

November/December 2006

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# Honorable John Christensen

by Francine Cullari

How does a judge with approximately 1,400 pending cases cope with the volume? If it is John Christensen, administrative law judge at the Social Security Administration (SSA) in Flint, he schedules 50 or more hearings a month and hopes for help from visiting judges. There are a total of 8,000 cases pending, or an average of 1,400 cases for each of six judges, the full complement of judges for the Flint office. The court covers 15 counties in the eastern half of the lower Michigan peninsula. Last summer, visiting judges helped to decrease the backlog.

The selection of judges follows Federal Office of Personnel Management (OPM) rules. A judge must have been admitted to practice for seven years, have experience in administrative procedures, rules of evidence, and trial procedure, written and oral communications skills, analytic ability, decision-making ability, and judicial temperament.

OPM reviews the above qualifications and 10 cases litigated by the applicant. If the review is favorable, the OPM contacts the judges and opposing counsel for evaluations. If they are positive, the applicant is given a written examination. If s/he passes, OPM interviews the applicant, assigns a numeric score, and places the candidate on an eligibility list.

When there is an opening, the chief judge or an agency representative interviews the top three candidates. The interviewer makes a recommendation to the director of the agency. The process from the initial application to appointment usually takes a couple of years.

There are 1,400 federal administrative law judges in the country, with 1,200 assigned to the Office of Hearings and Appeals (OHA) of the Social Security Administration. Ninety percent of the OHA hearings are appeals from adverse determinations of disability issues by State Disability Determination service staff. The remaining 10 percent relate

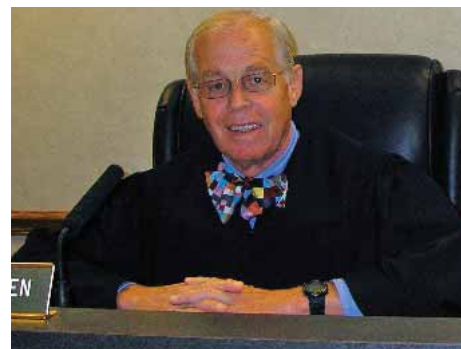
to overpayments, dependency, paternity, and evaluation of income and assets.

After obtaining a degree in English from Wayne State University and a law degree from Detroit College of Law, Judge Christensen began his law practice as an assistant U.S. attorney in the 1970s, followed by private practice in personal injury law as a sole practitioner, then with Lopatin Miller. He expanded his fields of practice at Lopatin to medical malpractice, professional licensing, employment discrimination, and construction liability.

Judge Christensen always had a desire to become a judge, but he was a Democrat during Engler's administration, which led him to apply for the federal bench. He received support from the Michigan Trial Lawyers, a number of judges, and George Bushnell, the past president of both the SBM and the ABA, but did not make the final cut. At the same time, John hedged his bets, also applying for a federal administrative law judge (ALJ) position. He now appreciates his fate of a lifetime appointment, where he traded prestige and "fishbowl" stress on the federal district bench for a position in which he has a serious impact on the lives of disabled persons.

As an ALJ, Judge Christensen directs his own docket and schedule. He is assisted by a lawyer, a paralegal, and a secretary. The cases are not typically complex and not subject to pressure or scrutiny, so that he is able to make independent decisions. The ALJ decisions are subject to appeal in the federal district courts, and many are appealed, but rarely beyond the district court.

Judge Christensen encourages lawyers to consider a practice in social security law. He believes it is less stressful than a typical law practice, with well-defined substantive and procedural law. Only 10 percent of claimants appear in pro per. There are no juries, the hearing is not open to the public, and no



special license is required to practice. Attorneys are paid under a contingent fee arrangement of 25 percent of the accrued benefit or \$5,300, whichever is less, unless a special petition is filed and granted. The average favorable decision is in the neighborhood of \$200,000 over the lifetime of an applicant.

The judge provides several tips for administrative law practitioners:

- Be prepared by knowing exactly what is in your file.
- Be clear on whether the client has an impairment (such as a ruptured disk) or a limitation (bending, inability to focus).
- Develop the distinction through specific testimony to show a disability.
- Do not depose expert testimony—medical records are sufficient unless the judge decides he needs an expert.
- In an SSI case, develop clearly the inability of the client to work.
- Review the vocational analysis prepared by the SSA-provided expert before the hearing—the experts are directed to be independent. Their role is to advise the court if there is work available in the state of Michigan for a person of the same age, education, experience, and disability as the applicant.

Nationally, approximately 70 percent of claimants prevail. No statistics are kept by individual judges, so judges are not influenced by the proportion of their cases for or against claimants, and so there is no attempted influence on the judge.

Judge Christensen has been married for 38 years to Joyce, a retired computer professional. He has a daughter in Ohio and a son in Detroit.

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|----|--|--|
| 2  | Honorable John Christensen   | by Francine Cullari                      |
| 4  | Two to Remember  | by Craig S. Sippell                      |
| 5  | 'Tis the Season  | by Ramona L. Sain                        |
| 6  | Constitutional Right to Counsel at Risk  | by Glenn Simmington                      |
| 7  | Santa Lives  | by Francine Cullari                      |
| 10 | Proposed Jury Reforms  | by Lori A. Buiteweg                      |
| 11 | Emotional Intelligence   | by Barbara Wolf and<br>Susan Schneberger |
| 12 | Michigan Lawyers and Judges<br>Assistance Program                                  |  |
| 13 | Individual Agents of Employer Can Now Be<br>Sued for Harassment and Discrimination | by Michael Edmunds                       |

## On the Cover

The holidays at Windfield Farm, the 1898 J. Bush home on 20 acres in Atlas Township. When Lee Steinhoff was in third grade, he rode past the home every day, and often commented, "I will own that house someday." Now Baron von Steinhoff, Lee acquired the property in 1994 and has stunningly refurbished the home to match the original. He relocated and refurbished the 1894 post-and-beam barn on the property, erected a guardhouse with the keystone and stone from the basement of the barn, and moved a tenant house from an off-site location onto the property.

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Flint Patent Services 15

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Appraisals 15

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

## Two to Remember

by Kraig S. Sippell

We are off and running in the fiscal year of 2006! By the time you read this, the holiday season will be fast approaching. Too fast!! As you are aware, the primary focus of the remaining months of 2006 and those to follow will be the ongoing strategic planning efforts. We are moving along slowly, but are confident that these efforts will bear fruit in the near future and in the years to come.

Through the planning process, we have identified many positive attributes of our association, as well as some areas which need additional attention and focus. Two areas needing improvement are what I consider our most important events of the year: the Law Day Luncheon and the Annual Meeting and Election of Officers. Although the extensive efforts of the committees and the programming have remained strong, the attendance and participation of the Bar as a whole has been declining over the past few years. Obviously, we are not providing what our members need or expect in these two endeavors. In an effort to reinvigorate these events, the board, with the assistance of two of our members—Lynne Taft and Susan Philpott Preketes—will spearhead significant programmatic changes.

The first change is the separation of the business and social aspects of the Annual Meeting and Election of Officers. Thus was born the idea of a Barrister Ball. It is the vision of the board that this would be "the annual event" in the legal community. Ideally, it would consist of a midwinter black-tie optional event. It would include the presentation of our most prestigious awards to our honored members, including the Herbert A. Milliken, Jr., Civility of the Year Award; Distinguished Case Evaluator of the Year Award; Legal Services of Eastern Michigan's Pro Bono Attorney of the Year Award; and the Centennial Inn's Jerome

F. O'Rourke Advocacy Award. The focus of the event would not be business per se, but the business of honoring those attorneys for whom the awards are named—our colleagues who have brought distinction to the Bar. In addition, the ball would be a social gathering of the entire legal community, consisting of cocktails, formal dining, dancing, and socializing. It would be an event in which we could take pride—where we could look our best, feel our best, and be our best. The business aspect of the Annual Meeting, which is primarily the election of officers and board members, would occur at the May monthly membership meeting. Susan Philpott Preketes has graciously agreed to take on the Barrister Ball project. Anyone who wishes to be a part of this immense undertaking is welcome to contact Susan directly.

The second significant event, equally important, is Law Day. Before I discuss the recommended changes, I would first commend the efforts of recent Law Day Committee chairpersons for the high quality programming these past



Kraig S. Sippell

few years. As a former Law Day Committee chair, I know how much time and energy is necessary to ensure a successful program.

However, with declining participation due to the competing interests of students, teachers, and our members, changes are in order. It is time to reexamine our efforts with this very important function and refocus our energy on the rule of law and the students. Proposed programming changes involve the board, attorneys, and the courts. First, we seek to narrow Mock Trial student involvement to ONE day, with court starting in the morning and with the Law Day Luncheon to follow immediately. This will maximize the involvement of the students, parents, teachers, attorneys, judges, and the entire legal community at the luncheon itself. In addition, I believe we should recognize

*Continued on page 14*

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# 'Tis the Season

by Ramona L. Sain

By the time this issue of *Bar Beat* goes to press, the holiday season will be just around the corner. In previous years, the association has assisted the Young Lawyers with a "Horn of Plenty" food and clothing drive. This year, we are collaborating with two local not-for-profit organizations, King's Closet and Ellen's Closet, who respectively collect and distribute professional clothing to men and women entering the work force. Apparel must be business-like, in relatively good shape, and delivered to the association clean and pressed. All donations are tax deductible. Food will also be collected and distributed to a local charitable organization.

Speaking of food, in August the association mailed four care packages from money donated by our members to Lt. Col. Robert Swartwood, deployed to Iraq this past summer. Imagine my surprise when we received a recent telephone call from Bob, who expressed his appreciation for the goodies and in particular the card distributed and signed by our members who attended the May membership meeting. He said that while the conditions are difficult, he is managing exceptionally well and is very positive. When I asked for suggestions on how to allocate the remaining money collected, he commented that his basic needs are being met and suggested leftover funds go to help clothe Iraqi children orphaned by the war. In typical Bob-like fashion, he was thinking about the needs of others, and his suggestion dovetails nicely with our own local efforts to help the needy through the Holiday Dinner. Bob's workday often runs 14-16 hours a day, but he promised that he would write an article for *Bar Beat* sometime in the near future when he has a little extra time. I assured Bob that he is in our thoughts and prayers and begged him to take very good care of himself.

Committees are up and running, and the association has a number of legal seminars in the works, including the mediation series in collaboration with the local chapter of the Centennial Inn of Court. If you have a suggestion on a specific topic, please refer to the attached list of committee chairs and give one of them a quick telephone call. They would be pleased to consider your suggestions and ideas.

Last, the pictorial directory is in the proofing stage in order to be distributed at the beginning of the year. In order to ensure that the listings are as accurate as possible, we are in



Ramona L. Sain

regular contact with the printer updating information for those members who have recently changed locations. One way you could help us ensure accuracy is to simply take a quick look at the mailing address on the front of this recent issue of *Bar Beat*. If there is an error in your name, firm, or address, please give us a telephone call. Thank you, and I look forward to seeing you at the Holiday Dinner.

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# Constitutional Right to Counsel at Risk

by Glenn Simmington

The Sixth Amendment guarantees (among other things) that persons accused of criminal wrongdoing have the right to be represented by an attorney. The "right to counsel" was specifically designed by our constitutional authors to ensure that individuals will not be unfairly overwhelmed by the awesome power of the government. Because of its prime importance to individual liberty, however, many are alarmed by recent efforts of the federal government to scale back the protections of the Sixth Amendment, particularly in the context of so-called "white collar crime."

Traditionally, business concerns, including professional corporations, that become the subject of fraud investigations, (e.g., medicaid/medicare "fraud and abuse"), have provided legal counsel to employees whom the government wishes to question or interrogate. Such a policy makes good sense, since wrongdoing by an employee can potentially be imputed to the employer, and since the employer usually has available to him or her superior financial resources with which to hire counsel. The federal government, however, has recently undertaken to essentially coerce employers to end the practice of affording legal representation to employees, leaving employees who lack the means to hire their own counsel *without* counsel.

U.S. Assistant Attorneys General have done this by offering to spare businesses from being criminally indicted if they "cooperate" with the investigation, that is, by refusing to provide employees with either legal counsel, or with the funds to obtain legal counsel. This policy is set forth in a 2003 Department of Justice (DOJ) internal memorandum that has become known as the "Thompson Memo."

Both federal and state courts, however, including the United States Supreme Court, have repeatedly held that

the state's interest in seeing that justice is done is paramount, "trumping" its interest in obtaining convictions. The courts have also frequently made the point that the right of an accused person to obtain high quality legal counsel actually protects the *government's* interest in securing convictions that are both procedurally and substantively fair—the veritable hallmark of a free society. Rather than protecting that interest, however, the DOJ policy memorialized in the "Thompson Memo" effectively serves to undercut it.

Consider that the great majority of businesses, when facing the prospect of a federal indictment, are often looking at a virtual death sentence. The potential financial penalties in fraud cases—fines and restitution—are crippling, and a government promise to forego prosecution of the employer, even if made contingent upon the employer's agreement to deprive employees of effective legal representation, becomes irresistible.

At least one successful challenge to the practice, however, has recently been reported. In late June, 2006, in *U.S. v. Stein, et al.*, a New York federal district judge found that, to the extent that the DOJ's policy authorizes prosecutors to threaten indictment of a corporation,

depending upon whether the corporation has provided legal assistance or fees to employees thought "culpable" by the government, (i.e., to have engaged in fraudulent practices), both the policy and the practice are unconstitutional. Each violates, the court said, the right to counsel guaranteed by the Sixth Amendment.

Although the DOJ can be expected *elsewhere* to continue its policy of pressuring corporations to withhold legal representation from employees, the *Stein* case, should it be appealed, and should the appellees prevail, may very well eliminate the coercive effects of the "Thompson Memo." Such a result would represent a welcome reaffirmation of bedrock constitutional principle, as embodied in the Sixth Amendment right to counsel.

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# Santa Lives

by Francine Cullari

Ho, ho, ho! Readers will hear the familiar sound often this month and perhaps ignore it. After all, how many *Bar Beat* readers believe in Santa Claus, in spite of what Francis P. Church of *The New York Sun* editorialized to eight-year-old Virginia O'Hanlon in 1897?

"Santa Claus . . . exists as certainly as love and generosity and devotion exist, and you know that they abound and give to your life its highest beauty and joy. Alas! how dreary would be the world if there were no Santa Claus! . . . No Santa Claus! Thank God he lives and lives forever. A thousand years from now, Virginia, nay, 10 times 10,000 years from now, he will continue to make glad the heart of childhood."

The answer is that at least 650 readers and over 1,000 residents of Genesee County do believe in Santa Claus. They believe because they see him at work physically performing Santa tasks. From September until mid-December each year, he directs his "elves" to purchase gifts for adults and children; recruits an attorney to portray Santa; solicits thousands of dollars in donations; and gathers attorney and judge elves to be decorators and servers, drivers and greeters, cleaners and entertainers.

In other words, he organizes the Genesee County Bar Association (GCBA) Annual Holiday Dinner for the less fortunate, now in its 15th year. The dinner has grown from serving 400 adults and children to 900. The event has entertainment, excellent food provided by the Battiste family at the Masonic Temple in Flint, and gifts given to children by a substitute Santa. Children receive anything from sports equipment to dolls to bicycles.

The real GCBA Santa operates incognito all year, under the attorney

name of Brian M. Barkey. But rest assured, every lawyer, judge, and attendee in town knows it is only his incredible humility that prevents him from using his genuine birth name—Santa.

Ramona Sain, executive director of the Genesee County Bar Association, finds that "'Brian' is the prime motivator behind the holiday dinner. He tracks every activity, conducts regular meetings of the volunteer committee, and personally solicits donations and volunteers. He is the backbone of the effort, bar none."

Perhaps "Brian" did not think being Santa was enough, coming from a family with an attorney father. In a family where all the children have post-graduate degrees and one sister is an attorney, perhaps even Santa felt some pressure to excel in a professional field. With a bachelor's from Western Michigan University, he attended Wayne State University Law School, graduating *cum laude*. At Wayne, he was a member of the Law Review and Law Review Board.

In his attorney persona, locals watch him acting Santa-like as well. He practices just as Santa would, primarily handling Social Security disability cases. His eyes twinkle when a client who has been denied benefits, has had a disability ignored by the system, and has had financial hardship, prevails at a Social Security hearing. No doubt his clients believe he is Santa, and they refer many others to "Brian."

Part of Santa's disguise as an attorney is his lack of the jolly waistline. He is an avid jogger with nary an ounce of extra poundage. But, of course, we know the magic of Santa, and he can shrink that girth at will. One reason "Brian" adopts a trim appearance is that he has been the training coordinator since 1999 for the annual Crim Festival of Races in Flint, which serves as



Santa, aka Brian Barkey

a vehicle of support for Special Olympics. The training program started with a little over 100 people and currently has over 950 trainees, thanks to "Brian." He has changed people's lives with the program. He was a member of the Crim Board of Directors from 1989 until 2004 and held the presidency from 1994 to 1999. His love of running prompted his article, "The Myth of Runner's High," in *Michigan Runner* (March/April 1990).

In addition to the poor and the disabled, "Brian" helps the sick. He served as a member of the Genesee Memorial Hospital Board of Trustees for 13 years and as its chairperson from 1988 to 1991. "Brian" has also served the public-at-large in several ways. He chaired the Flushing Township Zoning Board of Appeals for five years, acted as a Flushing Township planning commissioner for seven years, counseled the Flint City Attorney's Office, represented the Genesee County Parks Commission from 1994–2001, and has been its general counsel since 2001. The City of Flushing contracted with him as its attorney for five years, and Thetford Township similarly since 2003.

As an attorney, "Brian" certainly has the respect of his colleagues and judges, but it is his labors for the poor and the disabled that garner admiration. The Genesee County Bar Association

regards him as the "Chairman for Life" of the Annual Holiday Dinner Committee. The members elected him GCBA vice president in 1992 and president in 1993, and honored him with the Distinguished Mediator Award in 2002.

Believers think Santa monitors who is naughty or nice, but he does more than that. He encourages folks to be nice by mediating and arbitrating disputes. "Brian" has mediated for the Genesee County Circuit Court on its general civil and defense panels, the district court panel, and the federal district court panel from 1988 until present. He has been an arbitrator for the American Arbitration Association for 20 years.

"Brian" carries a list of his favorite quotes in his planner. One of them, from Benjamin Franklin, states:

"He had some reason for loving to dispute, being eloquent ...and, therefore, generally successful in argumentative conversation...But I think the practice was not wise, for in the course of my observation, these disputing, contradicting and conflicting people are generally unfortunate in their affairs. They get victory sometimes, but they never get goodwill, which would be of more use to them."

Santa extends his largesse to other attorneys in several ways. He is the secretary/treasurer of the American Inns of Court in Genesee County, which he joined in 1998. The Inns are mentoring vehicles for young lawyers, particularly in ethics and professionalism.

When an attorney in his office passed away a few years ago, "Brian" started the receivership of the attorney's practice and facilitated wrapping up the practice for the attorney's family. Since then, unfortunately, he has had to perform the service for the families and clients of four other attorneys.

"Brian" is called upon many times by other lawyers when they have an ethics question or problems arise in their practice. On many occasions,



Santa (third from right) and his helpers

he has cancelled all appointments to immediately counsel an attorney and walk him or her through a problem. He helps all attorneys—especially new attorneys—in their practices. Several times, he has provided the forms and the information to handle Social Security cases, even though they are the primary source of his livelihood (that and the treats from his elves).

He shares his knowledge by writing articles for colleagues, and edited the local *Bar Beat* magazine for a few years. His topics cover a wide range, including real property law, the Federal Rules of Evidence, joint and mutual wills, arbitration, constructive failure, attorney fees, and other topics. He writes to promote goodwill with such articles as "Being Good to Yourself First," *Bar Beat* (March 1990); "In Search of a Kinder, Gentler Lawsuit," *Bar Beat* (September 1989); and "Civility and Defense Practice," 69 *Michigan Bar Journal* 912 (1990).

One of the true indications that "Brian" is indeed Santa is that, given the choice of taking credit for something or giving credit, he will always give credit. He never boasts about himself. He will speak of everyone else's accomplishments, but not a word of his own. If he organizes a program or completes a

goal, he literally searches for a person to credit.

"Brian's" secretary of 13 years, Shelle Robinson, sums Santa up succinctly: "I am a better person for knowing 'Brian.' He is a truly great man. He has no ill will toward anyone. He always finds the better in others. He truly cares for people. 'Brian' puts many, many hours into volunteer programs. I know this because he keeps exact records of his time, including volunteer time, and I see the results at the end of the month. If he did not love these programs, he would not be able to justify the time and income that he is giving up."

"Brian" is married to Dorie. He is father to Ross, Kelly, Jim, and Erin; stepfather to John and Rebecca; and grandfather to Jordan, Madison, Keegan, Brendan, Colin, Alyssa, Tyler, and Paige.

*Francine Cullari practices real estate, estate planning, and business law in Grand Blanc. She is on the State Bar of Michigan Board of Commissioners and is vice chairperson of the Publications and Website Advisory Committee, where she is responsible for the Michigan Bar Journal. She is the editor of Bar Beat.*



Lynnmarie Johnson helps wrap gifts prior to the dinner



Line Captain John Christensen serves food



Dave Hanson busses tables



GCBA members serve dinner



Ann Lossing and Emily Gibbs assist Santa



Karen Folks, director of the Flushing Singers, leads an ensemble of volunteers

# Proposed Jury Reforms

by Lori A. Buiteweg, Immediate Past Chairperson, SBM Representative Assembly

The State Bar of Michigan's Representative Assembly, the final policy-making body of the State Bar, met all day in Ypsilanti, Michigan on September 14, 2006, to debate and vote on numerous jury reforms published by the Michigan Supreme Court on July 13, 2006. The period for comment expired on November 1, 2006, which required the Assembly to adjourn several other major policy issues in order to timely address these overwhelmingly significant proposals.

A panel of lawyers and judges from Michigan and Indiana was on hand to address a multitude of concerns raised by the 150-member body. Indiana has had many of the proposed reforms in place for several years.

Justice Stephen J. Markman opened the debate by introducing the proposals on behalf of the Michigan Supreme Court. He said the proposals are "intended to enhance the quality of the jury's deliberative process and thereby further the truth seeking function of the jury trial. Each is designed to strengthen the ability of the jury to undertake to make informed and intelligent decisions by making evidence more accessible. Each is designed to diminish opportunities for gamesmanship in the trial process and to facilitate the ability of the jury to assess the evidence before it, and each is designed to render somewhat less true Robert Frost's adage that a jury consists of 12 persons chosen to decide who has the better lawyer."

Justice Markman described the present rules as having worked well in enabling the jury to carry out its missions, "and those rules should not be altered lightly or without struggling to anticipate the unanticipated consequences of change." He was appreciative that the Assembly would be addressing the rules. "My court...will take your comments very, very seriously, as I believe



we always do with respect to the Representative Assembly. We appreciate the expertise here, and it is unfathomable to me that your comments on this matter or on any other matter would not be given the most serious consideration by my court."

After much debate, the Assembly recommended:

the adoption of jury reforms allowing jurors to take notes and ask questions;

the rejection of jury reforms allowing judges to comment upon the weight of the evidence, requiring counsel to read summaries of

expert witnesses' *de bene esse* depositions into the record at trial, allowing the judge to craft a procedure for the presentation of expert testimony, and allowing the jury to discuss the case prior to deliberations; and

the adoption, as modified by the Assembly, of jury reforms requiring judges to provide jurors with preliminary and final instructions and lawyers to provide jurors with trial notebooks, and allowing jurors to request a view of a scene in civil and criminal cases.

# *Emotional Intelligence as a Key to Attorney Success*

by Barbara Wolf, PhD and Susan Schneberger, ACSW, MLSW, JD

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Decades ago, the U.S. State Department questioned its diplomat selection process. Diplomats scoring highest on tests were not necessarily the most successful in field assignments. David McClelland, a Harvard professor, proposed that IQ, experience, and personality were not the best way to identify those who would succeed in their chosen careers. Now we understand that the difference lies in the area of emotional intelligence (EI).

Good leaders inspire and move us. Poor leaders de-motivate and anger us. Both move us through emotion. Resonant leaders (Goleman, Boyatzis and McKee, authors of *Primal Leadership*) are those who have developed competencies in emotional intelligence. They create an environment in which others flourish. Years of research have formed a strong and reliable body of knowledge about what contributes to success.

Research in the area of neuroscience has furthered this knowledge by shedding light on the ways in which the emotions and intellect interact. EI competencies are divided into two domains: (1) personal and (2) social. The personal domain involves self-awareness and self-management, while the social domain demonstrates how we manage our relationships. Within these domains exist numerous competencies which successful attorneys master.

To explore the personal domain, imagine a conversation recently overheard. One attorney called a senior partner one evening. She started the conversation by saying they had to take care of something that she had not attended to during the day. She did not ask if it was a good time to talk or even say hello when he answered the phone. She was clearly very anxious about the situation and not able to manage it. The senior partner, already feeling

frustrated with her earlier in the day, became very angry during the conversation and eventually hung up on her. If we analyze this through the focus of EI, we can see that both attorneys were having difficulty with self management and experiencing what is called an "amygdala hijack." Neuroscience tells us that the amygdala, a small structure in the brain, has much to do with strong emotion (often relating to fight or flight). When held in check, it is modulated by the prefrontal cortex, whose job is to allow us to slow down and not say all those things we may be thinking which, if said, could lead to significant distress. For instance, when your partner makes ridiculous suggestions, your amygdala would answer, "well that's the stupidest thing I ever heard," while your prefrontal lobe might respond with, "well that's an interesting thought, let's see where that might take us...."

A much different working relationship is established when we can manage our emotions. Most of the time we are able to be thoughtful and not "fly off the handle." In times of heightened stress, however, it becomes much more difficult.

In order to self manage, the successful attorney must be able to do an accurate self-assessment. Easily said, but not so easily done. This means being able to honestly understand one's strengths and weaknesses. Sometimes this is accomplished with help from a colleague, but law school and practice rarely teach attorneys to look for mentors who can support in this way. Business has often invested in leadership development in order to give executives a way to increase competence in these areas. Perhaps it is time for law firms to pursue this training as well.

Asking for feedback from those around you can help you make an honest assessment of your skills and the

areas in which you may need improvement. This can also be done through a 360-degree evaluation. A 360 seeks anonymous feedback from many of those with whom you work, from supervisors to subordinates to clients to other attorneys and judges. The information is aggregated to give you a picture of how others see you, providing valuable feedback not available by any other method.

Self-management is more than understanding emotions. It also includes other competencies of adaptability, achievement, initiative, and optimism. These are building blocks for the second domain, social competence, which includes competencies of social awareness and relationship management.

Begin to think about your own emotional intelligence. Pay attention in your practice this month. Notice how others respond to you. Ask for feedback about how you managed a meeting or a case. Notice the ways that you further or hinder discussion. Read one of the many good books or articles on the subject. Remember: IQ was sufficient to get you into law school, but EI is essential to maximize the success of your legal practice.

*Barbara Wolf, Ph.D., is director of behavioral medicine education at McLaren Regional Medical Center, director of graduate medical education-psychiatry and associate professor at Michigan State University College of Human Medicine, and senior consultant at Wolf & Associates, a leadership consulting firm.*

*Susan Schneberger, ACSW, MLSW, JD, is an attorney who consults on emotional intelligence, organizational development, and hospital health care issues.*

# Michigan Lawyers and Judges Assistance Program

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Substance abuse is often at the heart of malpractice claims and disciplinary proceedings against lawyers. If not successfully treated, it can lead to professional and personal disasters including disbarment, criminal charges, family breakups, and potentially lethal medical or psychiatric illnesses.<sup>1</sup>

The message should be clear to any attorney—if you are abusing chemicals, there is a good chance you will be disciplined and potentially lose your license. The problem does not reside only in attorneys who have been practicing a while. Young lawyers “in the field must learn to recognize and appropriately address the sources of their stress before it turns to distress, or risk suffering a multitude of physical and mental ailments.”<sup>2</sup>

Information on the number of lawyers who have chemical and other addictions tends to be somewhat anecdotal. However, as the article in the *ABA Journal* noted, “[s]tudies conclude that 15-18 percent of lawyers are problem drinkers or alcoholics,” and “a 1996 survey found that 26 percent of lawyers in Washington State had used cocaine—more than double the figure for the general population.”

The numbers of lawyers facing chemical and other addictions, including gambling, is of great concern to the profession and should be of great concern to the individual attorney. In Michigan, a group of attorneys work together as the Lawyers and Judges Assistance Committee (LJAC) to assist in directing the efforts of the Lawyers and Judges Assistance Program of the State Bar of Michigan (SBM).

## History

Each of the 50 states, as well as all of the Canadian provinces, has varying forms of assistance programs. Michigan's is

one of the oldest, founded in 1979 by a group of recovering alcoholics, all attorneys, with the support of the State Bar of Michigan. Historically, the Michigan program was a reactive approach to lawyers assistance—when calls came in, program personnel assisted and went on to the next call. Michigan's program advertised over the years, most notably in the *Michigan Bar Journal*, with the ad depicting a man or a woman trapped inside a liquor bottle. The message is plain and is the same message that has been responsible for salvaging careers, families and lives. In addition to staff assistance, outside clinical services have been used by the Lawyers and Judges Assistance Program (LJAP).

## Future Growth

LJAP intends to continue the work that began in 1979 and to help in other areas as well. In 1999, after a two-year study conducted by the LJAP Committee, the SBM decided to move towards a broad-brush proactive approach. Life's problems do not have to reach a point where they cause significant impairment either professionally or personally. With a proactive approach, LJAP will be available on the front end when there is a greater likelihood of successful resolution.

Proactive activities include the quarterly newsletter, *Turning Point*, which publishes information applicable to almost everyone. A new web page currently in design will be refined regularly and will be accessible through the SBM home page. Timely topics for attorneys and a complete rundown of the LJAP services will be online. Since 1999, an attorney-monitoring program has been used by the Attorney Grievance Commission, Attorney Discipline Board, SBM Character and Fitness Committee, employers, and the judiciary. Through a structured intervention, monitors work with the entities to

provide a planned approach of recovery for the impaired attorney caught up in the mire of chemical dependence and the consequent fallout. The attorney is advised by the entity to resolve this chemical dependence problem through the structured process or face other ramifications.

## Study of Recovery

A recent study by the Oregon Attorney Assistance Program (OAAP) demonstrated the truth of a belief long held by insurers, state bars, and insurance programs: that getting lawyers into recovery saves lives and dollars. The study involved 55 attorneys in recovery from active alcoholism. The subjects were in private practice for five years prior to their sobriety date and five years after that date.

During the five years before sobriety,<sup>3</sup> the lawyers had 83 malpractice claims filed against them, whereas the number dropped dramatically to 21 claims in the five years after sobriety. The same lawyers had 76 discipline complaints during the five years before sobriety and 20 discipline complaints during the five years after sobriety ensued.<sup>4</sup>

Lawyers in recovery also have lower malpractice and discipline claim rates than the general population of lawyers. In Oregon, the current annual malpractice claim rate for lawyers in private practice is 13.5 percent, compared to 8 percent for lawyers in recovery. The current annual discipline complaint rate for Oregon lawyers is nine percent compared to seven for lawyers in recovery.

## Conclusion

There are a number of attorneys and judges who care about the profession and are available to assist an attorney who is in crisis (or who is on his/her

*Continued on page 13*

# Individual Agents of Employer Can Now Be Sued for Harassment and Discrimination

by Michael Edmunds

For the general practitioner who may not be current on employment law, it may be of interest to learn that the Michigan Supreme Court issued a landmark employment opinion in June, 2005. *Elezovic v Ford Motor Co*, 472 Mich 408; 697 NW2d 851 (2005) overruled *Jager v Nationwide Truck Brokers, Inc.*, 252 Mich App 464; 652 NW2d 503 (2002).

In *Jager*, the court of appeals held that there is no cause of action for harassment and discrimination against an individual under the Michigan Civil Rights Act (CRA), MCL 37.2101 et seq. Only the employer can be sued. In reaching its conclusion, the *Jager* court relied on federal cases interpreting Title VII of the Federal Civil Rights Act, the analogous federal statute to the CRA.

The CRA prohibits employers from discriminating on the basis of membership in certain classifications. In *Elezovic*, the Court noted that the CRA at MCL 37.2201(a) defines employers to include "an agent" of the employer. It was not a difficult leap for the Court to find that since an employer includes an agent of the employer, the statute allows individuals to be sued too. *Elezovic* found that the *Jager* court erred in relying

upon federal precedent because of differences between the language of Title VII and the CRA.

The *Jager* rule left many plaintiffs feeling unsatisfied, even when they obtained a verdict against the employer, because the persons who actually perpetrated the harassment and discrimination were never held responsible for their actions. Thus, *Elezovic* will be seen as a victory for the plaintiffs. However, it is not a complete victory.

The Court did not answer the question of who is an agent of an employer. The *Elezovic* opinion leaves room for employers to argue that non-supervisory employees are not agents, and that supervisory employees who are acting outside the course and scope of their employment are not agents either. If such employees are not agents of the employer, they could not be liable under the CRA, even after *Elezovic*.

This is a significant issue which is expected to be hotly contested at the trial court level. It may take some time to obtain a clear decision on this issue from the appellate courts, because the

*Elezovic* opinion revealed a sharply divided Court, with a lengthy opinion and a lengthy dissent.

The Supreme Court analysis in *Elezovic* is consistent with other recent employment cases, as well as recent jurisprudence of the Court in other areas of the law which focuses on statutory construction. Thus, *Elezovic* demonstrates the majority's dedication to principles of strict statutory construction, even when the outcome is favorable to plaintiffs.

The Court's decision in *Elezovic* should serve as a reminder that all employers should establish written employment policies that include, at a minimum, anti-harassment and anti-discrimination provisions, and that employers review these policies periodically with all employees, including supervisors. Clear policies and handbooks ensure that employees know what is expected of them. Repetitive training of supervisors in these policies is necessary to reduce the chance that the employer and supervisor will be sued. Written job descriptions help define who is a supervisor and what sort of activities are within the course and scope of a person's employment.

## LJAP...

*Continued from page 12* way into a crisis). If you feel you are in need of assistance or know someone who is in need, please contact the LJAP at the State Bar of Michigan.

## Endnotes

1. William C. Smith, "Pass the Bar, Flunk Rehab," *Journal of the American Bar Association* 89 (Jan, 2003), 18.

2. *Michigan Lawyers Weekly*, 17,4 (December 2, 2002), 1.

3. *Oregon Attorney Assistance Program (OAAP)*

4. *Annual discipline complaint rate before sobriety of 28 percent and 7 percent afterwards.*

## Historic Move by ABA

In August, the American Bar Association unanimously passed a resolution calling for a right to counsel in civil cases, urging the federal, state, and territorial governments to assure that poor people have a right to legal counsel in civil cases where basic human needs are at stake. Such cases may include those that deal with shelter, sustenance, safety, health, or child custody. Michael S. Greco, the president of the ABA, and other proponents compared the recommendation's potential impact to the 1963 ruling in *Gideon v. Wainwright*, in which the Supreme Court declared that individuals are entitled to counsel in criminal cases. In partnership with clients and communities across the country, advocates intend to urge legislatures and courts to recognize the right to counsel in certain categories of cases and to make funding available to finance the right.



## Does a Top School Make a Difference?<sup>1</sup>

John G. Roberts, Jr.  
Chief Justice  
A.B. from Harvard College  
J.D. from Harvard Law School

John Paul Stevens  
A.B. from the University of Chicago  
J.D. from Northwestern University School  
of Law

Antonin Scalia  
A.B. from Georgetown University and the  
University of Fribourg, Switzerland  
LL.B. from Harvard Law School

Anthony M. Kennedy  
B.A. from Stanford University and the Lon-  
don School of Economics, LL.B. from Har-  
vard Law School

David Hackett Souter  
A.B. from Harvard College  
Two years as a Rhodes Scholar at Magdalen  
College, Oxford  
A.B. in Jurisprudence from Oxford  
University  
M.A., LL.B. from Harvard Law School

Clarence Thomas  
Conception Seminary and A.B. from Holy  
Cross College  
J.D. from Yale Law School

Ruth Bader Ginsburg  
B.A. from Cornell University  
attended Harvard Law School  
LL.B. from Columbia Law School

Stephen G. Breyer  
A.B. from Stanford University  
B.A. from Magdalen College, Oxford  
LL.B. from Harvard Law School

Samuel Anthony Alito, Jr.  
A.B. from Princeton University  
J.D. from Yale Law School

Sandra Day O'Connor (retired)  
B.A. and LL.B. from Stanford  
University

<sup>1</sup> *If you want to be on the Supreme Court, it does.*

### *Two to Remember...*

and honor ALL of those students and teachers who participate, including each school individually. We will continue with the traditional awards and program, but possibly include "new" awards like the most outstanding presentation by an individual school or team. Lynne Taft, a former Law Day chairperson, has graciously accepted the role of chair for this event. For more information or to

*Continued from page 4*

express your interest in assisting Lynne, please contact her directly.

The aforementioned ideas are only a vision for these events. We welcome your ideas and feedback in this learning process to make these events more attractive to our members. The details and programs are in the very early stages of development, so now is the time to get involved. I thank you again

for taking the time out of your busy schedules to read and understand our concerns. And I thank you in advance for your assistance and participation in not only these events, but also the association as a whole. As always, I am available at any time to discuss these matters or any other bar association business. Please feel free to contact me.

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## Thanks from the Editor

When I took over the editorship of *Bar Beat* from Randy Piper, of one thing I was certain. I would not attempt to write a regular column – his shoes were much too large to fill. He gave me a sense of what our readers want and the “philosophy” of *Bar Beat*, which has kept me on track. Now that I am passing the torch to LindaLee Massoud in March, please allow me a moment to thank you for your support over the past few years.

Being editor has been a terrific experience. We added color and a professional touch on our covers with the assistance of artist and designer Sarah Nussbaumer at the State Bar. We also have been able to add color centerfolds to honor various segments of our membership.

We reversed the cash flow direction with the help of Nancy Brown at SBM, who told me of the State Bar printing service available to local bars, and with increased advertising, some of which dropped in our laps from Stacy Sage at SBM. Under our former system, we did not take staff time and expenses into account, yet still had to subsidize the printing periodically. We now stand at a pure profit of \$6,800 from May, 2004 (when my editorship began) until September, 2006 – that is, we reimburse GCBA for staff time/expenses before calculating profit. We make a profit on each issue now.

Our April Fool's and Swimsuit issues are totally produced outside the *Bar Beat* venue, with private contributions. Only the Fools Editorial Board is responsible for the credit or blame. But the idea was brought to me because I was the *BB* editor, and has provided some of the funniest sessions in my legal career. I imagine our meetings were like Saturday Night Live comedy writers' sessions, albeit without various enhancing substances (unless pizza counts).

Thanks to all of you who have contacted me expressing appreciation for our special magazine. It is I who owe you the appreciation, however, for giving me the opportunity to write about Len Shulman, Gil Rubinstein, Jack Wright, and the many other exceptional members of our close-knit legal community. *Bar Beat* truly has been one of the highlights of my legal career.

Francine Cullari

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## Three Corrections to the September–October Issue



Linda Pohly, a GCBA Board member, also serves on the Flint Children's Museum Board of Directors. Pohly solicited monetary donations from GCBA members to sponsor the month of July at the museum. July's theme was *Stars & Stripes* and featured a wide range of patriotic activities, including a performance by the Church Street Singers, a Civil War presentation by Greg Branch, and a visit from Randy Spohn of the Michigan National Guard.

Additional money from the GCBA sponsorship purchased free access passes that were used by members of the community to visit the museum during July. The Flint Children's Museum extends its appreciation to Linda and GCBA donors and invites attorneys and their families to enjoy the museum.

The ending to the article on Judge Christensen was not printed. The entire article is on page two in this issue.

Matthew Lawrence Norwood was incorrectly identified in the below photograph.



(L-r) Jeremy Piper, Hon. Archie Hayman, Matthew Lawrence Norwood, and Mike Jablonski



(L-r) J.D. Winegarden and Edward Henneke



(L-r) Sgt. James Snow, U.S. Marines, and Donald Shaw

## *Arrested for a Cause*

Thanks to the following attorneys who supported the Muscular Dystrophy Association Telethon this year.

Terry Bankert  
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 Barbara Dawes  
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 John Kalo  
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