

March/April 2021

# BARBEAT

Genesee County Bar Association



Photo by Shelley R. Spivack

A Walk in the Woods (and other ways to manage stress)

GCBA Golf Outing Returns

Constructive Responses to Systemic Racism

Women's History Month

A Wild Ride to the US Supreme Court

Defining Moments in My Career

Law is the Family Business: Local Attorney Families

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# *A Walk in the Woods (and other ways to manage stress)*

By Michael A. Tesner, President



Michael A. Tesner

**“It’s not the mountain we conquer, but ourselves.”**

**-- Sir Edmund Hillary**

It is a familiar saying: “Don’t burn the candle at both ends.” And the meaning seems clear: that doing so may double your output, but eventually the two flames will meet, the wax is all consumed and your fire will burn out, its fuel completely spent. A more apt analogy of our efforts in the legal profession, however, might be to that of an oil lamp. We each have our own personal output of energy and brightness, but if we don’t refill the lamp oil, no matter how brightly we shine our fuel will run dry and our light will extinguish. Each one of us must from time to time find a way to restore our energy supply.

For myself, there is nothing more rejuvenating than a good long walk in the woods. And during this pandemic year of Zoom relations and the isolation from friends and colleagues, my saving grace has been to hike at Seven Lakes State Park with my wife, usually dragged along by our Chocolate Lab, Cooper. We have even taken several camping trips and backpacking journeys along the North Country Trail in Northern Michigan. I can think of no greater way to reduce the stress of practicing law in the time of COVID-19.

As lawyers, however, stress is not limited to the long, strange trip of the past year. It is widely reported that, even

in normal times, practicing lawyers experience an incredible amount of daily stress—and we don’t always handle it well. According to a 2016 study by the Hazelden Betty Ford Foundation and the American Bar

Association Commission on Lawyer Assistance Programs,<sup>1</sup> 21% of licensed, employed attorneys are problem drinkers, 28% suffer from some level of depression, and 19% struggle with symptoms of anxiety. According to the World Health Organization, burnout is an occupational hazard — “a syndrome conceptualized as resulting from chronic workplace stress that has not been successfully managed.”<sup>2</sup> And, of course, all of this is compounded by the unique stressors of the past year.

“Lawyer burnout” is a non-medical term often used to describe a “process of disengagement.” It stems from a mismatch between demands and resources and occurs when there are “too many job demands, too few job resources, and too little recovery,”<sup>3</sup> something to which we can all relate. This growing condition not only threatens thriving legal careers, it carries the added” grave risks of heart disease, suicide, alcohol-related illness and overdose.”<sup>4</sup>

So what can we do to manage stress before it leads to burnout? According to experts, the best way is to prevent it in the first place. “There is no ‘one size fits all’ approach to

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preventing and/or combating lawyer burnout but a simple approach could be characterized as ‘take care of yourself.’”<sup>5</sup>

There are as many ways to recharge our batteries as there are individuals practicing law. A brief survey of my fellow lawyers reveals a non-exhaustive sampling (in no particular order): meditation/mindfulness practice, knitting, yoga, watching a movie, routine exercise, golf, bowling, running, skiing, boating, flying a plane, cooking, singing or playing a musical instrument, playing with pets, reading, creative writing, poetry, journaling, and, of course, spending time with family. In short, take time away from the practice of law, even briefly, and do not neglect the other aspects of life.

Be kind to yourself. Take an assessment of how you are faring in these trying times and in this rewarding, but challenging, career. And remember to find a way to rest and recuperate so you can continue to thrive both personally and professionally.

I recommend a nice long walk in the woods.

## Endnotes

- 1 Patrick R. Krill, et al, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 *J. Addiction Med.* 46 (2016).
- 2 World Health Organization Burn-out an “Occupational Phenomenon:” *International Classification of Diseases* (May 28, 2019), <https://www.who.int/news/item/28-05-2019-burn-out-an-occupational-phenomenon-international-classification-of-diseases>.
- 3 Kate Mayer Mangan, *Keeping the Fire Burning, Stopping Lawyer Burnout*, *L. Prac. Today*, Feb. 2016, <http://www.lawpracticetoday.org/article/stopping-lawyer-burnout/>.
- 4 Jennifer Gibbs, *What Lawyers Can Do to Prevent and Combat Burnout*, Jan. 31, 2019, <https://www.jdsupra.com/legalnews/what-lawyers-can-do-to-prevent-and-14034/>.
- 5 *Id.*

## GCBA Golf Outing Returns

By Anthony “Tony” Tomaszewski

“Hello friends.” That line has been uttered by Jim Nance each April as he opens broadcast coverage of The Masters on CBS.

Well, in 2020, The Masters was played in November, not April, and the GCBA Golf Scramble was played in September, not June.

In 2021 both The Masters and the GCBA Golf Scramble are returning to their normal dates.

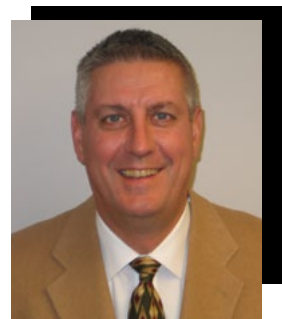
The 43rd Annual GCBA event is scheduled for **Monday, June 14, 2021 at Flint Golf Club**. So clear your calendars and get your team together for another great event.

We are planning for a 1:00 p.m. shotgun start with dinner to follow at approximately 5:30 p.m.

On course contests include Long Drive and Closest to the Hole (for both men and women). There is a raffle, a barrel of booze, and a lottery ticket board, among other prizes.

Cost is \$150.00 per golfer, but if you sign up by May 1 you get a **discount** to \$125.00. If you want to play but don’t have a foursome, let the GCBA staff know and we can get you on a team. If you don’t play golf, you can still join for dinner only for \$30.00, and you get to take part in the raffles and prizes.

So come out and support the GCBA in its largest fundraiser for the year!



Anthony Tomaszewski



# Constructive Responses to Systemic Racism

By Kendall B. Williams



Kendall B. Williams

Prior to the recent attack on the nation's Capital by domestic terrorists who tried to overturn a presidential election, I was asked to author an article about the impact of systemic racism on me personally or professionally. With my long years (68, with 44 as an attorney), and limitations of space, I could not begin to capture the life impact of my experiences with racism for this article. Instead, I decided to write about how it is possible to constructively respond to systemic racism.

I was fortunate to have wonderful parents. They moved North to Michigan to flee the segregated South. They wanted my brother and me to have better opportunities than were available to people of color in the South. They quickly realized that there is a continuum of systemic racism. It includes slavery, lynching, and segregation. Even in the north there were racially based limits on who could fully realize the American Dream.

In my view, as a man of color, it is undebatable that systemic racism still exists in 2021. The rhetoric of hate and the support of White supremacy by some leaders in our country shows beyond doubt the persistence of this American stain.

As a lawyer, it has been troubling to see brazen attacks by some in power on laws that protect the rights of all people, regardless of their race. Likewise, recent efforts to overturn a valid presidential election and undermine our democracy have been chilling.

The last four years have been very painful for me. I witnessed behavior that ripped scabs from wounds caused by my life experiences with racism. These wounds are too many to list and describe in this article.

However, I am mostly concerned about how young people of color will individually respond to the open displays of systemic racism over the last four years. I ask: will they see the racial barriers espoused by some of our leaders as insurmountable hurdles to their goals and aspirations? Will they give up any interest in pursuing professional careers? Or will they, despite obvious racial barriers, continue to pursue their dreams and ambitions?

I vividly recall the moment I decided to pursue a legal career. I was a junior at MSU in the College of Business. My academic adviser and a marketing professor were pushing me to consider law school. I had not given this much thought. I was a 19-year-old Black college student from Flint, Michigan, and did not even know any attorneys.

One evening I received a call from my roommate from jail. He had been arrested by the Lansing, Michigan police for a minor traffic offense. He asked me to pull together the \$60 needed for his bail and to come to the Lansing police station

to get him released. I arrived at the police station around 10PM and checked in with the Desk Sergeant. I informed him that I had the bail money for my roommate's release. I had an 8AM class the next day so I wanted to return home as soon as possible.

At 3AM my roommate had not been processed for release from jail. When I inquired of the Desk Sergeant why my roommate had not been processed for release, he told me to sit down and shut up or he would whip "my Black a\*\*" with his pistol.

As I sat in the lobby of the police station, very disturbed by the physical threat made by the Desk Sergeant, I had a deep realization. I did not know my legal rights or those of my roommate. My ignorance made me feel helpless. That realization prompted my decision to pursue a legal career. As I think back, I believe my response to the racist act of the Desk Sergeant was constructive. I opted to pursue a professional career in the face of the major racial barriers which existed 50 years ago.

It is my sincere hope that young people of color will not be discouraged by the demonstrations of disturbing racial hostility and attacks on our Democracy by some in our country. Rather, I hope that they will respond constructively by continuing to work hard to pursue their life aspirations -- that they realize the opportunities the American Dream is supposed to provide to all citizens. These hopeful responses will help to overcome systemic racism and the pain and sense of helplessness it causes.

## ~Omission~

The January-February *Bar Beat's* article featuring attorneys of color in Genesee County unintentionally omitted Mary Hood.

Referee Mary A. Hood has been serving as a Family Court Attorney/Referee for the 7th Judicial Circuit since her appointment in October of 2002.

# Women's History Month

By Shelley R. Spivack

In 1872 the US Supreme Court, in *Bradwell v Illinois*, 83 US 130, upheld a decision of the Illinois Supreme Court which had denied Myra Bradwell's application for admission to the bar as she was a married woman. In a concurring opinion, Justice Joseph Bradley summed up society's view of the proper role of women:

*"The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother." Id., 83 US at 141.*

One hundred and fifty years later more women than men are now entering law school.

As we celebrate Women's History month, *Bar Beat* has asked several "veteran" women attorneys in Genesee County to reflect on their careers.



Shelley R. Spivack

## A Wild Ride to the US Supreme Court

By Linda Pylypiw and Shelley Spivack

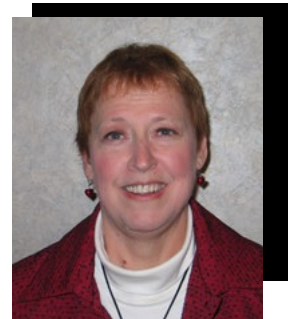
Recently I was asked if there was a case during my legal career which defined me. I immediately answered that it was the case of *Lewis v Lewis*. In the summer of 1988 I, along with Shelley Spivack as co-counsel, went on a 10-week, wild roller coaster ride from Genesee County Circuit Court to the U.S. Supreme Court.

In mid-August 1988, I received a phone call from Howard Simon, the Executive Director of the ACLU of Michigan, asking for help for a woman in Genesee County. A Genesee County Circuit Judge had just issued an Ex Parte Preliminary Injunction (TRO) in a divorce case enjoining the wife from seeking an abortion. The penalty for violating the order was up to 90 days in jail and/or a \$500.00 fine. As Shelley and I were active in the local chapter of the ACLU, we decided to jump in on a pro bono basis.

Almost immediately the media got wind of the case since the husband had contacted the local newspaper and later brought in a national right to life group. We were fielding calls from local, state-wide and national newspapers and broadcast media. The TV magazine show, *A Current Affair*, did a story; Dan Rather called; producers from Hollywood contacted us; CNN had a truck in our parking lot. Shelley and I quickly learned how to answer questions so we could not be easily edited. We also learned that protecting the privacy of our client was no easy task.

In early September 1988, a hearing was held on our motion to set aside the TRO before the Circuit Court Judge. The Judge denied our motion, ruling that the fetus was a "child" as defined under Michigan law and therefore he had jurisdiction to determine custody. Two days later, we filed an appeal with the Michigan Court of Appeals which shortly thereafter set aside the Judge's order, BUT issued a stay pending appeal. The husband, who was represented by a national right to life group, quickly filed an appeal with the Michigan Supreme Court which upheld the Court of Appeals decision, BUT issued a stay pending appeal. All the while the clock was ticking for the client as to whether she could have the abortion safely.

The next step was the U.S. Supreme Court, the BIG TIME. As neither Shelley nor I were admitted to practice before SCOTUS we brought in the attorneys at the National Office of the ACLU who helped us tweak the brief, but our names were listed as lead counsel. In early October 1988, the Supreme Court of the United States denied certiorari and lifted the stay. What a wild ride!! In family law you don't often get a chance to impact lives other than the family in question. In this case, both Shelley and I believe we made an impact on the lives of women in Michigan.



Linda Pylypiw



# Defining Moments in My Career

By Lynne A. Taft



Lynne A. Taft

In preparation for this *Bar Beat* issue, I was recently asked if there was a case that defined my career. There were several.

(1) In my first three or four years of practice, I had a probate case where a juvenile was accused of touching a little girl at his mother's daycare. After meeting with the family, I became convinced that he had not done what he was accused of. Although I had very little trial experience, I forged ahead. Aware of the damage such an incident can do to a young girl, I was faced with the issue of zealously defending my client versus further abusing the claimant during cross-examination. I chose to be kind and gentle with her.

She recanted during my cross-examination.

I have never wavered from my belief that advocacy does not require one to sacrifice their humanity.

(2) In 1997, I was appointed to defend a former Flint school teacher accused of sexually assaulting a student many years earlier. It was a massive undertaking as there was an extensive transcript from a trial in Florida where he had been acquitted of similar charges. It lasted three weeks. My husband joked that it was a good thing it ended because I was running out of "lawyer costumes" to wear.

When the jury locked, I waited in Judge Ransom's outer office. Within a half hour, I became very sick with a cold that I had been fighting off for days. It made me realize the toll that trials take on us both physically and emotionally.

The highlight of the experience for me was something Jerry O'Rourke said at an Inns of Court meeting. I was a member of the group presenting that month, but I had to miss the meeting because of the trial. When Jerry introduced the members of the group he said "Lynne Taft cannot be here tonight. She is doing what we were all trained to do." It meant so much to me coming from such a fine lawyer.

I lost clients because I defended this man. At the salon where my mother had her hair done for many years, she was

so harassed about me defending him that she stopped going there.

Best possible outcome—I did a really good job, and he was convicted.

(3) My last criminal case did not go to trial but involved a hearing on the qualification of an expert witness that, itself, took as much preparation as most trials.

A young couple was charged with first- and third-degree child abuse and torture. The alleged victim was their infant daughter. The basis for the child abuse charges was primarily healing injuries discovered when they took her to the hospital for a respiratory issue. I was convinced that my client, the mother, had not done what she was accused of. The family was very proactive and did a lot of the research needed to find a medical expert. This doctor had devoted a great deal of time to assisting parents who are wrongly accused of child abuse. I immersed myself in the subject—reading articles, spending hours on the phone—and discovered that there are far too many parents who lose their children and go to prison for child abuse premised on protocols that do not consider other explanations for injuries.

When the judge qualified our expert, it led to a very favorable resolution: an offer of no contest to a misdemeanor (from a life offense) with dismissal at the end of probation. I have to say it was the most satisfying "win" of my career. These young parents missed their daughter's first steps, her first words and so much else while the case was pending, but this resolution means they will be around to raise her.

And, of course, there was the June 28, 2009 "courtroom brawl" (crawl). As of February 23, 2021, 1,375,721 hits on YouTube and counting (<https://youtu.be/U0-f8lgxgk0>).

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# Law is the Family Business: Local Attorney Families

By William J. Brickley



The GCBA has a rich history of members who come from a family of lawyers. Many of our attorney families accomplish as much as the “big name” attorneys, but they do not receive the same public recognition. In each edition we will highlight a couple of our local attorney families who work hard to serve the Genesee County community.

## The Pabst Family

After graduating from University of Michigan - Flint **Tom Pabst** decided that he wanted to be a lawyer. He enrolled at Wayne State University and graduated in 1977. Upon graduation he was honored to be hired and worked with Lietson, Dean, Dean, Segar and Hart. Most of Tom's early practice was focused on business law and commercial transactions. He even took the plunge and returned to Wayne State to obtain a Master's degree in Taxation.

One of Tom's mentors, Mort Lietson, felt Tom had the ability to be a good trial lawyer. In 1981 Mort left the firm to work on his own and invited Tom to come with him and to try some cases. Tom initially resisted, but the urge to be in the courtroom drove him to take the offer and join Mort.

As the legal community knows, Mort Lietson was correct about his instincts with Tom. Never one to shy away from any courtroom battle, Tom embraced the work of a trial lawyer with a passion few others possessed. While Tom handled many of the standard personal injury cases he also had the opportunity to work on some non-traditional plaintiff work in the field of labor and employment as well as civil rights.

Tom was able to see the pendulum swinging on personal injury cases and shifted to doing employment and civil rights litigation for victims of job losses and excessive government behavior. While he still does a variety of litigation matters including personal injury and even fire loss cases, he still is very active in employment and civil rights claims and still brings the passion most associated with a young lawyer seeking to prove himself.

Tom's son **Justin** also completed his undergraduate studies at University of Michigan-Flint and then enrolled at DCL at MSU. Despite suffering serious injuries in an auto accident in 2004 he completed his studies in 2005 and came to work with Tom. After many full-time years of working with his father Justin has transitioned to working part time with Tom and also involving himself in other non-legal endeavors.

**Jarrett** broke the family mold and attended MSU for his undergraduate studies, as an honor student no less, with a science degree and a concentration in biology. He then went on to Cooley Law school, graduating in 2009 before also coming home to work in the family firm.

*Continued on next page*



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Tom and Jarrett are still working very hard, still enjoy getting into court and are looking forward to the return of in-person activities as soon as this pandemic is under control.

### The Joseph Family

When Norman Joseph immigrated from Syria, and James Shaheen immigrated from Lebanon, it was unlikely either could imagine the impact on the law that each would have.

Two of Norman's sons, Edward and Ernest, became lawyers in Flint, Michigan. Prior to becoming an attorney **Ernest** served his country in WWII and fought in the Battle of the Bulge. He was captured by the Germans and served as a POW until the war's conclusion. Upon returning to Flint, he eventually established a successful legal career before his untimely passing.

**Edward** also established a successful career in Flint but neither he nor Ernest were the only lawyers in the extended family. Cousins and nephews also jumped into the law and began spreading the family legal legacy.

James Shaheen's daughter **Sally** took an unconventional path to the law. Possessing marvelous vocal skills, she honed her trade as a jazz singer, dancer and entertainer. She was noticed by national talent sources, had an agent and was negotiating to appear on national television shows. So what

happened? **Edward Joseph.**

The two met, had a whirlwind courtship and were engaged and married in a very short time. Times being what they were, Sally was expected to give up the life of an entertainer to be a wife and mother, a role she embraced.

Edward saw that Sally, though, had more than just wonderful skills of tending to home and children. He encouraged her to go to college, and she received a Bachelor's degree from University of Michigan-Flint in physiology in 1975. Working as a budget and credit counselor in the Genesee County Prosecutor's office led her to go on to Cooley Law School and become an attorney.

Eventually Sally became the Risk Manager and Purchasing Agent for the Genesee County Road Commission, the first time either position was held by a woman. In addition to her legal work, Sally decided to serve the public in a different way. She was elected a Trustee in Flint Township in 1984 and subsequently was elected as Township Supervisor. Again, she was the first woman in Genesee County to ever hold those positions. She was also a member of Mott Community College's Board of Trustees from 2007 until 2020.

Sally's dear, sweet Edward passed away while preparing for a deposition in 1987. Sally now lives in Northern Michigan.

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# A New Way of Life

By Elisabeth McIlhargie

It is a well-known fact that law school is intense and rigorous, and that the legal profession is demanding. The expectations are high, and the workload is often unforgiving. Law school curriculum is created this way to prepare future attorneys for the demanding career they will soon embark upon. However, that career may look different for the next group of future lawyers as the pandemic has seemingly forever changed the world we live in. While integrity and commitment to the profession will remain, it is apparent that the virtual technologies that have allowed the legal profession and academic curriculum to continue to run efficiently are, to some degree, here to remain.

To date, the American Bar Association has not accredited any online-only Juris Doctor programs. But just as court proceedings and attorney-client contact have been made possible through Zoom, law schools have utilized technology to continue academic learning. Classes are still intense, professors still cold call, and even in a virtual setting with a mute and unmute button professors still utilize the Socratic method, but now it is all recorded.

There is also the bar exam, typically consisting of fifteen essays and the MBE 200 multiple-choice questions taken over the course of two days. That is until the Michigan Board of Law Examiners dropped the MBE during the last exam; in other words, exam takers took a one-day remote, 15-question essay exam. Unfortunately, due to what the software company claimed was a cyberattack, exam takers experienced difficulties and delays during the exam. It appears the Bar Exam will return to the two-day format consisting of both the traditional essay and MBE components.

It is not just the legal profession that has turned virtual; a lot of school districts in our county have flipped to a virtual setting for our kids. As parents, our responsibilities have doubled as we now take on this new role as an assistant teacher to help our kids keep up with their own virtual classes. If you have kids, you can probably relate to my husband and me having to learn a whole new platform such as Google Classroom. Parents and teachers are doing the best they can to transition our kids to this new way of life. I think the only

regret we all share is not investing in Google Classroom and Zoom before the pandemic.

But what does this all look like for our other vulnerable populations on the receiving end of our new virtual lifestyle? For nearly the past five years, I have assisted local attorneys in managing their court-appointed legal guardianship responsibilities. Part of that role is ensuring that the wards are well cared for in all aspects of their life including placement, coordinating services to meet their personal and medical needs, and completing quarterly face to face visits.

As a result of the pandemic, one obvious change for individuals under guardianship is the restriction of family visitations at care facilities. Some residents in facilities are struggling with this temporary isolation. Fortunately, I have seen staff at facilities step up to the challenge and support the residents. Some of these facilities have also turned to technology to foster family relationships by scheduling visitations through FaceTime and Zoom. A silver lining to this new streamlined way of life may be that individuals who previously struggled to attend in-person court hearings will now be provided with a virtual alternative to attend.

So, what do we do with our new way of life? We take what we have learned and create a new efficient way to serve others. John F. Kennedy once said, "Change is the law of life. And those who look only to the past or present are certain to miss the future." While we look to the future of our new virtual way of living, we shouldn't forget the importance of being together: kids returning to school to be with their peers, staff returning to offices, and lawyers returning to the courtroom. And certainly, we should take away the lessons from the trials and tribulations of this pandemic. We now know some of what we have always done in person can successfully be accomplished through technology. We also know that once it is safe to do so, our next in-person visit with someone who is in a nursing home or assisted living facility may be the thing that brightens their day.



Elisabeth McIlhargie



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# Insuring Evidentiary Knowledge

By Hon. Joseph J. Farah

*"Hey, honey, have you seen our car insurance policies?"*

*"No. I haven't. With COVID restrictions and us not driving much, I put them someplace. But right now, who cares what they say."*

Knowing what's in your auto insurance policy – when you're not driving much – is kind of like knowing the rules of evidence when there are no trials. But soon we will be back in full swing on the roads, trains, planes – and in the courtroom. So, let's refresh you on the rules of evidence so you can come back more ready than ever.

This article will not be overly scholarly. Not trying to be, but rather practical, useful, helpful, and in the best sense, rudimentary. Let's look at some evidence rules, with a game-plan approach.

## Relevance, 401 – 403

The trick here is drawing the line about what's relevant. The word "any" twice in MRE 401 suggests its breadth. Relevance can be gauged through (1) theory, (2) purpose, and (3) format. A common pitfall: objecting because the evidence is "far more prejudicial than probative" under MRE 403 concedes the challenged evidence is relevant – when maybe it isn't. An objection in the alternative is suggested.

## Character Evidence, 404(a) and 405

Think of 404(a) as the "if" rule on the admissibility of character evidence and 405 as the "how" rule, or the format of proof of character evidence. In this context, character equates with conformity: because of your character, you conformed your behavior on a salient day to that character. For the most part, the 404(a)(1)-(2) exceptions to the character-to-conformity bar leave the introduction of character evidence to the accused and rebuttal to the prosecutor. Also, 99% of the time only two methods of proof are allowed to establish character: reputation and opinion.

## Other Acts Evidence, 404(b)

Too much to write here, so I will write too little! Pages could be written about prosecutors using 404(b) in criminal cases. But did you know 404(b) is not limited to use by the prosecutor? Civil cases: *Rock v Crocker*, 499 Mich 247 (2016). Regarding witnesses: *People v Rockwell*, 188 Mich App 405 (1991). By criminal defendants: *People v Woodle*, 121 Mich App 336 (1982).

## Witnesses, 601 et seq

Quick pointers: Don't fall in love with "Leading, Your Honor" objections. Pick your spots. Leading questions are allowed in many situations. Be familiar with them. Leading questions virtually never cause reversals. Too many of these useless objections and you will reveal you are not billing your client by the hour – but by the minute. MRE 611(d).

If you want to impeach by prior inconsistent statement, give the witness the opportunity to explain or deny the claimed contradiction. MRE 613.

If you want to refresh recollection, know the steps. If you need them, give me a call. This endeavor in court is botched 75-80% of the time. MRE 612.

## Hearsay, 801 – 806

When responding to a hearsay objection, do not immediately cite an exception when maybe your first reaction should be the statement you want in is not hearsay at all, e.g., no assertion in the statement, 801(a); not introduced for statement's truth, 801(c); is excluded from hearsay definition, 801(d)(1)(2). Simple rule: if the statement is not being introduced for the truth of the assertion it contains, the statement cannot be hearsay. Not-so-simple rule: if the proponent of the statement voices a non-hearsay purpose, that purpose must still be relevant, 401, and not excludable, 403.

## Expert Testimony, 702

Break this rule into four parts: (1) will the jury be helped by consideration of expert testimony; (2) is the proposed expert qualified to render an opinion based on skill, knowledge, education, experience or training; (3) does the opinion transcend the expertise; and (4) are the facts and data in the case sufficient for the expert to apply the expertise and make a reliable opinion based on that expertise. Pick your fight. Seldom – but sometimes – the expert's testimony won't be helpful to the jury. If not, it's done there. Hardly ever – except in medical cases – will expertise be successfully challenged. While point (4) usually comes up in a pretrial *Daubert* hearing, the action right now on experts is on point (3): does the opinion match up with the expertise, or does it transcend it?

*"Hey, honey! I found our insurance policy. It was stuck in your evidence book! Good news. Now we know we're covered."*



Hon. Joseph J. Farah



# Navigating the FOC Forms Field: Opting Out of FOC Services

By Tony McDowell



Tony McDowell

Of the many Friend of the Court matters I get questions about, one of the most common topics is regarding opting in and out of the Friend of the Court (FOC). I think the reason this topic is a fan favorite is because it is deceptive. It looks like it should be incredibly simple: no support = no FOC. In practice, navigating the opt-out process is more complicated than it appears, requires a bunch of forms, and that doesn't even get into whether a family should opt out.

Although the process is tricky, it is not because the FOC is trying to make it difficult to opt out. We have plenty of work to do. In Genesee County alone, we have about 50,000 cases. If your clients want to opt out, that's okay. We are happy to serve the families who want our help.

By default, if no affirmative steps are taken to opt out, the FOC must open a FOC case for every domestic relations matter. MCL 552.505a(1). It is important to note that the requirement is for every domestic case, not just cases where support is ordered or where there was a request for services. When parties agree to no support, FOC is still required to open the case, unless we receive an opt-out order. When making this opt-out decision, it is important to remember that although we are known for our support collection, we also offer a host of other services, including medical and parenting time enforcement. We have a lot of tools in our tool box.

If families want to opt out, then the question becomes *how*? MCL 552.505a(2) provides the answers. To opt out, the parties may file a motion<sup>1</sup> with their initial pleadings for the court to order the FOC not to open a case.<sup>2</sup> The court may not issue an order to opt out of the FOC in a few situations: (a) the children on the case are receiving public assistance (Medicaid or TANF), (b) one of the parties wants there to be FOC services, or (c) there is domestic violence or unequal bargaining. Whenever the parties want to opt out, they must file paperwork acknowledging the services that they are not getting by opting out of the FOC.<sup>3</sup>

If there is going to be a support order, albeit opted out of the FOC, the support order should be entered on a No FOC Services Uniform Support Order to comply with MCR 3.211.<sup>4</sup> Although MCR 3.211 only requires a Uniform Support Order (USO) if support is being ordered, there may be value in entering a No FOC Services USO when no support is ordered, especially if the family might ever want FOC services in the future. The No FOC Services USO and the Order Exempting from FOC Services provides the FOC

with the authority to "prepare and submit an ex parte, uniform support order." This means that if, sometime after opting out, things go awry and the parties want FOC services, we can jump in and get support reinstated immediately. Generally, when families want to opt in, they want us involved yesterday, so speed can be key.

Parties can opt back into FOC services any time after they have opted out by completing the Request to Reopen FOC Case.<sup>5</sup> We will welcome them back with open arms and no hard feelings, but we will not be able to re-create history. If there are disputes about what happened before there were FOC services, we will not be able to enforce those, as we do not have those records. Additionally, as with any time someone requests FOC services, we will require another form, the Request for Child Support Services, which is required for us to be able to offer all of our IV-D funded services.<sup>6</sup>

As I said, deceptive! It seems like an easy process (just don't enter a support order) but there is a lot more to it than that. Hopefully this has helped, but if it hasn't, don't worry, we at the FOC are here to serve. Reach out any time and we will be happy to assist.

*Tony McDowell is the Genesee County Deputy FOC. FOC questions? Reach Tony at [tmcdowell@co.genesee.mi.us](mailto:tmcdowell@co.genesee.mi.us) Follow us on Facebook/Instagram @geneseecountyfoc*

## Endnotes

- 1 Available at [www.gc4me.com/foc](http://www.gc4me.com/foc).
- 2 SCAO FOC 102.
- 3 SCAO FOC 101.
- 4 SCAO FOC 10a.
- 5 SCAO FOC104.
- 6 SCAO DHS1201d.

# CONGRATULATIONS

## Mott Community College Congratulates Judge Thomas Yeotis

Judge Thomas Yeotis is one of three recipients of the prestigious 2021 Outstanding Alumni Award from the American Association of Community Colleges (AACC).

Judge Yeotis served as a municipal court judge, then as a probate court judge, and then was elected to Genesee County Circuit Court. Now retired after 32 years as a judge, he has been a licensed attorney for nearly 65 years. Judge Yeotis was a founding member of New Paths, the Greater Flint Area Sports Hall of Fame, and our own Bruin Club of Genesee County. He has served on more than 30 non-profit community and civic organizations, often as chairman or president, and has established athletic and music scholarships in his name. In 2001, Judge Yeotis was honored as a C.S. Mott Citizen of the Year by the Flint Area Chamber of Commerce. He has also received the William Blamer Distinguished Service and Alumni-Athlete of the Year awards from the Bruin Club. We look forward to celebrating Judge Yeotis in April and showing our appreciation!



Hon. Thomas Yeotis

Article: <https://4me.mcc.edu/ui/bear-advisory.html#/view/851>

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January/February 2021

## BARBEAT

Genesee County Bar Association



Photo by Shelley R. Sprack

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