

BARBEAT

Genesee County Bar Association



November 2015 Admission Ceremony

Training the Brain: May it Never End
When *Their* Search Ends, *Yours* Begins
Mallory Van Dyne Scott Bar Association Elects
Officers for 2015-2016
Changes in American Indian Legal System
Who's On the Bench? Hon. Daniel S. Opperman

Miranda: More than Words
Law Day—Give Us a Hand!
New Indigent Defense Standards
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Published bimonthly by the State Bar of Michigan, 306 Townsend St., Lansing, MI 48933, for the Genesee County Bar Association. For advertising, call (517) 346-6315.

No material in *Bar Beat* reflects the opinion or endorsement of the Genesee County Bar Association, unless otherwise stated.

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Training the Brain: May it Never End

By Shayla D. Blankenship, President



Shayla D. Blankenship

It's that time of year when the holidays are over and it's the long stretch to spring.

In my area of practice there is usually a lull in business, so instead of being bored, I look for ways to improve myself and my practice. During this time I begin to plan a family vacation for the warmer months. I also use the down time to look for seminar opportunities.

The Genesee County Bar Association (GCBA) offers a variety of wonderful in-depth seminars and training opportunities to our members at a nominal cost. I dare say you won't find more affordable seminars and trainings than what we offer.

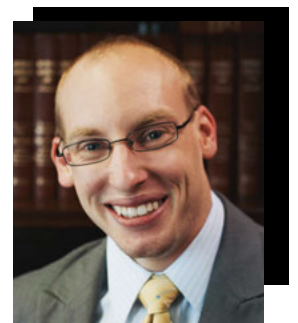
Why do we offer seminars to our members?

- Because we recognize that our members who present these trainings and seminars are a vast resource of accumulated knowledge.
- Because we know that we can always improve and be better.
- Because we recognize that in addition to the knowledge we receive, we also build connections to what I like to call our "legal family."

I encourage you to look at the GCBA website and find a seminar which might benefit you and join us. I hope to see you there.

When Their Search Ends, Yours Begins

By Scott R. Bigger



Scott R. Bigger

It seems almost routine in police reports: A vehicle is stopped for some sort of traffic infraction and the report indicates that consent was given for a search and contraband was quickly discovered. I am left shaking my head whenever I read this colloquy. If a client knows that they have contraband in the area to be searched, why would they consent to that search? When I ask my clients this question, the response is almost invariably the same.

"What do you mean I gave consent to a search? I did no such thing!" he or she will exclaim.

Now, I know that criminal clients are not usually the most truthful with their attorney, but as I dive deeper into the discovery materials that have been provided to me, I realize that I have received no Consent to Search forms signed by my client, nor any audio or visual recording of my client granting the supposed consent. All I have is a single line in the police report that defies common sense.

A search conducted without a warrant is "per se unreasonable."¹ That is always our starting point. The burden is on the *Prosecutor* to show that one of the few delineated exceptions to the warrant requirement applies in the given case.² Furthermore, when consent is at issue, the People must "prove by *clear and positive* evidence that the consent was unequivocal and specific, freely and intelligently given."³ Therefore, when I challenge the validity of a warrantless

search, the evidence is suppressed unless the State can present sufficient evidence to meet their burden.

When a defense attorney reads in a report that consent was given or when a witness so testifies at a preliminary examination, the inquiry should not end there. Examine the totality of the circumstances. What proof does the State have that the defendant actually gave consent? Is there a Consent to Search Form signed by the defendant? Is there a recording of the defendant granting consent or are we simply being asked to take the officer's word for it? Was the defendant coerced into giving consent, either expressly or impliedly? Was the defendant in handcuffs when he granted consent? Were guns drawn? What was the specific language that the defendant used to grant the consent? Was the consent unequivocal? Did the defendant limit the scope of the search when he granted consent? Did the client understand that he had the right to refuse consent? Hold the People to their burden of proof before simply allowing the fruits of the search to be admitted against your client.

You might also consider putting your client on the stand at an evidentiary hearing. It is an established rule of law that

A defendant may take the stand and testify for the limited purpose of making of record his version of the facts and circumstances under which [the challenged evidence] was obtained. . . [and] by so doing defendant does not waive his right to decline to take the stand on trial in chief. . . [nor] does he waive any of the other rights stemming from his choice not to testify.⁴

This rule is in place so as to ensure that a defendant is not forced to choose between asserting that evidence was unconstitutionally obtained and exercising his Fifth Amendment rights at the time of trial. Be aware, however, that a defendant's testimony can be used to impeach him at trial should he choose to testify at that stage of the case.

This level of constitutional analysis should apply to any warrantless search. Do not walk away from a good Fourth Amendment issue. Make sure to know what is required in order to justify a particular warrantless search and conduct a complete analysis of the facts and circumstances and *then* hold the State to its burden of proof. You may be happy that you did.

Endnotes

- 1 *Katz v United States*, 389 US 347, 357, 88 S.Ct. 507 (1967).
- 2 See *People v Davis*, 442 Mich 1, 497 NW2d 910 (1992).
- 3 *People v Brown*, 127 Mich App 436, 339 NW2d 38 (1983), (emphasis added).
- 4 *People v Walker*, 374 Mich 331, 338, 132 NW2d 87 (1965).

Mallory Van Dyne Scott Bar Association Elects Officers for 2015-2016


By Judge Herman Marable, Jr.

The Mallory Van Dyne Scott Bar Association, the organization of African-American attorneys and judges in Genesee County, elected officers for 2015-2016 in November. Officers elected include I'Lanta Robbins, President; Angela Wheeler, Vice-President; Stephanie Cannon, Secretary; Torchio Feaster, Treasurer; Judge Herman Marable, Jr. and Vinson Carter, Members of the Board of Directors.




The Mallory Van Dyne Scott Bar Association was founded in 1989, and takes its name from Dudley Mallory, R.M. Van Dyne, and Elisha Scott, three of the earliest African-American attorneys in Genesee County.

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Changes in American Indian Legal System

By Attorney Ronald G. Douglas, Retired Tribal Court Judge

When I was a child I became interested in solving American Indian law problems as I learned about the tremendous mistreatment of my relatives under federal and state courts and agencies, and that none of the state rules protecting a defendant's civil rights applied in the tribal courts.

Tribal courts were limited to assessing fines for domestic or alcohol abuse. All other matters were under the jurisdiction of the federal courts. The federal government also controlled the employment of officers for tribal police departments and the issuance of construction or home improvement permits.

Over a third of federal laws protecting individuals, including the 1964 Civil Rights Act, did not apply to Indians arrested on a reservation. This was partially corrected in 1968 by the Indian Civil Rights Act, which extended the protections of the Bill of Rights to Indian Country.

The Indian Self Determination Act of 1974 authorized tribes to hire their own court staff and their own police forces. The Indian Child Welfare Act gave tribal government a strong voice in child custody matters where a child is placed

with a non-parent, recognizing the tribal courts' exclusive jurisdiction when the child lived or was domiciled on the reservation and presumptive jurisdiction over non-reservation foster care placement.

Still, problems persisted. These issues motivated me to finally obtain my law degree at the age of 41.

After law school, I found there were only two or three American Indian members of the State Bar of Michigan. So in the early 90's I began working part-time as outside legal counsel for the Saginaw Chippewa Indian Tribe as they could not find attorneys who were educated in Indian law. I was amazed that tribal courts across the state were limited to non-attorney magistrates and employees who worked without any court rules and with strongly limited and vague statutes. There were few alcohol, drug treatment or domestic violence programs on which tribal courts could rely.

Other issues included the unauthorized service of warrants, repossession of cars by city or county officers on tribal trust property, and the refusal to allow tribal police to issue traffic violations to Non-Indians violating traffic laws on a reservation. Tribal police could not make arrests for crimes by non-Indians against tribal members.

Tribal courts could not hear cases against contractors for shoddy or fraudulent home improvement work. A tribal court's jurisdiction ended where a reservation ended. There was no jurisdiction over matters on reservation land that was not in trust.

Tribal courts lacked jurisdiction to handle probate matters, as there were no tribal statutes. There were no statutes to recognize tribal members' marriages or to file for divorces on the Saginaw Chippewa Indian Tribal reservation until I persuaded the tribal council to adopt such ordinances. Tribal laws did not create authority to issue driver licenses or to oppose state withdrawal of them even on a reservation, and tribal courts had no court rules or tribal ordinances to rely on to dispute such actions.



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Cultural differences resulted in injustice. I became aware of some racial prejudice and misjudgment of American Indians by non-Indian attorneys. Many local attorneys would charge large, non-refundable fees for tribal members and then refuse to represent them. One judge told me he was disturbed at seeing so many liars before him. He said that Indian witnesses would not look him in the eye when they testified. I explained to him that in our traditions it is customary for Indians to avoid eye contact with strangers as it is considered an evil way to greet them. While those biases are finally changing, there is still much work to be done to overcome the prejudices of the past.

The Michigan Indian Judicial Association was formed by Tribal Court Judges so that we could join in our efforts to

reform Tribal Court activities. We also formed the American Indian Law Section of the Michigan State Bar to allow attorneys to help improve tribal laws and administrative agencies.

We took action to encourage the Michigan Supreme Court to begin training for tribal judges and encouraged them to issue a ruling that would recognize Tribal Court judgments under the principle reciprocity, just as judgments from other states are recognized, if each tribe would agree to recognize state court judgments. Improved Tribal Court relations with state agencies has resulted in better representation. And tribes now have Indian court rulings to cite as authorities for their decisions instead of being limited to state or federal court decisions based upon state and federal laws.

Who's On the Bench? Hon. Daniel S. Opperman

By Roberta J.F.Wray

Hon. Daniel S. Opperman is a Bankruptcy Judge in the United States Bankruptcy Court for the Eastern District of Michigan in Flint and Bay City. Prior to taking the bench, he practiced with Braun Kendrick Finkbeiner from 1981 to 2006, concentrating in litigation, bankruptcy, and real estate. Judge Opperman was sworn in on July 13, 2006.

Judge Opperman is a Flint native with connections to Millington and Saginaw. His wife works in communications at Dow. They have two sons, Matthew, who is studying law at Wayne State and Thomas, a CPA. Judge Opperman jokes he's "not sure where the CPA gene comes from."

Since taking the bench, the judge says he has "found the opportunity to help a lot of people in bad (financial) situations to change their lives." He says most people who face the prospect of bankruptcy have lost a job, a spouse, or had catastrophic medical expenses. He says it's satisfying to

see that, "By the time they get through Chapter 7 or 13, they have been able to rehabilitate themselves and go on living normal, productive lives."

Judge Opperman also says, "It's great to work with members of the bars of both Flint and Bay City. They display so much collegiality and cooperativeness" as compared with lawyers in other parts of the state.

The judge earned his B.S. degree, *magna cum laude*, from Eastern Michigan University, graduating in 1978 with majors in History and Political Science. He earned his J.D., *magna cum laude*, from Wayne State University Law School. While at Wayne State, Judge Opperman was a member of the Wayne Law Review and served as Note and Comment Editor.



Hon. Daniel S. Opperman

2015 In Memoriam

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Miranda: More than Words Law Day—Give Us a Hand!

By Andrea Rossi, LSEM

Law Day events happen all over our country around May first, every year. GCBA's Law Day involves high school students in a simulated trial. Students engage in case preparation, jury selection, witness examination and cross, evidence presentation, closing arguments, and, of course, delivery of the ruling.

This year's law day theme "Miranda: More than Words" celebrates the 50th anniversary of *Miranda v Arizona*, the case which required courts to ensure the protection of a suspect's 5th and 6th amendment rights. As you plan for spring, consider participating in Law Day. You can be part of an event that has changed lives and ignited passions.

Assistant Prosecuting Attorney Whitney Frazier described how her experience translated into a lifetime of accomplishment:

Participation in Law Day expanded my creative and critical thinking skills and made me more familiar with the judicial system. After presenting a case in Mock Trial, I knew I wanted to pursue a career in the law. The Mock Trial program is

a great confidence builder and prepares high school students for other challenges in their future.

I presented my mock trial case before Judge Yeotis, and years later Judge Yeotis was my sponsor at my admission ceremony.

After nearly three decades practicing law in Genesee County, attorney and former GCBA President Kurtis L.V. Brown recalls:

I had the honor to participate in Law Day as far back as 1980, when I was in high school. As a student at Lake Fenton High School I was fortunate enough to have social science teachers who were very active and involved in the community. They also searched for additional learning opportunities for their students. Through their efforts I was honored to participate in Law Day as a student the last three years of my high school career, two of those years as an attorney. Both the skills and the exposure to the legal community I obtained through Law Day were important factors I considered when I later made the decision to attend law school.

After graduating law school and settling in to my career here in Genesee County I heard that Law Day was still an ongoing event each spring. To my surprise, I found that my high school Law Day Advisor was still volunteering her time as the faculty advisor for the Lake Fenton Law Day team. Very soon thereafter, I began a volunteer career that has spanned a number of years and two faculty advisors at Lake Fenton advising Law Day teams each spring.

For a time, the number of area high schools participating in Law Day seemed to dwindle. However, over the past few years, the school participation has seemingly stabilized, and I have expanded my role to also be the legal advisor to Powers Catholic High School where my sons have attended.

Law Day includes court proceedings at 7th Circuit Court and awards luncheon at the Masonic Temple. This year's case features young adults of varying sizes, fitness and para-



Andrea Rossi

THANK YOU

Entering his third year as an independent, private practitioner, with an office at 503 South Saginaw Street, Suite 1000, Flint, Michigan 48502, Mr. Simmington wishes to extend a hearty "thanks" to the legal community for its support.



He remains available for consultation, regarding general civil matters, criminal matters (state and federal), and appeals, and can be contacted at 810-600-4211, by e-mail at gsimmington@gmail.com, or by visiting his website at www.simmingtonlaw.com.

military training, “fightin’ words,” intimidation, intoxication and - dun-da-dunnnn - death.

As an attorney advisor you communicate regularly with a student advocate team and their Mock Trial teachers. You are encouraged to share your expertise to guide your team to successful techniques and proper methods. This includes

advising them on the demeanor and decorum expected of attorneys in the courtroom towards opposing counsel and, of course, to the judge.

Don't remain silent! Reach out to us at GCBA to participate in another great Law Day.

New Indigent Defense Standards Attorney Input Requested

By Roberta J.F. Wray

The Michigan Indigent Defense Commission has finally submitted the first four proposed standards for improving indigent defense in Michigan to the Michigan Supreme Court for approval. The Court is expected to vote on the standards in late spring or early summer.

In addition to calling for mandatory continuing education of indigent defense attorneys, the standards require early meetings with defendants and set requirements for investigation of cases by the appointed attorneys. Some modification of the initial set of four standards occurred after input from attorneys and the public at a hearing in August. The final version can be found on the MIDC website at <http://michiganidc.gov/standards>.

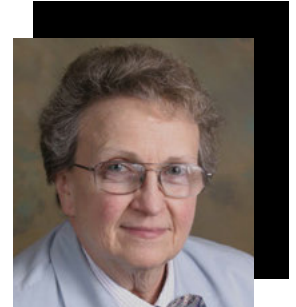
At their December meeting, the commission also appointed six regional consultants to serve as liaison between local indigent defense programs and the MIDC. They will work with local courts and defense attorneys to design the “most appropriate plans for meeting minimum standards in the particular counties and/or programs.” Discussion

of the next set of standards to be proposed included caseload limitations for court appointed attorneys and attorney compensation.

A survey relating to the first set of standards has been prepared for distribution to criminal defense attorneys. The MIDC says the survey was live and accepting responses as of January 15. Criminal defense attorneys are asked to complete the online survey found at this link: <http://obsurvey.com/survey/9A9E5C8E-FE81-4B9B-BE91-DADA562F83BE>.

The MIDC says it would be pleased to have as many attorneys from Genesee County participate in the actual survey as possible.

The survey itself should take approximately ten (10) minutes to complete. If you have any questions or concerns about the survey, please contact Marla McCowan at mmccowan@michiganidc.gov. The MIDC will post comprehensive reports on these surveys after completion.



Roberta J.F. Wray



Welcome New Members

Attorney: Maurice C. Davis

Employer: Davis Law Group PLLC
Undergrad School: Michigan State University
Law School: Florida State University School of Law

Attorney: Sean P. Burns

Employer: Munger & Associates, P.C.
Undergrad School: Bowling Green State University
Law School:
Western Michigan Thomas M. Cooley Law School

Attorney: Shane R. Nolan

Employer: Garan Lucow Miller, P.C.
Undergrad School: Kalamazoo College
Law School: Wayne State University Law School

Attorney: Christopher V. Burtley

Employer: Dykema Gossett PLLC
Undergrad: Michigan State University
Law School: University of Michigan

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New Board Member

Name: Hon. Vikki Bayeh Haley

Family: Husband, Patrick; 3 children

Undergraduate school, degree and grad year: University of Michigan-Flint, BA Honors Program
Psychology, 1986; University of Michigan-Flint, BA, English, 1992

Law School and grad year: Wayne State University, 1990

GCBA member since: 1992

Area(s) of practice: Past: criminal law, appellate law as Assistant Prosecuting Attorney. Current: 67th District Court Judge

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Past GCBA committees and activities: Bar Beat; Appellate Practice; Criminal Law Committees and Holiday Dinner

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Hon. Vikki Bayeh Haley

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