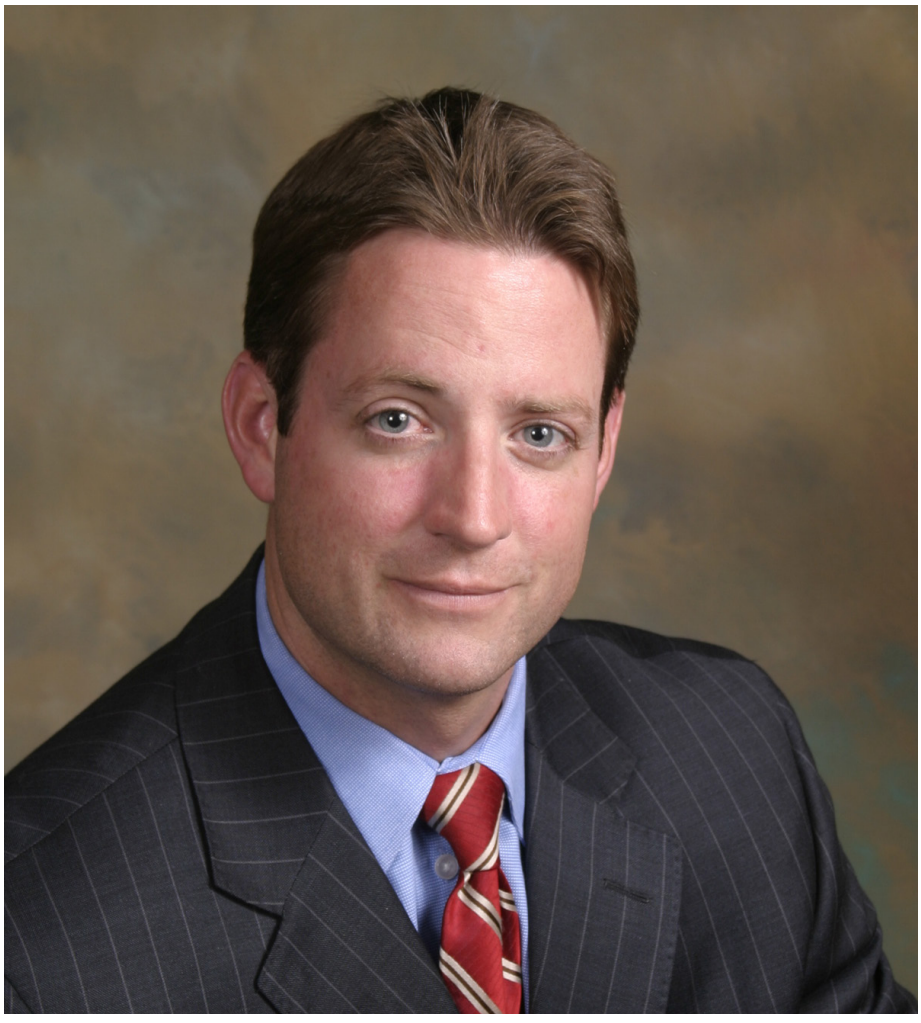
January/February 2011

BAR BEAT

Genesee County Bar Association



Peter M. Bade,
Chief Legal Officer, City of Flint

Genesee County Bar Association
315 E. Court St., Flint, Michigan 48502-1611
(810) 232-6012
For editorial information, call (810) 232-6000.

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Social Networking

By B.D. "Chris" Christenson, President

B.D. "Chris" Christenson

One day last year I had a criminal matter up in West Branch that was scheduled for a pre-trial. Upon arriving at the court, imagine my surprise when I walked into the courtroom and found three other Genesee County attorneys waiting for their pre-trials. Two of the lawyers rode together. The other two rode separately, myself included. It occurred to me that we could have car-pooled or covered the pre-trials for one another if we had known that the other attorneys had to appear as well. This situation happens on a fairly regular basis.

Another situation that comes up is where coverage may be needed when scheduling conflicts arise. It occurred to me that if we had a bulletin board or some way that we could quickly and effectively communicate with each other, we may be able to more efficiently attend Court hearings and provide coverage for each other.

To that end, I looked around to see what options were available or if there was any alternative that might be helpful and if there was any way that the Bar Association could be useful to its members in this type of scenario. The Bar Association is always looking for ideas to provide better services and increase the productivity and efficiency of its members. I found that social networks are being used around the country to act as bulletin boards.

Social networks are now online where groups of people can gather and exchange information instantly. By far the most popular site is Facebook. If you have not explored Facebook, I would encourage you to spend some time and explore this site. Currently, several bar associations and more and more businesses are using this social network to maintain contact with their members and/or clients. In fact, the State Bar of Michigan has had a Facebook page since 2009 that is used to provide useful links and information on lawyer related issues, calendar of events and reminders. The State Bar of Michigan currently has 829 "Friends" (friends are people that have signed up to receive information from a business or an individual on their web page), of which 580 are active on a monthly basis.

The Genesee County Bar Association is reviewing the State Bar of Michigan Facebook page as well as several other bar associations' Facebook pages around the country in an effort to create a social network presence for our members. It is our hope that everyone will be able to have access to our social network page which will have a running calendar of upcoming events, contact information, photographs from previous events, and updates and bulletins of notices and urgent alerts. It can also be used for posting court coverage items and/or travel items.

We believe that once our members test the system and begin to check it once or twice during the day, you will find that you will have valuable information at your fingertips that can be used to assist you in the efficient application of your practice.

If any of you have any ideas or suggestions, please forward them to the Bar Association. As technology advances, it will remain the Bar Association's goal to be in the forefront.

Can I Sue a Municipal Corporation for Land?

By Sherri L. Belknap

Sherri L. Belknap

The old adage was that municipal corporations are immune for claims of adverse possession and acquiescence. In 2009, the Court of Appeals amended the old adage and issued two opinions allowing claims for adverse possession and acquiescence.

In the past, municipal corporations relied upon MCLA 600.5821 in order to argue that they were exempt for adverse possession and acquiescence claims. MCLA 600.5821(1) and (2) provides:

> (1) Actions for the recovery of any land where the state is a party are not subject to the periods of limitations, or laches. However, a person who could have asserted claim to title by adverse possession for more than 15 years is entitled to seek any other equitable relief in an action to determine title to the land.
>
> (2) Actions brought by any municipal corporations for the recovery of the possession of any public highway, street, alley, or any other public ground are not subject to the periods of limitations.

In *Mason* v *City of Menominee*, 282 Mich App 525, 766 NW2d 288 (2009) *lv den* 485 Mich 880 (2009), Mason brought suit against the City of Menominee to quiet title to an adjoining land deeded to the city for use as a street. In its decision, the Court ruled that MCLA 600.5821(1) applies to the State only. MCLA 600.5821(2) applies to municipalities. The Court held that "the language of MCLA 600.5821(2) prevents a private landowner from acquiring property from a municipality by acquiescence *only if* the municipality brings an action to recover the property." Id at 529 (emphasis added). Based on *Mason, supra*, a cause of action for acquiescence is actionable if the municipality does not bring a cause of action for recovery of land.

In *Mason, supra*, Judge Beckering reviewed *Adams Outdoor Advertising Inc* v *Canton Charter Township*, 269 Mich App 365, 711 NW2d 391 (2006) in her concurring opinion. In *Adams*, a billboard company sued the township for adverse possession. The Court in *Adams, supra*, held that the billboard company could not maintain a claim of adverse possession against the township. In order to clarify what seemed to be conflicting opinions, Judge Beckering wrote that the parties in *Adam, supra,* did not raise the issue before that Court as stated in *Mason, supra*. *See Mason, supra* at 536. The parties in *Adams, supra*, focused on the definition of public ground.

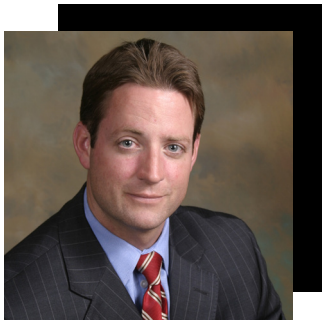
Approximately two months after *Mason, supra*, the Court of Appeals again reviewed whether a party can maintain a cause of action against a municipality for adverse possession. In *Beach* v *Township of Lima*, 283 Mich App 504, 770 NW2d 386 (2009), plaintiff and defendant owned lots in the Harford Village plat. The Beach family erected fences around undeveloped roads that abutted vacant lots owned by the township. The Beach family filed suit for adverse possession of the privately dedicated streets enclosed by their fences. The township argued that by virtue of MCLA 600.5821(2) it was not subject to the limitations period of adverse possession for public ground, streets, or highways. The Court of Appeals disagreed and ruled that the undeveloped roadways were a *private* dedication in the plat and not opened to the public. The Court ruled that by defendant's own admission, the undeveloped roads were not public streets for which the statute applies.

On January 22, 2010, the Michigan Supreme Court granted leave to appeal on *Beach* v *Township of Lima* for one issue. The issue is whether a plaintiff must file a claim under the Land Division Act, MCLA 560.101 *et seq*, if the plaintiff is not expressly requesting that the plat be vacated, corrected, or revised but seeks to establish a claim of adverse possession that would affect property in the recorded plat. Amicus briefs were filed by Department of Energy, Labor & Economic Growth, State Bar of Michigan – Real Property Section, and the Michigan Municipal League. The Court heard oral arguments on October 5, 2010. As of the date of submission for this article, no opinion has been rendered by the Court.

When determining whether your client has a claim for adverse possession and/or acquiescence against a municipality, you should determine whether a claim has been brought by the municipality and if so, then is the property public ground, a street, or highway as defined by the statute. If the property is not public ground, a public highway, a public street, or public alley, then your client may have a claim for adverse possession and/or acquiescence against the municipality.

City Attorney Loves Flint, Welcomes Challenges

By Roberta J.F. Wray



Peter M. Bade

"Strange as it may sound to some people, I really love living in Flint and being part of this up-and-coming city." These are the words of Pete Bade in one of several exchanges to get information for this profile. This upbeat attitude helps when dealing with budget constraints that have resulted in the department he heads being half the size it was during his initial stint in the city's legal department.

When Peter Bade became Flint's Chief Legal Officer a year and a half ago, he knew the job had challenges. The variety of cases, the lack of funding, the requirement that he provide the best legal advice he can to the City Council and the Mayor, make him a kind of traffic manager trying to find solutions to the many problems.

Additional stress comes from the recent cutback in police services and from what Pete calls a "B team mind set among city employees." He says, "It's easy to be negative when police officers see criminal activity and they know they can't do anything because there's no place to house the violators." But he adds, "There's a lot to be proud of, too," citing the quality and dedication of the city's remaining police officers and other city employees.

Pete began his legal career after graduation from University of Toledo Law School in 1994. He served as Judicial Advisory Assistant to the Honorable Robert M. Ransom (1994-1995), then as an associate with Plunkett Cooney, PC (1995-1997), and Assistant City Attorney to Karen McDonald Lopez (1997-2001), with whom he continues to interact on government issues. He next joined forces with Eric Mc Cormick, former City Attorney Michael Joliat, and John Tosto in a small firm (2001-2009) based on a team approach to civil litigation in state and federal court.

The complexities of modern city government make the job of Chief Legal Officer "professionally exciting," says Bade. His prior experience with the city has given him a great foundation, and he maintains close personal and professional contact with his predecessors in the position. He is particularly grateful for the almost familial characteristics of the Genesee County Bar Association, whose members he feels comfortable contacting for input and support.

Pete is an alumnus of Powers High School. He is married to Jennifer Abbot Bade. They have three children, Andrew (13), Joe (10), and Katie (8), who all attend school in Flint. "My free time is largely devoted to them – and I enjoy every second of it. We spend a lot of time at football and basketball games, or just playing in the backyard. I love being a dad," he says. "We take part in many events downtown and at FIA and The Whiting, as well as events like 'Back to the Bricks' and the Crim, and each year new things are added to the calendar that make this a fun place to live."

33RD ANNUAL
GCBA GOLF OUTING

SAVE THE DATE OF:
FRIDAY,
JUNE 3, 2011

SUGARBUSH GOLF CLUB
1 Sugarbush Drive
Davison, MI 48423

SHOTGUN START AT 11 A.M.

Foreclosure in Michigan

By Jill L. Nylander, Legal Aid Committee Chair

Jill L. Nylander

According to a recent news report, federal and state efforts to keep families in their homes have delayed many foreclosures until now. Michigan has 25% more foreclosures today than at this time last year – leaving it still ranked 8th in the foreclosure crisis, while the rest of the national average went down.

There are two ways to foreclose on property in Michigan: by lawsuit or by advertisement (Sheriff Sale). The standard mortgage document used by lenders in Michigan generally contains a "Power of Sale" clause that allows a mortgage holder/servicer to proceed with the foreclosure by advertisement process when there is a breach in the terms of the loan. Under changes in the law, however, homeowners and tenants facing foreclosure are granted significant new protections.

On May 20, 2009**,** the Governor signed into law amendments to the Michigan foreclosure by advertisement statute. These amendments require a mandatory 90-day process prior to foreclosure and are designed to allow the borrower and the mortgage holder to work together to avoid foreclosure where possible.

This pre-foreclosure process applies only when the first notice of foreclosure by advertisement is published after July 5, 2009 and before July 5, 2011, when the May 2009 amendments are scheduled to sunset.

The process may not apply if the borrower and the mortgage holder/servicer have previously agreed to modify the mortgage loan and the borrower did comply with the terms of the loan modification. It also applies only to property the borrower claims as a primary residence which is exempt from taxes.

Pursuant to the amended pre-foreclosure process, the mortgage holder/servicer must serve a written notice on the borrower informing the borrower of his or her rights and the opportunity to avoid foreclosure before it can proceed with foreclosure.

The mortgage holder/servicer is required to mail the notice both by regular first-class mail and by certified mail, return receipt requested, restricted delivery to the borrower, at the borrower's last known address.

Within a week after mailing the written notices, the mortgage holder/servicer must also publish a notice informing the borrower of his or her rights in a newspaper published in the county where the property is located. The publication notice is required to contain a variety of specific information, including the borrower's right to request a work out meeting through a housing counseling agency and the right to have an attorney or housing counselor assist with the meeting. If the borrower asks for a meeting, then the foreclosure proceedings may not begin until 90 days from the date the notice was mailed to borrower.

If the borrower is eligible for a modification, the mortgage holder/servicer may proceed to foreclose by advertisement only if the borrower has, in good faith, been offered a complying modification agreement and, for unrelated reasons, did not execute and return the modification agreement within 14 days after the borrower received the agreement. Otherwise, the holder/servicer may proceed only through court proceedings. The holder/servicer may also proceed by advertisement where the borrower is ineligible for a modification under the terms prescribed by the amendments. If a holder/servicer proceeds by advertisement in violation of the amendments, the borrower may seek to convert to a judicial foreclosure.

The **Protecting Tenants at Foreclosure Act (PTFA)** was also signed into law by President Obama on May 20, 2009 and will sunset in 2014. This federal law provides important new legal protections for tenants residing in properties that are the subject of foreclosure actions.

The PTFA applies in cases involving a foreclosure on a federally related mortgage loan or on any dwelling or residential real property. Under the law, the new owner of the foreclosed property must give a bona fide tenant 90 days to vacate the property after providing notice that it is necessary do so. The new owner must also allow any bona fide tenant who entered into a lease prior to the notice of foreclosure to remain in the property for the term of his/her lease, and the new owner must honor the rights of any bona fide tenant living in the property without a lease or with a lease which can be terminated at will under state law.

As we continue to weather the foreclosure crisis in our state, it is important to be mindful of the legal protections afforded homeowners and tenants by these laws, and to avail ourselves of all the many local sources of expertise we have generated in dealing with foreclosure related issues.

End-of-the-Year Tax Law Changes

By Richard S. Harris

Richard S. Harris

On December 17, 2010, President Obama signed legislation referred to as the "2010 Tax Relief Act" (or "Act"). Below I have listed some of the important changes that may be of interest to you and your clients.

- The principal change brought about by the Tax Relief Act was to extend individual rates in effect during 2010 for two additional years. In the absence of this legislation, Bush tax cuts enacted in 2001 by EGTRRA would have expired, and the law would have returned to the way it was prior to the 2001 legislation.
- This means that for 2011 and 2012, the lowest tax rate will stay at 10% rather than move to 15%. The top rate will stay at 35% rather than move to 39.6% under the pre-2001 law.
- Net long-term capital gains will continue to be taxed at a maximum rate of 15% for 2011 and 2012, with some exceptions. Qualified dividends will be taxed at 15% for 2011 and 2012, versus the potential of being taxed at the maximum ordinary income rate.
- The Alternative Minimum Tax (AMT) was "patched" for 2010 and 2011. The AMT exemption is $72,450 for married people filing jointly in 2010, and $74,450 for 2011. For unmarried individuals, it is $47,450 for 2010, and $48,450 in 2011.
- There was estate tax relief in the form of a sizable increase in the estate tax exemption. This was scheduled to be reduced to $1 million per person on January 1, 2011, but Congress changed it to $5 million per person for all of 2011 and 2012. In addition, whatever part of the exemption is unused on the first spouse's death after 2010 could be used on the surviving spouse's death, if a proper election is made following the first death.
- With respect to estates of decedents dying in 2010, an option is given to elect to apply the estate tax based on the new 35% top rate and $5 million exemption, with stepped-up basis, or by electing the no estate tax and modified carry-over basis rules under EGTRRA, which were in effect for 2010.
- The maximum estate and gift tax rates have been lowered to 35%. In addition, the gift tax and the generation-skipping tax exemptions have been increased to $5 million each.
- There are sizable incentives for businesses to invest in new machinery and equipment before 2012. A business can write off 100% of its qualified equipment and machinery purchases, effective for property placed in service after September 8, 2010 through December 31, 2011. This drops to 50% for property placed in service during 2012.
- The law extends marriage penalty relief, the $1,000 child tax credit, the earned income tax credit, and the higher education tax credit (the American Opportunity Tax Credit), and its partial refundability for two years.
- Under pre-Act law, the total amount of itemized deductions for an upper-income taxpayer was reduced by a percentage of the amount by which the taxpayer's AGI exceeded a threshold amount. Under the Act, itemized deductions of higher income taxpayers are not reduced for 2010, 2011 and 2012.
- Under prior law, there was a phase-out of personal exemptions for taxpayers with incomes above a certain threshold. Under the Act, a higher income taxpayer's personal exemptions are not phased out for 2010, 2011 and 2012.
- For 2011, there is a lowering of the employee portion of the social security tax on all wages earned up to $106,800. The rate has dropped from 6.2% of wages to 4.2%. Note that the employer portion of the social security tax of 6.2% remains the same. A similar lowering of social security self-employment taxes occurs for self-employed persons. Their social security taxes drop in 2011 from 12.4% to 10.4% on the first $106,800 of self-employment income.
- There are certain tax breaks that expired at the end of 2009 that were retroactively reinstated and extended through 2011. These include:
  - The $250 above-the-line deduction for certain elementary and secondary school teachers.

continued on next page

- The election to take an itemized deduction for state and local general sales taxes in lieu of the itemized deduction permitted for state and local income taxes.
- The above-the-line deduction for qualified tuition and related expenses.
- The provision that permits taxpayers age 70½ or older to make transfers to charities from individual retirement accounts of up to $100,000 per taxpayer per year. Individuals will be allowed to treat IRA transfers to charities during January, 2011 as if made during 2010.

Caveat: The tax law is very complicated, with many nuances, exceptions, and limitations. Be sure to discuss these changes with your tax adviser and tax preparer, or have your clients discuss them with their advisers, because each situation is different.

My Experience with WLAM

Women Lawyers Association-Genesee-Shiawassee-Lapeer Region

By Hon. M. Cathy Dowd, 68th District Court Judge

Hon. M. Cathy Dowd

In the Courtroom with Judge Caswell doing an exam with Wendy Maxfield, 1990: that was what started it. Wendy just would not rest until she had convinced me to join the Women Lawyers Association-Genesee-Shiawassee-Lapeer Region. Oh, the memories that come forward as I write this.

My first meeting was attended by such notable members as Judge Judith Fullerton and Judge Arthalu Lancaster. The female attorneys that comprised that group were and continue to be very intelligent, articulate and professional women. I enjoyed their company and their help for numerous years. After that meeting I knew I wanted to be involved. However, I was not quite sure what the organization was all about.

It did not take long to find out. Our region was asked to assist the Port Huron area female attorneys with one particular male judge. Remember this is happening towards the latter part of the 20th century. This male judge would not allow female attorneys to wear slacks in court. (I wonder if he would have allowed male attorneys to wear skirts.) Our region went to work with the state organization attempting to influence the judge. I believe we were somewhat successful since we did not hear any more complaints.

We had meetings every month, usually with guest speakers. I remember one month we hosted the Family Court judges who spoke about civility. I can remember months that other attorneys came to speak to our group about many different topics.

But meetings and speakers were not all we did. WLAM-Genesee-Shiawassee-Lapeer Region was a supporter of the YWCA Safe House for years. We held bake sales and craft sales. Oh, the hours spent baking and crafting. I learned that not only is Joan Pierson an accomplished attorney and wonderful person, she is a crafting genius. She is very talented. Of course, we held our infamous Christmas benefit luncheons that were catered by Italia Gardens. My hope is that we were of some help to those residents of the Safe House.

Our membership started to shrink in the Region. Members dropped out. There were many different excuses: Not enough time, too busy, the kids. Perhaps even the original reasons behind organizing have become irrelevant. For whatever reasons, we shrank until it is likely I am the only member from our region still in the organization. When I renewed my membership last year, the State WLAM had eliminated the Genesee-Shiawassee-Lapeer Region and merged it with the Saginaw area.

Personally, I believe there are still reasons for WLAM to exist. We must still fight the fight. The fight may not be male against female or against old prejudices; but the fight still exists, not only for such things as equal pay and equal job opportunities, but for just plain friendship. Women have unique roles in life, as do men. We women who just happen to also be attorneys still need the organization for networking ("Hey, can you cover me?"), education, and just plain pleasure. Wish you had been there. Hope you will be again.

Gail Knapp, New Member Profile

Gail Knapp

Meet Gail Knapp, one of the newest members of the GCBA. She has been a psychology professor at Mott Community College for the past 37 years, and is scheduled to retire from that position on July 1, 2011. Gail is a graduate of Cooley Law School (2010) participating in their weekend program. While at Cooley she did an internship with Family Law Assistance Project and realized that her skills would be best used by pursuing mediation, particularly domestic mediation. She hopes to make that a part-time retirement career.

Gail's other academic training includes a B.A. in psychology from Stony Brook University in New York; M.A. in psychology from Hofstra University; and a Ph.D. in Family Ecology/psychology from Michigan State University. Gail is also a professional registered parliamentarian with the National Association of Parliamentarians.

Gail stated if she still had time for hobbies, she would continue to breed, show and judge Great Pyrenees and Brussels Griffon dogs, but law school did make those activities take a back seat.

When All Else Fails …

Part of rebuilding New Orleans caused residents often to be challenged with the task of tracing home titles back potentially hundreds of years. With a community rich with history stretching back over two centuries, houses have been passed along through generations of family, sometimes making it quite difficult to establish ownership. Here's a great letter an attorney wrote to the FHA on behalf of a client:

A New Orleans lawyer sought an FHA loan for a client.

He was told the loan would be granted if he could prove satisfactory title to a parcel of property being offered as collateral. The title to the property dated back to 1803, which took the lawyer three months to track down. After sending the information to the FHA, he received the following reply.

(Actual reply from FHA):

"Upon review of your letter adjoining your client's loan application, we note that the request is supported by an Abstract of Title. While we compliment the able manner in which you have prepared and presented the application, we must point out that you have only cleared title to the proposed collateral property back to 1803. Before final approval can be accorded, it will be necessary to clear the title back to its origin."

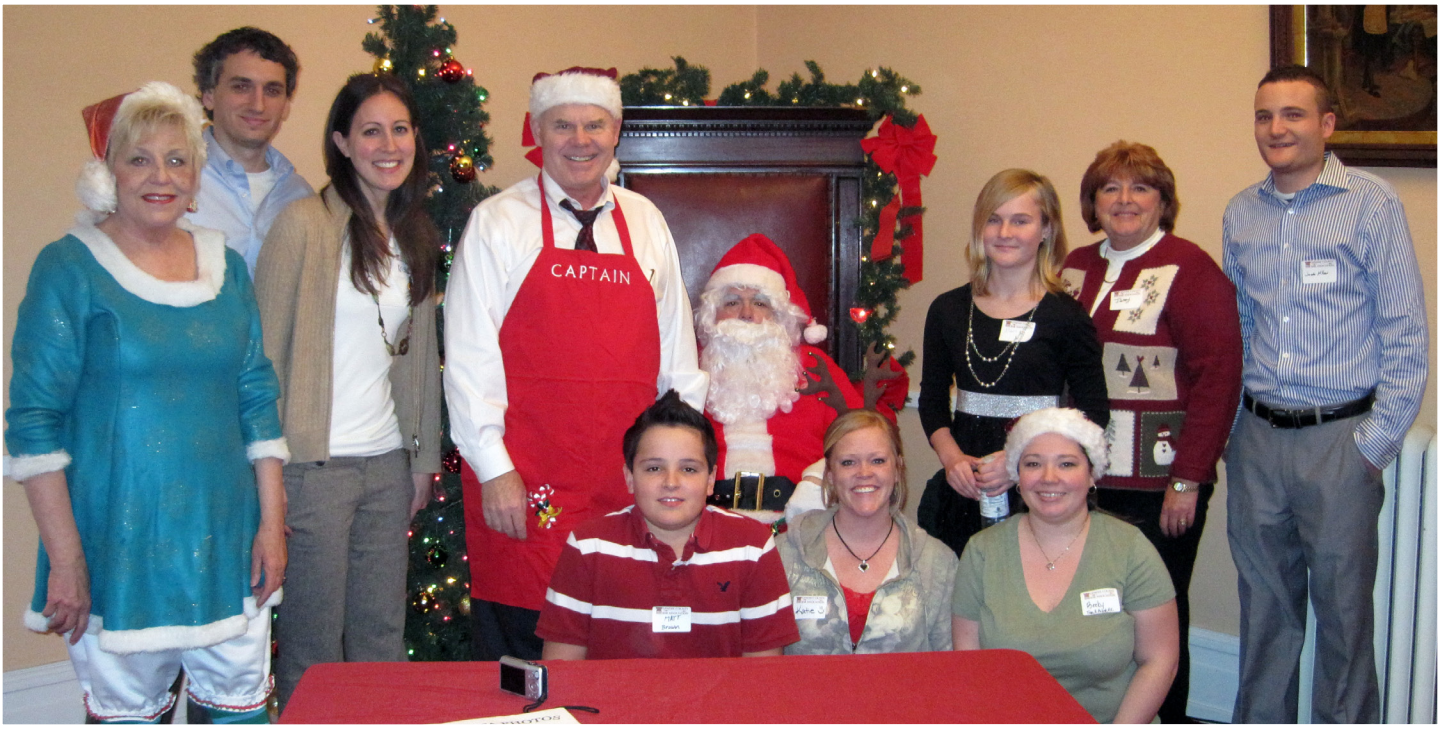
Annoyed, the lawyer responded as follows:

(Actual response):"Your letter regarding title in Case No.189156 has been received. I note that you wish to have title extended further than the 206 years covered by the present application. I was unaware that any educated person in this country, particularly those working in the property area, would not know that Louisiana was purchased by the United States from France in 1803, the year of origin identified in our application. For the edification of uninformed FHA bureaucrats, the title to the land prior to U.S. ownership was obtained from France, which had acquired it by Right of Conquest from Spain . The land came into the possession of Spain by Right of Discovery made in the year 1492 by a sea captain named Christopher Columbus, who had been granted the privilege of seeking a new route to India by the Spanish monarch, Queen Isabella. The good Queen Isabella, being a pious woman and almost as careful about titles as the FHA, took the precaution of securing the blessing of the Pope before she sold her jewels to finance Columbus 's expedition.

Now the Pope, as I'm sure you may know, is the emissary of Jesus Christ, the Son of God, and God, it is commonly accepted, created this world. Therefore, I believe it is safe to presume that God also made that part of the world called Louisiana. God, therefore, would be the owner of origin and His origins date back to before the beginning of time, the world as we know it, and the FHA. I hope you find God's original claim to be satisfactory. Now, may we have our damn loan?"

The loan was immediately approved.

2010 Holiday Dinner Volunteers



Save the Date

March 3, 2011
Probate/Elder Abuse Prevention Team Q&A

Sponsored by GCBA Probate Committee

March 29, 2011
Family Court Seminar

Sponsored by GCBA Family Court Committee

April 29, 2011
Law Day Luncheon and Mock Trial Competition

May 16, 2011
Annual Meeting & Election of Officers

June 3, 2011
33rd Annual Golf Outing

For detailed information on these events visit www.gcbalaw.org

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