

July/August 2007

# BARBEAT

Genesee County Bar Association



## **2007-2008 President**

**Kurtis L.V. Brown with wife Marlena  
and sons Matthew and Andrew**

Photo by Oxford Photography

**Workers' Comp: A Few Facts Worth  
Knowing for the Non-practitioner**

**Tax Incentive Cuts the Cost of Hiring  
Interpreters for the Deaf**

**Member Profile of Jim Zimmer**

## Gentleman Farmer in Disguise??

The second in a series of articles about members owning non-law related businesses

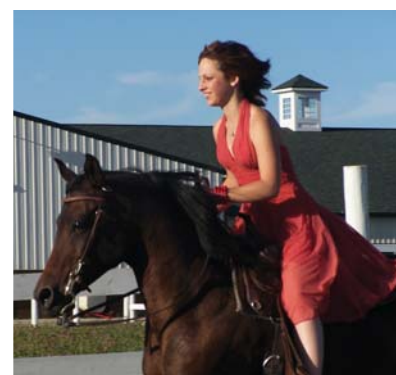
Genesee County Bar Association member Steven P. Iamarino has been practicing law as a litigation attorney in Genesee County for nearly 25 years, with personal injury claim and municipal law expertise. Steven has participated as an elected member of the association's Board of Directors, in addition to serving on various bar association committees, including as chairperson of the Law Day Committee the year he "roped" controversial Geoffrey Fieger into being the featured speaker on the "Right to Life" topic.

Recently, he "turned the corner" in terms of finding a hobby that has evolved into a second and actually third occupation. In addition to being a lawyer, Steven, along with his daughter Rachel, and with very important support from friends and family, has developed what is commonly referred to among lawyers who have been there as a "ranch" involving 75 acres of property in Mundy Township. The "ranch," also known as Willow Creek Horse Farm, can be viewed at [www.willowcreekhorsefarm.com](http://www.willowcreekhorsefarm.com). The farm manager, Kara Laethem,

takes her job so seriously that Steven will often see her up before what he refers to as "crack-o-dawn" and sees her working on into the night, because she is not only a hard-working individual but someone who really tries to please and satisfy the owners of the property.

The whole idea came about because of a mistake that Steven made in letting his daughter ride the "little pony" in a Meijer's store on Hill Road where he used to have to take about 10 to 15 pennies to give his daughter a satisfactory experience every time they went to the store to shop. Meijer's is not necessarily Steven's favorite store because of all the congestion, but it certainly was Rachel's because of the horse she could ride at the end of the check-out line. While finding the 20 minutes that Rachel rode for less than 25 cents sometimes inconvenient in terms of finding enough pennies, Steven would love to pay that little now for "horse expenses," which are considerably greater with a live animal involved.

*Editor's Note: Plans are underway for an October tailgate party at the ranch.*



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## Table of Contents

### 2 Gentleman Farmer in Disguise??

### 2 2007 Annual Meeting and Awards Ceremony

### 4 The GCBA: A Gem of a Legal Community

by Kurtis L.V. Brown

### 5 Workers' Comp: A Few Facts Worth Knowing for the Non-practitioner

by Robert J. MacDonald

### 7 Tax Incentive Cuts the Cost of Hiring Interpreters for the Deaf

by Stephanie Neal

### 10 Member Profile of Jim Zimmer

by LindaLee Massoud

## Advertisers

Larry Day  
Attorney/Mediator 3

Karl Haizer  
CFE, CPA, Expert Witness 7

Yeo & Yeo  
Accountants and Business Consultants 4

Paul Goebel Group  
Insurance 8

Classified Ads 4

Nan Ruth Chardoul  
Personal Property Appraisals 9

Glenn M. Simmington  
Cline, Cline & Griffin 6

Plante and Moran  
CPAs/Business Advisors 9

Gould Engineering, Inc.  
Civil, Municipal, and Land Development 7

Stevens Wealth Management Group  
Investment Consultants back cover



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



# The GCBA: A Gem of a Legal Community

By Kurtis L.V. Brown, President

It is a tremendous honor to be chosen as president of the Genesee County Bar Association. As I thought about leading this organization, I spent time reviewing the list of my predecessors and saw names like O'Rourke, Beagle, Bekofske, Hart, Washington, Pabst, and Rockwell. Reading those names of distinguished attorneys was a humbling experience, but unsurprisingly, the list includes many lawyers who have had a personal impact on my life and career. Others who have given of their time and their invaluable expertise to me and others in this association include Judge Thiele, Bob and Jeff Chimovitz, Olle Karlstrom, and the late Charlie White, just to name a few.

In a special category all his own is Henry Hanflik. I started working with Henry in 1987. Now, 20 years later, Henry continues to redefine the concept of commitment to his craft and typifies the best attributes of what makes Genesee County lawyers so outstanding. Henry's

success as a lawyer does not begin to define him as a person or to define the many philanthropic contributions he and his wife quietly make to this community.

Like many in our legal community, I am a life-long Genesee County resident. I was born and raised in Fenton Township and am a graduate of Lake Fenton High School. At an early age, the principles of hard work were deeply ingrained, in part because my family was closely tied to General Motors and the local automotive industry.

I also stayed within this community for my college, graduating from the University of Michigan. Notwithstanding obtaining my degree, the most important thing that happened to me at college was meeting the lady who would later be my bride, Marlena. For reasons I still have never figured out, Marlena married me 18 years ago and helped support me while I was in law school. She is the mother of my two wonder-



Kurtis L.V. Brown

ful sons, Andrew and Matthew, and is clearly the glue that holds our family together. When I am not at work, we enjoy spending time together on Lake Fenton, in my old cars, or traveling.

Having spent my entire career as a trial lawyer, including serving as a past president of the Flint Trial Lawyers Association, one of the group's most striking attributes is their incredible talent, level of legal scholarship, and willingness to share their knowledge. I am honored to have worked with, watched, and studied the likes of John Nickola, John Kalo, Ed Jakeway, and Norm Gottlieb, among others. Lest I show favoritism to trial lawyers, let me acknowledge that our community is blessed to have some of the most conscientious and hard-working lawyers and judges in the entire state.

*Continued on page 9*

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# Workers' Comp: A Few Facts Worth Knowing for the Non-practitioner

By Robert J. MacDonald



Robert J. MacDonald

## Generally

Since 1912, the rights and remedies of injured workers in Michigan have been delineated in what is now called the Michigan Workers' Disability Compensation Act, MCL 418.101-941. An injured worker can receive up to \$723/week in potentially lifetime wage loss benefits, lifetime medical care with providers chosen by the worker, and vocational rehabilitation that can include up to two years of tuition. Comp pays for attendant care expenses (but not for replacement services as it exists in auto no-fault cases). Comp is also responsible for paying mileage to and from doctors' offices.

This brief note attempts to touch upon a few important ways workers' compensation law intersects with other fields of practice.

## Tax Law

It has long been recognized that monies received as workers' compensation benefits or as workers' compensation settlements for personal injuries sustained are not subject to state or federal income tax. IRC 104(a)(2); *Tax Highlights for Persons with Disabilities*, IRS Publication 907. The Michigan Legislature had this fact in mind when it created the formula to calculate workers' compensation benefits. Workers' comp weekly benefits in Michigan amount to 80% of an injured workers' after tax average weekly wage (capped at \$723/wk). Our comp law was defined and created in response to the legal understanding that benefits are not taxable. *Radecki, v Worker's Disability Compensation Director*, 2008 Mich App 19 a (1994).

## Personal Injury Law

With the passage of the Compensation Act, workers' comp became the exclusive remedy an employee has against his or her employer for personal

injuries sustained due to the employer's negligence. In this country's first massive wave of tort reform, injured workers lost the right to a jury trial and lost the right to recover for pain and suffering (but no longer had to deal with contributory negligence, assumption of risk or the fellow servant doctrine).

Injured workers are still free to sue an employer for intentional torts and can still sue negligent non-employers who contributed to their injuries. Section 827(5) of the WDCA gives the workers' comp carrier a right of reimbursement on monies recovered against such third parties. (I was the recent beneficiary of a ruling by the Ohio Supreme Court that its then extant subrogation statute was unconstitutional. I think it is safe to assume that Chief Justice Cliff Taylor et al. will not be reaching similar conclusions here any time soon).

Personal injury attorneys will want to be familiar with *Franges*, 404 Mich 590 (1979) and its' progeny that describe the formula by which a comp carrier is reimbursed for its lien and how the comp carrier bears its proportionate share of the costs and attorney fees on any recovery.

## Auto Accident Law

If a person is injured in an automobile accident and those injuries also arose out of and in the course of employment, workers' compensation benefits are payable and considered primary over 1<sup>st</sup> party PIP benefits. Where PIP benefits are more generous than what workers' comp is required to pay, the PIP carrier pays differentials. MCL 500.3109; *Gregory v Transamerica*, 425 Mich 625 (1986).

Where there is a third party recovery against a negligent party in the auto accident, the comp carrier's lien

does not include benefits it paid that the PIP carrier would ordinarily be responsible for paying. *Great American Ins Co v Queen*, 410 Mich 73 (1980)

## Family Law

Workers' compensation benefits and settlements that injured workers receive are part of the marital estate in a divorce action. *Smith*, 113 Mich App 148 (1982). You can imagine our joy when a gold digging spouse decides to abandon his/her injured mate and file for divorce in the middle of settlement negotiations.

The Friend of the Court has a statutory lien on workers' compensation benefits. The law was recently amended so that the Friend of the Court is entitled to receive up to 1/2 of the claimant's net recovery. MCL 552.625a(6)(d)

## Elder Law

Those who assist clients with pensions and retirement planning should be familiar with the affect retirement has on Michigan workers' compensation benefits. For persons injured after March 31, 1982, there is a legal presumption that a person is not entitled to weekly workers' compensation if he or she leaves work to retire on a non-duty disability pension. MCL 418.354. If this presumption can somehow be rebutted, workers' comp benefits will still be reduced by the after-tax amount of employer-provided pension benefits. The law permits employers and employees to negotiate the effect disability pensions have on workers' comp. If you are counseling clients regarding retirement issues and a person has work-related injuries or conditions that effect the person's ability to work, that client needs the advice and assistance of a workers' compensation attorney.

## Social Security Disability

Securing monthly Social Security Disability benefits for the disabled client on its face would seem like it always a good idea. Usually it is, but not always. Sometimes, for example, a pension that would be lost pays more. Also, if a client is receiving or will receive workers' comp benefits for the same period, Social Security Disability can be reduced because of the receipt of workers' comp. Social Security's current rules state that workers' comp benefits and Social Security Disability benefits can not exceed 80 percent of the client's "average current earnings." 42 USC 424a. Usually, this means that a client's comp and SSDIB together can not exceed 80% of his/her best year of earnings in the previous six before he/she became disabled. (Note: President Bush proposes to change this!) If the client has a low wage-earning history, sometimes the comp wipes out all of the SSDIB—but the IRS still expects to receive taxes on the SSDIB never received! Social Security practitioners need to be alert to this possibility and work with a workers' comp attorney to explore ways to maximize income for the client.

## Bankruptcy Law

Workers' comp benefits and claims are assets of a bankruptcy estate. If these assets are declared in a timely fashion, there is case law in the 6<sup>th</sup> Circuit that such benefits can be exempt assets.

The Michigan Workers' Compensation Agency has determined that an employer's bankruptcy does not affect that employer's workers' compensation

insurance carrier's obligation to pay and defend claims. Some employers convince the agency that they are so financially sound that they need not bother with workers' comp insurance. When these professed well-heeled self-insured employers like K-Mart and Delphi file for bankruptcy, they can seek the permission of the bankruptcy court to administer and pay their comp claims, as K-Mart and Delphi both did. A Self-Insured Security Fund generates about \$10 million a year to pay claims for bankrupt self-insureds that don't.

## Collections Law

Creditors can generally not garnish workers' compensation benefits, nor can benefits be assigned. MCL 418.821(1). The Friend of the Court and disability and health carriers have liens and rights to reimbursement. MCL 418.821(a); MCL 552.625a. Most injured workers want to pay their debts and will do so when they have the means to. Most will enter into agreements to pay their debts with various creditors like landlords, or auto finance companies upon the successful conclusion of their cases, although an assignment of rights is not permitted. It is difficult to discern how any creditor's cause is advanced by forcing the attorneys of injured workers to waste time responding to thousands of calls from collection companies demanding payment.

## Business & Contract Law

Michigan employers who have three or more employers at a time or employ one worker for 35 hours a week for

13 of the past 52 weeks are subject to the act and are required to secure workers' compensation insurance (or get permission to be self insured). There are criminal penalties for failing to get necessary insurance. If a business fails to secure insurance, the exclusive remedy fails to apply and the business can be sued in negligence. Individual officers, directors, managers, or partners can be held jointly and severally liable for the business's obligations to the worker under MCL 418.647. Sometimes an employer will try to use creative drafting of contracts with its employees to contract its way out of the act; such efforts to evade the purposes of the act can result in a civil action under MCL 418.171 (4); *McCaul v Modern Tile*, 248 Mich App 610 (2001).

## Criminal Law

Injured workers are not entitled to receive weekly workers' compensation benefits while they are unable to obtain or perform work due to imprisonment. MCL 418.361. An insurance carrier may also argue, so far with less success, that a worker is disqualified from benefits because his/her inability to obtain work is due to the commission of a crime. *Ibid*. Lower courts have awarded benefits where a worker is on probation or is available for work release.

## Employment Law

The only way an employee can release its future workers' compensation benefits is through a workers' compensation redemption in a hearing before the magistrate. MCL 418.815, 835-837. While a voluntary quit, a written waiver, release and settlement, or a severance agreement, will frequently have negative repercussions on an injured worker's workers' compensation rights, these documents, as comprehensive as they may be, do not extinguish workers' comp rights.

## Poverty Law

For at least the last 70 years, injured workers in Michigan have received weekly wage loss benefits, based upon a percentage of their prior

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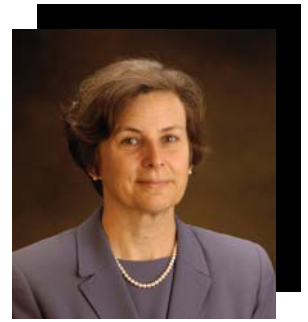
wages, if a work injury prevents that worker from performing his or her former work, the insurance carrier has been able to take a credit for any wages actually earned following an injury, and been able to argue for a reduction of benefits following the establishment of a new wage earning capacity upon a showing of a successful return to work. In its last pronouncement, *Sington v DaimlerChrysler*, 467 Mich 144 (2002), the Michigan Supreme Court stated that a worker has a compensable disability if that worker is unable to obtain or perform work at his or her maximum wage earning capacity in work suitable to his or her qualifications and training. Recently, in *Bessinger v Our Lady of Good Counsel*, 2006 ACO #257, the Supreme Court *sua sponte* ordered parties to brief the issue as to whether a plaintiff failed to demonstrate the inability to work as a telemarketer, suggesting that benefits might properly be reduced by the theoretical wages a telemarketer can make. (This analysis assumes that popular sentiment and lobbying efforts to criminalize telemarketing will not be successful). If Justices Markman, Taylor, Young and Corrigan rewrite the law and require injured workers to prove an inability to 'telemarket' in every case or conclude that every injured worker's benefits should be reduced by what a telemarketer can theoretically make, "poverty lawyers" will find themselves very busy with a deluge of claims from injured workers—and perhaps their advocates—for public assistance.

*Editor's Note: Robert J. MacDonald is the author of "Workers' Compensation Cases" in the Michigan Basic Practice Handbook, 6<sup>th</sup> ed. (ICLE, 2007). His firm, MacDonald, FitzGerald & MacDonald, PC has been representing injured workers in Genesee County since 1938. For questions or referrals, call (810) 234-2204.*

## Tax Incentive Cuts the Cost of Hiring Interpreters for the Deaf

*Disabled Access Credit Offers Business Owners Relief when Complying with ADA*

By Stephanie Neal



Stephanie Neal

**M**ost professionals and business owners have an obligation under the Americans with Disabilities Act (ADA) to provide deaf and hard of hearing individuals with full and equal access to their goods, services, facilities, privileges, or advantages. Yet many are unaware of the financial relief that is available under the U.S. Tax Code in the form of a Disabled Access Credit.

As a matter of public policy, the cost of compliance with the ADA is borne by the business community in order that individuals with disabilities will be better able to have equality of opportunity, full participation, and economic self-sufficiency. Business owners looking to do the right thing for the disabled often overlook the tax benefit available to them.

The Disabled Access Credit is available to eligible small businesses in the amount of 50 percent of eligible access expenditures that exceed \$250 but do not exceed \$10,250 for a taxable year. Eligible access expenditures include amounts paid or incurred to provide qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments. A business may take the tax credit each year that it makes an eligible access expenditure.

The Disabled Access Credit can be based on a series of expenses paid throughout the tax year. For example, a physician who sees a deaf patient may be billed about \$100–\$150 for the services of a qualified interpreter (assuming a two-hour minimum plus mileage). When the same patient returns for a follow-up visit or the physician sees another deaf patient during the taxable year, the total qualified interpreter expenses may range from \$250+. Under this scenario, the Disabled Access Credit will cut the cost of the physician's compliance with the Americans with Disability Act in half. A taxpayer may also combine qualified interpreter expenses, for example, with eligible access expenses to satisfy the minimum threshold necessary to claim a tax credit. The amount is capped at \$10,000 per tax year or a \$5,000 nonrefundable income tax credit.

*Editor's Note: Stephanie Neal, an advocate for the deaf and hearing impaired and an attorney who holds an LLM in taxation, likes to remind business owners about the help available to cover the cost of compliance with ADA regulations, such as the cost of providing interpreters for the deaf and the hearing impaired. For more information, Stephanie Neal can be reached directly at (616) 458-9481.*



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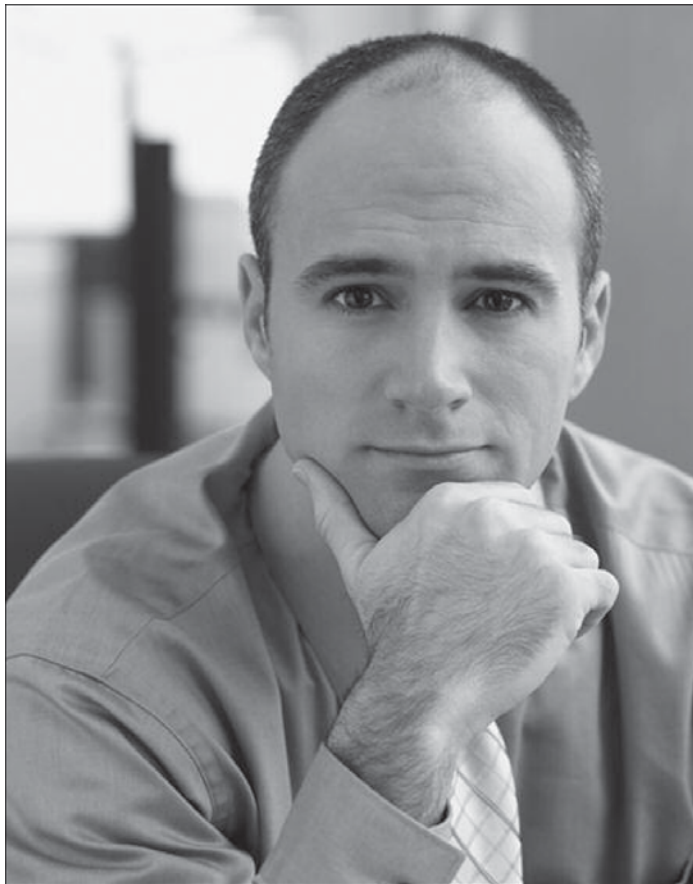
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Through my involvement with the GCBA, I have noted this simple consistency: The more difficult the challenge, the more the GCBA works together to accomplish the task at hand. Think about just a few examples:

- When allegations of misconduct were made about a lawyer's law practice that impacted our community, our courts took swift action to protect the vulnerable, and GCBA members, in collaboration with the Centennial American Inns of Court, stepped forth to volunteer their time to help the lawyer's displaced clients.
- When there was a recent issue about a lawsuit challenging the quality of legal representation received by indigent criminal defendants in this county, our members responded vigorously. In addition to positive support by Prosecutor Leyton, Past President Sippell, and circuit court administrator Barb Menear, Glenn Simmington gave a detailed interview to the media explaining that many of our most experienced and committed lawyers represent indigent criminal defendants.

Our system is not perfect and could certainly be improved, but members of our association do this difficult work out of a commitment to justice and a commitment to their profession. They should be saluted by us and by the media.

I have much to live up to and want this year to be a celebration of the positives of our Bar. Hopefully, you had the chance to join my wife and me for an evening of music, snacks, and relaxation at the Big Easy Grill and Oyster Bar, a social event in lieu of a formal annual meeting. In addition, I am also honored to announce that the GCBA is sponsoring another United States Supreme Court swearing-in ceremony, April of 2008. Given the legal talent in this community, there cannot be too many Genesee County lawyers admitted to practice before the U.S. Supreme Court.

Throughout the rest of the year, I hope we will be able to continue to honor those who have given so much to this legal community while we move forward together as an association. Thank you for the confidence you have shown in me by making me your president for the upcoming year.

*Editor's Note: As mentioned in Kurt's article, he enjoys his "old cars." The car featured on the cover, along with his lovely family, is a 1969 Oldsmobile 442 convertible.*

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Jim Zimmer

## Member Profile of Jim Zimmer

By LindaLee Massoud

### **Why did you decide to become an attorney?**

I grew up at 726 Beach on the corner of Fourth and Beach Street, Flint, Michigan. When I was approximately 10 or 11 years old, I discovered the courts. I would go and watch proceedings at court on a regular basis, most of the time in the summer when I could be there during the day. I became infatuated with attorneys and judges. My goal was always to go to law school but was delayed by a number of years so I could work and support my family.

### **In what area(s) of law do you practice?**

Over the years, I have practiced almost every area of the law. I still do general practice; however, I now refer cases to attorneys who specialize in certain areas. Presently, I do criminal defense, family law, probate estates, real estate and business work, in addition to representing other lawyers in grievance proceedings.

### **Which area of the law do you like the best and why?**

I enjoy practicing criminal law more than any other area. Although criminal law does take a bad rap on many occasions, in my opinion, criminal law is the front lines of defining our liberties and defining social order. Even though an issue may pertain to a particularly heinous crime, that issue may have far-reaching ramifications relative to the definition of everyone's liberty in this country and in defining the extent to which society will accept or not accept the actions of government. I am proud to add definition to that on a daily basis.

### **What do you like best about being an attorney?**

Learning is a rush. In no other profession could I continually learn and engage in the mental gymnastics necessary to under-

stand and interpret the law and apply that learning to a real, factual situation.

### **What part of being an attorney can you do without?**

Over the years, I have found that the practice of the law has become more and more confrontational and subject to a lack of civility. Sometimes I question whether procedure takes precedence over substances as times goes by. Obviously, it should be the opposite. If lawyers could be gentlemen and gentleladies in the competitive world of the practice of law, then it would be much easier for everyone.

I could easily do without the confrontational, procedure driven, anal-retentive attitude of many present-day lawyers.

### **What words of advice could you offer to new lawyers?**

Again, the advice that I would offer is to remember civility and cordiality; however, a lawyer should not lose his competitive spirit. It is that competitive spirit which drives the legal system to make the correct decisions over time.

### **What suggestions do you have to improve the legal system?**

The first suggestion I would have is that lawyers have access to judges. I am particularly peeved by the fact that the judges are locked away behind locked doors and are not accessible to the lawyers. I can understand, for the purpose of security, why litigants, witnesses and others are prevented from having contact with judges and the judge's staff; however, the lawyers should certainly have that contact to make the practice of law much more pleasant and efficient.

### **Offer one suggestion for improving our local Bar.**

To be honest, I don't have any suggestions to improve the local Bar. I don't have any objection to the way it is run. I only wish I had more time to participate. Hopefully, when my present crisis is over with my wife, I will find the time to do so.

### **Tell us about your life outside of the law.**

My life outside the law involves my children, step-children, grandchildren, and about-to-be great-grandchildren. I enjoy playing golf and do so at least one to two days a week during the summer. In addition, I do spend considerable time doing outreach work for certain lawyers and other people who are having problems with substance abuse. That does consume a fair amount of time. I am involved as a member of the State Bar Lawyers & Judges Assistance Committee. Also, I act as a mentor for lawyers in recovery.

### **If you had not become an attorney, what career would you have chosen?**

I don't think I would have chosen any other career. I worked at General Motors for 8 1/2 years, and the pain inflicted upon me by chasing the line eight hours a day drove me to continue to go to school and to obtain a law degree. I suppose if I had not obtained a law degree and extricated myself from the factory, I would have retired from General Motors.

### **Is there anything else you would like us to know about you?**

The most important thing that I enjoy about the practice of law is that it is fun. I enjoy reading, researching and writing. I enjoy the challenge of exploring certain issues and the rush of knowledge. Knowledge is an exciting thing. Sometimes when you come to a point where a light is turned on, it becomes a thrilling and exciting time. I don't enjoy watching television, except for certain sporting events, and therefore, the law has become my hobby, in addition to my profession. I suspect that is why I have been able to practice in many different areas of law over the years.

*Editor's Note: Jim's wife, Sue, recently underwent a surgery for a liver transplant. We wish the family our best.*



# *Judge Yeotis Honored*

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**Judge Yeotis —**

*All the best my fellow Spartan! Congratulations to the Centennial American Inns of Court and the Genesee County Bar Foundation for hosting a memorable event honoring the Lifetime Achievements of Thomas C. Yeotis.*

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