the *beginning* of plain-error analysis, not the end of it.

This Court’s decision in *Perry* is instructive. In *Perry*, this Court held that an unpreserved violation of R.C. 2945.10(G), which states that jury instructions “shall * * * remain on file with the papers of the case,” is not structural error and is subject to plain-error review. *Perry* at ¶ 26. Thus, although R.C. 2945.10(G) uses the word “shall,” any error under the statute must still be preserved or else be subject to plain-error review.

Nor does it matter that the mandatory duty is placed on the trial court, as opposed to someone else. In *Perry*, this Court stated that R.C. 2945.10(G) “clearly and unambiguously requires the *trial court* to maintain the written jury instructions with the ‘papers of the case.’” *Id.* at ¶ 8 (emphasis added). The Court in *Perry* repeatedly attributed the error directly to the trial court. *Id.*, syllabus (“The failure of the trial court”); *id.* at ¶ 8 (“trial court’s failure”); *id.* at ¶ 16 (“failure of the trial court”); *id.* at ¶ 23 (same); *id.* at ¶ 24 (same); *id.* at ¶ 25 (same). Yet the trial court’s failure to comply with mandatory statutory language did not eliminate the need for the defendant to establish plain error. *Id.* at ¶ 26.

Also instructive is *State v. Jackson*, 92 Ohio St.3d 436 (2001). There, this Court held that “[t]he trial court clearly erred in failing to abide by the mandates of Crim.R. 24(F) in allowing the alternate jurors to remain present during deliberations.” *Id.* at 439. Crim.R. 24(F) used mandatory language—“[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict”—and the Court unequivocally blamed the violation of this rule on the trial court. But because there was no objection, this Court applied plain-error review, and in doing so it refused to presume prejudice. *Id.* at 439-440; *see also*, *Olano*, 507 U.S. at 737-738 (district court improperly allowed alternate jurors to attend deliberations, but error was subject to plain-error review and defendant failed to show prejudice).

More examples: A trial court has a mandatory duty to instruct the jury on applicable law, R.C. 2945.11, but jury-instruction errors must be properly preserved or else be subject to plain-error review, Crim.R. 30(A); *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶¶ 97-102. A trial court also has a mandatory duty to determine the admissibility of evidence; Evid.R. 104(B); *State v. Getsy*, 84 Ohio St.3d 180, 201 (1998), but the admission of evidence is subject to plain-error review if not properly preserved, *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 83. These are just some of the many mandatory rules imposed on trial courts. Errors by trial courts are subject to the same error-preservation and plain-error standards as other errors.

In re C.S. does not help Morgan. The issue in *In re C.S.* was the voluntariness of a juvenile’s waiver of the right to counsel as it relates to the voluntariness of an admission under Juv.R. 29, which itself is a series of waivers. But the voluntariness of a waiver implicates different concerns than the forfeiture of an error. *Rogers* at ¶¶ 20-21 (explaining difference between waiver and forfeiture). Some rights require certain procedures to secure a valid waiver. *Olano*, 507 U.S. at 733. When a trial court fails to follow these procedures, any reversal is

ultimately based not on the error *as such*, but rather on the involuntariness of the waiver. In such a case, even if the error is forfeited, reversal may still be appropriate if the waiver is defective.

Even with such waiver rules, reversal is not automatic. Although not always phrased in terms of “plain error,” an appellant still must show that the error resulted in prejudice by affecting the voluntariness of the waiver. Thus, *In re C.S.* held that, so long as the juvenile court substantially complies with Juv.R. 29(D), “the plea will be deemed voluntary absent a showing of prejudice by the juvenile or a showing that the totality of the circumstances does not support a finding of valid waiver.” *In re C.S.* at ¶ 113; *c.f.*, *State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, ¶ 24 (noting that federal law “does not require automatic vacation of a plea when a judge fails to inform a defendant of a *Boykin* right); *United States v. Vonn*, 535 U.S. 55, 59 (2002) (plain-error review applies to claims under Fed.R.Crim.P. 11).

Morgan’s reliance on *In re D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, is similarly misplaced. In that case, this Court held that Juv.R. 3(E) allows a juvenile to waive the right to an amenability hearing, so long as the juvenile court follows certain procedures. *Id.* at ¶¶ 33-39. Again, waiver and forfeiture are different issues. If a trial court fails to follow these procedures, it is not the error that ultimately warrants reversal, but rather the involuntariness of the waiver. The Court refused to consider whether the juvenile forfeited his claim to an amenability hearing by not objecting, because the State failed to raise the forfeiture argument in the court of appeals, even though the defendant timely raised the issue on appeal. *Id.* at ¶ 41, n. 2.

Ultimately, *In re D.W.* cuts against Morgan’s argument that GAL errors need not be preserved. An amenability hearing is constitutionally required, *id.* at ¶ 21, citing *Kent*, 383 U.S. at 557, but the appointment of a GAL is not. It would be an odd rule that a juvenile can waive

the constitutional requirement to an amenability hearing (thereby precluding all review), but cannot forfeit the non-constitutional requirement of a GAL through lack of objection.

Morgan fares no better by relying on the Tenth District’s “plain error as a matter of law” approach to consecutive-sentence findings under R.C. 2929.14(C)(4). The State does not endorse the Tenth District’s approach in this regard, but if “plain error as a matter of law” is to have any place in appellate review, it would be limited to the context of sentencing, where finality interests are less compelling. *But see, Rogers* at ¶ 24 (refusing to adopt “reversible error per se” approach for merger). This may explain *State v. Amos*, 140 Ohio St.3d 238, 2014-Ohio-3160, which held that a trial court’s imposition of community control without first ordering a pre-sentencing investigation report was reversible error, even without objection. *Amos*, however, has limited precedential value, as three justices concurred in judgment only; two justices dissented in part, specifically noting that plain-error review should apply; and one justice dissented on other grounds. Whatever role a “plain error as a matter of law” approach has in sentencing, it would have no place in a case in which a defendant seeks to vacate convictions secured after juvenile-court bindovers and guilty pleas in common pleas court. (Of course, the issue of “void” sentences presents an entirely separate problem.)

In short, the word “shall” in Juv.R. 4(B) and R.C. 2151.281(A) does not transform those provisions into super-rules that are immune from normal error-preservation standards or plain-error review. Any error under Juv.R. 4(B) and R.C. 2151.281(A) must be properly preserved, and a failure to do so triggers plain-error review, which requires a showing of prejudice.

2. Counsel is capable of preserving GAL errors.

While the use of the word “shall” in Juv.R. 4(B) and R.C. 2151.281(A) does not eliminate the need to preserve GAL errors, this is not to say that the juvenile himself or herself

must request a GAL, as Morgan seems to suggest throughout his brief. Just as an adult may rely on counsel to preserve errors in common pleas court, so may a juvenile rely on counsel to preserve a GAL error in juvenile delinquency proceedings.

As noted, juveniles in delinquency proceedings have a constitutional right to be represented by counsel and to have counsel appointed if indigent. *In re C.S.* at ¶ 72. And R.C. 2151.352 grants juveniles a statutory right to appointed counsel that goes beyond constitutional requirements. *In re C.S.* at ¶ 83, citing *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500, ¶ 15; *see also*, Juv.R. 4(A). If a juvenile appears without counsel, the juvenile court must ascertain whether the juvenile knows of his or her right to counsel and of the right to appointed counsel if indigent. R.C. 2151.352.

A juvenile's ability to waive counsel is limited. "Counsel must be provided for a child not represented by the child's parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them." *Id.* Addressing this language, this Court has held that a juvenile may waive the right to counsel, but only if advised by a parent in considering waiver. *In re C.S.* at ¶¶ 95, 98. If there is a conflict between the child and the parent, custodian, or guardian on the question of whether counsel should be waived, the juvenile court is required to appoint counsel. *Id.* at ¶ 100. A parent has no authority to waive the constitutional right on behalf of a child. *Id.* And if a juvenile does seek to waive counsel, the juvenile court must "scrupulously ensure that the juvenile fully understands, and intentionally and intelligently relinquishes, the right to counsel." *Id.* at ¶ 106, citing *State v. Gibson*, 45 Ohio St.2d 366 (1976), syllabus.

It is of course true that counsel must advocate for a juvenile's stated interests. Prof.Cond.R. 1.2(a). But "[h]aving a client-directed approach does not mean that counsel sets

aside his or her legal training and experience at the whim of a client; rather, counsel, drawing upon that training and experience, must keep the client fully informed and provide the client with information and advice on a particular matter and possible outcomes. This will help the client to make informed decisions that the lawyer should then honor.” Nat’l Juvenile Defender Ctr., *National Juvenile Defender Standards* (2012), p. 20. Counsel “shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Prof.Cond.R. 1.4(b). So, while ultimately obligated to advocate for a juvenile’s stated interests, counsel must advise the juvenile on all options, and must explain to the client which option counsel feels is in the juvenile’s best interests and why.

If a client’s “capacity to make adequately considered decisions in connection with a representation is diminished * * * because of minority,” counsel “shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” Prof.Cond.R. 1.14(a). That is, counsel must continue to advocate for the juvenile’s stated interests. But if counsel “reasonably believes” that the juvenile “is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including * * * seeking the appointment of a guardian *ad litem*.” Prof.Cond.R. 1.14(b).

Thus, when a juvenile is represented by counsel and the need for a GAL arises, counsel may request that the juvenile court appoint a GAL. In doing so, “the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client’s best interests, and the goals of intruding into the client’s decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client’s family and social connections.” *Id.*, comment. While counsel’s ultimate duty is to advocate for the juvenile’s stated interest, counsel

nonetheless plays a role in ensuring that the juvenile's best interests are not lost but rather are presented to the juvenile court through a GAL if necessary.

3. Numerous factors weigh into whether the failure to appoint a GAL was prejudicial.

Morgan argues that requiring prejudice from a GAL error is an "impossible standard." App.Br., 16. But reviewing courts can weigh multiple factors in determining whether the failure to appoint a GAL was prejudicial. These factors include, but are not limited to, the following:

One: Whether the juvenile was represented by counsel. As mentioned above, a juvenile may not waive counsel unless advised by a parent, guardian, or custodian in considering waiver. *In re C.S.* at ¶ 95, citing R.C. 2151.352. But if a GAL is required because the parent has a pre-existing conflict with the child, Juv.R. 4(B)(2); R.C. 2151.281(A)(2), and the juvenile court nonetheless accepts the juvenile's waiver of counsel, then the absence of counsel throughout the proceedings will go a long way to establishing that the GAL error was prejudicial. The absence of a GAL would also invalidate the waiver of counsel. R.C. 2151.352; *In re C.S.* at ¶ 100.

Similarly, if the need for a GAL arises *after* a valid waiver of counsel (*i.e.*, because new facts emerge creating a conflict between the juvenile and the parent, or because the parents pass away), then that too will be a significant factor in establishing prejudice for any failure to appoint a GAL. Again, in such a case, the absence of a GAL not only constitutes a potentially prejudicial error in its own right, but it would also affect the validity of the waiver of counsel. R.C. 2151.352; *In re C.S.* at ¶¶ 95, 98, 100. The juvenile would have waived counsel with the understanding that he or she would have the support throughout the proceedings of a parent, guardian, or custodian. Any subsequent and unforeseen disappearance of this support could retroactively negate the voluntariness of the waiver. R.C. 2151.352 would preclude the juvenile from continuing to waive counsel throughout the remainder of the proceedings.

Two: Aside from just from the absence of counsel, whether the juvenile waived any other significant right or made some other significant litigation-related decision—*i.e.*, the juvenile entered into an admission, waived the right to an amenability hearing, waived the right to not to testify, *etc.*—that at least on its face raises the question whether the juvenile was acting in his or her best interests. This would exclude most routine, strategic decisions made by counsel, such as what evidence to present, what questions to ask, and the like. Whether counsel acted reasonably in representing a juvenile is appropriately litigated in an ineffective assistance of counsel claim. Of course, a GAL cannot force a juvenile to enter into a waiver any more than a parent can. *In re C.S.* at ¶ 100. But a GAL may advise a juvenile court that accepting a waiver is not in the juvenile’s best interests.

In this regard, Morgan’s brief actually provides a perfect example. App.Br., 11-12. If a juvenile actively seeks to be bound over on a low-level felony, thinking that adult sanctions are preferable to juvenile sanctions, then the juvenile could at least make the case that the absence of a GAL was prejudicial because a GAL could have advised the juvenile court that the juvenile’s best interests were better served by keeping the case in the juvenile system.

Three: Whether the juvenile court received information from some other source that would duplicate the facts a GAL would acquire in his or her investigation. Such information could come from a psychological evaluation under R.C. 2152.12(C), which requires “an investigation into the child’s social history, education, family situation, and any other factor bearing on whether the child is amenable to juvenile rehabilitation, including a mental examination of the child by a public or private agency or a person qualified to make the examination.”

Four: Whether the record shows that some other interested adult was available to advise and support the juvenile. As Morgan acknowledges, “parents are the natural guardians of their children’s best interest.” *Id.*, 9. Juv.R. 4(B) and R.C. 2151.281(A) place a preference of parents, guardians, and legal custodians over GALs. But even if a non-parental family member or close family friend does not meet the definition of “custodian” or “guardian,” Juv.R. 2(H) & (N); R.C. 2151.011(12) & (18), such a person may nonetheless be fully capable of filling the parental role. In fact, such a trusted confidant may provide *more* benefit to a juvenile than an appointed GAL with whom the juvenile has no personal relationship at all.

Five: Whether the juvenile was of such an age that he or she was more capable of understanding the legal process and being able to make informed, intelligent decisions about his or her best interests. A nine or ten year old will be much more likely to be prejudiced by the absence of a GAL than a sixteen or seventeen year old.

The State does not suggest that these factors bear on the “threshold question” of whether there was error under Juv.R. 4(B) and R.C. 2151.281(A). *Perry* at ¶ 6. Nor does the State suggest that a GAL report must be in the record in order to determine whether the absence of a GAL was prejudicial. But once a reviewing court finds that a juvenile court failed to appoint a GAL, the court may consider these factors—and possibly others—in deciding whether the error “affected the outcome” of the proceedings. *Barnes*, 94 Ohio St.3d at 27.

4. Cases cited in Morgan’s brief provide examples of prejudicial GAL errors.

Many of the lower court cases cited in Morgan’s brief address one or more of these factors in concluding that the failure to appoint a GAL was prejudicial. For example, in *In re Sappington*, 123 Ohio App.3d 448 (2nd Dist.1997), the court made no mention of the fact that no objection was raised to the lack of a GAL. True, the juvenile in *In re Sappington* was not

represented by counsel, so it is at least plausible (if not likely) that no GAL was requested. But the fact that the juvenile had no counsel was a key factor in the court's decision to reverse. The court noted that the juvenile asked for an attorney, but his father convinced him that he did not need an attorney and the magistrate did not advise the juvenile that he had a right to one. *Id.* at 455. Foreshadowing this Court's decision in *In re C.S.*, the court emphasized that the "central purpose of the guardian *ad litem* rule is to ensure protection of such rights." *Id.* This fact was important to the court's analysis because "[i]n evaluating the need for a guardian *ad litem*, courts have also considered whether the minor was represented by counsel," and "[a] juvenile court should be more sensitive to potential conflicts of interest under Juv.R. 4(B)(2) when there is no other person present to protect the rights and interests of the minor." *Id.* Thus, the court in *In re Sappington* actually did engage in a prejudice inquiry. It found that the lack of a GAL *caused* the juvenile to go unrepresented by counsel.

In re B.G., 5th Dist. No. 2011-COA-012, 2011-Ohio-5898, is distinguishable for similar reasons. Like in *In re Sappington*, the court in *In re B.G.* did not address the lack of an objection to the failure to appoint a GAL. Also, the court in *In re B.G.* engaged in a prejudice inquiry. The court emphasized that the "[t]he record does not show any other adult coming forward to fill the role of parent or guardian *ad litem*. This fourteen year old boy pled true to very serious charges with only his counsel to advise him." *Id.* at ¶ 20. Thus, the reversal was based on three key facts: (1) the juvenile had no other adult to advise him; (2) he pled true to serious charges, and (3) he was only 14 years old.

In *In re J.C.*, 5th Dist. Nos. 14CA23, 14CA24, 2015-Ohio-4664, the court did not mention whether the GAL issue was preserved below, but nonetheless reversed because the juvenile court failed to appoint a GAL despite there being a possible conflict between the juvenile and his mother.

Id. at ¶ 34. The court stated that the juvenile court abused its discretion in failing to appoint a GAL “prior to accepting the plea herein.” *Id.* Thus, the juvenile entered into an admission without a GAL advising the juvenile court whether the admission was in the juvenile’s best interests.

In reaching this conclusion, the court stated that the failure to appoint a GAL “constitutes reversible error.” *Id.* at ¶ 26, citing *In re Spradlin*, 140 Ohio App.3d 402 (4th Dist.2000). The court in *In re Spradlin* in turn relied on *In re Howell*, 77 Ohio App.3d 80 (4th Dist.1991). But in *In re Howell*, the GAL issue was preserved. *Id.* at 85 (noting “the trial court denied appellant’s motion for the appointment of a guardian ad litem”). Thus, it is unlikely *In re Spradlin* intended the “constitutes reversible error” language to require automatic reversal even when there was no specific request for a GAL. If these cases really do stand for the proposition that an unpreserved GAL warrants automatic reversal, their precedential value is on dubious footing. The Fourth District has recently openly questioned its precedent to the extent it exempts forfeited GAL errors from plain-error review. *State v. Legg*, ___ N.E.3d ___, 2016-Ohio-801, ¶ 14 (4th Dist.), n. 1; *c.f.*, *In re Cook*, 11th Dist. No. 2003-A-0132, 2005-Ohio-5288, ¶¶ 25-34 (relying heavily on *In re Howell*, *In re Spradlin*, and other Fourth District cases).

In *In re William B.*, 163 Ohio App.3d 201, 2005-Ohio-4428 (6th Dist.), the court (without mentioning the lack of objection) found that the juvenile court committed reversible error by failing to appoint a GAL when the juvenile’s interests conflicted with his mother’s. *Id.* at ¶ 43. But the court did so only after engaging in significant discussion into the juvenile court’s failure to appoint an attorney for the juvenile. Notably, the court stated that when a juvenile’s interests conflict with those of his or her parents or guardian, the means of “overcom[ing] this problem” is to appoint counsel. *Id.* at ¶ 15, citing *In re Agler*, 19 Ohio St.2d at 78. The court found that the juvenile’s

waiver of the right to counsel and his admission under Juv.R. 29(D) were defective. *In re William B.* at ¶¶ 23, 33.

The court *In re K.B.*, 170 Ohio App.3d 121, 2007-Ohio-396 (8th Dist.), stated that “the absence of an objection does not preclude a reversal due to the juvenile court’s failure to appoint a GAL when required under R.C. 2151.281(A)(2) or Juv.R. 4(B)(2).” *Id.* at ¶ 12, citing *In re Etter*, 134 Ohio App.3d 484, 492 (1st Dist.1998). This “does not preclude” language suggests that not every unpreserved GAL error will result in reversal. Muddying the issue further, *In re Etter* did not involve the failure to appoint a GAL. Rather, that case involved a juvenile magistrate’s failure to comply with Juv.R. 29(D). And because the juvenile in *In re Etter* did not raise the Juv.R. 29(D) claim in his written objections to the juvenile court, the appellate court applied plain-error review. *In re Etter*, 134 Ohio App.3d at 492-493. In *In re K.B.*, juvenile entered multiple waivers of counsel and entered into multiple admissions. *In re K.B.* at ¶¶ 3-8.

Incidentally, two cases cited in Morgan’s brief have no relevance to the present case. *In re B.M.R.*, 2nd Dist. No. 2005 CA 1, 2005-Ohio-5911, involved a juvenile court’s failure to hold a competency hearing, despite the fact that “B.M.R.’s counsel raised the issue of B.M.R.’s competence in a timely fashion.” *Id.* at ¶ 16. Thus, the case did not involve a GAL error, and the competency error was preserved, so the appellate court was reviewing for harmless error, not plain error. And *In re A.G.B.*, 173 Ohio App.3d 263, 2007-Ohio-4753 (4th Dist.), the court held in an abuse, neglect, and dependency case that the mother’s failure to request a GAL did not “waive the court’s mandatory duty to appoint a GAL to represent [the child’s] interests.” *Id.* at ¶ 15. Aside from the obvious distinction that a parent’s failure to object should not be imputed to a child, a GAL takes on heightened importance in custody cases because the child would otherwise have no say in the outcome of the proceeding. The analysis in *In re A.G.B.* simply

does not fit in cases involving a juvenile’s failure to object to a GAL in delinquency proceedings. Moreover, *In re A.G.B.* came from the Fourth District, which—as noted above—has doubted whether a GAL error warrants reversal absent a showing of prejudice. *Legg* at ¶ 14, n. 1.

Moreover, many of the cases cited in Morgan’s brief involve the failure to appoint a GAL despite a possible conflict between the juvenile and the parent under Juv.R. 4(B)(2) and R.C. 2151.281(A)(2). In conflict cases, courts sometimes phrase the error as the failure to investigate further into the possible conflict. *In re K.B.* at ¶22 (colorable claim of conflict requires a “thorough inquiry” by the juvenile court); *In re Spradlin*, 140 Ohio App.3d at 407 (court abused its discretion by failing to appoint a GAL “or inquiring further into whether a [GAL] was necessary”); *In re Cook* at ¶ 34 (“the juvenile court abused its discretion in failing to appoint a guardian ad litem or to further inquire into whether a guardian ad litem was necessary”); *In re Dennis*, 11th Dist. No. 2006-A-0040, 2007-Ohio-2432, ¶ 29 (“trial court has a duty to ‘inquire further into whether a guardian ad litem is necessary’”) (quoting *In re Cook*). The State does not concede that there should be a special rule for conflict cases, but conflict cases potentially implicate different concerns than other GAL errors. *C.f.*, *Cuyler v. Sullivan*, 446 U.S. 335, 349-350 (1980).

To the extent that any of the cases cited in Morgan’s brief really do hold that any GAL error requires automatic reversal, even if unpreserved, such holdings would be inconsistent with this Court’s precedents. Again, there is no such thing as “presumed prejudice” in plain-error review, and none of the cases Morgan cites contains any analysis as to how an unpreserved GAL error would warrant automatic reversal under the strict “structural error” framework. As explained below, a GAL error is not structural, and besides structural errors must be preserved to warrant automatic reversal.

In contrast, other courts have applied plain-error review—including the prejudice requirement—to GAL errors in a variety of different contexts, including delinquency proceedings. *State v. Smith*, 9th Dist. No. 26804, 2015-Ohio-579, ¶ 11 (“Assuming without deciding that the court erred [in failing to appoint a GAL at probable-cause hearing], Smith has failed to argue how this affected the outcome of the hearing.”); *In re M.T.*, 6th Dist. No. L-09-1197, 2009-Ohio-6674, ¶¶ 14-16; *In re Smith*, 3rd Dist. No. 14-05-33, 2006-Ohio-2788, ¶¶ 35-36; *In re McHugh Children*, 5th Dist. No. 2004CA0091, 2005-Ohio-2345, ¶ 38; *In re Amber G.*, 6th Dist. No. L-04-1091, 2004-Ohio-5665, ¶¶ 6-8 (opinion by Lanzinger, J.).

C. The Tenth District correctly held that Morgan failed to show plain error because he failed to show any prejudice from the absence of a GAL.

While this Court has articulated varying standards of prejudice for plain-error review, this Court has never wavered from the fact that plain-error review requires *some* showing of prejudice. *Rogers* at ¶ 24. Whether applying the “reasonable probability” standard of *Rogers*, the “clearly would have been otherwise” standard of *Long*, or something in between, Morgan cannot satisfy *any* standard of prejudice. Morgan complains that it is impossible to show prejudice from a GAL error, but in reality it was just impossible for *Morgan* to show prejudice.

Most importantly, Morgan was represented by counsel. As discussed earlier, although counsel and a GAL serve different roles, *In re Baxter*, 17 Ohio St.3d at 232, the two roles often coincide. Thus, appointed counsel may also serve as a GAL, so long as the roles do no conflict. Juv.R. 4(C)(1); R.C. 2151.281(H). There was absolutely zero indication that counsel’s efforts to challenge the bindovers and to argue for amenability conflicted with Morgan’s best interests. True, Morgan stipulated to probable cause, but this occurred *before* his mother passed away, when there was no need for a GAL. In any event, given the facts of the case, the decision to stipulate probable does not raise any question as to whether Morgan was acting in his best

interests. As for the amenability hearing, it is difficult to imagine that a GAL would have recommended anything other than that Morgan should not be bound over—which is exactly what Morgan’s counsel argued at the amenability hearing. Throughout this entire appeal, in both the Tenth District and this Court, Morgan has not offered one word as to what a GAL could have said or done that would not have merely duplicated the efforts of counsel. *In re M.T.* at ¶ 18 (“Appellant has failed to demonstrate how a [GAL] would have acted differently [from counsel] or produced a different result.”).

Similarly, the psychological evaluation done on Morgan contained an in-depth investigation, as required by R.C. 2152.12(C), and recommended that Morgan be found amenable. The evaluator reviewed the prosecutor’s files, conducted a clinical interview and mental status examination on Morgan, spoke with the prosecutor and defense counsel, and interviewed Morgan’s mother. Forensic Evaluation, p 2. Any investigation by a GAL would have covered largely the same ground as the evaluation. Sup.R. 48(D)(13) (outlining GAL’s duties investigatory duties). And any report by a GAL would have contained no more information than the evaluation.

What is more, up until her passing, Morgan’s mother attended every hearing and participated in the psychological evaluation. *C.f., In re Cremeans*, 8th Dist. No. 61367 (March 12, 1992) (although the GAL was absent during testimony of agency’s witness, the GAL was “actively involved in the case” so the “absence of the [GAL] in this one instance [] could not rise to the level of plain error.”). By the time of the amenability hearing, the godsister had “taken over the role of mom” and was present at the hearing, thus further eliminating any prejudice. *C.f., In re J.J.*, 10th Dist. No. 067AP-495, 2006-Ohio-6151, ¶ 25 (no plain error when a “stand-in” GAL appeared on behalf of the appointed GAL during part of the trial).

Significantly, when defense counsel mentioned that Morgan’s godsister was present at the amenability hearing, he told the juvenile court that she “wanted [defense counsel] to point her out to the Court.” 10-24-12, Tr., 12. Thus, Morgan’s godsister *wanted* the juvenile court to know she was there. This shows that she knew that she was not merely a bystander but rather served an important role at the hearing—*i.e.*, to “take[] over the role of mom.”

In sum, the Tenth District correctly held that Morgan failed to show prejudice from the absence of a GAL at the amenability hearing. Morgan—who was 17 years old at the time—was represented by counsel and had a close family friend supporting him at the amenability hearing. Morgan did not waive any rights at the hearing or otherwise make any decisions that even remotely suggest that he was acting outside his own best interests. Thus, appointing a GAL would have done nothing to affect the outcome of the amenability hearing. And even if Morgan had shown all three prongs of plain-error review, the Tenth District was well within its discretion in refusing to notice plain error. The absence of a GAL at the amenability hearing created no “manifest miscarriage of justice,” *Barnes*, 94 Ohio St.3d at 27, and did not “seriously affect the fairness, integrity or public reputation of judicial proceedings,” *Olano*, 507 U.S. at 736.

III. The failure to appoint a GAL is not “structural error.”

Morgan’s argument that appellate courts should presume prejudice from a GAL error is more properly phrased in terms of “structural error.” *Fisher* at ¶¶ 9-10. Structural errors “are constitutional defects that defy analysis by ‘harmless error’ standards because they ‘affect[] the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself.’” *Perry* at ¶ 17, quoting *Fisher* at ¶ 9, quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991) (some internal quotation marks omitted). “Such errors permeate [t]he entire conduct of the trial from beginning to end’ so that the trial cannot reliably serve its function as a vehicle for

determination of guilt or innocence.” *Perry* at ¶ 17, quoting *Fulminante*, 499 U.S. at 309, quoting *Rose v. Clark*, 478 U.S. 570, 577-578 (1986) (some internal quotation marks omitted). If “the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutiona[l] errors that may have occurred are subject to harmless-error analysis.” *Perry* at ¶ 17, quoting *Hill*, 92 Ohio St.3d at 197, quoting *Rose*, 478 U.S. at 579 (some internal quotation marks omitted). The United States Supreme Court “[h]as found an error to be ‘structural’ and thus subject to automatic reversal, only in a ‘very limited class of cases.’” *Perry* at ¶ 18, quoting *Neder v. United States*, 527 U.S. 1, 8 (1999) (collecting cases). Morgan’s structural-error argument fails, for several reasons.

A. Only constitutional errors can be structural.

Morgan’s structural-error argument stumbles out of the gate, because—as explained above—there is no constitutional right to a GAL. In determining whether an alleged error is “structural,” the “threshold inquiry is whether such error ‘involves the deprivation of a constitutional right.’” *Fisher* at ¶ 18, quoting *State v. Issa*, 93 Ohio St.3d 49, 74 (2001) (Cook, J., concurring). “[T]he trial-error/structural-error distinction is irrelevant unless it is first established that *constitutional* error has occurred.” *State v. Esparza*, 74 Ohio St.3d 660, 662 (1996); *see also*, *Perry* at ¶ 19. The absence of any constitutional right to a GAL precludes GAL errors from being structural. *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶ 55.

B. Structural errors are subject to plain-error review if not preserved.

Morgan’s argument flunks another basic requirement for structural error—*i.e.*, a structural error warrants automatic reversal only if it has been properly preserved. Structural error and plain error are “two completely separate and distinct standards.” *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, ¶ 27. “At its heart, the concept behind structural error is that

certain errors are so fundamental that they obviate the necessity for a reviewing court to do a harmless-error analysis. However, it is arguable whether the harmless-error/structural-error distinction discussed in cases such as *Neder* (in which an objection was lodged) should also apply to a plain-error case in which no objection was raised at trial.” *Hill*, 92 Ohio St.3d at 199.

Thus, “both this court and the United States Supreme Court have cautioned against applying a structural-error analysis where, as here, the case would be otherwise governed by Crim.R. 52(B) because the defendant did not raise the error in the trial court. * * * This caution is born of sound policy. For to hold that an error is structural even when the defendant does not bring the error to the attention of the trial court would be to *encourage* defendants to remain silent at trial only later to raise the error on appeal where the conviction would be automatically reversed. We believe that our holdings should foster rather than thwart judicial economy by providing incentives (and not disincentives) for the defendant to raise all errors in the trial court—where, in many cases, such errors can be easily corrected.” *Wamsley* at ¶ 28, quoting *Perry* at ¶ 23.

The present case illustrates perfectly the incentive for gamesmanship that would result if an unpreserved error could qualify for automatic reversal under the structural-error framework. Morgan had *nothing* to gain by requesting a GAL at the amenability hearing. Morgan’s counsel was fully protecting Morgan’s best interests, and so a GAL would have added nothing to the amenability hearing that the juvenile court did not already know through counsel and the psychological evaluation. Had there been a request for a GAL, the juvenile court likely would have simply appointed Morgan’s counsel to serve as a GAL, Juv.R. 4(C)(1), R.C. 2151.281(H), and the amenability hearing would have looked no different than if the GAL issue had never been raised.

But if a GAL error requires automatic reversal, then Morgan would have had *everything* to gain by not requesting a GAL. The absence of a GAL would not have made it any less likely that the juvenile court would find Morgan amenable. If the juvenile court found Morgan to be amenable, then Morgan would have scored a major victory in his defense. If the juvenile court found Morgan not amenable, then Morgan would feel secure knowing that the juvenile court’s finding would be automatically reversed without him having to show any prejudice from the absence of a GAL. Either way, there would be no incentive to request a GAL. The contemporaneous-objection rule is “essential and desirable,” *Puckett v. United States*, 556 U.S. 129, 141 (2009), and this Court should explicitly reject a structural-error framework that encourages gamesmanship of this sort.

C. A GAL error does not affect the entire framework of the proceedings.

Even if a juvenile does have a constitutional right to a GAL in delinquency proceedings, and even if an unpreserved error can qualify as structural, Morgan’s structural-error argument still fails. Most constitutional errors will not qualify as structural. *Glebe v. Frost*, 135 S.Ct. 429, 430 (2014) (*per curiam*), citing *Neder*, 527 U.S. at 8. A GAL error does not “affect[] the framework within which the trial proceeds,” but rather it is “simply [] an error in the [juvenile-court] process itself.” *Perry* at ¶ 17. Even without a GAL, a juvenile-court proceeding can “reliably serve its function” of determining whether the juvenile should be bound over or whether to adjudicate the juvenile delinquent. *Id.* The juvenile’s counsel and the juvenile court itself can protect the overall integrity of the proceedings. *Id.* The United States Supreme Court has held that the failure to instruct the jury on an element of an offense is not structural error. *Neder*, 527 U.S. at 8-15. If a jury can reliably find a defendant guilty without knowing all the elements of the offense, then a juvenile court can reliably adjudicate a juvenile without receiving

a GAL’s report on the juvenile’s best interests—particularly where, as here, the juvenile’s counsel advocates for the juvenile’s best interests and the juvenile court receives an in-depth psychological evaluation on the juvenile.

Morgan’s main argument as to why a GAL error qualifies as structural is that it affects the validity of the transfer of jurisdiction to common pleas court. Morgan’s argument suggests that *any* error during bindover proceedings would be structural because it would “affect[] the validity of the transfer of jurisdiction.” App.Br., 22. This would be a radical expansion of the structural-error doctrine. But this argument cannot be reconciled with this Court’s decision in *Quarterman*. There, the juvenile argued that the mandatory bindover was unconstitutional. *Quarterman* at ¶ 1. This Court refused to even consider this argument, because the defense did not properly preserve it below and did not properly present it to this Court. *Id.* at ¶¶ 21-22. The alleged error in *Quarterman* “affects the validity of the transfer of jurisdiction” far more than a GAL error. This Court’s decision in *Quarterman* establishes that even such transfer-of-jurisdiction errors must be preserved and do not require automatic reversal.

* * *

In the end, a GAL is not structural and thus does not require automatic reversal—especially when it is unpreserved. A juvenile seeking reversal for an unpreserved GAL error must establish plain error, which includes a showing of prejudice. Morgan has not even tried to demonstrate prejudice, and so the Tenth District correctly refused to find plain error.

CONCLUSION

For the foregoing reasons, the Tenth District’s judgment should be affirmed.¹

Respectfully submitted,

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¹ If this Court sua sponte contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170 (1988).

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail this day, June 21, 2016, to CHARLYN BOHLAND, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215; Counsel for Defendant-Appellant.

/s/ Seth L. Gilbert

Seth L. Gilbert 0072929

Assistant Prosecuting Attorney

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Baldwin's Ohio Revised Code Annotated
Title XXI. Courts--Probate--Juvenile (Refs & Annos)
Chapter 2151. Juvenile Courts--General Provisions (Refs & Annos)
Construction; Definitions

R.C. § 2151.011

2151.011 Definitions

Effective: September 29, 2015
Currentness

(A) As used in the Revised Code:

(1) "Juvenile court" means whichever of the following is applicable that has jurisdiction under this chapter and Chapter 2152. of the Revised Code:

(a) The division of the court of common pleas specified in section 2101.022 or 2301.03 of the Revised Code as having jurisdiction under this chapter and Chapter 2152. of the Revised Code or as being the juvenile division or the juvenile division combined with one or more other divisions;

(b) The juvenile court of Cuyahoga county or Hamilton county that is separately and independently created by section 2151.08 or Chapter 2153. of the Revised Code and that has jurisdiction under this chapter and Chapter 2152. of the Revised Code;

(c) If division (A)(1)(a) or (b) of this section does not apply, the probate division of the court of common pleas.

(2) "Juvenile judge" means a judge of a court having jurisdiction under this chapter.

(3) "Private child placing agency" means any association, as defined in section 5103.02 of the Revised Code, that is certified under section 5103.03 of the Revised Code to accept temporary, permanent, or legal custody of children and place the children for either foster care or adoption.

(4) "Private noncustodial agency" means any person, organization, association, or society certified by the department of job and family services that does not accept temporary or permanent legal custody of children, that is privately operated in this state, and that does one or more of the following:

(a) Receives and cares for children for two or more consecutive weeks;

(b) Participates in the placement of children in certified foster homes;

(c) Provides adoption services in conjunction with a public children services agency or private child placing agency.

(B) As used in this chapter:

(1) "Adequate parental care" means the provision by a child's parent or parents, guardian, or custodian of adequate food, clothing, and shelter to ensure the child's health and physical safety and the provision by a child's parent or parents of specialized services warranted by the child's physical or mental needs.

(2) "Adult" means an individual who is eighteen years of age or older.

(3) "Agreement for temporary custody" means a voluntary agreement authorized by section 5103.15 of the Revised Code that transfers the temporary custody of a child to a public children services agency or a private child placing agency.

(4) "Alternative response" means the public children services agency's response to a report of child abuse or neglect that engages the family in a comprehensive evaluation of child safety, risk of subsequent harm, and family strengths and needs and that does not include a determination as to whether child abuse or neglect occurred.

(5) "Certified foster home" means a foster home, as defined in section 5103.02 of the Revised Code, certified under section 5103.03 of the Revised Code.

(6) "Child" means a person who is under eighteen years of age, except that the juvenile court has jurisdiction over any person who is adjudicated an unruly child prior to attaining eighteen years of age until the person attains twenty-one years of age, and, for purposes of that jurisdiction related to that adjudication, a person who is so adjudicated an unruly child shall be deemed a "child" until the person attains twenty-one years of age.

(7) "Child day camp," "child care," "child day-care center," "part-time child day-care center," "type A family day-care home," "licensed type B family day-care home," "type B family day-care home," "administrator of a child day-care center," "administrator of a type A family day-care home," and "in-home aide" have the same meanings as in section 5104.01 of the Revised Code.

(8) "Child care provider" means an individual who is a child-care staff member or administrator of a child day-care center, a type A family day-care home, or a type B family day-care home, or an in-home aide or an individual who is licensed, is regulated, is approved, operates under the direction of, or otherwise is certified by the department of job and family services, department of developmental disabilities, or the early childhood programs of the department of education.

(9) "Chronic truant" has the same meaning as in section 2152.02 of the Revised Code.

- (10) "Commit" means to vest custody as ordered by the court.
- (11) "Counseling" includes both of the following:
- (a) General counseling services performed by a public children services agency or shelter for victims of domestic violence to assist a child, a child's parents, and a child's siblings in alleviating identified problems that may cause or have caused the child to be an abused, neglected, or dependent child.
 - (b) Psychiatric or psychological therapeutic counseling services provided to correct or alleviate any mental or emotional illness or disorder and performed by a licensed psychiatrist, licensed psychologist, or a person licensed under Chapter 4757. of the Revised Code to engage in social work or professional counseling.
- (12) "Custodian" means a person who has legal custody of a child or a public children services agency or private child placing agency that has permanent, temporary, or legal custody of a child.
- (13) "Delinquent child" has the same meaning as in section 2152.02 of the Revised Code.
- (14) "Detention" means the temporary care of children pending court adjudication or disposition, or execution of a court order, in a public or private facility designed to physically restrict the movement and activities of children.
- (15) "Developmental disability" has the same meaning as in section 5123.01 of the Revised Code.
- (16) "Differential response approach" means an approach that a public children services agency may use to respond to accepted reports of child abuse or neglect with either an alternative response or a traditional response.
- (17) "Foster caregiver" has the same meaning as in section 5103.02 of the Revised Code.
- (18) "Guardian" means a person, association, or corporation that is granted authority by a probate court pursuant to Chapter 2111. of the Revised Code to exercise parental rights over a child to the extent provided in the court's order and subject to the residual parental rights of the child's parents.
- (19) "Habitual truant" means any child of compulsory school age who is absent without legitimate excuse for absence from the public school the child is supposed to attend for five or more consecutive school days, seven or more school days in one school month, or twelve or more school days in a school year.
- (20) "Juvenile traffic offender" has the same meaning as in section 2152.02 of the Revised Code.
- (21) "Legal custody" means a legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline

the child and to provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. An individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by any section of the Revised Code or by the court.

(22) A “legitimate excuse for absence from the public school the child is supposed to attend” includes, but is not limited to, any of the following:

(a) The fact that the child in question has enrolled in and is attending another public or nonpublic school in this or another state;

(b) The fact that the child in question is excused from attendance at school for any of the reasons specified in section 3321.04 of the Revised Code;

(c) The fact that the child in question has received an age and schooling certificate in accordance with section 3331.01 of the Revised Code.

(23) “Mental illness” and “mentally ill person subject to court order” have the same meanings as in section 5122.01 of the Revised Code.

(24) “Mental injury” means any behavioral, cognitive, emotional, or mental disorder in a child caused by an act or omission that is described in section 2919.22 of the Revised Code and is committed by the parent or other person responsible for the child's care.

(25) “Mentally retarded person” has the same meaning as in section 5123.01 of the Revised Code.

(26) “Nonsecure care, supervision, or training” means care, supervision, or training of a child in a facility that does not confine or prevent movement of the child within the facility or from the facility.

(27) “Of compulsory school age” has the same meaning as in section 3321.01 of the Revised Code.

(28) “Organization” means any institution, public, semipublic, or private, and any private association, society, or agency located or operating in the state, incorporated or unincorporated, having among its functions the furnishing of protective services or care for children, or the placement of children in certified foster homes or elsewhere.

(29) “Out-of-home care” means detention facilities, shelter facilities, certified children's crisis care facilities, certified foster homes, placement in a prospective adoptive home prior to the issuance of a final decree of adoption, organizations, certified organizations, child day-care centers, type A family day-care homes, type B family day-care homes, child care provided by in-home aides, group home providers, group homes, institutions, state institutions, residential facilities, residential care facilities, residential camps, day camps, private, nonprofit therapeutic wilderness camps, public schools, chartered nonpublic schools, educational service centers, hospitals, and medical clinics that are responsible for the care, physical custody, or control of children.

(30) "Out-of-home care child abuse" means any of the following when committed by a person responsible for the care of a child in out-of-home care:

(a) Engaging in sexual activity with a child in the person's care;

(b) Denial to a child, as a means of punishment, of proper or necessary subsistence, education, medical care, or other care necessary for a child's health;

(c) Use of restraint procedures on a child that cause injury or pain;

(d) Administration of prescription drugs or psychotropic medication to the child without the written approval and ongoing supervision of a licensed physician;

(e) Commission of any act, other than by accidental means, that results in any injury to or death of the child in out-of-home care or commission of any act by accidental means that results in an injury to or death of a child in out-of-home care and that is at variance with the history given of the injury or death.

(31) "Out-of-home care child neglect" means any of the following when committed by a person responsible for the care of a child in out-of-home care:

(a) Failure to provide reasonable supervision according to the standards of care appropriate to the age, mental and physical condition, or other special needs of the child;

(b) Failure to provide reasonable supervision according to the standards of care appropriate to the age, mental and physical condition, or other special needs of the child, that results in sexual or physical abuse of the child by any person;

(c) Failure to develop a process for all of the following:

(i) Administration of prescription drugs or psychotropic drugs for the child;

(ii) Assuring that the instructions of the licensed physician who prescribed a drug for the child are followed;

(iii) Reporting to the licensed physician who prescribed the drug all unfavorable or dangerous side effects from the use of the drug.

(d) Failure to provide proper or necessary subsistence, education, medical care, or other individualized care necessary for the health or well-being of the child;

(e) Confinement of the child to a locked room without monitoring by staff;

(f) Failure to provide ongoing security for all prescription and nonprescription medication;

(g) Isolation of a child for a period of time when there is substantial risk that the isolation, if continued, will impair or retard the mental health or physical well-being of the child.

(32) "Permanent custody" means a legal status that vests in a public children services agency or a private child placing agency, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of all parental rights, privileges, and obligations, including all residual rights and obligations.

(33) "Permanent surrender" means the act of the parents or, if a child has only one parent, of the parent of a child, by a voluntary agreement authorized by section 5103.15 of the Revised Code, to transfer the permanent custody of the child to a public children services agency or a private child placing agency.

(34) "Person" means an individual, association, corporation, or partnership and the state or any of its political subdivisions, departments, or agencies.

(35) "Person responsible for a child's care in out-of-home care" means any of the following:

(a) Any foster caregiver, in-home aide, or provider;

(b) Any administrator, employee, or agent of any of the following: a public or private detention facility; shelter facility; certified children's crisis care facility; organization; certified organization; child day-care center; type A family day-care home; licensed type B family day-care home; group home; institution; state institution; residential facility; residential care facility; residential camp; day camp; school district; community school; chartered nonpublic school; educational service center; hospital; or medical clinic;

(c) Any person who supervises or coaches children as part of an extracurricular activity sponsored by a school district, public school, or chartered nonpublic school;

(d) Any other person who performs a similar function with respect to, or has a similar relationship to, children.

(36) "Physically impaired" means having one or more of the following conditions that substantially limit one or more of an individual's major life activities, including self-care, receptive and expressive language, learning, mobility, and self-direction:

(a) A substantial impairment of vision, speech, or hearing;

- (b) A congenital orthopedic impairment;
- (c) An orthopedic impairment caused by disease, rheumatic fever or any other similar chronic or acute health problem, or amputation or another similar cause.
- (37) "Placement for adoption" means the arrangement by a public children services agency or a private child placing agency with a person for the care and adoption by that person of a child of whom the agency has permanent custody.
- (38) "Placement in foster care" means the arrangement by a public children services agency or a private child placing agency for the out-of-home care of a child of whom the agency has temporary custody or permanent custody.
- (39) "Planned permanent living arrangement" means an order of a juvenile court pursuant to which both of the following apply:
- (a) The court gives legal custody of a child to a public children services agency or a private child placing agency without the termination of parental rights.
- (b) The order permits the agency to make an appropriate placement of the child and to enter into a written agreement with a foster care provider or with another person or agency with whom the child is placed.
- (40) "Practice of social work" and "practice of professional counseling" have the same meanings as in section 4757.01 of the Revised Code.
- (41) "Private, nonprofit therapeutic wilderness camp" has the same meaning as in section 5103.02 of the Revised Code.
- (42) "Sanction, service, or condition" means a sanction, service, or condition created by court order following an adjudication that a child is an unruly child that is described in division (A)(4) of section 2152.19 of the Revised Code.
- (43) "Protective supervision" means an order of disposition pursuant to which the court permits an abused, neglected, dependent, or unruly child to remain in the custody of the child's parents, guardian, or custodian and stay in the child's home, subject to any conditions and limitations upon the child, the child's parents, guardian, or custodian, or any other person that the court prescribes, including supervision as directed by the court for the protection of the child.
- (44) "Psychiatrist" has the same meaning as in section 5122.01 of the Revised Code.
- (45) "Psychologist" has the same meaning as in section 4732.01 of the Revised Code.
- (46) "Residential camp" means a program in which the care, physical custody, or control of children is accepted overnight for recreational or recreational and educational purposes.

- (47) "Residential care facility" means an institution, residence, or facility that is licensed by the department of mental health and addiction services under section 5119.34 of the Revised Code and that provides care for a child.
- (48) "Residential facility" means a home or facility that is licensed by the department of developmental disabilities under section 5123.19 of the Revised Code and in which a child with a developmental disability resides.
- (49) "Residual parental rights, privileges, and responsibilities" means those rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the child, including, but not necessarily limited to, the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support.
- (50) "School day" means the school day established by the board of education of the applicable school district pursuant to section 3313.481 of the Revised Code.
- (51) "School year" has the same meaning as in section 3313.62 of the Revised Code.
- (52) "Secure correctional facility" means a facility under the direction of the department of youth services that is designed to physically restrict the movement and activities of children and used for the placement of children after adjudication and disposition.
- (53) "Sexual activity" has the same meaning as in section 2907.01 of the Revised Code.
- (54) "Shelter" means the temporary care of children in physically unrestricted facilities pending court adjudication or disposition.
- (55) "Shelter for victims of domestic violence" has the same meaning as in section 3113.33 of the Revised Code.
- (56) "Temporary custody" means legal custody of a child who is removed from the child's home, which custody may be terminated at any time at the discretion of the court or, if the legal custody is granted in an agreement for temporary custody, by the person who executed the agreement.
- (57) "Traditional response" means a public children services agency's response to a report of child abuse or neglect that encourages engagement of the family in a comprehensive evaluation of the child's current and future safety needs and a fact-finding process to determine whether child abuse or neglect occurred and the circumstances surrounding the alleged harm or risk of harm.
- (C) For the purposes of this chapter, a child shall be presumed abandoned when the parents of the child have failed to visit or maintain contact with the child for more than ninety days, regardless of whether the parents resume contact with the child after that period of ninety days.

CREDIT(S)

(2015 H 64, eff. 9-29-15; 2014 S 43, eff. 9-17-14; 2013 H 59, § 110.20, eff. 1-1-14 (Provisions subject to different effective dates); 2012 S 316, § 120.01, eff. 1-1-14; 2013 H 59, § 101.01, eff. 9-29-13; 2011 H 153, eff. 9-29-11; 2009 S 79, eff. 10-6-09; 2006 S 238, eff. 9-21-06; 2004 H 11, eff. 5-18-05; 2004 H 106, eff. 9-16-04; 2002 H 400, eff. 4-3-03; 2000 S 179, § 3, eff. 1-1-02; 2000 H 332, eff. 1-1-01; 2000 H 448, eff. 10-5-00; 2000 S 181, eff. 9-4-00; 1999 H 470, eff. 7-1-00; 1998 H 484, eff. 3-18-99; 1998 S 212, eff. 9-30-98; 1997 H 408, eff. 10-1-97; 1996 S 223, eff. 3-18-97; 1996 H 124, eff. 3-31-97; 1996 H 265, eff. 3-3-97; 1996 H 274, § 4, eff. 8-8-96; 1996 H 274, § 1, eff. 8-8-96; 1995 S 2, eff. 7-1-96; 1995 H 1, eff. 1-1-96; 1994 H 715, eff. 7-22-94; 1993 S 21, eff. 10-29-93; 1993 H 152, eff. 7-1-93; 1992 H 356; 1991 H 155; 1990 H 38; 1989 H 257; 1988 H 403)

Notes of Decisions (107)

R.C. § 2151.011, OH ST § 2151.011

Current through Files 78, 80 and 84 of the 131st General Assembly (2015-2016).

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Baldwin's Ohio Revised Code Annotated
Title XXI. Courts--Probate--Juvenile (Refs & Annos)
Chapter 2151. Juvenile Courts--General Provisions (Refs & Annos)
Hearing and Disposition

R.C. § 2151.352

2151.352 Right to counsel

Currentness

A child, the child's parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code. If, as an indigent person, a party is unable to employ counsel, the party is entitled to have counsel provided for the person pursuant to Chapter 120. of the Revised Code except in civil matters in which the juvenile court is exercising jurisdiction pursuant to division (A)(2), (3), (9), (10), (11), (12), or (13); (B)(2), (3), (4), (5), or (6); (C); (D); or (F)(1) or (2) of section 2151.23 of the Revised Code. If a party appears without counsel, the court shall ascertain whether the party knows of the party's right to counsel and of the party's right to be provided with counsel if the party is an indigent person. The court may continue the case to enable a party to obtain counsel, to be represented by the county public defender or the joint county public defender, or to be appointed counsel upon request pursuant to Chapter 120. of the Revised Code. Counsel must be provided for a child not represented by the child's parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them.

Section 2935.14 of the Revised Code applies to any child taken into custody. The parents, custodian, or guardian of such child, and any attorney at law representing them or the child, shall be entitled to visit such child at any reasonable time, be present at any hearing involving the child, and be given reasonable notice of such hearing.

Any report or part thereof concerning such child, which is used in the hearing and is pertinent thereto, shall for good cause shown be made available to any attorney at law representing such child and to any attorney at law representing the parents, custodian, or guardian of such child, upon written request prior to any hearing involving such child.

CREDIT(S)

(2005 H 66, eff. 9-29-05; 2000 S 179, § 3, eff. 1-1-02; 1975 H 164, eff. 1-13-76; 1969 H 320)

Notes of Decisions (194)

R.C. § 2151.352, OH ST § 2151.352

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Baldwin's Ohio Revised Code Annotated
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2945. Trial (Refs & Annos)
Trial Procedure

R.C. § 2945.10

2945.10 Order of proceedings of trial

Effective: March 23, 2015

Currentness

The trial of an issue upon an indictment or information shall proceed before the trial court or jury as follows:

(A) Counsel for the state must first state the case for the prosecution, and may briefly state the evidence by which the counsel for the state expects to sustain it.

(B) The defendant or the defendant's counsel must then state the defense, and may briefly state the evidence which the defendant or the defendant's counsel expects to offer in support of it.

(C) The state must first produce its evidence and the defendant shall then produce the defendant's evidence.

(D) The state will then be confined to rebutting evidence, but the court, for good reason, in furtherance of justice, may permit evidence to be offered by either side out of its order.

(E) When the evidence is concluded, one of the following applies regarding jury instructions:

(1) In a capital case that is being heard by a jury, the court shall prepare written instructions to the jury on the points of law, shall provide copies of the written instructions to the jury before orally instructing the jury, and shall permit the jury to retain and consult the instructions during the court's presentation of the oral instructions and during the jury's deliberations.

(2) In a case that is not a capital case, either party may request instructions to the jury on the points of law, which instructions shall be reduced to writing if either party requests it.

(F) When the evidence is concluded, unless the case is submitted without argument, the counsel for the state shall commence, the defendant or the defendant's counsel follow, and the counsel for the state conclude the argument to the jury.

(G) The court, after the argument is concluded and before proceeding with other business, shall forthwith charge the jury. Such charge shall be reduced to writing by the court if either party requests it before the argument to the jury is

commenced. Such charge, or other charge or instruction provided for in this section, when so written and given, shall not be orally qualified, modified, or explained to the jury by the court. Written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into court and remain on file with the papers of the case.

The court may deviate from the order of proceedings listed in this section.

CREDIT(S)

(2014 H 663, eff. 3-23-15; 1953 H 1, eff. 10-1-53; GC 13442-8)

Notes of Decisions (157)

R.C. § 2945.10, OH ST § 2945.10

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Baldwin's Ohio Revised Code Annotated
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2945. Trial (Refs & Annos)
Trial Procedure

R.C. § 2945.11

2945.11 Charge to the jury as to law and fact

Currentness

In charging the jury, the court must state to it all matters of law necessary for the information of the jury in giving its verdict. The court must also inform the jury that the jury is the exclusive judge of all questions of fact. The court must state to the jury that in determining the question of guilt, it must not consider the punishment but that punishment rests with the judge except in cases of murder in the first degree or burglary of an inhabited dwelling.

CREDIT(S)

(1953 H 1, eff. 10-1-53; GC 13442-9)

Notes of Decisions (64)

R.C. § 2945.11. OH ST § 2945.11

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Baldwin's Ohio Revised Code Annotated Rules of Criminal Procedure (Refs & Annos)

Crim. R. Rule 24

Crim R 24 Trial jurors

Currentness

(A) Brief Introduction of Case. To assist prospective jurors in understanding the general nature of the case, the court, in consultation with the parties, may give jurors a brief introduction to the case.

(B) Examination of Prospective Jurors. Any person called as a prospective juror for the trial of any cause shall be examined under oath or upon affirmation as to the prospective juror's qualifications. The court may permit the attorney for the defendant, or the defendant if appearing *pro se*, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the state and defense to supplement the examination by further inquiry. Nothing in this rule shall limit the court's discretion, with timely notice to the parties at anytime prior to trial, to allow the examination of all prospective jurors in the array or, in the alternative, to permit individual examination of each prospective juror seated on a panel, prior to any challenges for cause or peremptory challenges.

(C) Challenge for Cause. A person called as a juror may be challenged for the following causes:

- (1) That the juror has been convicted of a crime which by law renders the juror disqualified to serve on a jury.
- (2) That the juror is a chronic alcoholic, or drug dependent person.
- (3) That the juror was a member of the grand jury that found the indictment in the case.
- (4) That the juror served on a petit jury drawn in the same cause against the same defendant, and the petit jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside.
- (5) That the juror served as a juror in a civil case brought against the defendant for the same act.
- (6) That the juror has an action pending between him or her and the State of Ohio or the defendant.
- (7) That the juror or the juror's spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against the juror.
- (8) That the juror has been subpoenaed in good faith as a witness in the case.

(9) That the juror is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

(10) That the juror is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted; or to the defendant.

(11) That the juror is the person alleged to be injured or attempted to be injured by the offense charged, or the person on whose complaint the prosecution was instituted, or the defendant.

(12) That the juror is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney, of any person included in division (C)(11) of this rule.

(13) That English is not the juror's native language, and the juror's knowledge of English is insufficient to permit the juror to understand the facts and the law in the case.

(14) That the juror is otherwise unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in division (C) of this rule shall be determined by the court.

(D) Peremptory Challenges. In addition to challenges provided in division (C) of this rule, if there is one defendant, each party peremptorily may challenge three prospective jurors in misdemeanor cases, four prospective jurors in felony cases other than capital cases, and six prospective jurors in capital cases. If there is more than one defendant, each defendant peremptorily may challenge the same number of prospective jurors as if the defendant was the sole defendant.

In any case where there are multiple defendants, the prosecuting attorney peremptorily may challenge a number of prospective jurors equal to the total peremptory challenges allowed all defendants. In case of the consolidation of any indictments, informations, or complaints for trial, the consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information, or complaint.

(E) Manner of Exercising Peremptory Challenges. Peremptory challenges shall be exercised alternately, with the first challenge exercised by the state. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge, but does not constitute a waiver of any subsequent challenge. However, if all parties, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused.

Nothing in this rule shall limit the court's discretion to allow challenges under this division or division (D) of this rule to be made outside the hearing of prospective jurors.

(F) Challenge to Array. The prosecuting attorney or the attorney for the defendant may challenge the array of petit jurors on the ground that it was not selected, drawn or summoned in accordance with law. A challenge to the array shall be made before the examination of the jurors pursuant to division (B) of this rule and shall be tried by the court.

No array of petit jurors shall be set aside, nor shall any verdict in any case be set aside because the jury commissioners have returned such jury or any juror in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return.

(G) Alternate Jurors.

(1) *Non-Capital Cases.* The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. Each party is entitled to one peremptory challenge in addition to those otherwise allowed if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternative jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by this rule may not be used against an alternate juror.

(2) *Capital Cases.* The procedure designated in division (G)(1) of this rule shall be the same in capital cases, except that any alternate juror shall continue to serve if more than one deliberation is required. If an alternate juror replaces a regular juror after a guilty verdict, the court shall instruct the alternate juror that the juror is bound by that verdict.

(H) Control of Juries.

(1) *Before submission of Case to Jury.* Before submission of a case to the jury, the court, upon its own motion or the motion of a party, may restrict the separation of jurors or may sequester the jury.

(2) *After Submission of Case to Jury.*

(a) *Misdemeanor Cases.* After submission of a misdemeanor case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors.

(b) *Non-Capital Felony Cases.* After submission of a non-capital felony case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors during any period of court adjournment or may require the jury to remain under the supervision of an officer of the court.

(c) **Capital Cases.** After submission of a capital case to the jury, the jury shall remain under the supervision of an officer of the court until a verdict is rendered or the jury is discharged by the court.

(3) **Separation in Emergency.** Where the jury is sequestered or after a capital case is submitted to the jury, the court may, in an emergency and upon giving cautionary instruction, allow temporary separation of jurors.

(4) **Duties of Supervising Officer.** Where jurors are required to remain under the supervision of an officer of the court, the court shall make arrangements for their care, maintenance and comfort.

When the jury is in the care of an officer of the court and until the jury is discharged by the court, the officer may inquire whether the jury has reached a verdict, but shall not:

(a) Communicate any matter concerning jury conduct to anyone except the judge or;

(b) Communicate with the jurors or permit communications with jurors, except as allowed by court order.

(I) **Taking of Notes by Jurors.** The court, after providing appropriate cautionary instructions, may permit jurors who wish to do so to take notes during a trial. If the court permits the taking of notes, notes taken by juror may be carried into deliberations by that juror. The court shall require that all juror notes be collected and destroyed promptly after the jury renders a verdict.

(J) **Juror Questions to Witnesses.** The court may permit jurors to propose questions for the court to ask of the witnesses. If the court permits jurors to propose questions, the court shall use procedures that minimize the risk of prejudice, including all of the following:

(1) Require jurors to propose any questions to the court in writing;

(2) Retain a copy of each proposed question for the record;

(3) Instruct the jurors that they shall not display or discuss a proposed question with other jurors;

(4) Before reading a question to a witness, provide counsel with an opportunity to object to each question on the record and outside the hearing of the jury;

(5) Read the question, either as proposed or rephrased, to the witness;

(6) Permit counsel to reexamine the witness regarding a matter addressed by a juror question;

(7) If a question proposed by a juror is not asked, instruct the jurors that they should not draw any adverse inference from the court's refusal to ask any question proposed by a juror.

CREDIT(S)

(Adopted eff. 7-1-73; amended eff. 7-1-75, 7-1-02, 7-1-05, 7-1-06, 7-1-08, 7-1-09)

STAFF NOTES

2009:

Prior to 2006, Crim. R. 24 appeared to require judges to empanel a prospective jury and examine each one individually, a process referred to as the “strike and replace” method. In 2006, Crim. R. 24 was amended with the intent to clarify that examination of prospective jurors in an array (sometimes referred to as the “struck” method of juror examination) was also permitted. Crim. R. 24(E) however, which was not changed in 2006, retained language that arguably applied only to examination of jurors seated on a panel. The 2009 amendments add language to Crim. R. 24(E) and delete language from Crim. R. 24(E) to further clarify that prospective jurors may be examined either in the array or after being seated on a panel.

2008:

Criminal Rule 24 is amended in order to give trial judges the option of retaining alternate jurors during the deliberation process in non-capital cases. The judge would have the option of retaining the alternate or alternates who would be sequestered from the rest of the jurors during deliberation, and if one of the regular jurors is unable to continue deliberations, to replace the juror with the alternate and instruct the jury to begin its deliberations anew.

The proposed amendments do not change the requirement in the current rule that alternate jurors be retained during the guilt phase of capital case deliberations. Under former Crim. R. 24, however, an alternate juror could not substitute for a juror unable to continue during deliberations. The proposed amendments allow trial judges in capital cases, as well as non-capital cases, the option of retaining alternates during any deliberations and substituting an alternate in the middle of deliberation.

2006:

Crim.R. 24 is amended to recognize the existence of alternative methods of jury selection and expressly permit the use of these methods in Ohio courts. The amendments are consistent with recommendations contained in the February 2004 *Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service*, at pp. 10-11.

The Task Force on Jury Service identified two primary methods of jury selection and encouraged the use of a selection process that is efficient and enhances juror satisfaction. The Rules Advisory Committee learned that some judges and lawyers believe that the pre-2006 version of Crim.R. 24 precluded the use of a selection method, commonly referred to as the “struck” method, whereby prospective jurors are examined as a group and then the trial judge and attorneys meet privately to challenge jurors for cause and exercise peremptory challenges. Two amendments to Crim.R. 24 are added to expressly permit alternative selection methods. Crim.R. 24(C), (F), and (G) also are revised to correct erroneous cross-references resulting from the 2005 amendments to the rule.

Rule 24(B) Examination of prospective jurors

The last sentence of Crim.R. 24(B) is added to expressly permit the examination of prospective jurors in an array. The rule differs slightly from the corresponding provision in Civ.R. 47 by requiring that the court provide the parties with

timely notice, at anytime prior to trial, of the intent to conduct an examination of prospective jurors in an array. The Rules Advisory Committee is of the opinion that pretrial notice to the parties in criminal cases is necessary to comport with constitutional requirements.

Rule 24(E) Manner of exercising peremptory challenges

The last sentence of Civ.R. 24(E) is added to expressly afford the trial court the discretion to allow the exercise of challenges for cause and peremptory challenges outside the hearing of the jury.

2005:

Crim. R. 24 is amended to reflect four recommendations of the Task Force on Jury Service. See *Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service* (February 2004).

Rule 24(A) Brief introduction of case

A new Crim. R. 24(A) is added to permit the trial judge, prior to jury selection, to provide a brief introduction to the case to persons called as prospective jurors. See *Report and Recommendations, supra*, at 1 (recommending “a brief statement of the case by the court or counsel prior to the beginning of voir dire” and inclusion of “the legal claims and defenses of the parties’ in the list of instructions the court may give at the commencement of trial”). The Rules Advisory Committee shares the views of the Task Force that the preliminary statement may “help the jury selection process run smoothly” and “increase the satisfaction of jurors.” *Report and Recommendations, supra*, at 9. The preliminary statement is intended to help prospective jurors to understand why certain questions are asked during voir dire, recognize personal bias, and give candid responses to questions during voir dire.

The Committee recognizes that there may be instances in which the brief introduction is unnecessary; thus the rule vests discretion with the trial judge as to whether an introduction will be provided in a particular case. The rule also requires the trial judge to consult with the parties as to whether to provide the introduction and the content of the introduction. The consultation is required in recognition that the parties can aid the trial judge in determining whether a statement is necessary and developing the content of the statement.

Unlike its counterpart in the Civil Rules [Civ. R. 47(A)], Crim. R. 24(A) does not contain language indicating that “[t]he brief introduction may include a general description of the legal claims and defenses of the parties.” The Committee recommends this distinction given the unique nature of criminal cases. For example, if the statement given prior to voir dire referred to a potential claim of an alibi, the jury could draw an inappropriate inference from the defendant’s subsequent decision to not offer any evidence of an alibi. For this reason, the Committee believes the opening statement in criminal cases should be more limited in scope.

Former divisions (A) through (G) of Crim. R. 24 are relettered to reflect the addition of new division (A).

Rule 24(E) Manner of exercising peremptory challenges

New Crim. R. 24(E) (formerly Crim. R. 24(D)) is amended to make two related principles regarding peremptory challenges more clear. One principle is that failure of a party to exercise a given peremptory challenge waives that challenge but does not waive any other peremptory challenges to which the party may otherwise be entitled.

The other principle is that consecutive passes by all parties or sides waives all remaining peremptory challenges. The Task Force concluded that, contrary to the language and intent of former Crim. R. 24(D), “often courts and attorneys will assume that once a peremptory challenge is waived all remaining peremptory challenges are waived.” *Report and*

Recommendations, supra, at 22. The amended language is designed to deter the incorrect assumption perceived by the Task Force.

Rule 24(I) Taking of notes by jurors

A new Crim. R. 24(I) is added to explicitly authorize trial courts, after providing appropriate cautionary instructions, to permit jurors who wish to do so to take notes during trial and to take notes into deliberations. The Rules Advisory Committee agrees with the Task Force that allowing jurors to take notes potentially promotes the fact-finding process and aids juror comprehension and recollection.

The reference in sentence one of new division (I) to “appropriate cautionary instructions” reflects the apparent requirements of *State v. Waddell*, 75 Ohio St.3d 163 (1996), which held that “[a] trial court has the discretion to permit or prohibit note-taking by jurors,” *Waddell*, 75 Ohio St.3d at 163 (syl. 1), and explained that “[i]f a trial court determines that a particular case warrants note-taking, the court can, *sua sponte*, furnish jurors with materials for taking notes and instruct the jurors that they are permitted to take notes during the trial.” *Id.* at 170. The *Waddell* opinion appears to condition the permitting of note-taking on the giving of instructions to jurors that (1) “they are not required to take notes;” *id.* (syl. 2), (2) “their notes are to be confidential;” (3) “note-taking should not divert their attention from hearing the evidence in the case;” (4) “a juror who has not taken notes should not be influenced by those jurors who decided to take notes;” and (5) “notes taken by jurors are to be used solely as memory aids and should not be allowed to take precedence over their independent memory of facts.” *Id.* (syl. 3); see also *State v. Blackburn*, 1996 WL 570869 at *3 and n.1, No. 93 CA 10 (5th Dist. Ct. App., Fairfield, 9-26-96) (finding no plain error in the trial court’s decision to permit juror note-taking despite lack of instruction on items (3) through (5) but noting that “in the future, it would be better practice for trial courts to instruct and caution the jury as suggested by the Ohio Supreme Court in *Waddell*”); *cf.* 1 Ohio Jury Instructions 2.52, § 1 (“Note-taking Prohibited”) and § 2 (“Note-taking Permitted”) (2002). The Task Force noted that many of the judges who participated in the pilot project that it sponsored “instructed jurors to make notes only when there was a break in the testimony (e.g., while judge and attorneys are busy at sidebar).” *Report and Recommendations, supra*, at 14.

Sentence two of new division (I) explicitly authorizes a practice perhaps only implicitly approved in *Waddell*, i.e., the carrying into deliberations by a juror of any notes taken pursuant to permission of the court. See Markus, *Trial Handbook for Ohio Lawyers* § 37:6 (2003) (citing *Waddell* for the proposition that “[w]hen the court permits the jurors to take notes during the trial, it may allow the jurors to retain those notes during their deliberations”).

The requirement of sentence three of new division (I) that the court require that all juror notes be collected and destroyed promptly after verdict reflects in part the *Waddell* prescription that “notes are to be confidential.” See also *State v. Williams*, 80 Ohio App.3d 648, 654 (1992) (cited with apparent approval by the Court in *Waddell* and rejecting the argument that notes taken by jurors should have been preserved for review rather than destroyed).

Rule 24(J) Juror questions to witnesses

A new Civ. R. 24(J) is added to set forth a procedure to be followed if the trial court permits jurors to propose questions to be asked of witnesses during trial. See *Report and Recommendations, supra*, at 15-16 and *State v. Fisher* 99 Ohio St.3d 127, 2003-Ohio-2761. The rule incorporates the holding of the Supreme Court in *State v. Fisher, supra*, by stating that the practice of allowing jurors to propose questions to witnesses is discretionary with the trial judge, and codifies procedures that have been sanctioned by the Supreme Court in *Fisher*. See *State v. Fisher* 99 Ohio St.3d at 135. In addition to the procedures outlined in *Fisher*, the rule provides that the court must retain a copy of all written questions proposed by the jury for the record and that the court may rephrase any question proposed by the jury before posing it to a witness. These added procedures ensure the existence of a proper record, should an issue regarding juror questions be raised on

appeal, and recognize that a question proposed by a juror may need to be rephrased for clarity, admissibility, or other reason appropriate under the circumstances.

The amendments to Crim. R. 24 also include nonsubstantive changes that include gender-neutral language and uniform usage of the term “prospective juror.”

2002:

Criminal Rule 24(A), (B), (C), (D), and (E)

Throughout divisions (A)-(E), masculine references were changed to gender-neutral language, the style used for rule references was changed, and other grammatical changes were made. No substantive amendment to any of these divisions was intended.

Criminal Rule 24 (F) Alternate jurors

The amendment effective July 1, 2002 divided division F of the previous rule into divisions (F)(1) and (F)(2). Division (F)(1) [Non-capital cases] contains the substance of previous division (F), plus the inclusion of an exception for capital cases. Division (F)(2) [Capital cases] was added to permit alternate jurors in capital murder cases to continue to sit as alternate jurors after a guilty verdict has been rendered. If an alternate juror replaces a regular juror for the penalty phase of the trial, the trial judge shall instruct the alternate juror that the alternate juror is bound by the guilty verdict.

Notes of Decisions (418)

Rules Crim. Proc., Rule 24, OH ST RCRP Rule 24

Current with amendments received through April 15, 2016

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Baldwin's Ohio Revised Code Annotated Rules of Criminal Procedure (Refs & Annos)

Crim. R. Rule 30

Crim R 30 Instructions

Currentness

(A) Instructions; Error; Record. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies shall be furnished to all other parties at the time of making the requests. The court shall inform counsel of its proposed action on the requests prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed. The court also may give some or all of its instructions to the jury prior to counsel's arguments. The court shall reduce its final instructions to writing or make an audio, electronic, or other recording of those instructions, provide at least one written copy or recording of those instructions to the jury for use during deliberations, and preserve those instructions for the record.

On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

(B) Cautionary Instructions. At the commencement and during the course of the trial, the court may give the jury cautionary and other instructions of law relating to trial procedure, credibility and weight of the evidence, and the duty and function of the jury and may acquaint the jury generally with the nature of the case.

CREDIT(S)

(Adopted eff. 7-1-73; amended eff. 7-1-75, 7-1-82, 7-1-92, 7-1-05)

STAFF NOTES

2005:

Rule 30(A) Instructions; error; record

Crim. R. 30 is amended to reflect a recommendation of the Task Force on Jury Service. See *Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service* at 1 and 12-13 (February 2004). The amendment mandates practices that trial courts have frequently chosen to adopt in particular criminal actions: (1) reducing final jury instructions to writing or making an audio, electronic, or other recording of those instructions; (2) providing at least one written copy or recording of those instructions to the jury for use during deliberations; and (3) preserving those instructions for the record.

The practices mandated by the amendment are intended to increase juror comprehension of jury instructions, reduce juror questions of the court during deliberations, and help juries structure their deliberations. The Task Force recommended that "each individual juror be given a copy of written instructions but, in the event of budgetary constraints, one copy of written instructions be provided to the jury to use during the deliberation process." *Report and Recommendations, supra*, at 13.

1992:

Rule 30(A) Instructions: error; record

The amendment gives a judge discretion to charge the jury before closing arguments, a practice apparently not contemplated by Crim.R. 30(A) as originally drafted. This practice, when utilized, has several advantages: it gives a natural outline to counsel for their argument (should they care to use it), permits counsel to know the precise language to be used by the court (should counsel care to incorporate it into their argument), may aid jury decision-making, especially in a lengthy or complicated case, and permits the court to instruct jurors when their attention is still fresh (which may not be the case after lengthy closing arguments). It is contemplated the amendment would permit pre-argument instruction on the substantive aspects of the case, and not merely on routine, across-the-board cautionary instructions which are already permitted by Crim.R. 30(B). The amendment does not affect the requirement that the court give complete instructions to the jury after the arguments of counsel.

In addition, masculine references are replaced by gender-neutral language and grammatical changes are made. No substantive change is intended.

This amendment parallels the amendment to Civ.R. 51(A) also effective July 1, 1992.

Notes of Decisions (443)

Rules Crim. Proc., Rule 30, OH ST RCRP Rule 30
Current with amendments received through April 15, 2016

Baldwin's Ohio Revised Code Annotated
Ohio Rules of Evidence (Refs & Annos)
Article I General Provisions

Evid. R. Rule 104

Evid R 104 Preliminary questions

Currentness

(A) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (B). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(B) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(C) Hearing of Jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall also be conducted out of the hearing of the jury when the interests of justice require.

(D) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(E) Weight and Credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

CREDIT(S)

(Adopted eff. 7-1-80; amended eff. 7-1-07)

STAFF NOTES

1980:

Rule 104, except for a slight change in subdivision 104(C), is a word for word counterpart of Federal Evidence Rule 104.

Rule 104(A) Questions of Admissibility Generally

Rule 104(A) governs preliminary matters essentially concerning the *competency*, rather than the relevancy, of evidence. The preliminary matters of competency governed by the rule are determined by the court. As a preliminary matter the court determines the qualification of a person to be a witness, i.e., Is the person about to testify as an expert a qualified expert? The court, and not the jury, also determines the existence of a privilege, i.e., Must the witness answer the question at hand or may he invoke the privilege against self-incrimination? The court, as a preliminary matter, also determines the admissibility of evidence, i.e., Is the confession a valid confession or is it contaminated by coercion?

The rule provides that in making a determination on a preliminary matter, the court is not bound by the exclusionary rules of evidence, except that the court is bound by the rules governing privilege.

For an excellent analysis of determination of preliminary matters, see McCormick § 153 (2d ed. 1972). Rule 104(A) does not change prior Ohio practice; see, 52 OJur 2d Trial § 60.

The provisions of Rule 104(A) are modified by Rule 104(B), discussed in the succeeding note, if a question of “conditional relevancy” is involved.

Rule 104(B) Relevancy Conditioned on Fact

Rule 104(B) governs “conditional relevancy”, or in terms of the rule, “relevancy” depending upon “the fulfillment of a condition of fact.” Conditional relevancy, conditioned upon a fact, is determined by the jury. In contrast, preliminary matters concerning competency, as previously noted, are determined by the court pursuant to Rule 104(A). Rule 104(B) prevents the court from usurping the function of the jury under the guise of determining a preliminary matter of competency. The distinction between the two rules is this: Rule 104(A) deals with *competency* and Rule 104(B) deals with factual *relevancy* or probative value. The distinction may be illustrated by example.

First, Rule 104(B) and determination of conditional relevancy by the jury. In *Coleman v. McIntosh* (1919), 184 Ky. 370, 211 S.W. 872, plaintiff sued defendant for breach of promise to marry. Defendant sought to introduce into evidence an unsigned letter allegedly in the handwriting of plaintiff and relevant to the facts in dispute. Defendant, as a preliminary matter (See Rules 901(A) and 901(B)(2)), authenticated the letter by identifying the handwriting on the basis of prior familiarity. Plaintiff denied that she had written the letter but admitted familiarity with the person to whom the letter was written. On this state of facts, the trial judge refused to admit the letter into evidence. Error. The case involved conditional relevancy and hence a question of fact for the jury to determine; that is, the letter was relevant conditioned upon its genuineness--genuineness being a disputed question of fact to be determined by the jury.

Similarly, it should be noted that Rule 1008, specifically referring to Rule 104, states that there is a question of fact for the jury, rather than a preliminary question for the court, when under certain circumstances secondary evidence (submitted in lieu of an original document) is challenged.

In contrast, the application of Rule 104(A) to determination of a preliminary matter of competency of evidence by the court. In *Potter v. Baker* (1955), 162 Ohio St. 489 [488], plaintiff was knocked unconscious in an auto accident. At some uncertain time after the accident plaintiff regained consciousness and heard a stranger at the scene say, “God, he rushed the light.” The trial judge refused to permit the plaintiff to testify as to the quoted statement. It is within the province of the court to determine the admissibility of evidence as a preliminary matter, and the court was correct in finding that in light of the lapse of time, the quoted hearsay utterance did not meet the necessary elements of the spontaneous exclamation exception.

For definitive discussions distinguishing the principles underlying Rule 104(A) and Rule 104(B), see Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv. L. Rev. 165 (1929). See also McCormick § 53 (2d ed. 1972).

Rule 104(C) Hearing of Jury

The first sentence of Rule 104(C) states that preliminary matters regarding the admissibility of a confession *shall* be conducted out of the hearing of the jury. See *Jackson v. Denno* (1964), 378 U.S. 368. The rule also provides that other

preliminary matters should be heard outside the hearing of the jury when the interests of justice require; in short, the judge should exercise his sound discretion.

Unlike its federal counterpart, Rule 104(C) does not provide that a hearing on a preliminary matter should be conducted out of the hearing of the jury "... when the accused is a witness, if he so requests." The principle expressed by the quoted language (which does not appear in the Ohio rule) is governed by the language of the Ohio rule which provides that a hearing on a preliminary matter should be conducted out of the hearing of the jury "when the interests of justice require." Certainly, if an accused is a witness and he requests that the preliminary matter be conducted out of the hearing of the jury, the court should exercise its sound discretion and hear the matter not in the presence of the jury. Indeed, even if the accused does not so request, the court may on its own motion excuse the jury in the "interests of justice."

Rule 104(C), although more specific with regard to confessions, for example, is similar to Rule 103(C).

Rule 104(D) Testimony by Accused

In light of the breadth of cross-examination permitted by Rule 611(B), Rule 104(D), a protective rule, provides that if an accused testifies as to a preliminary matter, he does not subject himself to cross-examination as to other issues in the case.

As noted in the Federal Advisory Committee's Note, "The rule does not address itself to questions of the subsequent use of testimony given by an accused at a hearing on a preliminary matter. See *Walder v. United States* (1954), 347 U.S. 62; *Simmons v. United States* (1968), 380 [390] U.S. 377; *Harris v. New York* (1971), 407 U.S. 222."

Rule 104(E) Weight and Credibility

Rule 104(E) simply provides that if the court determines as a preliminary matter that certain evidence is competent to be admitted, the mere admission of the evidence does not prevent a party from introducing countervailing evidence to the jury that goes to the weight or credibility of the evidence so admitted. Thus, if a court determines that certain evidence may be admitted as an exception to the hearsay rule, an opposing party is free to present evidence that goes to the weight or credibility of that evidence.

Notes of Decisions (121)

Rules of Evid., Rule 104, OH ST REV Rule 104

Current with amendments received through April 15, 2016

Baldwin's Ohio Revised Code Annotated Rules of Juvenile Procedure (Refs & Annos)

Juv. R. Rule 3

Juv R 3 Waiver of rights

Currentness

(A) A child's right to be represented by counsel may not be waived in the following circumstances:

(1) at a hearing conducted pursuant to Juv.R. 30;

(2) when a serious youthful offender dispositional sentence has been requested; or

(3) when there is a conflict or disagreement between the child and the parent, guardian, or custodian; or if the parent, guardian, or custodian requests that the child be removed from the home.

(B) If a child is facing the potential loss of liberty, the child shall be informed on the record of the child's right to counsel and the disadvantages of self-representation.

(C) If a child is charged with a felony offense, the court shall not allow any waiver of counsel unless the child has met privately with an attorney to discuss the child's right to counsel and the disadvantages of self-representation.

(D) Any waiver of the right to counsel shall be made in open court, recorded, and in writing. In determining whether a child has knowingly, intelligently, and voluntarily waived the right to counsel, the court shall look to the totality of the circumstances including, but not limited to: the child's age; intelligence; education; background and experience generally and in the court system specifically; the child's emotional stability; and the complexity of the proceedings. The Court shall ensure that a child consults with a parent, custodian, guardian, or guardian ad litem, before any waiver of counsel. However, no parent, guardian, custodian, or other person may waive the child's right to counsel.

(E) Other rights of a child may be waived with permission of the court.

CREDIT(S)

(Adopted eff. 7-1-72; amended eff. 7-1-94, 7-1-12)

STAFF NOTES

2012:

Ohio Revised Code § 2151.352 establishes that juveniles have a right to counsel.

The amended rule is intended to implement a process for the mandates of the United States Supreme Court's decision *In re Gault* (1967), 387 U.S. 1 and the Supreme Court of Ohio's decision *In re C.S.* (2007), 115 Ohio St.3d 267, 2007-Ohio-4919, to ensure children have meaningful access to counsel and are able to make informed decisions about their legal representation.

Under Juv.R. 3 as it existed prior to amendment, a child facing a mandatory or discretionary bindover to adult court could not waive counsel. The amended rule adds to this prohibition on waiver of counsel by including a child charged as a serious youthful offender pursuant to ORC § 2152.13 as required by ORC § 2152.13(C)(2).

Division (A)(3) of the amendment differentiates between a conflict between the child and parent, custodian or guardian and a disagreement. If the interests of child parent, custodian, or guardian are adverse in the proceeding, a conflict exists and the child should be appointed counsel. If the parent, custodian, or guardian and the child disagree on the question of whether counsel is necessary for the child or if the right to counsel should be waived, counsel should be appointed.

1994:

Rule 3 Waiver of Rights

Prior to this revision, some courts had interpreted Juv. R. 3 to permit a juvenile to waive the right to counsel at the probable cause hearing phase of the bindover process. Juv. R. 3 now makes specific reference to bindover proceedings delineated in Juv. R. 30 to remind the court and practitioners that a juvenile cannot waive counsel at any stage of the bindover procedure.

Notes of Decisions (16)

Juvenile Procedure, Rule 3, OH ST JUV P Rule 3

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Baldwin's Ohio Revised Code Annotated Ohio Rules of Professional Conduct Client-Lawyer Relationship

Rules of Prof. Cond., Rule 1.4

Rule 1.4 Communication

Currentness

(a) A lawyer shall do all of the following:

(1) promptly inform the client of any decision or circumstance with respect to which the client's *informed consent* is required by these rules;

(2) *reasonably* consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client *reasonably* informed about the status of the matter;

(4) comply as soon as practicable with *reasonable* requests for information from the client;

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer *knows* that the client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent *reasonably* necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(1) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(2) A lawyer who is involved in the division of fees pursuant to Rule 1.5(e) shall inform the client as required by division (c) of this rule before the client is asked to agree to the division of fees.

(3) The notice required by division (c) of this rule shall not apply to either of the following:

- (i) A lawyer who is employed by a governmental entity and renders services pursuant to that employment;
- (ii) A lawyer who renders legal services to an entity that employs the lawyer as in-house counsel.

NOTICE TO CLIENT

Pursuant to Rule 1.4 of the Ohio Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.

.....
Attorney's Signature

CLIENT ACKNOWLEDGEMENT

I acknowledge receipt of the notice required by Rule 1.4 of the Ohio Rules of Professional Conduct that [insert attorney's name] does not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.

.....
Client's Signature

.....
Date

CREDIT(S)

(Adopted eff. 2-1-07; amended eff. 1-1-12)

OFFICIAL COMMENT

[1] Reasonable communication between the lawyer and the client is necessary for the client to participate effectively in the representation.

Communicating with Client

[2] If these rules require that a particular decision about the representation be made by the client, division (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Division (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations, depending on both the importance of the action under consideration and the feasibility of consulting with the client, this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, division (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation and the fees and costs incurred to date.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, division (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Professional Liability Insurance

[8] Although it is in the best interest of the lawyer and the client that the lawyer maintain professional liability insurance or another form of adequate financial responsibility, it is not required in any circumstance other than when the lawyer practices as part of a legal professional association, corporation, legal clinic, limited liability company, or limited liability partnership.

[9] The client may not be aware that maintaining professional liability insurance is not mandatory and may well assume that the practice of law requires that some minimum financial responsibility be carried in the event of malpractice. Therefore, a lawyer who does not maintain certain minimum professional liability insurance shall promptly inform a prospective client or client.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.4(a) states the minimum required communication between attorney and client. This is a change from the aspirational nature of EC 7-8. Rule 1.4(a)(1) corresponds to several sentences in EC 7-8 and EC 9-2. Rules 1.4(a)(2) and (3) correspond to several sentences in EC 7-8. Rule 1.4(a)(4) explicitly states what is implied in EC 7-8 and EC 9-2. Rule 1.4(a)(5) states a new requirement that does not correspond to any DR or EC.

Rule 1.4(b) corresponds to several sentences in EC 7-8 and EC 9-2.

Rule 1.4(c) adopts the existing language in DR 1-104.

Comparison to ABA Model Rules of Professional Conduct

Rules 1.4(a)(1) through (a)(5) are the same as the Model Rule provisions except for division (a)(4), which is altered to require compliance with client requests “as soon as practicable” rather than “promptly.”

Rule 1.4(b) is the same as the Model Rule provision.

Rule 1.4(c) does not have a counterpart in the Model Rules. The provision mirrors DR 1-104, adopted effective July 1, 2001. DR 1-104 provides the public with additional information and protection from attorneys who do not carry malpractice insurance. Ohio is one of only a few states that have adopted a similar provision, and this requirement is retained in the rules.

Notes of Decisions (281)

Rules of Prof. Cond., Rule 1.4, OH ST RPC Rule 1.4

Current with amendments received through April 15, 2016

Baldwin's Ohio Revised Code Annotated Ohio Rules of Professional Conduct Client-Lawyer Relationship

Rules of Prof. Cond., Rule 1.14

Rule 1.14 Client with diminished capacity

Currentness

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as *reasonably* possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer *reasonably believes* that the client has diminished capacity, is at risk of *substantial* physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take *reasonably* necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator, or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to division (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent *reasonably* necessary to protect the client's interests.

CREDIT(S)

(Adopted eff. 2-1-07)

OFFICIAL COMMENT

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under division (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in division (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then division (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members; using a reconsideration period to permit clarification or improvement of circumstances; using voluntary surrogate decision-making tools such as durable powers of attorney; or consulting with support groups professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian *ad litem*, conservator, or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to division (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, division (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety, or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent, or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

Comparison to former Ohio Code of Professional Responsibility

There are no Disciplinary Rules that cover directly the representation of a client with diminished capacity. The only comparable provisions are EC 7-11 and 7-12, which discuss the representation of a client with a mental or physical disability that renders the client incapable of making independent decisions.

Rule 1.14 is both broader and narrower than EC 7-12. It is broader to the extent that it explicitly permits a lawyer to ask for the appointment of a guardian *ad litem* in the appropriate circumstance, it explicitly permits the lawyer to take reasonably necessary protective action, and it explicitly permits the disclosure of confidential information to the extent necessary to protect the client's interest.

Rule 1.14 is narrower to the extent that it does not explicitly permit the lawyer representing a client with diminished capacity to make decisions that the ordinary client would normally make. The rule does not address the matter of decision-making, as is the case in EC 7-12, but merely states that the lawyer should maintain a normal client-lawyer relationship as far as reasonably possible.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.14 is identical to the ABA Model Rule.

Notes of Decisions (2)

Rules of Prof. Cond., Rule 1.14, OH ST RPC Rule 1.14
Current with amendments received through April 15, 2016