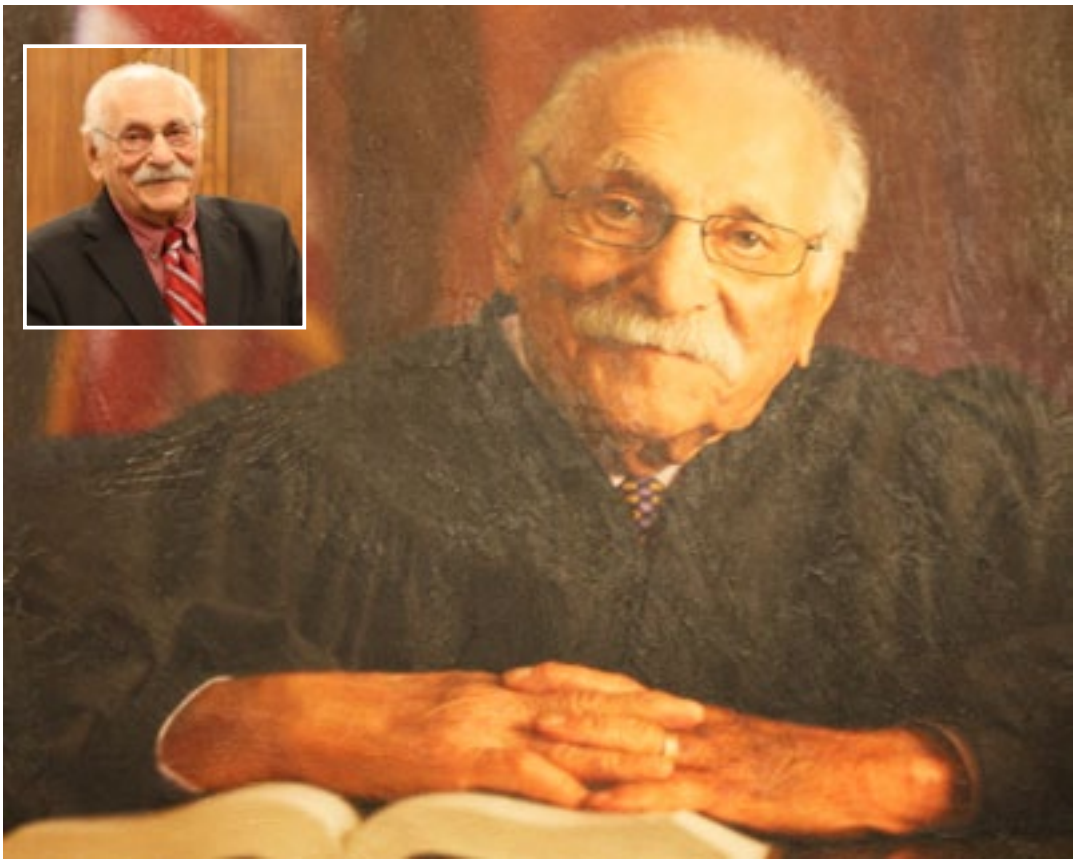
January/February 2013

BARBEAT

Genesee County Bar Association



The Honorable Stewart A. Newblatt

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Newblatt Portrait Unveiling

By Brian M. Barkey

Brian M. Barkey

On November 20, 2012, in the presence of his family, friends and a quorum of the US Federal District Bench, the portrait of Judge Stewart A. Newblatt was unveiled in his former courtroom.

The ceremony was moderated by Chief District Judge Gerald E. Rosen and featured remarks by his sons, Judge David Newblatt, Robert Newblatt, and Dr. Joshua Newblatt. It was also witnessed by his spouse, Flora, and his grandchildren. One of his former clerks from the late 1980's, Susan Mashour, shared some insights from the perspective of her working relationship. These were supplemented by remarks of his former law partner, Howard Grossman.

It was a short review of a stellar legal career spanning 60 years. Judge Newblatt was the youngest circuit judge in the state when he was appointed by Governor G. Mennan Williams in 1962. Judge David Newblatt recounted his father's famous ruling in a civil rights matter that was appealed to the Court of Appeals. That Court, rather than write an opinion of its own, quoted ***his*** opinion in its entirety, noting that it left "nothing further to be said." There is no higher compliment that an appellate court can pay to a trial judge.

There were many warm memories shared with those in the room, but the absolute best part of the afternoon was the portrait itself. It was created by Dan White, a Pulitzer Prize-winning photographer of considerable renown. In addition to his fame, Dan is the son of Judge Stewart Newblatt's former law partner, Charles White, and was the perfect candidate for creation of this artwork.

When the portrait was unveiled, there was an audible gasp. It caught how we regarded Judge Newblatt perfectly. His forearm was over an open book (appropriate to his scholarship) and the expression on his face was both warm and receptive. Please stop by the U.S. District Court and visit it. It will make you miss him.

Genesee County Veterans Treatment Court

By Robert L. Swartwood and James N. Bauer

Robert L. Swartwood James N. Bauer

The Michigan Legislature recently passed legislation authorizing the establishment of Veterans Treatment Courts in Michigan (MCL 600.1200 et. seq). Local court and Veterans Department staff and officials are in the process of establishing a Veterans Treatment Court in Genesee County. Probate Judge Jennie E. Barkey, 68th District Court Judge Nathaniel C. Perry III, and 67th District Court Judge David J. Goggins have agreed to serve as judges in the Veterans Treatment Court. Veterans Treatment Court officials will reinvent their traditional adversarial roles pertaining to criminal defendants and work as a team to make this specialized court most effective for participant recovery. Judges, prosecutors, police agencies, defense attorneys, and treatment professionals from Genesee County and veterans service organizations will work collaboratively to develop a strategy that is in the best interest of both the participating veterans and society.

The Veterans Treatment Court is based on principles of immediate and progressive sanctions combined with appropriate rewards. Defendants that enroll in the Veterans Treatment Court Program must accept the legal sanctions

associated with the crime committed (fines, costs, restitution, and driver's license consequences) and comply with an individualized treatment plan designed by the Veterans Court Team.

Program Mission Statement

The mission of the Genesee County Veterans Treatment Court is to prevent recidivism through an intensive court-structured treatment and recovery program designed specifically for Active, Reserve, Guard, or Post-Active military service members whose physical and/or psychological injury from service contribute to criminal behaviors.

The court will follow the modified version of the 10 key components of drug treatment courts, as promulgated by the Buffalo Veterans Treatment Court, in order to carry out the above mission successfully.

Mentor Program

This specialty court is service member-centered. The Court recognizes that those who have served our country have endured unique and intense experiences. Those experiences have permanently colored the service members' outlook on the world and the way they interact with others. Because the Court recognizes this, it does not expect the service member to trust "the system" and, initially, the merits of this specialty court. Therefore, the Court will create a mentoring program for enrolling participants. These mentors are veterans themselves who have endured experiences similar to those of the offending service members. The mentors could assist the service member as early as his or her arrest and will assist the service member through the program mandates. These mentors have been chosen by the Court, cooperate with the Court, and are committed to seeing the service member recover.

Target Population

Simply serving in the military does not automatically qualify a defendant for entry into the Veterans Treatment Court program. There must be a tie-in where the military service they were exposed to in some way contributed to the behavior that caused them to be involved with the justice system.

Conclusion

Several Veterans Treatment Courts have been in existence in Michigan since 2009. Veterans Treatment Court Judges all agree that this specialty court is the one where the judge can offer the greatest amount of resources to participants due to the participation of the Department of Veterans Affairs. Genesee County will soon join a small but growing number of counties offering veterans who qualify an opportunity to make significant, positive changes in their lives.

Book Review: The Devil Won't Care—Should You?

By John A. Streby

John A. Streby

The rise-and-fall theme has long intrigued me, driving my fascination with director Elia Kazan's brilliant *A Face in the Crowd* (1957) that featured an Oscar-caliber film debut of Andy Griffith as a drifter propelled by fortuity into national prominence. As local events unfolded in the 1990s that saga began to hit painfully close to home. Encouraged by reader reaction to my debut novel, *Rabbit Stew*, I plunged ahead with what was originally titled *Lanny & Me*.

Trust and loyalty, along with their dark-side corollaries, deception and betrayal, collectively define most human interaction. So writes Warren C. Hill, the author-narrator of *The Devil Won't Care*, the spinoff from *Rabbit Stew*, and his is the voice of bitter experience. Whereas *Rabbit Stew* focused on local corruption in the criminal justice system, my second novel addresses the intellectual corruption of Lanny Lessner, a populist documentary filmmaker who gains fame and fortune with an entertaining but misleading treatment of the devastation wrought in his home town after a spate of auto plant closings. Revered by millions, Lessner seems poised to become the Ralph Nader of his generation.

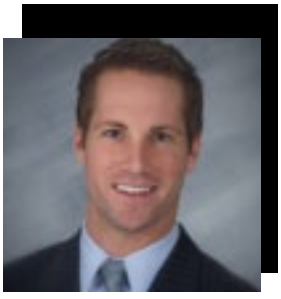
Protagonist Hill is a law school dropout with a dead-end job who aspires to write "The Great American Screenplay." Consequently, when he is persuaded to invest $2,000 in Lessner's maiden film, there is an element of self-interest. Hill's relationship with Lessner began in college but hit a glitch when Hill and two buddies gave fate a boost by setting up Lessner to lose his virginity. That ploy backfired, enhancing Lessner's paranoia and arguably contributing to his later anti-social behavior, of which Hill is but one of many victims. A thematic cross-current is that power corrupts, typically leading to arrogant conduct that occasionally destroys the miscreant. But in contrast to the judicial and political power abused by the villains in *Rabbit Stew*, the antagonist here abuses the power of the media. "I'm a molder of mass opinion," Lessner proudly proclaims to Hill, and that's no exaggeration. "By 2004, he'll swing the presidential election one way or the other," comments one of the characters (the story is set in the late 1990s). That actions have consequences is part of the narrative subtext. Had one controversial filmmaker not endorsed John Kerry in 2004, our nation might have been spared another four disastrous years of George W. Bush.

We live in a dysfunctional society in which "What's in it for me?" is the common denominator. Checkbook photojournalism, rampant narcissism, celebrity worship, reality TV, and a dumbed-down, sound-bite culture are all treated in *The Devil Won't Care* with appropriate disdain.

Hill's relationship with Lessner is deeply conflicted. As Lessner's friend, he basks in the vicarious glory attending his early success. But ultimately, Hill must grapple with one of the age-old dilemmas facing the victims of major betrayal: When is it best to "turn the other cheek," and when is it obligatory---if only for peace of mind---to ignore the biblical admonition and boldly pursue the revenge of the righteous? Hint: the book's tagline, *Paybacks can be fatal*, isn't mere rhetoric. The devil won't care why, but you will.

Municipal Borderlines and Criminal Defense

By Matthew L. Norwood



Matthew L. Norwood

Michigan has 83 counties with numerous smaller municipalities. Genesee County alone has 33, many with separate law enforcement agencies. Therein lies a specific issue that criminal defense attorneys need to understand.

When practicing misdemeanor criminal defense, there is a good chance that you will come across a case occurring on the border between municipalities. Because many of these borders are roads, this situation usually comes up when an officer makes a traffic stop in the neighboring jurisdiction.

MCLA 764.2a states that a peace officer of a county, city, village, township, or university of this state may exercise the authority and powers of a peace officer outside the geographical boundaries of the officer's jurisdiction under any of the following circumstances:

(a) If the officer is enforcing the laws of this state in conjunction with the Michigan state police;

(b) If the officer is enforcing the laws of this state in conjunction with a peace officer of any other county, city, village, township, or university in which the officer may be;

(c) If the officer has witnessed an individual violate any of the following within the geographical boundaries of the officer's county, city, village, township, or university:

(i) A state law or administrative rule;

(ii) A local ordinance;

(iii) A state law, administrative rule, or local ordinance, the violation of which is a civil infraction, municipal civil infraction, or state civil infraction.

In an opinion in 1976, Michigan Attorney General Frank J. Kelley wrote that a stop made "in conjunction with the Michigan State police" does not demand the actual physical presence of a Michigan State Police officer. OAG, 1975-1976, No 5031, p 613 (September 17, 1976). A later clarifying order states that MCLA 764.2a also authorizes local peace officers to exercise their authority in another jurisdiction in conjunction with peace officers of that jurisdiction. OAG, 1977-1978, No 5158, p___ (July 19, 1977).

An attorney must analyze this along with MCLA 257.726a. It gives any peace officer of the state authority and powers outside his own jurisdiction "when he is enforcing this act on a street or highway that is on the boundary of his county, city, village or township, just as if he were in his own county, city, village or township."

It appears a local police officer patrolling the adjacent flow of traffic would be allowed to stop an individual, provided that he has the requisite probable cause. However, if that officer issues the individual a ticket, that municipality's prosecutor still must meet the venue requirement to prove the crime occurred in that specific municipality. Criminal Jury Instruction: CJI2d 3.10. Venue is a part of every criminal prosecution and must be proved by the prosecutor beyond a reasonable doubt. *People* v *Webbs*, 263 Mich. App. 531, 533; 689 N.W.2d 163 (2004).

If this is an issue in a case, it must be raised before the case is submitted to the jury. MCLA 767.45(1)(c). Keep in mind that a car swerving over a centerline may put a defendant in the proper venue. Obviously, if the officer issues the citation under state law then the prosecutor would only need to prove that the infraction occurred in the State of Michigan.

A criminal defense attorney's ability to recognize this issue when reviewing a client's case could be the difference in a successful resolution for them. As defense attorneys, we are responsible for holding the prosecutors and police officers to their duties. This will offer one more tool to do so.

About the Author

Matthew L. Norwood has been in private practice in Genesee County for the past 8 years. He served as chairman of Genesee County Bar Association Criminal Law Committee in 2010 and 2011. He specializes in criminal defense, drunk driving and driver's license restoration. Mr. Norwood graduated with a B.A. from Michigan State University in 1998 and earned his J.D. from Michigan State University School of Law in 2001.

The Mallory VanDyne Scott Bar Association Update

By Torchio W. Feaster

Torchio W. Feaster

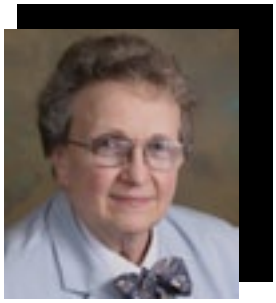
The Mallory VanDyne Scott Bar Association remained very busy during 2012. It is an organization composed of African-American judges and attorneys practicing in Genesee County. The mission of this specialty bar association is to enrich the community by zealously advocating on behalf of the under-represented; educating the public; and enhancing the justice system through scholarship, public service, and education. I am tremendously pleased to say that we have continued to meet our mission.

Mallory once again sponsored a scholarship essay contest for Genesee County graduating seniors to help them with their continued education. We also provided $1000 to the Boys and Girls Club of Flint to aid in the creation and operation of their new Haskell Center project. The Haskell Center is a place on the north side of Flint that provides after-school activities to our youth, such as, tutoring, mentoring, and life skills. This is the first such center located on the north side of Flint, and it was sorely needed in our community. We are pleased to have been able to assist them in this worthwhile endeavor. Lastly, Mallory continues to work with Northern and Hamady High Schools in coaching their mock trial teams in the Genesee County Bar Association Law Day Program.

Mallory welcomes new members and invites them to join us at our monthly membership meetings at the Genesee County Bar Association on the 1st Thursday of every month from 5:15-6:15pm. For membership information, please contact Torchio Feaster at attorneyfeaster@gmail.com.

Sobering Facts

By Roberta J.F. Wray



Roberta J.F. Wray

The slaughter of 20 six and seven year olds at Sandy Hook Elementary School in Connecticut has brought renewed attention to gun violence in this country. But the mass killings are a small part of the problem. In the month after Sandy Hook, more than 400 children and adults died by gunshot in the USA. Among them were a four-year old who was getting into a car in Kansas City, and a mourner who was shot in a Flint church at the funeral of a gunshot victim.

FYI: US population: 311,500,000. Firearms owned by civilians: approximately 270-million, including 114-million handguns; 110-million rifles; and 86-million shotguns. Percentage of US citizens who hunt: five percent of those over 16 years old; less than 20 percent of residents in rural states.

In Memoriam
2012

Arthur Kurand

GENESEE COUNTY BAR ASSOCIATION

The Supreme Court and Marriage Equality: A Sneak Preview

By Shelley R. Spivack

Shelley R. Spivack

As lawyers the term "marriage" confronts us daily. In the Family Court we find ourselves disentangling couples from the bonds of "marriage" and trying to resolve the myriad issues regarding property and children that "marriage" has brought about. Yet even if we never set foot in Family Court, the term "marriage" winds its way into our practice. From estate planning to taxes and torts, the marital status of our clients will have an effect on the advice that we give and the outcome of our clients' cases. However, as busy practitioners or judicial officers, rarely do we have the time or opportunity to think about the meaning or nature of the term "marriage."

This year, the nine justices on the US Supreme Court not only have the opportunity to think about the nature of marriage but also will have the ability to revolutionize its definition as they decide cases involving the federal Defense of Marriage Act (DOMA) and the California constitutional ban on same-sex marriage.

The case that could bring about the most widespread change is *Hollingsworth v Perry*, the challenge to California's constitutional amendment (Proposition 8), passed in 2008, that defines marriage as a union between one *man* and one *woman*. In placing Proposition 8 on the ballot, opponents of same-sex marriage sought to overturn the California Supreme Court decision that held, "limiting the designation of marriage to a union between a man and a woman" violated the Due Process clause in the California Constitution. *In re Marriage Cases*, 183 P.3d 384 (2008).

In a sweeping 138-page decision the US District Court held that Proposition 8 violated both the Due Process and Equal Protection clauses of the US Constitution. Stripping the term "marriage" of its gendered connotations, the court compared the ban on same-sex marriage to the bans on interracial marriage which the US Supreme Court found unconstitutional in *Loving v Virginia,* 388 US 1 (1967). The Ninth Circuit, while affirming the lower court decision, narrowed its scope by declining to rule on the broader issues of whether same-sex couples have a fundamental right to marry (due process) and if excluding same-sex couples from marrying violated the Equal Protection clause. Relying on the decision in *Romer v Colorado*, 517 US 620 (1996), the 9th Circuit limited its ruling to the unique facts in the California case.

In *USA v Windsor,* the Supreme Court will be reviewing the constitutionality of Section 3 of the Defense of Marriage Act (DOMA) that defines marriage as "a legal union between one man and one woman as husband and wife" for the purposes of federal law. This section of DOMA, which was passed by Congress in 1994, denies federal benefits (such as Social Security, VA, immigration, income tax, estate tax, etc.) to same-sex couples who have been legally married in the nine states that now allow same-sex marriage.

In *Windsor*, a New York woman, facing a federal tax bill of $363,000 on the estate she inherited from her same-sex spouse, challenged this provision of DOMA that prevented her from filing as the "spouse" of the deceased and receiving a more favorable tax rate. The Second Circuit, applying the "heightened scrutiny" standard of review, held that Section 3 violated the Equal Protection Clause as "DOMA's classification of same-sex spouses was not substantially related to an important government interest." Thus, while the decision in *Windsor* does not seek to redefine marriage, it upholds the right of states to delete all notions of gender from their definitions of marriage.

From estate planning to taxes and torts, the marital status of our clients will have an effect on the advice that we give and the outcome of our clients' cases.

The legal landscape in Michigan, with its state constitutional ban on same-sex marriage, would be affected by a Supreme Court ruling affirming the decisions in either of these cases. The most drastic change would be seen if the Supreme Court adopts the District Court's rationale in the *Perry* case, finding it a violation of both Due Process and Equal Protection to limit the definition of marriage to persons of opposite genders. It is doubtful that Michigan's constitutional ban of same-sex marriage would survive such a ruling. However, even a decision solely affirming the Second Circuit's decision in *Windsor* would have widespread repercussions within Michigan as couples lawfully wed in other states would be eligible to receive the panoply of federal benefits available now only to married persons of the opposite gender.

Stay tuned for the latest developments in these cases. Oral arguments will most likely occur in the spring, with a decision by the end of June.

Kim v. JP Morgan Chase: *A Foreclosure Tale*

By B.D. "Chris" Christenson

Our firm argued in front of the Michigan Supreme Court on October 10, 2012. This is a brief synopsis of the case.

We represent a homeowner in Macomb County who attempted to get a loan modification in the spring of 2009 following the failure, in 2008, of their original mortgage holder, Washington Mutual. JP Morgan Chase purchased all of WAMU's assets from the FDIC receiver. This resulted in some confusion on the part of my clients, as to whom they should consult with regard to a loan modification and who was processing the foreclosure.

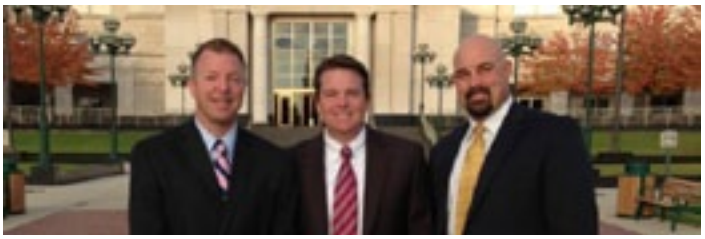
Representatives of the bank told them that they had to be three months behind in their mortgage payments before they would qualify for a loan modification. They stopped making their mortgage payments and began working with an out-of-state law firm that they found on the Internet to help them with the paperwork in order to obtain a loan modification. During that time, they signed documents and sent them all back. Our clients were told that the loan modification was being processed and it should be fine.

Also, in the spring of 2009, the legislature amended the Michigan statute (MCL 600.3205) to require foreclosing institutions to allow homeowners to seek a 90-day stay of foreclosure proceedings in order to fully and properly explore a loan modification, which included a face-to-face meeting with a representative of the bank. That legislative change was announced in May to take effect at the beginning of July.

At the same time the bank and the foreclosure department accelerated the actual foreclosure process including the advertisement requirements of the statute in order to proceed with the foreclosure of my clients' house. When my clients received some of the paperwork at their house, they called the bank and were told on the phone that the loan modification was still pending, that they were still addressing the issue, and not to worry about it.

Shortly thereafter, a sheriff's sale was held, and the house was re-purchased by the bank. On July 1, my clients were sent a separate notice from the bank indicating that their loan modification could not be approved at this time because the package they sent was incomplete and they were missing documents. Obviously, these two things did not make any sense and we sent numerous letters in July and August trying to set aside the sheriff's sale and obtain a loan modification.

In November of 2009 we filed litigation. The firm that represented the bank asked for over a year's worth of extensions to avoid filing their answer to the lawsuit. Then in November of 2010, after the redemption period had expired, they filed summary disposition motions arguing, among other things, that there was no issue of material fact and that the redemption period had expired.



Chris Christenson, Craig Fiederlein, and Rick Hetherington

We filed a counter-motion for summary disposition arguing that they had failed to properly follow the statute, that they had rushed the statute, and various other arguments. The circuit court ruled that Chase did not have to follow the Michigan Foreclosure by Advertisement statute [MCL 600.3204, specifically (3)] because Chase had acquired their interest in the mortgage by operation of law. That particular portion of the statute requires that if you are not the original mortgage holder then you are to record some evidence of title prior to initiating a Foreclosure by Advertisement.

It was clear that Chase was not the original bank, so our position was that they were required to record their interest prior to starting the Foreclosure by Advertisement process. We appealed the circuit court's decision to the Court of Appeals which heard both arguments and agreed with us. Chase was not the original mortgage holder and the statute did not provide an exception for them to avoid recording, as the statute did not provide an exception for mortgages that were acquired by operation of law. Further, the Court of Appeals then published the opinion, making it binding on all of the lower courts in the State of Michigan. Chase then sought leave to appeal to the Supreme Court.

On October 10, 2012 we argued this case before the Supreme Court after it was narrowed to three specific issues:

1. Whether or not Chase acquired its interest by operation of law;
2. If they acquired their interest by operation of law, whether or not MCL 600.3204(3) requires them to record that interest;
3. If there was a flaw or defect in the foreclosure process, is the foreclosure in this situation void *ab initio* or voidable.

Both sides presented good arguments. We are still waiting for the results.

My Supreme Court Experience

By B.D. "Chris" Christenson

My first trip to the Michigan Supreme Court took place on October 10, 2012. I was nervous and excited as I prepared. My business partner, Craig Fiederlein, and our associate, Rick Hetherington, made the trip to Lansing with me to argue the case.

I spent the week and a half prior to the hearing reviewing the paperwork, researching, drafting and trying to hone our arguments. In addition, I went online at the State Bar website to the virtual Supreme Court and watched various video clips of arguments over the past year in order to get an idea of the mood, tenor, and flow of the proceedings. I called the clerk to inquire about parking and any other tips, timing issues, etc.

It was a blustery, gray day as we drove to Lansing. When we parked the car, the sun came up and shone brightly right on the front of the Courthouse which, if you have never been there, is a very imposing building. We decided to get our picture taken in front of the Court. Our associate, Rick, took a picture of Craig and me. Then we wanted a picture of all three of us. The next person walking down the path toward the Court was a lady carrying a briefcase. She agreed to take our picture. (See picture opposite page.)

We asked if it was her first trip to the Supreme Court. "No," she said. "I've been here before." She noted that it must be our first trip because we were taking pictures. She asked my name and I told her that I was Chris Christenson. She said, "Oh my goodness, I am opposing counsel. I am Jill Wheaton." We then walked into the Courthouse together. It was intimidating because the other firm had sent five attorneys to assist and observe the hearing that day. Jill Wheaton had been there so often that even the security guards knew her by her first name.

The Supreme Court has a podium with lights on it. During the first five minutes, while the yellow light is on, the Justices allow the attorneys to present their basic arguments without any interruption. After that five-minute period, the attorneys stand at the podium for up to 25 minutes being peppered with questions from all of the Justices who direct the conversation and flow as they see fit.

Chris Christenson and Craig Fiederlein in front of the Hall of Justice in Lansing.

When our case was finally called and opposing counsel got up, I thought we had a great shot at finally winning this case, based upon the questions that were directed to her. It appeared as though the Court had read my brief and was right on track with the main points that I had argued.

However, when it was my turn to stand up and argue, it became clear in my mind that the other side was now winning and I probably need not to have gotten out of bed that morning.

When I was finished, I went to opposing counsel and told her just what I had been thinking. She told me that even though she has been there frequently she often has that feeling when she leaves -- that she has no idea who has won.

So, at this time, we are unsure who won and are anxiously awaiting the ruling.

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