September 2023

BARBEAT

Genesee County Bar Association

Craig R. Fiederlein, 2023-2024 GCBA President

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Advertisers

Another Year has Come and Gone

By Craig R. Fiederlein, President

Craig R. Fiederlein

Well, another year has come and gone and I want to thank GCBA members for electing me as your new President. Thanks again to Nancy Chinonis for passing the Spoon of Power! Nancy has done a wonderful job, and her hard work and dedication did not go unnoticed. I will try my best, with your help and the help of our excellent support staff, Tina and Star, to guide us through the next year.

As President, my first priority will be to promote the mission of the GCBA. This association has a rich 125+ year history, and I encourage you to purchase the book by former President Sherri L. Belknap, *Genesee County Bar Association, The First 125 Years of Excellence.*

As President, one of my goals will be to encourage members to become involved in our association's events, utilizing its resources, engaging with judges and mentoring attorneys, attending informative monthly meetings, seminars, and trips to Washington DC and Tigers' games. It was at a GCBA Golf Outing that former executive director, Ramona Sain, teamed me up with Chris Christenson, another young lawyer. That meeting grew into a friendship and a future partnership.

For those of you who don't know me, I am just a kid from New York and a first-generation lawyer. My father is a retired New York City police sergeant who had two brothers in the force. He instilled in me the importance of education, having obtained his master's degree while working as an officer. I lost my mother, who was my guardian angel, to cancer, while I was a first-year law student.

However, it was my exposure to my Uncle Dave's property management business in the Bronx and interning at a title company and with a real estate lawyer, that led me to pursue a law degree from the University of Toledo College of Law.

The answer to the most frequently asked question, "Why do you live in Michigan?" is that I came to Michigan after visiting Michigan State University with my high school buddy who wanted to become a veterinarian. I fell in love with the school, the state, and its quality of life. It was there that I met my wife, Nancy. Together, we have two children. I am an active member of the Grand Blanc Chamber of Commerce and have been involved in the community where we raised our children. In my free time, I enjoy attending MSU football and basketball games.

As Bar President, I intend to rely on our past presidents, members, and the judiciary to guide me on how best to lead this organization in the post-COVID-19 era. A lot has changed in the past few years, and I will explore ways to improve the efficiency of the GCBA and actively promote participation in our organization to fulfill our mission. I believe that the changing demographics and economics of the legal profession have impacted the time lawyers have available for extracurricular activities. New societal norms like Zoom meetings require this profession and the association to adapt to the times.

Our past Presidents have laid the foundation for incorporating social media into our organization, recognizing that technology is part of our future and I look forward to continuing their vision. I also promise to be mindful of your time.

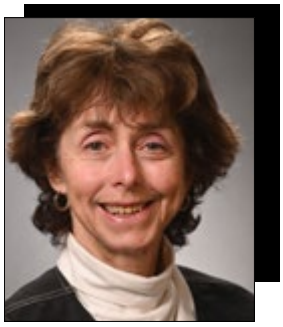
GCBA Past Presidents Luncheon held Friday, July 21, 2023 at Warwick Hills Golf & Country Club. Pictured: Standing (L-R): Donald G. Rockwell, Valdemar Washington, Hon. Jessica J. Hammon, Michael W. Krellwitz, William J. Brickley, Jeffrey J. Himelhoch, Nancy K. Chinonis, Kurtis L.V. Brown, and Brian M. Barkey. Seated (L-R): Craig R. Fiederlein; Hon. Duncan M. Beagle, Richard J. Ruhala, Tom R. Pabst, Susan Philpott Preketes, and C. Robert Beltz.

As President I will also look to ways that can continue to involve us in the community. We will continue to be active with the soup kitchen, holiday dinner, and hosting blood drives. I will be working with Jeremy Piper and the Bar Foundation to create new events for lawyers and the community with national speakers. These events will take time and effort to create and I am looking for volunteers to make these national speaking engagements a reality.

I am looking forward to an enjoyable year and meeting as many members as possible and learning your stories. Please come out to our events and participate in our numerous committees. If you want to join a committee and/or have ideas for this organization, please reach out to Tina to set up a meeting or email me at cfiederlein@cflegal.net. Thanks again.

From the Editors

By Shelley R. Spivack and Sean M. Siebigteroth



Shelley R. Spivack

Sean M. Siebigteroth

As we finalize the fall issue of *Bar Beat*, another summer storm is brewing over Michigan. While the storms disrupt many of our summer plans, today's storm has given me a chance to reflect upon the goals of our quarterly magazine.

For me, *Bar Beat* serves several purposes: to keep our members updated on changing legal landscapes; to highlight how the GCBA is serving our members and our community; and to spotlight the achievements of our members.

As the U.S. Supreme Court ended its '22-'23 term at the end of June, we are highlighting several of their recent decisions. Assistant Prosecutor and former GCBA president Mike Tenser has written an informative and comprehensive review of five of the most important criminal law cases decided by the court this term. Thank you Mike for the clarity you bring to even the most complicated of cases!

Judge Ariana Heath, in her excellent article on *Haaland v Brackeen*, unpacks the complexities of the Indian Child Welfare Act (ICWA) as well as delineating the Court's decision upholding the Act's constitutionality. Thank you Judge Heath for your continued dedication to issues surrounding children and families!

My co-editor Sean Siebigteroth reports on the Supreme Court decision striking down affirmative action programs at Harvard and UNC (as well as other universities around the country). The second part of Sean's article, analyzes *Creative LLC v Elenis*, in which the Court considered whether the First Amendment prohibits Colorado from forcing a website designer to create expressive designs speaking messages with which the designer disagrees. Thanks you Sean for your insight into these important cases!

Peter Doerr, in the second of a two-part article, recounts Andrew Transue's momentous and precedent setting journey to the Supreme Court.

This issue also brings you news of GCBA events such as the Annual Membership meeting, the Annual Awards dinner, and the Golf outing as well as an introduction to our new GCBA President, Craig Fiederlein. In addition we celebrate the achievement of U.S. District Court Judge F. Kay Behm with some photos of her investiture ceremony.

On a sad note, on June 15 2023 we lost our past GCBA president, Mike Kowalko. Thank you to Tom Waun for sharing his memories of Mike with GCBA members.

Lastly, we need to hear from you, our readers, about what you would like to see in *Bar Beat* and to volunteer as writers of future articles.

Pictures from the Annual Meeting

Outgoing GCBA President Nancy Chinonis & incoming GCBA President Craig Fiederlein

Nancy Chinonis and LindaLee Massoud

Judge Geoffrey Neithercut and Nancy Chinonis

2023 GCBA Awards

The Genesee County Bar Association and American Inns of Court held a joint Awards Night on Thursday, June 22, 2023, at Redwood Steakhouse. The program began with presentations by Kenneth Nixon and Marvin Cotton Jr. on the Conviction Integrity Unit as well as the following awards.

Herbert Milliken, Jr. Civility Award:

Timothy H. Knecht and Nancy Chinonis

Timothy H. Knecht was awarded the Herbert Milliken, Jr. Civility Award. The recipient is a longtime, practicing member of the Genesee County Bar Association. Tim is recognized for his willingness to offer professional guidance and advice to fellow attorneys and for being widely a professional role model who demonstrates the highest standards of professional courtesy and civility combined with a zealous and thorough advocacy on behalf of their clients.

Brian M. Barkey Community Service Award:

Ward Chapman, Hon. Judith Fullerton, Donald and Diane Rockwell

Donald G. Rockwell was awarded the Brian M. Barkey Community Service Award. This award recognizes a GCBA attorney member or affiliate member who has demonstrated an outstanding commitment to community service and provided volunteer services to charitable, religious, civic, community, governmental or educational organizations which have improved Genesee County.

Jerome O'Rourke Advocacy Award:

Alexandra Nassar and Jill Nylander

Alexandra Nassar was awarded the Jerome O'Rourke Advocacy Award. The recipient is of a member of the Genesee County Bar Association who demonstrates the highest level of professional excellence in advocacy, and who exemplifies the other principles of the American Inns of Court: Professionalism, Ethics and Civility. The award is bestowed by the Centennial American Inns of Court.

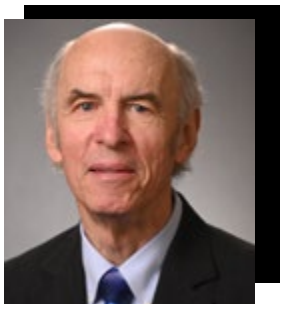
Pro Bono Attorney of the Year Award:

Stacy Olivier, John L. Hicks, and Stacy Davis

John L. Hicks was awarded the Pro Bono Attorney of the Year Award. This award recognizes an attorney who has demonstrated an outstanding commitment to pro bono legal advocacy and has provided volunteer legal services to the Genesee County community, often through clinics and cases conducted at Legal Services of Eastern Michigan. This attorney provides legal advice and/or direct representation to those individuals that are the most in need, often totaling more than 50 hours of annual pro bono time to Genesee County community members. This award is bestowed by Legal Services of Eastern Michigan.

Revisiting the Persistence of Andrew Jackson Transue (Part 2)

By Peter Doerr



Peter Doerr

***Editor's note**: In our June 2023 issue we published Part One, which this case in which the defendant Morissette was convicted of stealing government property.*

Part Two

Unwilling to give up, Transue convinced Morissette to let him appeal to the US Supreme court by agreeing to do it at his own expense. Transue traveled to Washington DC for oral argument with his wife Vivian and their two daughters, ten-year-old Tamara and five-year-old Andrea. Sitting in the audience gallery, Tamara recalled thinking that her dad was nervous because he drank a lot of water.

During oral argument, Transue presented a photo of the pile of remaining abandoned practice bombs that Morissette did not take. Justice William O. Douglas remarked upon seeing the photo: "Why, it's just a bunch of junk." The photo was given to me by Genesee County attorney Richard Figura, who received it from the photographer's son, Ken Wallace, after a chance meeting. I later mentioned to John Nickola that I had the photo. Nickola had known Transue since he was 8 years old and openly expressed great admiration of Transue, who had encouraged Nickola to go into law.

Upon seeing the photo, Nickola exclaimed that it was sacred to our profession, like finding the "Holy Grail." The photo was admitted into the permanent exhibit collection of the Genesee Circuit Court on September 14, 2017, with Transue's children, Andrea and Tamara, in attendance.

In reversing Morissette's conviction, the Supreme Court stated that it could find no grounds for inferring any affirmative instruction from Congress to eliminate intent from any offense with which Morissette was charged, setting forth its rationale:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.' Common-law commentators of the Nineteenth Century early pronounced the same principle, although a few exceptions not relevant to our present problem came to be recognized. Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.

If one of the features of wisdom is knowing basic truths, I believe that Transue had early on internalized the truth enunciated by the Court. Therefore, when Morissette told Transue that he did not intend to steal, Transue immediately knew how he would defend Morissette. I have little doubt based upon my years with Transue that he meticulously researched the concept of intent to steal and carefully planned his strategy for presenting it to the jury and then making a good record of his objection when the trial judge denied his request.

Morissette has been cited over 10,000 times since it was issued in 1952, the latest being the opinion in *Ruan*. In *Ruan*, the Supreme Court vacated the conviction under the Comprehensive Drug Abuse Prevention and Control Act for "knowingly or intentionally" distributing a control substance "except as

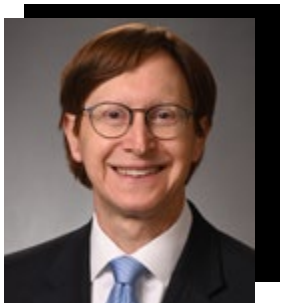
authorized." The Court held that once a defendant meets the burden of producing evidence that his/her conduct was "authorized," the government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner.

The *Ruan* rationale was largely based upon *Morissette*. The Supreme Court indicated that as a general matter our criminal law seeks to punish the vicious will. With few exceptions, wrongdoing must be conscious to be criminal. Indeed, consciousness of wrongdoing is a principle as universal and persistent in mature systems of criminal law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Mr. Transue often said that his duty as a lawyer was to accept the position of his client and then to do his very best to move the client to a better position. I am sure that those of us who had cases with him could tell stories about his persistence, but those stories are for another time.

SCOTUS 2022-23 Criminal Law Update

By Michael A. Tesner



Michael A. Tesner

In addition to striking down affirmative action in college admissions and rejecting an argument that state legislatures have unfettered discretion to control federal elections, the United States Supreme Court also decided some significant cases affecting the criminal law.

In ***Counterman v Colorado*,** No. 22-138 (June 27, 2023), the Court addressed when threatening speech can give rise to criminal liability over the general protection of the First Amendment. Counterman was convicted under a state law for stalking and harassment of a local female singer and musician with whom he had become obsessed. Among the hundreds of Facebook messages Counterman sent were several envisioning violent harm upon her, causing her fear and upending her daily existence. The statute at issue made it unlawful to "[r]epeatedly . . . make[ ] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress." Such conduct would certainly also constitute the crime of stalking under Michigan law.

The Court recognized that the First Amendment permits restrictions upon the content of speech that amount to "true threats." A true threat is a "serious expression" conveying that a speaker means to "commit an act of unlawful violence." The Court held that to prove a true threat, the state must establish the defendant had some subjective understanding of his statements' threatening nature. Thus, in order to hold one criminally liable for threatening speech, courts must employ a subjective test; the threat must be intentional or made recklessly. "The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence."

In another First Amendment case, ***United States v Hansen*,** No. 22-179 (June 23, 2023), Hansen was convicted for conducting a scam by encouraging and inducing aliens to enter the country seeking citizenship through a fraudulent adult adoption program. Once in the country, as their legal status expired, he further encouraged them to stay, awaiting citizenship papers that would never arrive. Hansen was tried and convicted for violation of the Immigration and Nationality Act, which imposes criminal penalties for any person who "encourages or induces" a noncitizen to "come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such [activity] is or will be in violation of the law."

Hansen challenged the statute as facially overbroad, criminalizing or chilling protected speech under the First Amendment. The Court disagreed and interpreted the words in the statute, "encourages or induces" to have the narrow meaning

Continued on next page

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under the criminal law for solicitation and facilitation, akin to the conduct and mens rea required for aiding and abetting. So interpreted, the statute is not facially overbroad and does not offend First Amendment protections.

In ***Smith v United States,*** No. 21-1576 (June 15, 2023), the Court held that Double Jeopardy does not bar a new trial after a conviction is vacated due to improper venue. The defendant was tried and convicted in the Northern District of Florida for stealing trade secrets via computer from his home in Alabama from a website owned by a company whose servers were in the Central District of Florida. Because the Court of Appeals' decision that venue was improper did not adjudicate the defendant's culpability, and the trial was terminated "on a basis unrelated to factual guilt or innocence of the offense," retrial was not barred by the Double Jeopardy Clause.

Perhaps the most significant criminal decision of the term is from ***Samia v United States,*** No. 22-196 (June 23, 2023), in which the Court held that when a non-testifying co-defendant's testimonial statement is altered so as not to implicate the defendant, the statement is admissible in a joint trial with a single jury, subject to a limiting instruction that the statement is only to be considered as evidence against the co-defendant. In *Samia*, three defendants were tried before a single jury for committing a murder-for-hire of a New York real estate broker. Following his arrest, a co-defendant, Stillwell, admitted he had been driving the van in which the victim was killed but claimed that Samia was the one that shot her to death. At trial, a DEA agent testified to an altered version of the statement in which Stillwell had confessed to "a time when *the other person he was with* pulled the trigger on that woman in a van that he and Mr. Stillwell was driving."

The Court noted that, although the co-defendant's confession was a testimonial statement falling within the ambit of the Confrontation Clause, the Clause only applies to witnesses "against the accused," and where the evidence is admitted only against a co-defendant, and where the jury is instructed to consider that testimony only against the co-defendant, then the Clause is not implicated. The Court explained that this general rule is consistent with the Clause's text, historical practice, and the law's reliance on limiting instructions in other contexts.

The Court placed the present case in context of precedent. In *Bruton v United States*, 391 US 123 (1968) the Court held admission of a co-defendant's confession that named the defendant was unconstitutional. In *Richardson v Marsh*, 481 US 200 (1987), however, the Court declined to extend *Bruton* to confessions that do not name the defendant. And in *Gray v Maryland*, 523 US 185 (1998), the Court qualified the *Richardson* holding by finding that certain "obviously redacted" confessions might be "directly accusatory," such as using a blank space or the word "deleted," demonstrating an obvious alteration that is so similar to an unredacted statement as to be unconstitutional. In *Samia*, the Court declined to expand the *Bruton* rule to encompass the facts of that case. The alteration of the statement to use the phrase "the other person," which avoided directly or indirectly identifying the defendant, and the trial court's limiting instruction were sufficient to protect the defendant's constitutional rights and allow proper admission of the co-defendant's confession.

Finally, in ***Sackett v EPA,*** No. 21-454 (May 25, 2023), the Court limited the scope of wetlands that are subject to protection under the Clean Water Act (CWA). The CWA exposes landowners to significant criminal and civil penalties for even the negligent discharge of pollutants (including soil) into navigable waters. The Court held that for wetlands to qualify as "waters of the United States" subject to the CWA, they must be indistinguishably part of a body of water that itself constitutes "waters" under the CWA. The Court rejected the EPA interpretation that would include wetlands that are "adjacent to" covered waters where the wetlands possessed "a significant nexus" to traditional navigable waters. Instead, wetlands are covered by the CWA only where they are adjacent to a body of water connected to traditional interstate navigable waters and have "a continuous surface connection" with that water such that it is difficult to demark where the water ends and the wetland begins. The Sacketts' wetlands located on their residential lot, across the street from a ditch connected to a creek that fed into the waters of a navigable intrastate lake, did not constitute "waters of the United States."

Congratulations

Congratulations to Amneh Sheikh-Khalil on her admission to the State Bar of Michigan Tuesday, May 23, 2023.

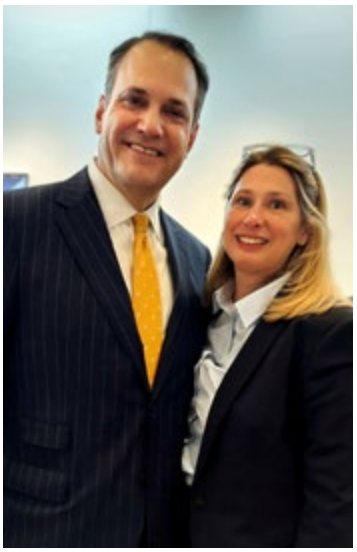
Thank you to Judge B. Chris Christenson, GCBA President Nancy K. Chinonis, GCBA Young Lawyers Representative Craig Datz, and Prosecutor David Leyton for making this a memorable day!

Investiture Ceremony for Federal District Judge F. Kay Behm

Senator Debbie Stabenow

Senator Gary Peters

Judge Behm and Sixth Circuit Court of Appeals Judge Stephanie Dawkins Davis



Judge Behm and husband Mike Behm

On May 19,2023 an investiture ceremony was held at the Flint Institute of Arts for newly appointed Judge F. Kay Behm. Attending the ceremony were Michigan's two U.S. Senators, Gary Peters and Debbie Stabenow, as well as Judges from the 6th Circuit Court of Appeals, the Eastern and Western Districts of Michigan and Genesee County Circuit, Probate and District Courts.

SCOTUS Upholds ICWA in 7-2 Decision

By Judge Ariana E. Heath

Hon. Ariana E. Heath

On June 15, 2023, the United States Supreme Court upheld the constitutionality of the Indian Child Welfare Act (ICWA) in a 7-2 decision. The petitioners (a birth mother, foster and adoptive parents, and the State of Texas) in *Haaland v Brackeen*[1] challenged the constitutionality of ICWA. They asserted that Congress lacked the authority to pass ICWA and that it was a violation of the 10th Amendment's anticommandeering principle. They additionally argued that ICWA unlawfully hindered non-Indian families from fostering or adopting Indian children. Finally, they challenged §1915(c) (a portion of ICWA that allows tribes to alter the order in which placements are prioritized) on the ground that it violated the nondelegation doctrine.

ICWA was passed in 1978. Historically, Native children were removed from their families and their tribes and placed outside of their communities at much higher rates than other segments of the population. In his concurrence, Justice Gorsuch provides an excellent historical context of the atrocities perpetuated on Native children and families that led to the eventual passage of the ICWA. ICWA mandates that in any voluntary or involuntary proceeding involving the removal of a Native child, notice must be provided to the parents and the child's tribe. The tribe can intervene at any point in the proceeding. For an involuntary proceeding, ICWA sets a higher standard of proof for both removal and termination of parental rights. A party must show that active efforts were made to prevent the removal of a Native child and must show by clear and convincing evidence that if not removed, the child will likely suffer serious emotional or physical damage. Testimony must be provided by a qualified expert, usually from the child's tribe, regarding these standards. ICWA also sets the burden for termination of parental rights as beyond reasonable doubt. Even in a voluntary proceeding, the tribe must be notified and ICWA establishes preferences for placement. The tribe can also overrule a parent's adoption placement choice and place the child in a home higher on the preference list.

SCOTUS ruled ICWA is consistent with Congress's Article I authority stating that the Indian Commerce Clause authorizes Congress to regulate not only trade with the tribes, but also certain Indian affairs, including individuals composing those tribes. When Congress validly legislates pursuant to Article I, federal law can preempt state law in any area. The petitioners also challenged ICWA under the anticommandeering clause of the 10th Amendment, claims rejected by SCOTUS. Petitioners focused on the active efforts requirement, arguing it directs state and local agencies to provide extensive services to Native families. SCOTUS ruled this provision applies to any party, covering private and state actions, so this portion of ICWA cannot be said to be directed exclusively at the States. SCOTUS stated that legislation that is applied evenly to both state and private actors does not typically implicate the 10th Amendment and cannot be said to command states to implement federal policy.

Petitioners challenged the placement preferences in §1915. SCOTUS ruled this provision applies to both public and private parties and thus does not demand the use of state sovereign authority. Furthermore, §1915 places the burden on the tribes, not the parties, to produce a higher ranked placement so the section does not require state agencies to do anything. It does require state courts to implement

the placement preferences, but Congress can require state courts to implement federal law. Petitioners claimed that the record keeping requirements dictated by ICWA were unconstitutional. Congress may impose "ancillary record keeping requirements" related to state court proceedings without violating the 10th Amendment.

SCOTUS declined to reach the merits of two claims due to lack of standing. Petitioners raised an equal protection challenge to ICWA's placement preferences and a nondelegation challenge to §1915(c), the provision that allows tribes to alter the placement preferences. SCOTUS ruled petitioners did not show that the injury is likely to be redressed by judicial relief as it is the state courts, not federal parties, that apply the placement preferences and state agencies that carry out the placements. However, in a footnote, the majority opinion said the individual petitioners can challenge the constitutionality of ICWA in state court. Texas has no equal protection rights of its own and cannot assert claims on behalf of its citizens against the federal government, thus lacking standing to raise this issue.

While litigation may continue in state courts regarding the placement provisions, this was a resounding triumph for tribes and the Indian children the statute protects.

Endnote

1 No. 21-376 (June 15, 2023)

Civil Rights at the Supreme Court

By Sean M. Siebigteroth


Sean M. Siebigteroth

In the consolidated case *Students For Fair Admissions, Inc. v. Harvard College*, No. 20-1199 (June 29, 2023), the court considered Harvard's and the University of North Carolina's (UNC's) undergraduate admissions processes. At Harvard, an initial screener provides an overall score of an applicant's submission, which may include a consideration of race. A regional committee then reviews all applications from a geographic region and makes recommendations to the full admissions committee, also taking race into account. The full admissions committee then discusses the relative breakdown of recommended applicants by race. The full admissions committee tentatively admits from the pool of recommended applicants, and in a final process, culls that list (using race as a factor) to arrive at an admissions list. UNC uses a similar race-conscious process.

Students for Fair Admissions (SFFA) challenged the admissions processes under Title VI of the 1964 Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment. Writing for the majority, Chief Justice Roberts traced the history of the Fourteenth Amendment and stated that cases interpreting the Equal Protection Clause share a similar recognition of the clause's core purpose: "do[ing] away with all governmentally imposed discrimination based on race." Thus, both admissions programs are subject to constitutional strict scrutiny. Under the Court's decision in *Grutter,* student body diversity is a compelling state interest permitting the use of race in university admissions, but such programs must not use race as a stereotype or negative, and must, at some point, end.

The Court held that the admissions processes under review fail all of the *Grutter* criteria: first, the ultimate goals of the admissions processes are too "elusive" to permit judicial review of whether the processes are sufficiently tailored; second, the connection between the means the schools employed and the ultimate goals is "unclear;" third, since admissions are "zero-sum," any class-based preference to one individual is a disadvantage to individuals not in that class; fourth, as the processes assume that racial identity is a proxy for certain desirable characteristics, they stereotype. Finally, the admission

processes lack a "logical end point" that does not amount to prohibited "racial balancing."

Even though the admission programs were invalidated as irreconcilable with the Equal Protection Clause, the Court commented that the decision does not prohibit consideration of how race affected an applicant's life by developing a quality of character or ability that the particular applicant can contribute to the university.

In *303 Creative LLC v Elenis,* No. 21-476 (June 30, 2023), the Court considered whether the First Amendment prohibits Colorado from requiring a website designer to create expressive designs speaking messages with which the designer disagrees. Petitioner, a sole-proprietorship graphic design business, sought to enjoin enforcement of the Colorado Anti-Discrimination Act (CADA) so that she would not be compelled to create websites celebrating non-heterosexual marriages, which is against her religious scruples. The Court granted *certiorari* after the District and Circuit courts denied relief.

Justice Gorsuch wrote the majority opinion, finding for the Petitioner, for a 6-3 Court. He first found that wedding websites qualify as "pure speech," so that Petitioner's theoretical refusal to prepare a website for a non-heterosexual couple would amount to protected First Amendment conduct. In Gorsuch's view, the CADA would require her as a business owner who creates expressive conduct to speak "as the State demands or face sanctions for expressing her own beliefs." 600 US ___, *slip op* at 11. Gorsuch expressed a belief that a contrary result would "compel anyone who speaks for pay on a given topic to accept all commissions on that same topic - no matter the underlying message - if the topic somehow implicates a customer's statutorily protected trait." *Id, slip op* at 11-12.

WANTED: WRITERS and EDITORS FOR *BAR BEAT*

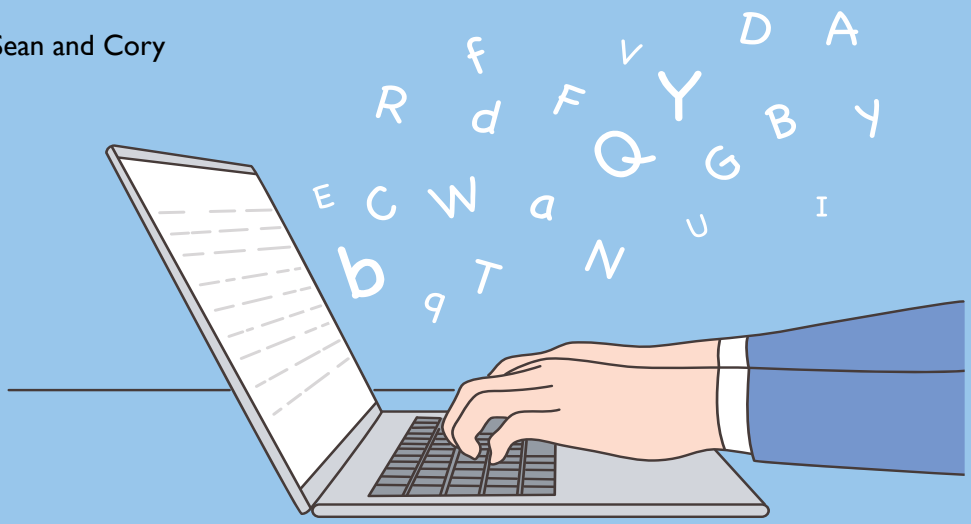
Bar Beat is looking for contributing writers and assistant editors for our quarterly publication. If you like to write and have something to say- get in touch! We can help you choose a topic as well as assist you in the writing process. Here are the due dates for upcoming issues: September 30, 2023; December 30, 2023; March 30, 2024; and June 30, 2024.

We also are looking for volunteers to help with the editing and proofreading of articles. If you have a flair for style and grammar and have a sharp eye- we want to hear from you!

Please contact us at: barbeat@gcbalaw.org.

Thanks!

Shelley, Sean and Cory



45th Annual Golf Outing

Thanks to everyone who supported the 2023 Annual Golf Outing

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Remembering Mike Kowalko

By Tom W. Waun

Tom W. Waun

Former Genesee County Bar Association President Mike Kowalko unexpectedly passed away on June 15, at the age of 65. His loss to his wife Karen and daughters Camille and Allison, as well as his friends has been profound. Since he was my friend and colleague for the past 30 years, and also a co-worker until his untimely death. Judge Jessica Hammon asked if I would provide some thoughts about him.

I first met Mike 30 years ago when he was in solo practice and rented office space from my prior firm of Wascha and Waun. We became friends and continued that friendship for the rest of his life. Approximately four years ago Mike came on board at the Johnson Law Flint office where we worked together until his untimely death.

Mike was one of the nicest and kindest people that I've ever met. He had a knack for making anyone that he was speaking with think that they were very important to him. That was because he had a genuine interest in knowing and understanding the people around him.

Another strong aspect of Mike's character was the fact that he was a team guy. He was proud of having been part of the football and baseball teams at Grand Rapids Union High School. He was proud of having been part of the Northern Michigan University football team during his college years where he played as a starting offensive tackle. He was also proud of being part of our Johnson Law team.

Mike was a fine lawyer with a strong work ethic. On many of the Saturdays and Sundays that I would make it into the office, Mike would be there grinding through his files. Mike's biggest strength as an attorney though was his empathy for people who were victims and his strong desire to protect and represent them. He cared about his clients and that showed.

For anyone who had the pleasure of knowing Mike there will be warm memories and a sense of loss when remembering him. He will be missed.

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