

November/December 2014

BARBEAT

Genesee County Bar Association



Donald Rockwell and State Bar of Michigan Roberts P. Hudson Award Winner, Francine Cullari

There is No Stupid Question
State Bar Honors Francine Cullari
Genesee County Bar Foundation
"Bruton, We Have a Problem"
Are You Ready? What if You're Not?
When Parents are Unmarried: ADAPT
Paternity Project

Who's on the Bench? Hon. Geoffrey L.
Neithercut, 7th Circuit Court
Community Action Committee: Making a
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New Member Profile Affiliates Division:
Amy Braley Hadd and Kimberly Poisson
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- BarBeat@gcbalaw.org

Genesee County Bar Association

- 315 E. Court St., Flint, Michigan 48502-1611
- (810) 232-6012
- For editorial information, call (810) 232-6000.

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There is No Stupid Question

By Jeffrey J. Himelhoch, President



Jeffrey J. Himelhoch

I remember when I started practicing law thirty-three years ago how veteran lawyers in our county were always willing to help answer questions and serve as mentors to help me become a better lawyer.

All of us are fortunate to practice law in a county where there is special legal talent willing to share their expertise. We have committees in almost every specialty as well as many prominent defense attorneys.

We have attempted to strengthen our mentorship through the bar association's committee structure. The efforts of our standing committees have increased the number of attorneys who will lend their expertise. The Family Law committee chaired by Barbara Dawes, Probate Committee chaired by Craig Wright, Bankruptcy Committee chaired by Sherri Belknap, and Social Security Committee chaired by Brian Barkey all have lists of attorneys willing to answer questions through email. The names of these members will be posted on the GCBA website, and an email will be sent out to all of the members advising us of the names of the attorney-mentors. In addition, the Criminal Law Committee chaired by Amy Harris will be hosting a series of criminal

practice seminars, and at these seminars they will leave time for individual questions and answers. Also, shadowing of attorneys in a specialty can be arranged. Furthermore, Inns of Court is developing different mentorship opportunities for Inn members.

We appreciate all the hard work of the committees and chairpersons in helping to augment the education of our younger lawyers. No one should be afraid to seek help as there is no such thing as a stupid question. Hopefully, we can all learn from each other and help improve our skills.

The GCBA's reputation for community service has been enhanced thanks to Jessica Hammon and volunteers of the new Community Action Committee who put in several hours for Habitat for Humanity. Also, thanks to all who volunteered on October 24, 2014 at Legal Aid in celebration of the October Pro Bono month for the legal community. Now, let us all come together and continue to make our Holiday Dinner a great success.

State Bar Honors Francine Cullari

By Brian M. Barkey

At a banquet in September, the State Bar of Michigan presented its highest honor to GCBA member Francine Cullari. The Roberts P. Hudson Award is intended to recognize a member of the State Bar whose service brings honor, esteem and respect not only to themselves but to our entire profession. The standard for this award is so high that it is not given every year.

This is especially gratifying in the case of Francine, whose work is often out of the public eye. In Genesee County, we know about Francine's unselfish service to the GCBA. As a 15-year member of the board of directors, an officer and president she initiated many projects and programs still in practice, and some sorely missed.

Less well known is the work Francine performs for the SBM. She currently serves as chair of its Publications and Website Advisory Committee responsible, among other



Francine Cullari

things, for the monthly *Michigan Bar Journal*, and she developed its popular *Citizen Lawyer* series. She has served as a member of the Representative Assembly and Board of Commissioners and has headed innumerable committees.

In each of these roles, Francine has played an active but frequently invisible part. As Joseph Kimble, editor of the Plain Language column in the *Michigan Bar Journal*, stated in his nomination letter, "It is a pleasure to serve on a committee that she chairs. She gets the best and most from everyone – to the great benefit of our State Bar."

As we heard the list of Francine's accomplishments for the benefit of pro bono clients, her students and members of the local and state bar associations, we could understand why the SBM decided to give this award this year. It was gratifying to see that the State Bar appreciates her qualities as well.

Several other awards were presented for extraordinary public service. One of the other recipients was Matilyn Sarosi, a high school student who had prepared an amicus brief in a case before the Supreme Court on the issue of re-sentencing children facing life imprisonment under circumstances that the Supreme Court formerly determined



(L-R) Brian Barkey, Donald Rockwell, Francine Cullari, Linda Pohly, and Richard Morley Barron.

were cruel and unusual. In her brief acceptance speech Matilyn said that she had been impressed hearing all about the work of those who received awards that evening. "You must be so proud to be a lawyer," she said. Everyone at our table looked over at Francine. We knew exactly what this student meant.

Genesee County Bar Foundation

By Walter P. Griffin, President

The Genesee County Bar Foundation has been able to accomplish its mission of legal education for lawyers and the public through generous donations made by members of the bar.

The Foundation first received a donation from the Estate of the Hon. Louis McGregor, Genesee County Court Judge and Michigan Court of Appeals Judge. This fund was restricted for education. Since that time, the Earl Cline Young Lawyer's Fund, the Dana and Duncan Beagle Fund, Holiday Dinner Fund, and the John S. Beagle Scholarship Fund have been established.

Most recently, as published in an article by Randolph P. Piper, the Foundation received a generous gift from Edward and Libby Neithercut, again restricted for education. These types of gifts are unexpected, but they are graciously accepted to foster the mission of the Foundation.

In fact, each month we receive smaller donations that are published in the GCBA News n' Notes. These small donations mount up. With all the donations received to date and with conservative investing, the monetary value of the Foundation (for the month of September) was \$855,381.



Walter P. Griffin

Examples of grants from the Foundation in 2014 are as follows:

- The Genesee County Bar Association Young Lawyers
- Genesee County Bar Association Bankruptcy Seminar
- Genesee County Bar Association Affiliate Membership Seminar
- Holiday Dinner
- Law Day
- Criminal Court Seminar
- Probate Court Seminar.

Every dollar is useful as we strive to carry out our mission.

Thanks to the Board of Directors, Kathleen Buckley-O'Neill, Jeffrey D. Rocco, Carl L. Bekofske, Erwin F. Meiers, III, Patric A. Parker, Randolph P. Piper, Francine Cullari, the Honorable Duncan Beagle and the Honorable Thomas C. Yeotis, who unselfishly donate their time to the Genesee County Bar Foundation.

“*Bruton*, We Have a Problem”

By Hon. Joseph J. Farah



Hon. Joseph J. Farah

Tom Hanks' memorable phrase from *Apollo 13*¹ lifts off this informal discussion on the applicability of the Sixth Amendment's Confrontation Clause to preliminary examinations. Circuit judges review preliminary examination transcripts where, in multi-defendant criminal cases, the district judge is sometimes called on to deal with "Judge, we have a *Bruton* problem" arguments. This article addresses those concerns by confronting whether there is such a thing as a "*Bruton* problem" at a preliminary examination.

What's a *Bruton* problem? The holding in *Bruton v United States*, 391 US 123 (1968) states an accused's right to confrontation is not satisfied by redaction of his name from a statement made by his non-testifying co-defendant who implicates them both, even if the jury is instructed to confine the statement to the statement maker. What? Let's try again. A police officer can testify about what a co-defendant admitted in an interrogation but not about what the statement-maker said the defendant did. Why? Because the defendant cannot confront that statement, ergo the Sixth Amendment violation.

Our issue is not only about the right to confrontation but rather *where* it applies. Confrontation has repeatedly been called a "trial right." A preliminary examination is not a trial. The former is statutory, the latter constitutional. So, if confrontation is a "trial right," it may have no place at preliminary examination.²

But back to *Bruton* and "*Bruton* problems." Somehow it seems – maybe only to me – that "*Bruton* problems" have taken on a magnified significance. The *Bruton* rule prohibits the introduction of *certain* types of statements at *trial*.

Dealing first with the *type* of statements, because the *Bruton* rule is grounded in the Sixth Amendment's right to confrontation and because confrontation, in this context, only applies to "testimonial statements,"³ *Crawford v Washington*, 541 US 36 (2004), then by extension the *Bruton* rule applies only to testimonial hearsay statements. See *US v Johnson*, 581 F 3d 320 (6th Cir 2009). So on the "announcement" at preliminary examination that "we have a *Bruton* problem", the first inquiry is whether the statement is "testimonial" (just as it would be at trial). If testimonial statements are not involved, the Sixth Amendment doesn't apply and neither do *Crawford* nor *Bruton*.⁴

Back to the central question: Does *Bruton* apply at *preliminary examination*? The U.S. Supreme Court has called the right to confrontation a right of trial. *Pennsylvania v Ritchie*, 480 US 39, 52 (1987). While this holding may be subject to dispute, it is certainly the prevailing view. Many jurisdictions deny hearsay protections to pre-

liminary examination testimony, much less Confrontation Clause protections to "special" types of hearsay. To answer the question, a deeper look at the confrontation right is needed.

The Sixth Amendment guards against unreliable and untrustworthy evidence being used to gain conviction. Hearsay evidence falls into those categories. Such evidence is revealed as unreliable and untrustworthy, though through cross-examination, a central component of confrontation. Testimonial evidence – unchecked by cross-examination – defeats the Sixth Amendment's goal.

But the foregoing deals with the trier of fact. It deals with convictions. Preliminary examinations are probable cause hearings contemplative of further hearings (a trial) where the confrontation right unquestionably applies. The preliminary examination, while fully capable of ensuring the accused's denial of liberty, nevertheless is hard to equate with the finality of a trial and the commensurate need for confrontation rights.⁵

While supportable (see *People v Kinsman*, 16 Mich App 611 [1969]; *People v Otter*, No. 252235, March 10, 2005), this conclusion is hardly irrefutable. Time will tell; but only if that time is filled with counsel willing to test the applicability of the Clause in a proper case, and jurists at both the district and circuit court levels willing to invest the analytical efforts to address the issue.

At that juncture, we will know for sure whether or not this article will need to be renamed, "*Bruton*, We Don't Have a Problem."

Acknowledgements

- Attorney Ken Mogill, who prompted the question presented, unwittingly, through his 2010 presentation to the Criminal Law Section and his written materials.
- Katherine Nighswander, then-law-student and now attorney, for her scholarly research into the topic.

Endnotes

- 1 Hanks said, "Houston, we have a problem." *Apollo 13*. 1995, Universal Pictures.
- 2 This is not to say the accused has no right to cross examination at preliminary examination. MCL 766.12.
- 3 What comprises a testimonial statement is beyond the scope of this article.
- 4 *People v DeShazo*, 469 Mich 1044 (2004)
- 5 *People v Hall*, 435 Mich 599 (1990) suggests that evidentiary errors at preliminary examination can be cured at trial.

Are You Ready? What if You're Not?

By Roberta J.F. Wray



Roberta J.F. Wray

In case of disability or death, who takes care of your clients? What happens to your old files? Do you have a plan in place?

A special program at the October Senior Lawyers' luncheon put a new focus on things we all need to know about closing out a law practice, especially in case of an unexpected turn of events. Even in the normal course of things there will come a time when someone else will have to take over.

In the case of a partnership, the partnership agreement may cover the handling of uncompleted cases in the event of the retirement of one of the partners. But, what about the unexpected death or disability of one of the partners? It may be that the issue is overlooked in setting up the partnership.

A solo practitioner, especially just starting out, may not have considered what could happen if s/he were unable to continue representing clients because of illness or accident. Even if the closing of a practice is because of retirement, what happens to all those boxes and cabinets full of old files?

Michigan Court Rule 9.119(G) provides, "if an attorney dies or becomes otherwise incapacitated, the grievance administrator may ask the chief judge of the circuit where the attorney maintains an office to appoint a receiver"¹ to take care of finishing up your business. Fortunately, the Oregon State Bar Professional Liability Fund has developed a handbook that has been adopted by the SBM that will assist Michigan attorneys in dealing with both the expected and the unexpected in protecting their families and their clients.

At the Senior Attorneys' meeting, Diane Ebersole, Director of the Practice Management Resource Center,

presented information about consequences of failing to establish a formal plan that addresses the possibility of an attorney's inability to carry on the practice. Among the most serious is the nullification of malpractice insurance.

A PDF file is available online at the SBM website, <http://www.michbar.org>, through the Practice Management Resource Center. It includes a summary of issues that need to be addressed, form letters to various entities who will need to be contacted and/or engaged, checklists, and references to other resources that will be helpful in establishing a plan.

The importance of reviewing your firm's contingency plans cannot be over-emphasized. The consequences of failing to have a plan are great for both your survivors/successors and your clients.

If there is no formal plan, the sooner you put one in place the better:

- First, it can make for an orderly transition for your clients and your successors or survivors.
- Second, you can get help and guidance on line from the SBM Practice Management Resource Center.
- Third, if you haven't thought about this issue before, you cannot get started any sooner, so start now!

Endnote

- 1 Planning Ahead, SBM Practice Management Resource Center, p. 1.



When Parents are Unmarried: ADAPT Paternity Project

By Anthony J. McDowell, ADAPT Project, Genesee County Friend of the Court



Anthony J. McDowell

People are not getting married anymore. This is especially true in Flint, Michigan, where nearly 80% of the births are to unmarried parents. As families change in our area, our courts are working to adapt to the needs of the community.

Judge Duncan Beagle saw the need for a change in how unmarried families' cases were handled and reached out to Friend of the Court, Jack Battles. Together, they created a plan to expedite paternity establishment and assist families. To implement this plan, the Friend of the Court contacted colleagues at the Prosecuting Attorney's Office, Hurley Medical Center, and the State Court Administrative Office. Ultimately, the ADAPT (Acquiring DNA and Paternity Timely) Project, a special collaborative effort to expedite paternity establishment and order entry, was born.

ADAPT is a voluntary project with several major components including, but not limited to, education regarding paternity establishment, an expedited court process, assistance with completing court orders, and holistic services for the family.

The ADAPT project begins with community outreach and education for unmarried parents. Friend of the Court staff members conduct weekly informational sessions during the prenatal clinic at Hurley Medical Center and have become a resource for Hurley Medical Center staff looking for information regarding paternity establishment. At these sessions families learn the basics of paternity establishment and support order entry, including information about Affidavit of Parentage, Order of Filiation, the traditional paternity establishment process, and the expedited ADAPT process.

Ultimately, the ADAPT project is about providing an opportunity for unmarried parents to start their families on a strong foundation.

If families are interested in participating in the expedited ADAPT process, they can sign up for it in the prenatal clinic before the baby is even born. Some families prefer to wait until after the birth. In that situation when the baby is born Hurley staff or the family will contact the Friend of the Court. Then, Friend of the Court staff members will work with the family to assist them in either completing DNA testing or signing an Affidavit of Parentage. Friend of the Court staff will also assist the family with completing

a stipulated form, waiving the traditional process of a summons, complaint, and answer, to start a paternity case or support case with Judge Beagle, the assigned judge for all ADAPT cases. The parties will also receive a date to appear before Judge Beagle to address custody, parenting time, and child support, which will be scheduled four to six weeks after the birth of the child.

Friend of the Court staff provides the Genesee County Prosecutor's Office with the stipulated waiver form which allows the assigned assistant prosecuting attorney to file the stipulated waiver form with the court in lieu of a traditional summons and complaint.

Within six weeks after the filing of the stipulated waiver form, a date will be set before Judge Beagle. Staff from the Prosecuting Attorney's office will be present to address the issues of child support, paternity, and order entry. Staff from the Friend of the Court will be present to address the issues of parenting time, custody, and any holistic services the family needs. Judge Beagle will enter orders relative to all issues. Judge Beagle will also enter orders for holistic services to set the new family up for success, including referral orders for counseling, job training, or parenting classes.

Ultimately, the ADAPT project is about providing an opportunity for unmarried parents to start their families on a strong foundation. For some families, ADAPT provides education to make sound decisions about becoming legal parents. For others, ADAPT is an opportunity to have a near-immediate Court Order defining their rights and roles as parents. For still others, ADAPT will allow both parents to care for and support their children from birth.

The ADAPT project, like many of the families it assists, is just beginning. The first few cases were heard by Judge Beagle in late October. There are likely to be changes and improvements to the project as ADAPT evolves. Hopefully, the end result of this special project is a process which could be implemented statewide to assist the growing number of unmarried families.

If you have any questions, contact Anthony McDowell at (810) 257-3300, ext. 4964.

If you know of individuals who might benefit from ADAPT, they can contact the ADAPT project at (810) 232-3278 or (810) 23-ADAPT.

Who's on the Bench?

Honorable Geoffrey L. Neithercut, 7th Circuit Court

By Roberta J.F. Wray



Hon. Geoffrey L. Neithercut

As part of the oldest law family in Genesee County, one might expect that law was his first career choice, but young Geoffrey Neithercut aspired to be a social worker. He proudly proclaims himself a “Flint kid” through and through. He is a life-long resident of the city’s East Court Street area.

Judge Neithercut obtained his undergraduate degree in 1970 from Albion College, attended the Divinity School at Colgate-Rochester in 1971-72, and earned his law degree from University of Detroit-Mercy Law School in 1975.

Before his election to the 68th District Court in 1986, Neithercut worked as a partner in the law firm of *Neithercut, Klapp, Shegos & Dillard*, where two generations of his family had practiced before him. He also served two terms as councilman from the 7th Ward. In 1993, Governor James Blanchard appointed Judge Neithercut to the Circuit Court.

His childhood interest in social work has translated itself into his legal career, both as an attorney and a judge. He says the thing he likes best about being a judge is his

ability to do things for people, sometimes by correcting them.

He says, “The judiciary is the last bastion of the general practice of law. It is necessary to know something about everything in the law.” When he doesn’t know something he says, “Lawyers have to educate me. I love the educational aspect of the law.”

The judge says he does not like the helpless feeling he has when he’s “forced to sentence someone to prison who needs mental health care, not incarceration.” But he says, “The taxpayers have decided they don’t want to pay to care for the mentally ill. Some people just cannot live in unsupervised settings.”

Judge Neithercut has four grown children. He lost his first wife to cancer. Earlier this year, he married Constance, a speech therapist. He has broken both shoulders while participating in bicycle races, enjoys woodworking, reading, and helping maintain Burroughs Park and several other neighborhood locations.

Community Action Committee: Making a Difference

By Angela N. Wheeler

Saturday, October 11, 2014, was a great day to be outside. So the Genesee County Bar Association Community Action Committee partnered with the Genesee County Habitat for Humanity to build a neighborhood park in the Foss Avenue Community, located off I-475 and Carpenter Road.

Bar Association members Jade Edwards and Angela Wheeler, and affiliate, Stephanie Kane, her children and a family friend, were able to build a park in a matter of hours.

They landscaped and built a fire pit, park benches and flower beds. It was amazing to see how a few hands and feet working together could create a small neighborhood park. With just a little bit of “sweat equity,” Bar members were able to make a little piece of Flint a little better, benefiting both the Flint Community and the GCBA.

Future plans include enlisting more volunteers for various projects. Together we can make a difference.



New Member Profile Affiliates Division: Amy Braley Hadd and Kimberly Poisson

Amy Braley Hadd is a deputy court clerk in the 67th District Court Grand Blanc office. She has extensive experience working in the court system in various capacities. She earned her first degree in Liberal Arts from Kirtland Community College. In 2006 Amy completed her Bachelor of Arts degree from Saginaw Valley State University (with honors) with a double major in Sociology and Criminal Justice. She is currently enrolled at U of M-Flint to obtain her Master's Degree in Public Administration with an emphasis on Criminal Justice.

Amy served with the Michigan Army National Guard and was trained to be a legal technician. She and her husband, Jeffrey and son, Dylan are long-time residents of Grand Blanc.

Amy's volunteer efforts in the community include Boat 4 Vets, community golf tournaments, VA, fund-raisers and campaigning. She loves golf, travel, her family and is an avid foodie!



Amy Braley Hadd

Kim Poisson is originally from Flushing but now resides in Davison with her husband, John. They were married this past June, 2014 and have three daughters between them.

Kim has worked for the Genesee County Friend of the Court for the past 13 years. She has an associate degree in Business Administration from Baker College in Flint, and a Paralegal degree from Baker College in Auburn Hills. She will receive her Bachelor degree in Studies of Law at Baker College in Auburn Hills in December, 2014. She is a member of the Baker College of Auburn Hills Chapter of Lambda Epsilon Chi.

She enjoys traveling to warm weather places such as Maui, Cancun, and Florida during the winter months and participates in run/walk races every month with friends and family. Kim's most rewarding races included a duathlon in Holly, MI where she finished first in her division in 2013, a half marathon in the Great Turtle Race on Mackinaw Island in 2013, and a 10K on Maui, Hawaii in 2013. Kim has participated in the Crim Races for the past nine years. Kim also enjoys gardening and flowers.



Kimberly Poisson

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Pure Joy!

By Tom R. Pabst

In 1994 when I was Vice President of the Genesee County Bar Association and Brian Barkey was President, we traveled to the Saginaw County Bar Association. The dream of the Annual Holiday Dinners here in Flint was born on that trip.

People ask me why I volunteer at the Holiday Dinner every year. The simple answer is joy. Pure Joy! To see the hundreds of people lined up, waiting to come into the Masonic Temple for a hot meal and a chance for the kids to see Santa, and to see these people's faces light up when

they receive simple gifts such as hats and gloves, or a toy, is immeasurable; Joy! There is Christmas music playing in the background while Santa's helpers (my fellow members of the legal profession) are dressed in the holiday spirit with smiles on their faces, ready to selflessly serve. Joy! I go home every year exhausted, feet hurting and tired, but that's a very small price to pay for the joy and happiness I see on every person's face that enters the Masonic Temple for the Holiday Dinner.

The need in Genesee County for this type of selfless giving is great. The need for joy in our community is great. I am proud to be part of an organization that sees the value in bringing joy to others. The dream of the Holiday Dinners continues today, spreading joy in and among our community.



Tom R. Pabst



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