

May/June 2010

# BARBEAT

Genesee County Bar Association



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Next issue: Arthur Hurand

Courtrooms and Cell Phones

Practicing Civility, Part II

Getting to Know You: An Interview  
with Kathleen Swart

Uncapping Property Taxes Update

GCBA 2010 Annual Meeting and  
Election of Officers and Awards  
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Published bimonthly by the State Bar of Michigan,  
306 Townsend St., Lansing, MI 48933, for the  
Genesee County Bar Association. For advertising,  
call (517) 346-6315.

No material in *Bar Beat* reflects the opinion or endorsement of the  
Genesee County Bar Association, unless otherwise stated.

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# Courrooms and Cell Phones

By Timothy H. Knecht, President



Timothy H. Knecht

By now, most, if not all, of you have become aware of the latest courtroom security procedures. Effective May 17, 2010, the Genesee County courts instituted a new local administrative rule regarding security policies and courtroom decorum. The Order, predictably, limits people from bringing guns, weapons, chemical sprays, and other dangerous items into the courthouse buildings. The portion of the Order which affects our clients reads as follows:

Cell phones, camera phones, electronic recording devices and cameras **except for** attorneys with a bar card, individuals in possession of a summons for jury duty or otherwise identified as a seated juror, court employees, county, city, state or federal employees on official business or law enforcement officers on official business.

Signs will be conspicuously posted at courthouse entrances notifying all persons of the rule. There will be no place in the courthouse for people to store their phones, cameras, or recording devices. The courthouse security personnel will not hold items for safekeeping. All of our clients will be walking back to their cars to deposit their ever-present cell phones before they will be allowed in the courthouse. Expect long lines, and expect your clients to be late for court. When your clients express their anger, explain to them the rationale for this rule. The rationale regarding recording devices is clearly spelled out in the Order as follows:

Because of the potential for unauthorized recording of court proceedings, all film or electronic recording devices are prohibited from the Courthouse and any satellite District Court

or satellite court offices, except for recognized media outlets. In accordance with this policy, all other persons shall be prohibited from entering the Courthouse, any satellite District Court or satellite court offices, while in possession of a camera, video camera, video recorder, tape recorder or any other device equipped with recording features.

The rationale regarding cell phones can be explained quite logically as well. Court proceedings, though public, are filled with moments which should not be broadcast to potential witnesses or others. Witnesses are commonly sequestered during a trial for good reason. There have been incidents within the court system where someone in the courtroom will text/e-mail the substance of testimony being presented to a sequestered witness. Remind your clients that the abuses of court protocol made possible by modern electronic devices is what is behind this particular rule. Courtroom decorum is also addressed in the Order as well as many other items. Please encourage your clients to dress appropriately and act appropriately in court.

This is my last president's bar article. It has been a pleasure and an honor to be the president of the Genesee County Bar Association, an association in which we can all take pride.

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# Practicing Civility, Part II

By Karen L. Folks, Professional Practice and Ethics Committee Chairperson



Karen L. Folks

Civility in the legal profession has been a topic in numerous *Michigan Bar Journal* articles and discussions by lawyers, judges, legal staff, and courtroom observers. In the late 1980s and early 1990s, many state and local bar associations, including the Genesee County Bar Association and the Eastern District of Michigan, began promulgating standards or guidelines for professional conduct. The focus was on courtroom decorum and other aspects of litigation. In part one of "Practicing Civility," Genesee County judges and former recipients of the Herbert A. Milliken, Jr. Civility of the Year Award agreed that incivility has seeped into the very basics of practicing law, reflecting an erosion of what we referred to a generation ago as "just good manners." This month we focus on strategies, techniques, and solutions that can move us toward "practicing civility" consistently in both the courtroom and the office.

**As a Herbert A. Milliken, Jr. Civility of the Year Award recipient, what is the best piece of advice you would give to a new attorney? What strategies and techniques have you successfully used to maintain your cool under the worst of circumstances?**

**Bill Smith:** "Focus on the immediate issue/case and zealously advocate for each client while recognizing that a professional career is more a marathon than a sprint." Bill maintains his cool with "a good sense of humor and understanding (as best as I can) the perspective from the other side."

**Ed Jakeway:** "My advice is that it takes the same amount of time to be nice as it does to be nasty. It is best of the attorney, his client, and

the court to show respect, argue effectively, and with preparation."

**Pam Wistrand:** "Try not to react in kind to incivility. Rise above it and maintain a respectful level of professionalism." Her secret for remaining calm in the storm is to "pray a LOT for my cases, my opponents and the judges, that we will all be given wisdom in arriving at solutions."

**Richmond Riggs:** "Remember that as a trial attorney you are upholding the most honorable and noble part of our profession; never give in to the temptation to respond to fire with fire." His personal strategy for grace under pressure is "patience and age."

**Bob Segar:** "I would advise a young attorney not to retaliate when another attorney acts inappropriately. This doesn't mean letting anyone run over you. Be firm but not nasty. In short, don't allow yourself to be goaded into being non-professional. Take a deep breath and stay calm. In most

cases, the uncivil lawyer will lose points before a judge or jury."

**Linda Pylypiw:** "I have always been a proponent of the Golden Rule. I try to remind myself that my reputation with the bench, my fellow counsel, and the public transcends the case I'm presently involved in, and no client is worth tarnishing my reputation."

**If incivility is an issue that lawyers, judges, other members of the legal community, and the public should intentionally and strategically address, what specific strategies, techniques, and other concrete solutions would you recommend?**

**Judge Neithercut:** "Stability and reassurance to citizens that justice reigns in the courthouse are served by tightening up on formalities and customs in the courthouse."

Continued on next page

## Herbert A. Milliken Jr., Civility of the Year Award

The nominee is a longtime, practicing member of the Genesee County Bar Association who is recognized for the habit of offering professional guidance and advice to his fellow attorneys and being widely recognized as a professional role model who demonstrates the highest standards of professional courtesy and civility combined with a zealous and thorough advocacy on behalf of his clients.

### Recipients

2010	Brian M. Barkey	2002	Earl J. Cline
2009	William D. Smith	2001	Jerome F. O'Rourke
2008	Linda L. Pylypiw	2000	Edwin W. Jakeway
2007	Richmond M. Riggs	1999	Dale E. Andrews
2006	Leonard B. Shulman	1997	Robert L. Segar
2005	Pamela Wistrand	1996	Ernest Joseph
2004	Kendall B. Williams	1995	Jon T. Warren
2003	Richard M. Goldstein		

**Ed Jakeway:** “Civility should be thought of as a strength, not a weakness, in attorneys and judges.”

**Judge Perry:** “More intervention through the bar association through training and inviting older lawyers to share their experiences with younger lawyers.”

**Judge Fullerton:** “Attorneys with apparent behavioral deficits (should be encouraged) to join the Inns of Court because members subscribe to a code of conduct embracing the duties of courtesy to and cooperation with opposing counsel in both pretrial matters and during trial.”

**Pam Wistrand:** “Somehow we need to educate the public that litigation isn’t a win/win when it becomes a dog fight. War for the sake of war doesn’t resolve anything satisfactorily.”

**Judge Goggins:** “Unfortunately, respect for the court and the legal system has to be taught at home more than anywhere else.” He also has observed the power of role modeling civility, “... it is amazing how many lay persons watching will behave in the same manner after that attorney has left. Setting an example truly goes farther than what most of us realize.”

**Linda Pylypiw:** “Although we can encourage civility by our own actions and judges can impose sanctions for incivility in their courts, it is ultimately the responsibility of the individual to behave.”

**Bill Smith:** “There should be more education on identifying “troubled” practitioners and the resources available for referrals to deal with stress-related behavior

in a more positive and productive manner.” He encourages individuals as well as the organized bar to “work with professionals who specialize in behavioral medicine to develop a tool for early recognition/intervention and provide appropriate resources.”

**Judge Barkey:** “I think the solution starts and ends with the judge.”

**Judge Hayman:** “I think it must start at the top. I think judges should make sure that they do not reward attorneys for their unprofessional conduct and hold them to a high standard.”

**Richmond Riggs:** “Judges must be vigilant to not reward or tolerate uncivil behavior. Likewise, judges MUST act with respect and civility toward attorneys. Much too often the court is improperly impatient and pushing counsel for speed at the cost of justice.”

**Judge Fullerton:** “Judges from whose courtrooms such behaviors emanate should not tolerate the conduct and should take immediate action to indicate that the behavior is inappropriate, and, upon repetition, sanctionable.”

**Bob Segar:** “Awareness of this problem must start in law school with an appropriate amount of time spent on it. Judges must control the conduct of attorneys in their courtroom and be willing to enforce the rules. They must not let one side profit from the misconduct of its counsel. Lawyers should be encouraged to join legal associations that are attempting to improve the situation.

Thank you to all of the judges and past Herbert A. Milliken, Jr.

Civility of the Year Award recipients for taking the time to provide us with their observations, insights, and recommendations. When I was reviewing the impressive list of award recipients over the past 15 years, I was reminded of a story I recently read on why civility matters. As a footnote to this discussion on the current climate of civility in the practice of law, I share the following:

Apparently, each year, a well-known Phoenix law firm conducts a session with its new associates on the subject of “How to Be a Classy Lawyer.” As part of their training, the associates are informed about some of the good business reasons for being “classy.” Here is a brief summary of those reasons:

1. It’s a small town. If you aren’t classy, *word gets around*.
2. Classy lawyers get *better results*. Judges, juries, and appellate courts *trust* classy lawyers more.
3. It’s more *efficient*. Less time is wasted on petty and needless disputes.
4. Classy lawyers get more referrals.
5. It’s good for the firm. A firm with a classy reputation provides each of its members with tremendous advantages.

Take a moment and look up the names of the past Herbert A. Milliken, Jr. Civility of the Year Award winners and be sure to congratulate Brian Barkey as the 2010 recipient. What a classy group of attorneys! Watch them in action and see if you don’t agree that the natural result of their consistent civility no matter what the situation proves the truth of the five points above.

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# Getting to Know You:

## Interview with Kathleen Swart

By LindaLeeMassoud, Bar Beat Editor



Kathleen Swart

**Q:** Kate [pronounced Katie], you're one of the newer attorneys in town. Please tell us a little about yourself.

I've been licensed to practice since 1999. I graduated from Montrose Hill-McCloy HS in 1989, received my BA from Aquinas College in 1993. I worked full time as an administrative assistant at the Flushing Police Department and went to Cooley Law School's night program, graduating in 1999.

**Q: Why did you become an attorney?**

That is such a hard question for me to answer! No one in my family is an attorney. I honestly think my interest in the law began my junior year in high school when I competed in the Law Day mock trial in Judge Ransom's courtroom.

**Q: What kind of law do you practice?**

I am truly a general practice attorney. Being in a small town, I get a little bit of everything. However, I focus primarily on criminal law, family law, district court practice, and probate.

**Q: I understand you are the only attorney in Montrose. How does that make the practice of law different from the way it would be in a larger city?**

On the plus side, everyone in town knows me. On the down side, everyone in town knows me! My husband always wants to know why I change my clothes and put on makeup to run to the grocery store on a Sunday afternoon. Well, it's because I always run into a client. And clients don't want to picture their attorney in sweat pants and a ball cap. I also have to remind local clients that if I run into them in public I won't specifically acknowledge them—not to be rude, but to honor the attorney/client confidentiality that is so important.

**Q: What do you like about practicing in a small town?**

I grew up in Montrose, and after the birth of my son I wanted to open up my own practice, so my family and I moved to Montrose and I opened up my practice downtown. Montrose is a wonderful community, but it hadn't had an "attorney in residence" for more than 20 years. I wanted to fill that void

and give back to the community. It is very gratifying to be able to help people with whom I grew up.

**Q: Are there disadvantages as well?**

Having to put on makeup to go to the grocery store! And although certainly not a disadvantage, I always chuckle when people tell me, "But I remember you when you were just a little girl. You're really a lawyer?"

**Q: What advice would you offer to other attorneys thinking about practice in a small town?**

It certainly helps to have grown up in the community, or have a spouse or other relative who is from the area. Also, it's important to do business locally, join the Chamber of Commerce, the DDA (Downtown Development Authority), a local church, attend council/board meetings, school board meetings, etc. In a smaller community becoming involved in that community will bring you more goodwill and clientele than any amount of advertising.

**Q: Tell us something about your life outside the law.**

I am married to Louis Weller, and we have two children: Daniel, 5, and Grace, 3. Need I say more? I have a very busy life. Children certainly have balanced my life and keep things in perspective for me. When I've had a particularly rough day at work, there is nothing better than being greeted at the door with hugs and kisses by two little ones who could not care less that Mommy lost a motion in court!

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# Uncapping Property Taxes Update

By Sherri L. Belknap, Business Law Committee member



Sherri L. Belknap

There are only two guarantees in life, death and taxes. In the past two years, the Court of Appeals addressed the uncapping of property taxes when a joint tenancy ends. In these two decisions, the Court of Appeals ruled in favor of the property owner and disallowed the uncapping.

In 1994, Michigan adopted Proposal A to the Constitution which limits increases in property taxes, absent a transfer of ownership. A non-exhaustive list of events that is and is not a transfer of ownership is located at MCLA 211.27a(6) and MCLA 211.27a(7), respectively. The Court of Appeals helps bring clarity as to whether the ending of a joint tenancy because of death or conveyance is a transfer of ownership under MCLA 211.27a(7)(h).

In *Moshier v Whitewater Twp*, 277 Mich App 403, 745 NW2d 523 (2007), the petitioner's parents owned the property as tenancy by entireties. In 1994, the parents conveyed the property to themselves and petitioner as joint tenants with full rights of survivorship. Petitioner's father died in January 1995. In March 2003, petitioner's mother conveyed her interest in the property to petitioner. Upon this conveyance, respondent uncapped the property taxes.

In determining whether the uncapping of the property taxes was correct when a joint tenancy is ended, the Court reviewed MCLA 211.27a(7)(h). The Court created two requirements based on this statute that if met would not constitute a transfer of ownership subject to uncapping. The requirements are: (1) at least one of the persons involved in the transfer was an original owner of the property before the tenancy was created; and (2) if the

property was held as a joint tenancy at the time of the conveyance, "at least one of the persons" involved in the transfer was a joint tenant at the time the joint tenancy was originally created and has remained a joint tenant since that time. *Moshier, supra* at 409410. Based on these requirements, the Court held that the conveyance between petitioner's mother and petitioner was not a transfer of ownership subject to uncapping. In its ruling, the Court found that the mother was an original owner of the property before the tenancy was created. See *Moshier, supra* at 410. Further, the Court found that since mother and petitioner were both joint tenants at the time the joint tenancy was created, the second requirement was met because petitioner was one of the persons involved in the joint tenancy at the time the joint tenancy was originally created and remained a joint tenant since that time. *Moshier, supra* at 410411.

Next, death of a joint tenant is not a conveyance. In *Klooster v City of Charlevoix*, 286 Mich App 435 (2009), petitioner's parents acquired ownership of property in Charlevoix, Michigan as tenancy by the entireties. The mother conveyed her interest to the father. In August 2004, petitioner's father conveyed the property to himself and petitioner as joint tenants with full rights of survivorship. In January 2005, petitioner's father died. In 2006, the assessor uncapped the taxable value because it claimed the death of the father constituted a transfer of ownership.

The Court relied on the two requirements set forth in *Moshier, supra*, in making its ruling. The first requirement of MCLA 211.27a(7)(h) was met because petitioner's father

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**The Court created two requirements based on this statute that if met would not constitute a transfer of ownership subject to uncapping.**

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was an original owner of the property. However, the second requirement is not applicable in this case because it was not triggered by a conveyance. See *Klooster, supra*.

The second requirement is conditioned upon the property being held as a joint tenancy at the time of conveyance. Since the General Property Tax Act did not define conveyance, the Court relied on the plain and ordinary meaning of the word. Conveyance as defined by *Black's Law Dictionary* (8th ed) is "the transfer of an interest in real property from one living person to another, by means of an instrument... [or] the document...by which such transfer occurs." *Klooster, supra*. The Court held that petitioner's father's death did not constitute a conveyance because there was no instrument in writing created that affected title to the property. Therefore, the taxable value should not have been uncapped.

With *Moshier and Klooster*, the Court of Appeals clarified whether there is a transfer of ownership when a joint tenant dies or conveys his/her interest to his/her fellow joint tenant. If your clients have their property taxes uncapped, you must file an appeal with the Michigan Tax Tribunal within 35 days of the uncapping.

# GCBA 2010 Annual Meeting and Election of Officers and Awards Ceremony

## 2010 Herbert A. Milliken, Jr. Civility of the Year Honoree

By Ramona L. Sain, Executive Director

A gentleman's gentleman. Courteous. Civil. Respectful. Humble. These are just some of the adjectives Genesee County attorneys commonly use to describe the 2010 Herbert A. Milliken, Jr. Civility Award recipient, Brian M. Barkey. Joan Pierson's nominating application identified and captured so many of the personal attributes that Brian consistently demonstrates, such as treating everyone with respect, accepting and valuing feedback, a natural role model and mentor for new and experienced attorneys alike. While presenting the award to Brian at the GCBA's Annual Meeting and Election of Officers, Professional Practice and Ethics Committee Chairwoman Karen L. Folks commented that no matter whether it is a young attorney who has just met Brian or a tough and difficult opponent, all walk away from their experience knowing that Brian Barkey is that rare breed of attorney that seamlessly blends strong and articulate advocacy, intelligent preparation, with genuine compassion and unwavering patience no matter the circumstances. In every situation Brian demonstrates that the core principle of civility is a tool that successfully builds bridges towards resolving issues.

While accepting the award Brian mentioned that attorneys who knew Herb Milliken are fewer and fewer as time passes. He recalled Milliken as a person who fought strongly for his clients, but never at the expense of his honesty and integrity. Brian reminded members that there will always be a place for respect, civility, and opportunities to serve as a role model for younger attorneys and encouraged everyone to get involved and to give back to their community.

Also on hand was Brian's sister, Chief Probate Judge Jennie Barkey, and brother, Dr. Walter Barkey. Judge Barkey said that the only person missing from the ceremony



Dr. Walter Barkey and Hon. Jennie Barkey tease brother Brian M. Barkey as the recipient of the 2010 Herbert A. Milliken, Jr., Civility of the Year Award at the GCBA 2010 Annual Meeting.

was their father, former GCBA member Walter J. Barkey. To commemorate the celebration in remembrance of their father, the two siblings presented Brian with their father's State Bar of Michigan 50 year service pin.

## 2010 Pro Bono Attorney of the Year Public Award

By Jill L. Nylander, LSEM Directing Attorney



Jill L. Nylander presents Ilene and Bob Segar with the Pro Bono Attorney of the Year Award

Legal Services of Eastern Michigan is very pleased to be awarding this year's Pro Bono Public Award to two of the Genesee County Bar Association's respected colleagues. For the first time in the history of the award, Robert and Ilene Segar will share in this heartfelt recognition.

During her tenure at Legal Services, Ilene championed several cases where public benefit recipients were wrongfully accused of fraud. Upon her retirement,

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she agreed she would continue work on these types of cases on a pro bono basis. She was nearing the culmination of one such complicated case earlier this year when an unexpected illness left her unable to appear for the final oral argument. Robert stepped in, and in his consummate style, masterfully presented the case. He secured a favorable decision for the client which the judge rendered directly from the bench.

For the countless hours over many months which Ilene dedicated to this case and for Robert's continuing support and assistance with her commitment, LSEM wants to express its deepest appreciation. Accordingly, they have been jointly chosen as the 2010 Pro Bono Attorney of the Year Award recipients.

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## Attorney Terry Sheehan, Persistent and Tenacious

By James J. Wascha, Past President  
Centennial American Inns of Court

Terry Sheehan has been named this year's recipient of the Jerome P. O'Rourke Advocacy Award in recognition of a long history of criminal litigation. The award was presented by Don Rockwell, Past President of the American Inn of Court at the Genesee County Bar Association Annual Meeting.

Attorney Terry Sheehan left a notable and unparalleled mark as a tenacious court appointed counsel in the matter of *People vs. Forrest M. Henley*. Mr. Henley was charged with a 1976, murder/armed robbery at the Fraternal Bar and Grill on South Saginaw Street. The killer used a sawed-off 12-gauge shotgun. Mr. Sheehan tried the case an unprecedented **four times**. The first three trials resulted in hung juries, with the fourth resulting in a "not guilty" verdict.

The *Henley* Case was heard in three different venues. Two circuit court judges presided. Several Genesee

County prosecutors, four separate juries, months of investigation, and a multitude of expert witnesses were involved. Mr. Sheehan doggedly pursued a defense that tested the judicial system and pushed it to all corners of advocacy.

A cross-section of the four trials found Mr. Henley first testifying and then not testifying. A cellmate testified that Mr. Henley had boasted of the crime, but cross-examination revealed a prosecution promise of later favorable parole board treatment. Positive latent finger print analysis was offset by Henley's claim that he had been at the bar the day before the killing. Positive eyewitness identification was countered by a prior line-up misidentification. Psychological witnesses testified on the fragility of eyewitness testimony. A defense-retained California dog expert challenged local police tracking dog evidence. Police found a sawed-off 12-gauge gun barrel at the Henley residence but never located the weapon itself.

Strong opinions abound as to the correctness of the final not guilty verdict. However, the long history of this case speaks to the tenacity of Attorney Terry Sheehan as a litigator pursuing the highest standard of client representation. We congratulate Mr. Sheehan on this award.



Past President of the Centennial American Inns of Court Don Rockwell introduces Terry Sheehan as the Jerome F. O'Rourke Advocacy Award winner.

## Congratulations

On May 4, 2010, The State Bar of Michigan held its annual 50th Honoree luncheon and among this year's honorees were attorneys Robert Keil, Robert Segar, Richard Cooley, and Clifford Hart for their 50 years of service in the Flint area. Participating in the presentation was the State Bar of Michigan Board of Commissioners Young Lawyers Representative, attorney B.D. 'Chris' Christenson, also from Flint.



(L-R) Robert Keil, Robert Segar, B.D. 'Chris' Christenson, Richard Cooley, and Clifford Hart

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