January/February 2015

BAR BEAT

Genesee County Bar Association

Winter Snacks for Birds

Genesee County Bar Association
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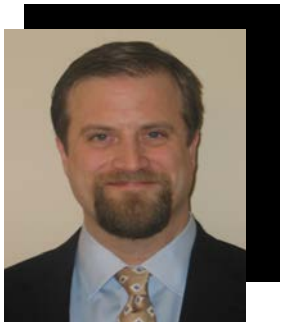
Maintaining Professionalism in Genesee County



Craig L. McAra

By Craig L. McAra

There is a distinction between ethics – the rules we *must* follow – and professionalism – the rules we *should* follow. It is fair to say that Genesee County is among the most cordial Michigan venues in which to practice. With relatively few exceptions, we enjoy a far less pugnacious or belligerent environment than, for example, our brothers and sisters of the Oakland County Bar. This fact presents an interesting question: Why? Why would geography tend to dictate how an attorney conducts his or her practice?

I was surprised to hear a more "seasoned" attorney recently tell me that Oakland County was once an extremely amicable place to practice law. Assuming that to be true, more questions must follow: What changed? How does a legal community sour? My only answer: because that community's attorneys *let it happen*.

The State Bar ostensibly enforces the Michigan Rules of Professional Practice. The responsibility for maintaining professionalism in Genesee County lies with the attorneys and judges who comprise our legal community. Our judges certainly have broad authority to ensure that litigants conduct themselves appropriately in certain respects. However, *participation and engagement* from our entire legal community seems the only real way to encourage us to keep doing the right thing, even when nobody is watching.

To this end, I encourage all of us to *become involved* in the excellent programs of the Genesee County Bar Association and Centennial Inns of Court. The numerous social events both groups sponsor help create and maintain friendships, as well as expanding business networks. Perhaps the most exciting programs the GCBA and Centennial Inns are sponsoring to promote professionalism (among other things) in our community this year involve mentoring. The October Inns of Court "Speed Mentoring" program was one of the most fun, well attended, and best reviewed meetings the group has ever had.

The value of these mentoring programs cannot be over-emphasized. As stated on the American Inns of Court website:

> Mentoring, on a formal or informal basis, is one of the best experiences for lawyers to build or refresh the knowledge and skills needed to become, and remain, effective practitioners. By creating an environment for idea exchange and open discussion, [we create] the ideal place for new lawyers to learn from more senior members of the legal community and for more seasoned professionals to expand their understanding of new approaches and technologies. Mentoring can provide fresh perspectives and insights, regardless of experience level.

I very much hope all of us will find the time and energy required to ensure Genesee County maintains the highest level of professionalism within our legal community. Whether by mentoring, being mentored, or participating in other programs and events, we can only do this by *being involved*.

For more information on the GCBA Mentorship Program visit http://www.gcbalaw.org/page.cfm?pageid=80

Social Security Disability Benefits and Child Support

Teresa A. Knight

By Teresa A. Knight

It is not uncommon these days for those who practice family law to encounter clients who have applied for Social Security Disability Income (SSDI) benefits and also have child support obligations. The initial application for these benefits can take time, and there is even more delay if an appeal becomes necessary. Once SSDI is approved, the payee parent can usually expect a lump sum retroactive payment plus continued monthly payments based on the payer's earning history (usually 50% of the payer's benefit per child, but with limitations on the maximum a family can receive).

Meanwhile, the arrearage clock is probably ticking

against your client as the payer parent who is unable to work due to disability and is barely surviving without any true means of income.

A good place to start is the 2013 Michigan Child Support Formula Manual (MCSF). Section 3.07(A) provides a credit against the payer parent's child support obligation for any SSDI benefit paid to the child. If the benefit amount exceeds the support amount, no additional support should be ordered; if less, then the difference becomes the ordered obligation.

2013 MCSF 3.07(B) lists four cases that discuss how Social Security benefits affect child support obligations, as follows:

- *Frens v Frens*, 191 Mich App 654 (1990). SSDI benefits are credited toward any child support arrearage as long as the arrearage accumulated *after* the disability, and payer is not entitled to any credit for an arrearage that accumulated *before* the disability, even if the monthly benefit exceeds the child support obligation.

- *Jenerou v Jenerou*, 200 Mich App 265 (1993). Payer's child support arrearage, all accumulated *after* the disability, exceeded the lump sum payment to payer's daughter (who had reached the age of majority). Payer was denied any credit since the payment had been made to the daughter, and not to the daughter's mother. The payer's downfall here appears to be that he had previously filed, and then abandoned, his motion to modify child support in light of MCL 552.603 prohibiting retroactive modification.

- *Paulson v Paulson*, 254 Mich App 568 (2002). This is an unique fact pattern that is not contemplated in the MCSF where both parents ultimately qualified for disability benefits. The custodial parent was first to receive her benefits, and the child received monthly benefits based on her earnings record. The trial court creatively calculated child support per the MCSF as if the noncustodial payer parent had qualified first for his benefits and as if the child's benefits derived from his disability, which resulted in no child support obligation. (Although this case did not appear to be an arrearage issue, I thought it was worth mentioning.)

- *Fisher v Fisher*, 276 Mich App 424 (2007). FOC withheld $510.00 monthly from payers SSDI. Payee began to receive SSDI on the child's behalf, which exceeded the child support obligation. The trial court determined that the funds previously withheld by the FOC were to be applied to satisfy any *pre-disability* arrearage, and any excess that payee received from SSDI for the child beyond the monthly child support calculation was to be applied to satisfy any *post-disability* arrearage. This still resulted in the overpayment of nearly $24,000.00 by payer. Because there was no pending motion to modify child support, however, MCL 552.603 precluded payer from receiving any refund of the overpayment.

It is also worth mentioning that Supplemental Security Income (SSI), a means tested source of income, cannot be counted as income (MCSF 2.04(A)) and is inalienable per 42 USC 1383 (d) (1) and MCL 400.63. Further, the court cannot impute income where the payer's sole source of income is means tested, and the court may deviate from the formula only if it is determined that application of the formula would be unjust or inappropriate (*Ghidotti v Barber*, 459 Mich 189 (1998)).

To fend off a potential show-cause motion against your client pending approval of Social Security benefits, file a motion to modify child (or even spousal) support when your client files for benefits whether s/he is in arrearage or not. MCL 552.603 prohibits retroactive modification. Filing that motion immediately may negate the effect of MCL 552.603 and provide early notice to the payee parent of the possibility of modification of support. You will probably have to convince the Court to defer its ruling, possibly for more than a year, pending approval of benefits. It will serve your client well to have copies of the above cases at hand to strengthen your client's position.

Analysis of What Hath Ferguson Wrought

From an interview prepared for WNEM-TV

By Glenn M. Simmington

Glenn M. Simmington

Regarding the Ferguson, Missouri, grand jury decision not to indict Darren Wilson for the fatal shooting of Michael Brown, "level heads" will consider first, that the jurors had no control over what evidence was presented to them or how it was presented. Neither did they choose what legal standard they were to use in deciding whether the killing was "justified." According to grand jury transcripts, they were instructed with a "mix" of old, *overruled law*, and selected language from the current Missouri statute on use of deadly force by police officers. Thus, it is hard to conclude that the grand jury, as a body, "got it wrong."

Second, though the *method* by which the county prosecutor chose to decide the issue – *through the use of a grand jury that he entirely controlled* – seems suspect to most legal observers, he also had complete authority in the exercise of his prosecutorial discretion to simply investigate and then rule that Mr. Brown's killing was a justifiable homicide.

By utilizing a grand jury instead, the prosecutor seems to have achieved the result he was seeking – no indictment – without tying his electoral future to what would certainly be a controversial decision. The impact of that approach after almost four, mostly patient, months in the making has left countless "persons of color" with an even deeper perception that "the system," overall, simply has neither been designed for, nor operates in favor of, equal justice for them.

We are seeing the results.

Editor's Note: *On January 5, 2015, the ACLU filed suit in Federal Court on behalf of a Ferguson grand juror who claims the gag order imposed on grand jurors prevents the presentation of important information about the process to Missouri legislators considering changes to the grand jury law.*

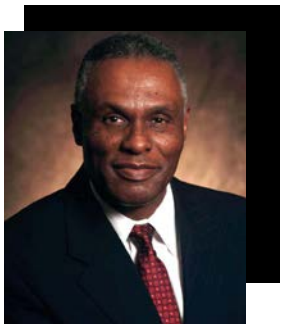
Thank You

Commencing "year two" of his independent, private law practice, located 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.

The Risk of Undervaluing Mediation

By Abner J. Tansil



Abner J. Tansil

A 2008 study of 2,054 contested civil litigation cases in which the plaintiffs and defendants conducted settlement negotiations, but rejected the other party's settlement proposal and proceeded to arbitration or trial, strongly suggests that settlement is often better than trial. The study was authored by Randall Kiser, *et al*, and appeared in Cornell Law School's *Journal of Empirical Legal Studies*. It found that Plaintiffs, on average, would have done better by $43,000 per case had they taken the settlement offer whereas, defendants would have saved, on average, $1.1 million. Although defendants made the wrong decision by proceeding to trial far less (24%), compared to plaintiffs (61%), getting it wrong was far more costly to defendants.

Obviously, each case is different and needs to be analyzed as such; therefore, many factors may have impacted the decision by these parties to go to trial. However, the study does draw attention to the potential cost implications of a party's miscalculation or mistake in this respect and the importance for their lawyers to adequately explain the odds to them before making this decision.

Mediation is one of the most effective risk assessment tools available to litigants. It gives them an opportunity to look at the strengths and weakness of the other party's case, as well as their own, before deciding whether to go to trial. It is also one of the most effective means of settling cases before trial for the following reasons:

Flexibility: The parties may jointly select their mediator and decide when and where the mediation will be conducted. They may also creatively tailor their settlement to meet their primary interests which may include non-monetary relief not available in court.

Cost Reduction: The mediator can help the parties accelerate the litigation process by the early identification and narrowing of discovery to the critical issues and the parties' respective interests needed for settlement.

Mediation is one of the most effective risk assessment tools available to litigants.

Confidentiality: Under MCR 2.412(C), mediation communications are confidential and are not subject to discovery, are not admissible in a proceeding, and may not be disclosed to anyone other than the mediation participants except as provided in MCR2.412 (D). This allows the mediator to create an atmosphere whereby the parties can provide information for limited settlement purposes without fear that the information will be used against them later.

No Obligation to Settle: Parties ordered into mediation by the court are not under an obligation to settle. Under no circumstances are they forced to accept a proposal with which they disagree. The only requirement is that the parties discuss the case with each other.

While certain cases may not be appropriate for mediation or it is unnecessary because the parties or their attorneys are able to resolve the case on their own, the vast majority of civil cases can benefit from a properly timed and conducted mediation. Indeed, in most instances mediation provides attorneys and their clients a "nothing to lose and everything to gain" opportunity to settle their cases without the necessity of lengthy and expensive discovery and pretrial proceedings.

***Abner Tansil** is the Chairperson of the GCBA's ADR Committee. His legal practice is Labor, Employment and Human Resources Law.*

In Memoriam

2014

James C. Dillard

Hon. Paul V. Gadola

Robert P. Keil

Ronald H. Ring

Jack Straley

GENESEE COUNTY BAR ASSOCIATION

New Year Computer Resolutions

By LindaLee Massoud

LindaLee Massoud

"Better safe than sorry" is a tip that applies especially well to computers. We might *think* our procedures are safe, and they might have been last year, but we should be paranoid about some issues. With that in mind:

1. Have your computer person *demonstrate* to you a restore process from your back up.
2. Create a back up to store *off-site*, even if you are using cloud back up. Rotate it regularly.
3. Speaking of cloud back-up, cloud sites *are* being hacked. Does your software program *encrypt* as well? Attorneys keep significant amounts of sensitive data. Paranoia (and overkill) is a wise precaution.
4. Change your passwords. The new password hacking programs are able to hack "common" pass-phrase passwords. (Example: MtFbwy = May the Force be with you.) Passwords should include both upper and lower case letters, numbers, and special characters, with a length of more than 8 characters. And don't write them on a slip of paper taped to the monitor. <wink>
5. Check the privacy settings on social media sites (because companies keep changing them to decrease privacy).

It is always fun to learn something new. Here are a couple of useful quick tips in any version of Windows. (Most of these tips use a two-key sequence with the Control key or the Windows key.)

1. **Quickly open task bar programs.** In the bottom left of your screen are programs you open frequently. Instead of clicking them, number them mentally from 1-9 (after the start button) and use the Windows-# keystroke to open them.
2. **PrintScreen** (PrtScrn) takes a snapshot of the screen (to *view* as a graphic). Alt-PrintScreen captures only the *current* window (if multiple windows are open or if there are two monitors). On a laptop, blue writing might indicate using Fn-PrtScrn (The function key is usually in the bottom/front left of the keyboard.) After pressing the key, open a program in which to paste the graphic, such as Word, PowerPoint or Paint (if saving it as a stand-alone graphic file). Both this and the next tip can have many productive uses.
3. **Snipping tool** is another very handy feature that takes a screen capture of a rectangular *part* of the screen only. To find and open the application, use the search feature to type "snip," and it will show up. Click-drag a rectangular portion of the screen. Paste it directly into another document or save it as a stand-alone graphic file.
4. **Enlarge/zoom** the screen in a *browser* (but not Word) using Ctrl-+ (plus sign) (multiple zooms are possible) and Ctrl- - (minus sign) to zoom back out.
5. **Two windows on the same screen** – if working on a larger monitor, set up side-by-side windows. Use Win-(left arrow) to put one in the left half, and then Win-(right arrow) to move the other one to the right half. Use the maximize button to restore either to full screen size, as usual.

To find more tips, Google "Windows keyboard shortcuts."

Happy New Computer Year!

NOTE: After writing the article, I read a helpful article in *Reader's Digest* (Jan/Feb issue, p. 52) about creating helpful passwords. To summarize, create a password that will help you acheive your life goals. Change as you accomplish one goal and set another one. Sample passwords include: Forgive@h3r, Quit@smoking4ever, EatSnack@3hrs, Kill2birdz@1stone!!!

The Sixth Circuit and Same-Sex Marriage

By Shelley R. Spivack

Shelley R. Spivack

In a decision that surprised both supporters and opponents of same-sex marriage, the Sixth Circuit Court of Appeals on November 6, 2014 upheld Michigan's 2004 constitutional amendment defining marriage as a "union of one man and one woman." *DeBoer v Snyder,* et al _____ F3d_____ (6th Cir. Nov. 6 2014). The 2-1 ruling reversed the lower court in *DeBoer*, 973 F. Supp.2d 757, (E. D. Mich 2014) as well as the decisions of the U.S. District Courts in Ohio, Kentucky, and Tennessee.

The Sixth Circuit currently stands alone amongst the Federal Appeals Courts that have considered the issue. The 4th, 7th, 9th, and 10th Circuits all have struck down legislative and constitutional bans on same-sex marriage, as have state supreme courts in at least five states. Additionally, U.S. District Courts in Mississippi, Arkansas, Missouri, Texas, and Florida have recently invalidated same-sex marriage bans, leaving Louisiana as the only Federal District Court to uphold such a ban.

In rejecting the District Courts, Circuit Judge Sutton, writing for the majority, held that neither Due Process nor Equal Protection "require States to expand the definition of marriage to include same-sex couples." (Slip Op. at 13). Using a "rational basis review" (Slip Op. at 19) the Court repeatedly stated that voters, not judges, should determine the meaning of the word "marriage."

Amongst the lower court cases reviewed by the 6th Circuit, *DeBoer* was the only case in which a full evidentiary record was developed. After an eight-day bench trial consisting of testimony from sociologists, law professors, a psychologist, a historian, a demographer, and a county clerk, Judge Freidman concluded that the state had failed to show that the marriage amendment was rationally related to any legitimate state interest.

In reversing the District Courts, Circuit Judge Sutton crafted a rationale for the ban that had not been put forward by any of the states at trial. Using what has been termed the "irresponsible procreation" theory (Slip Op. at 44) he found a rational relationship existed between same-sex marriage bans and the state's interest in regulating sex, "most especially the intended and unintended effects of male-female intercourse." (Slip Op. at 19). According to this theory states have a "need to regulate male-female relationships and the unique procreative possibilities of them" (Slip Op. at 19) in order to "create and maintain stable relationships within which children may flourish." (Slip Op. at 20). As same-sex couples "do not run the risk of unintended offspring" (Slip Op. at 21), Judge Sutton reasoned that it is not irrational for the state to exclude them from its statutory scheme regulating family relationships and marriage.

Judge Sutton also rejected the notion that same-sex couples have a "fundamental right" to marry. While the U.S. Supreme Court in *Loving v Virginia*, 388 US 1 (1967) overturned state bans on interracial marriage by declaring the freedom to marry a person of one's own choosing to be a fundamental right, Judge Sutton distinguished *Loving* by stating that it only referred to "marriages" in the traditional man and woman sense and did not include same-sex couples: "Loving did not change the definition. That is why the Court said marriage is 'fundamental to our very existence and survival,' 388 U.S. at 12, a reference to the procreative definition of marriage." (Slip Op. at 29). Thus, as same-sex couples do not naturally procreate, Judge Sutton reasoned that these relationships do not fall within the fundamental rights protected by the Constitution.

In a vigorous dissent, Judge Martha Craig Daughtrey rejected not only the majority's conclusions and reasoning, but its repeated call for voters and not judges to determine the meaning of the word marriage. Relying on the findings and rationale of the District Court in *DeBoer* and the other four circuits, Judge Daughtrey was left to "speculate that the majority has purposefully taken the contrary position to create the circuit split regarding the legality of same-sex marriage that could prompt a grant of *certiorari* by the Supreme Court and an end to the uncertainty of status and the interstate chaos that the current discrepancy in state laws threaten." (Slip Op. at 55).

On January 16, 2015 the Supreme Court granted *certiorari* on four 6th Circuit cases. They will consider the power of states to ban same-sex marriages in an April hearing. They will also consider whether states must recognize same-sex marriages performed in another state. A decision is expected by June 30, 2015.

Who's New *on the Bench?*

By Roberta J.F. Wray

The life-long ambitions of two GCBA members became reality on January second when they officially took the bench in 67th District Court. They also became the first women judges in the 67th District Court since the retirement of The Honorable Arthalu Lancaster in 2002.

Judges Vikki Bayeh-Haley and Jennifer J. Manley have a lot more in common than their gender. Their aspirations began when they were both youngsters, and they both grew up in Genesee County.

Hon. Vikki Bayeh Haley

Judge Bayeh-Haley, who sits in Mt. Morris, was graduated from Powers High School and then University of Michigan-Flint where she earned a degree in Psychology in 1986 and another in English in 1992. Between those degrees, she also attended Wayne State University Law School, earning her Juris Doctor in 1990.

As a child, her mother, the late Diane Bayeh, took her to observe activities in a courtroom. She came away impressed and with a life goal: to be "a judge who applies the law equally and fairly . . . and is always . . . cognizant of how important each case is to the people who appear before her."[1]

Judge Manley, who sits in Davison, was graduated from Goodrich High School in 1992. She attended Michigan State University and transferred to William Tyndale College in Farmington Hills where she earned a degree in communications, graduating in 1996. While attending Thomas M. Cooley Law School, she interned in the prosecutor's office in Jackson County, and after graduating Magna Cum Laude in 1998, she applied for her dream job in the Genesee County prosecutor's office.

Hon. Jennifer J. Manley

When she was in high school, Judge Manley participated in a GCBA Law Day program as one of the mock trial attorneys. "From then on . . . there was no question I wanted to be an attorney. And, I actually wanted to be a prosecutor."[2]

Like Judge Bayeh-Haley, Judge Manley views the responsibilities of judge as following the law and treating the people fairly. She says, "These are real people in the courtroom, not just case files. A good judge acts accordingly."[3]

They have both been assistant prosecuting attorneys for Genesee County and in private practice. They both have extensive experience in service to their communities in various civic capacities beginning at very early ages. They both cite a desire to continue to serve their respective communities as the best judges they can be.

Endnotes

1 *http://legalnews.com/flintgenesee/1398842/*

2 *http://legalnews.com/oakland/1399347*

3 *http://thevoterguide.mlive.com/race-detail.do?id=13356957*

In the November/December 2014 issue of Bar Beat *we congratulated all of the elected and re elected judges in Genesee County. We unintentionally omitted to congratulate Hon. David J. Goggins on his re-election. Judge Goggins, congratulations!*

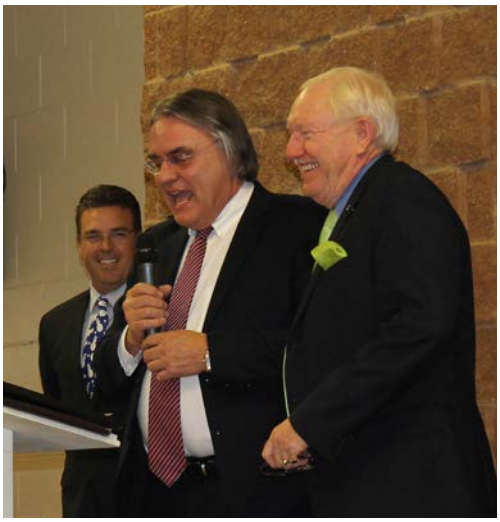
GCBA Around Town

Santa's GCBA helpers served 1250 dinners and gave Christmas presents to 485 youngsters at 24th Annual Community Holiday Dinner at Masonic Temple on December 18, 2014

At December meeting, GCBA senior attorneys invite Santa to join the "club."

Hon. Larry Stecco's retirement party (L-R) Susan DeCourval, Judge Stecco, and Dena Altheide

Hon. Larry Stecco's retirement party Judge Stecco and Judge Robert Ransom



Hon. John Conover retirement party Judge Mark McCabe and Judge Conover

Hon. Larry Stecco's retirement party. (L-R) Dennis Lazar, Tom Pabst, Judge Stecco, Chris Ebbott, and Timothy Bograkos

Hon. John Conover retirement party Judge-elect Jennifer Manley & Judge Conover

GCBA November 2014 New Admittee Ceremony
(L-R) Rochelle Ralph, Hon. David J. Newblatt, , Jared Welehodsky, and Nicholas S. Laue

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