

July/August 2006

BARBEAT

Genesee County Bar Association



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Medicaid: Malpractice Trap

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- ❖ **Publications**—"Private Mediation," *Bar Beat*, July 1995; "Facilitative Mediation," April 1996 and "Michigan Mediation Update," June 2004, *Michigan Lawyers Weekly*

Gone Fishin'

by Kraig S. Sippell, President

After mowing the lawn and digging in the dirt, I finally sat down to watch the end of the Tigers game with a cold glass of iced tea. The Tigers lost today, but who would have guessed that the Tigers would be playing better than both the Red Wings and the Pistons. Yes, it is that time of year again. School is just about out, those with boats and cottages (summer homes to some) have probably already been on the lake, and the summer has arrived.

The golf clubs have been out of the closet for over a month now, but they probably haven't seen much use (shameless plug here—that reminds me to thank sponsors and golfers who supported our recent golf outing). In my mind, this is the best time of year. The NBA and NHL playoffs, baseball in full swing, high school sports at a furious pace and the summer months ahead.

This is truly family time, or just the time to spend some relaxing days somewhere away from the endless stress and responsibilities of law. From Cadillac to Coldwater to Copper Harbor, we are truly blessed to live in this state. There is nothing better than family, friends, food, sun and the water — “spirits” don't hurt, either. We all forget to take some time to enjoy what we work so hard for — our freedom. As I have learned in 13 short years of practice, free time is vitally important to not only exist, but to prosper in this field. Nothing comes easy in the practice of law, and with the economy, especially locally, the obstacles that we must overcome are numerous and increasing. That precious time away from it all allows us to make it through the months of never-ending work. It is very difficult to experience any sense



of closure. One case ends and two more begin. Where am I going with all of this, I'm going fishing. No, really, I am going to convince us all to take some time and have some fun. We all have earned it! And this time of year, there is no better place in the world than Michigan!

Note: I am truly honored to have been chosen by my colleagues to represent this organization as its president this year. I am awed by the quality of the individuals who have preceded me, and especially by those who have not yet occupied this position. There are many more deserving of this honor, but none more appreciative or humbled.

1950-1956 State Bar of Michigan admittees from Genesee County Celebrate 50 Years as Attorneys

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(l-r) Jo Ann Stipes, Judge Thomas C. Yeotis, Madeline Yeotis, Reese Stipes at the State Bar of Michigan 50-year Honoree Golden Celebration

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Committment: An Honor and Privilege

by Ramona L. Sain, Executive Director



Ramona L. Sain

“Not only is it our duty to carry on the legacy through our commitment of time and resources, but it is also an opportunity that we cannot afford to ignore,” wrote Kraig Sippell in 1994, appealing to our association’s young lawyers while serving as their representative to the GCBA Board of Directors. He continued, “(c)ommitting ourselves to our association and community is not only an obligation, but an honor and privilege.”

To Kraig, those were more than just words on a piece of paper. They were, and are, a way of life. Now, twelve continuous board years later, Kraig was elected GCBA president at our Annual Meeting and Election of Officers due to his hard work and commitment to the association.

Kraig immediately became active in the Bar Association after passing the bar and soon was elected the Young Lawyer Representative to the board. Through the years, Kraig served as chairperson of the Law Day Committee, Professional Practice Committee, and Golf Outing Committee too many times to count. He also serves or has served on the Membership and Marketing Committee, Nominating Committee, Explorer’s Post Committee, Lawyer Referral Committee, Juvenile Law Committee, Family Law Committee, Bench and Bar Committee, Probate Committee, and Capitol Campaign Building Committee. Sounds pretty dry, huh? But Kraig is always up for some association fun, as was seen in 1999 during a talent show where Judge Bruce Newman “married” Kraig and Julia Black during a humorous skit.

In real life, Kraig is married to Deb and they have two lovely children, son Jack and daughter Victoria “Tori”.

Awards bestowed at the Annual Meeting included Past President Ed Henneke (1982-1983) who received

the Distinguished Case Evaluator of the Year Award. As one would guess, any award given to Ed would logically include the word distinguished. It is very fitting.

Leonard Shulman was given the Herbert Milliken, Jr., Civility of the Year Award, posthumously. Len’s wife, Gail, joined us to receive the honor on his behalf. It was heartbreaking, but I couldn’t help but think that Len was in a better place fishing to his heart’s content, gleeful that he got in the last word during last year’s *Bar Beat* article and rebuttals with Bob Segar and Frank Kastle.

consider joining us for that occasion.

We will miss departing board member Robert Schaffer and are pleased to report that Cathy Dowd has agreed to serve as the WLAM representative on the board. As most of you are aware, Cathy was instrumental in reviving the local WLAM chapter a few years ago and her presence on the board is vital.

Pete Bade, Fred Meiers and Jim Wascha were elected as new members to the board, while returning board mem-

“Not only is it our duty to carry on the legacy through our commitment of time and resources, but it is also an opportunity that we cannot afford to ignore.”

“Committing ourselves to our association and community is not only an obligation, but an honor and privilege.”

Kraig Sippell

2006-7 GCBA President

Speaking of Bob Segar, he was out of town the evening of the dinner at a family gathering and was not available to receive the Jerome F. O’Rourke Advocacy Award from the Centennial Inn of Court. Family comes first with Bob and while he was exactly where he should have been, he was missed nonetheless. Arrangements have been made to bestow the award on Bob in the future.

Likewise, Michael Smith was not able to attend to receive the Pro Bono Attorney of the Year Award from Legal Services of Eastern Michigan. Mike’s award will formally be presented at the September 18, 2006 Membership Meeting, so please

members include Chris Christenson, and Lynne Taft. They are all highly regarded members of our association who will do a splendid job, or continue to do so, in Chris and Lynn’s case. Also, we are fortunate to still have Bill Reising on the board as past president.

On a final note, the strategic planning retreat with the ABA is complete and we are anxiously waiting their final report on observations and recommendations gathered during this session and through the member survey. In true GCBA spirit, we exceeded the number of survey responses targeted by the ABA and they were truly impressed. Thanks to everyone who took the time to complete the survey. It is very much appreciated.

Medicaid: Malpractice Trap

by Michael E. Thomas

One of the most deceptively complex areas of the law is the area of Medicaid. Too many attorneys offer incorrect advice regarding Medicaid law, assuming it is simple. This article will address selected issues regarding Medicaid nursing home eligibility, addressing the current and the new laws.

Current Law

The new law makes several changes regarding eligibility. A review of the current law lays the foundation to understand the changes. The basic Medicaid issue involves which assets of a nursing home resident (NHR) are counted to determine Medicaid eligibility. Exempt assets (assets a client can keep and still become Medicaid eligible) include one residence, one automobile, income-producing real estate that nets at least six percent of the recipient's equity in the property, an irrevocable funeral arrangement, and \$2,000. The spouse of the NHR can keep an additional amount of countable assets.

In order to prevent prospective NHRs from giving away all of their countable assets to become instantly Medicaid eligible, the regulations currently contain ineligibility periods, calculated by dividing the amount divested by the average cost of a month in a nursing home (currently \$5,549). The result is the number of months of ineligibility, starting with the month in which the divestment is made (fractional months are dropped). The Medicaid eligibility worker can only "look back" 36 months for divestments under the current law.

If an NHR is married, the spouse of the NHR can keep an additional amount of countable assets, which includes a residence, one car, and a proportion of other assets, within a range of \$19,920 to \$99,600, based on a formula. The balance of assets (other than the resi-

dence and car) must be "spent down." The spend-down amount prevents eligibility for the number of months calculated above. Alternatively, the NHR (through a power of attorney, if necessary) can pay for funerals for himself and his spouse, pay for house repairs, and give the balance to his spouse in the form of an immediate annuity (subject to very strict rules), which is called a "Medicaid Annuity," or create a "Spousal Annuity Trust."

Note that a single person does not have the annuity opportunity. If an annuity is purchased for a single person, then the payments have to go to the nursing home. The NHR could, by serial gifting, shelter \$11,000 per month under current law. Note that a lawyer should also consider how to protect the gifted money from greed, lawsuits, divorce, arguments, and death of the children.

Confused? Wait until you read the new law.

The New Law

The Deficit Reduction Act was signed February 8, 2006. That is the presumed effective date. However, when state policy provisions are adopted, the effective date may change for selected issues. Further, all states are operating on old policy regulations until new ones are passed.

The Act made sweeping changes to Medicaid law. Gifting is all but eliminated, although some attorneys have determined they can devise a method to allow gifting to shelter part of the assets. The "look back" period for gifting is now five years, but the ineligibility period does not start until the NHR is out of money. Assume a woman gives to her church, gives Christmas gifts, and helps her granddaughter with college, then has a stroke and enters a nursing home. She will have to spend all of her

money, less exempt assets (money can be used to buy exempt assets). Then the Medicaid worker will go back five years, add the gifts, and find the NHR ineligible for Medicaid for some number of months after she is broke. The problem is who pays for that time in the nursing home?

Under the amended law, if one purchases a Medicaid annuity for the NHR, the state where the home is located must be named the beneficiary.

Practice Tips and Dangers

Two cases under the present law illustrate the pitfalls of not knowing the eligibility rules thoroughly. If an attorney does not practice this type of law as a major portion of her practice, she should not practice it at all. Recently, a parent on Medicaid in a nursing home inherited over \$100,000 from an unmarried son. A local attorney suggested filing a probate and disclaiming the \$100,000, which under Medicaid law is divestment. This would create an 18-month irreversible ineligibility. With proper planning, the NHR could have accepted and reported the gift and sheltered some of the inheritance.

Another attorney advised a family whose father was a NHR to gift \$11,000 to each child and grandchild and apply for Medicaid. This advice was based upon federal estate tax law, and the total amount gifted created an ineligibility period of 19 months. Applying monthly gifting would have protected some of the cash and reduced the ineligibility period.

If you do not want to refer Medicaid cases to another attorney, attend a seminar in Medicaid practice so that you will not give incorrect counsel. For seminar information on the writer's seminars, call 810-235-6238, or contact the Institute of Continuing Legal Education for seminars put on by ICLE. The writer's seminars are not associated with ICLE.

Michael E. Thomas is an estate planning attorney in Genesee County.

Academy of the Wise

next luncheon meeting is

September 14, 2006

Bar Beat did not receive the following information in time for the May issue honoring post-World War II veterans.

Michael J. Smith

Army Intelligence – Aviation
1968 to 1970
Rank – Classified

Right seat of 2-person OV-1 Mohawk fixed wing aircraft; stationed at Phu Heip Army Airfield, Republic of South Viet Nam; 250 + combat missions over South Viet Nam, Cambodia and Laos long before such missions were officially acknowledged; received numerous service medals

Judge Paul V. Gadola

1953-55

Army

Began his service at Fort Knox, Kentucky where he completed basic training and advanced infantry training. He was then transferred to Camp Kilmer, New Jersey, the point of embarkation for the European theater of conflict. Subsequently stationed in Fort Wadsworth, New York, he was assigned to the Finance Corps. At the close of service, Judge Gadola left military as a Corporal. During his time in service, he received a Good Conduct Award and the Korean War Medal.

The Academy of the Wise

by Douglas Buck, Sr.

One of the nicest rewards after years 'at the bar' (that is, practicing law) is to reminisce with a band of brothers. Recollections often differ from reality, and we can even remember our opponents in a good light, brag about victories, and be amused at our defeats. How does such a happy situation occur? Are we being rewarded for our perseverance, or just "doing our duty"? Would it be a stretch to think it might be virtue?

At any rate, we senior attorneys who meet monthly for lunch are very thankful for the friendships we have made over the years, the fond memories we have of the battles we have fought, and the good humor we are able to share with one another.

The second Thursday of each month is the time, and Valley Coney Island is the place where several senior attorneys meet. It is largely a storytelling time, where the only forbidden topics are politics and religion.

At a recent meeting, Judge Beagle spoke to us about representing juveniles who need legal advice. This suggestion is yet to be developed, but the group is interested in embracing a civic or charitable project.

The attendees on a regular basis are Dick Ruhala, Doug Buck, Jim Ruhala, Marv Failer, Max Dean, Sally Joseph, and on occasion Jack Wright, Tom Yeotis, Ed Jakeway, John Hermann, Peter Marroso, Harry Piper, and Bob Crites. Ben Gotlieb recently moved to Farmington Hills, so we'll miss him.

When asked what we're about, Max Dean said, "Tell them we just have a good time. There is no agenda, no reports, no minutes, no preparation, no officers, no bylaws and no dues. We just have good conversation."

There is no age requirement, so the invitation is open to all. Join the "Academy of the Wise" at noon on the second Thursday of each month, at the Valley Coney Island on Miller Road.



The Academy of the Wise members (l-r) Max Dean, Dick Ruhala, Jack Wright, Doug Buck, Bob Crites, Jim Ruhala, Marv Failer

Family Strife Spilling Into Our Courts

By Hon. William C. Whitbeck

Judges can decide cases; they cannot fix Michigan families. The problem of broken families should frighten anyone who is concerned about children and our state's future. We are moving—indeed, we have moved—from a culture of marriage to a culture of divorce and births out of wedlock.

Families are fragmenting and are turning for help to our courts in huge numbers. From our vantage point on the bench, we see the dire results, and they shock us. No judge, however compassionate and wise, can hope to heal a child who lacks a stable and loving home. No court system, no matter how well run, can cure the underlying social trends that menace our children and our future.

In the information age, statistics overwhelm us. Occasionally, however, we can make some sense out of the data that constantly assail us. Consider the following data about family cases in our judicial system; the data have remained fairly constant over time and do not appear to be particularly affected by the state's economic situation.

- In 2004, 223,499 new family cases were filed in Michigan's family courts, almost 67 percent of all circuit court level filings.
- Divorcing couples with children filed 26,761 new cases in 2004.
- If each child support case in the offices of the Friend of the Court represents a mother, a father, and one child—a conservative assumption—then the over 800,000 such support cases account for roughly 2.5 million people, about one quarter of the population of Michigan.
- In 2004, there were 15,558 new paternity cases. Nearly half of the child support cases are also paternity cases. In other words, these are cases in which the mother sought a support order and a court had to determine

who the child's father was.

- The number of children in foster care at any given moment is approximately 19,000. In the 2001 Annual Report of the Michigan Citizen's Foster Care Review Board, "nine of the top twelve reasons that temporary wards remain in the [foster care] system are related to the parents' inability to understand the problems that caused the removal of their children or their unwillingness to deal with those issues."
- The number of appeals to the Michigan Court of Appeals from lower court decisions terminating parental rights has grown steadily; over the last 10 years, the number has increased by almost 73 percent. Despite the increased caseload, the court has managed to reduce by 30 percent the average time to decide such TPR cases during the past five years.
- In 2002 and 2004, new family cases (defined as divorce proceedings, paternity proceedings, child support proceedings, adult and minor personal protection orders, juvenile proceedings including child protective proceedings, adoption proceedings, and miscellaneous family cases including parental waivers) filed in Michigan's family courts accounted for almost 67 percent of all circuit court level filings.

The data tells us our judicial system is changing before our very eyes. Classically, courts conducted civil and criminal trials. Increasingly, however, the judicial system now deals with cases involving broken families.

We should be very clear on one point: while trial and appellate judges can decide such cases, we cannot and do not resolve the issues that bring these families into our courts in the first place.



Of course, our courts are not helpless in the face of this onslaught. For example, a joint Supreme Court/Court of Appeals work group on delays in dependency appeals – those appeals that involve termination of parental rights or a dispute over child custody – pointed out that in 2001, on average, the Court of Appeals disposed of such appeals within 325 days of filing. We have now cut that time to 206 days, a reduction of 36 percent.

While this is certainly progress, ultimately the judicial system can only do so much. Our society as a whole must address the underlying trends that send so many Michigan families into the legal system...and the children are waiting.

Hon. William C. Whitbeck is the Chief Judge of the Michigan Court of Appeals.

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You, Too, Can Join Granholm's Navy

by Richard J. Figura

Do you own a boat which might be classified as a "yacht?" Or do you belong to a yacht club? If so, and you are "subject to military duty," you and your yacht could get called to serve your state in Michigan's naval militia.

Public Act 184 of 1893, MCL 33.1, et seq., is an act "to provide for the enrollment, organization, equipment, maintenance and discipline of the naval militia of the state." Section 1 of the act, MCL 33.1, provides that, "Whenever in conformity with the laws of this state, an enrollment of all persons subject to military duty shall be ordered," it shall be the duty of "all officials and persons charged with the making of such enrollment" to separately enroll all persons liable for military duty who shall be included in a

number of listed classifications.

Among the listed classifications subject to enrollment (call up?) are "seafaring men of whatever calling or occupation," all yacht owners and "all members of yacht clubs and other organizations formed for the pursuit of aquatic sports...and pastimes." (Quaere: Does that include the pool at the local senior citizen wellness center?)

MCL 33.31 gives the Governor the power to order "into service for instruction and drill any portion or all of the naval forces of this State," and section 33.33 empowers the governor to "issue honorary commissions" to individuals who will promote the best interests of the state, "particularly in the areas of water safety, water recreational facilities, boating

facilities and improved marine recreational developments and assist in the promotion and expansion of recruiting, training and educational facilities of marine oriented associations." Promote safe use of jet skis or lead the war on zebra mussels and you could become an honorary admiral!

Now you may think there is no chance that you or anyone you know could get called up to serve, but it has happened before. The U.S.S. Yosemite, a 6,000-ton cargo ship converted from freighter to fighter, was part of a naval blockade of San Juan, Puerto Rico, when she encountered a Spanish ship loaded with munitions during the Spanish-American War and forced the Spanish ship aground.

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What was interesting about the Yosemite was the composition of her crew. With the exception of four regular navy officers, the rest of the crew was volunteer sailors from the state of Michigan, most of whom had never been on the open seas. Further, many of these men were students, alumni and faculty of the University of Michigan. Other crewmen came from the ranks of the socially elite Detroit Club—so many from that organization's board of directors that no important club business could be conducted back home.¹ All of the Michigan men were part of the Michigan naval militia.

The U.S.S. Yosemite

As noted by Miguel J. Hernández Torres in *Scholar-Sailors in the Spanish-American War*, on the website listed in the footnote below, the Spanish-American War

... was the war nobody wanted to miss, and in contrast to the Civil War where the wealthy were allowed to pay others to serve in their place, the Spanish American War saw the wealthy pay others to allow them to serve in it. Many socialites, such as Hamilton Fish, William Tiffany, and others joined Theodore Roosevelt's 'Rough Riders.' Those who could not find places in this regiment raised or joined other volunteer regiments. It was reported that one such fellow

¹For a detailed account of the adventures of the U.S.S. Yosemite and her Michigan crew during the Spanish-American war, go to <http://www.fortunecity.com/victorian/churchmews/1216/scholar-sailors.htm>

offered the 1st Montana Infantry \$100,000 for the privilege of going with them to the Philippines.

Similarly, war fever infected the nation's college campuses in early 1898. In stark contrast to the campus anti-war movement of the Vietnam War era when doves ruled the roost, the nation's campuses were veritable nests of hawks. The University of Michigan was no exception, and 576 men with U-M ties (students, faculty, staff and alumni) served in the war, 514 in the army, 61 in the navy, and one in the U.S. Marine Corps. A record of their names and military histories resides in the archives of the University of Michigan.

Don't think it can't happen today. As recently as four or five years ago, the Senate Democrats' version of a proposed state budget for the state of

Wisconsin would have provided funds for the creation of a "Wisconsin naval militia consisting of members or former members of the U.S. Naval, Coast Guard or Marine Corps reserve who would have been under the command and control of the governor." If created, who would such a navy battle? There are only two choices—Michigan or Canada—and knowing how much Wisconsin covets the port at Escanaba (in da moonlight?) and our bridge (they don't have anything similar), my guess is we would be the target. But I fear not, because I know that our governor wouldn't hesitate to call the Detroit and Grosse Pointe Yacht Clubs into service to defend our state. Could our defense be in any better hands?

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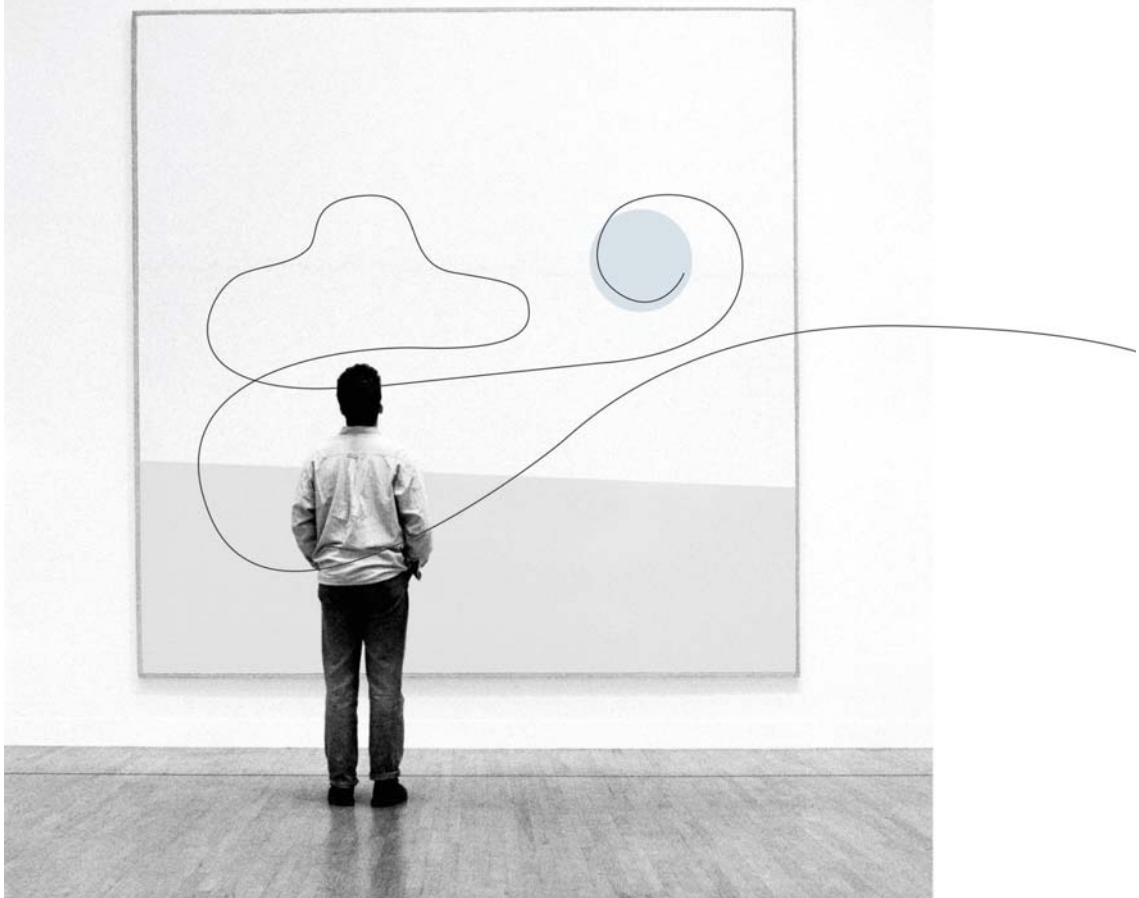
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