

January/February 2009

BARBEAT

Genesee County Bar Association



Abraham Lincoln
Image from photos.com

Abraham Lincoln's Bicentennial
Birthday

In Memory of the Honorable
Robert E. Weiss

Why Mediation Often Works
When Lawyers Haven't Been Able
to Settle

Cooper Decision

STATE OF MICHIGAN
COUNTY OF GENESEE

Admission to the Bar/
Oath of Office

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Three GCBA members admitted into the practice of law on November 13, 2008

Hon. David Newblatt, Presiding Judge



*Charles Riley introduces
admittee Kimberly Hornik*



*Col. Robert Swartwood comments about
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Heather Burnash signs the historical "Red Book"



The Oath of Office is administered

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- ❖ **Publications**—“Private Mediation,” *Bar Beat*, July 1995; “Facilitative Mediation,” April 1996 and “Michigan Mediation Update,” June 2004, *Michigan Lawyers Weekly*

A New Year, a New Beginning, and a New Hope for a Brighter Future

By David S. Leyton, President



David S. Leyton

Although this first *Bar Beat* publication of 2009 comes out in February, the year is still fresh enough for me to send everyone best wishes for a new year that is full of hope and promise.

The late author Bill Vaughan once wrote: "An optimist stays up until midnight to see the New Year in. A pessimist stays up to make sure the old year leaves." So, how would you categorize yourself in this regard?

Certainly there are many things that culminated in 2008 that might cause some of us to focus on the "good riddance" side of the equation. But I would like to focus on the more positive, optimistic side for 2009: a new year, a new beginning, and new hope for a brighter future!

An important part of being an optimist, other than always seeing that proverbial glass as half full, is to be thankful for the many blessings in life that too often go unappreciated. So, first things first, I am thankful for simply being alive and healthy. I am also thankful for my family and my friends and for those I work with on a daily basis. I hope that you might also consider these and all the other too often unappreciated blessings in your life when deciding whether you're

going to be a pessimist or an optimist in 2009.

In case you are reading this as just another whimsy, feel-good piece that does not necessarily apply to your view of the world in 2009, let me share with you some of the tangible benefits that each of us can benefit from and be thankful for as members of the Genesee County Bar Association.

Your bar association provides quality continuing legal education, great networking opportunities, and community service opportunities that will help you be a better lawyer and will make this a better community.

One of the simplest, best networking opportunities is our monthly lunch meetings held at the Masonic Temple in downtown Flint. For a \$10 pre-registration fee, you get a delicious hot meal with refreshments and dessert, a chance to casually network with your peers in a warm and friendly atmosphere, and a chance to hear from one of our great speakers on a variety of topics.

If you haven't been to one of these meetings in a while, I highly recommend that you consider it. Our next meeting is Monday, March 16.

Another benefit of being a bar association member is that you receive a subscription to *Bar Beat* magazine. Other forms of communication available to members include our *Notes and News* monthly newsletter, our Internet web page (www.gcbalaw.org), and our pictorial directory. All of these provide information on members: our continuing legal information seminars; important announcements, legal links, and phone numbers; upcoming events; and lots of other worthwhile information for lawyers practicing in Genesee County.

In addition, as a member of the Genesee County Bar Association, you can benefit from our lawyer referral service; free use of an executive-style conference room for meetings, depositions, mediations, and arbitration hearings; credit union banking services; reduced rates on professional services such as various insurance, retirement, and employee assistance plans; mailing

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Abraham Lincoln's Bicentennial Birthday

By Roberta J.F. Wray

Photography by Roberta J.F. Wray

Last March I took a trip to Arizona, passing through seven state capitols on the way. The first was Springfield, Illinois. It was three weeks after the 199th birthday of Abraham Lincoln. The monument containing his tomb was still filled with the wreathes sent by states and military units who stood by the principle of union at a time when the nation was divided. The curator of the monument told me that on February 12, hundreds of people visited the hallowed place, with its marble walls and its array of statues of Lincoln as a captain in the Black Hawk War, as orator and circuit-riding lawyer, as office-seeking candidate advocating change, and ultimately as commander-in-chief.



Commander-in-Chief

It was not until the return trip from Arizona that I realized that his bicentennial was approaching. An article in the Quincy, Illinois newspaper,

purchased while I was sick in a hotel room in Hannibal, Missouri, described a symposium on Lincoln, which would be limited in attendance to 212 persons. My initial reaction was that it might be hard to find 212 people interested in attending. I briefly entertained the notion that I might be one of them. Then it dawned on me that the bicentennial might be a magnet. I'd like to be in Springfield at the monument on February 12, 2009, I thought. But if hundreds showed up on Lincoln's birthday in an ordinary year, how much larger might the crowd be on a milestone like the 200th anniversary of his birth? An indication might be found on the Internet. Using the search terms "Abraham Lincoln Bicentennial" results in no less than half a million entries.

From Lincoln's birth place in Hardin, Kentucky, to Timbuktu, and in countries around the world, the 200th anniversary of the birth of our 16th president is being observed. The mode of observance covers a broad spectrum. Town hall meetings sponsored by the Lincoln Bicentennial Commission at 12 "Lincoln sites" and universities are exploring the progress that has been made toward "the unfinished work" that Lincoln spoke of in his Gettysburg address. There will be readings and reenactments of his many memorable speeches in classrooms and auditoriums around the country, and in the District of Columbia, "Living the Legacy: Lincoln in Washington, D.C." where it is said, "As a senator and as president, Lincoln carved out his legacy of strong leadership and powerful ideals." More than 75 exhibitions, lectures, performances, and special events exploring the life of Lincoln and his years in Washington will run between January 1 and April 30, 2009. There are more than 110,000 entries in an Internet search of "Abraham Lincoln Bicentennial Michigan." Included in the mass of information is the fact that Lincoln visited Michigan only once, making a campaign speech in Kalamazoo, in support of the very first Republican nominee for president, John C. Fremont, in August 1856. In 1860, Michigan supplied the greenery for the speaker's podium at the Republican Convention at which Lincoln was nominated. Michigan Governor Austin Blair led a Michigan delegation that supported rival candidate, William Seward, for the nomination, but when it became evident Lincoln would win the nomination, it was Blair who moved for a unanimous nomination. Later, after Lincoln was elected and wondering where the troops would come from to defend the capitol and fight for the Union, Michigan answered the call. Governor Blair

committed Michigan troops, who were among the first to arrive in Washington. Lincoln is quoted as saying, "Thank God for Michigan." In 1865, Michigan had a more somber role, supplying the greenery for his funeral

(www.main.gvsu.edu/hauenstein).

One Internet entry says more books have been written about Lincoln than about any other person, living or dead. It goes so far as to suggest that libraries should be divided into three sections: fiction, non-fiction, and biographies of Lincoln. Another cites "The Global Lincoln" (www.lincolnbicentennial.gov/lincolns-legacy/global-lincoln), showing how Lincoln's stature has overspread the world and grown in magnitude year after year. Lincoln's tomb bears the words of Secretary of War Edward Stanton at Lincoln's death bed: "Now he belongs to the ages." His legacy has spread worldwide. Another statesman from a later time, British Prime Minister David Lloyd George, said of Lincoln: "He lost his nationality in death." It seems odd to me, given all this information and adulation, that fewer than 50 percent of Americans, elected officials included, know that the phrase, "of the people, by the people, for the people," is from Lincoln's best known speech, The Gettysburg Address (www.americancivilliteracy.org—civics quiz, results summary).



Roberta J.F. Wray



Now he belongs to the Ages

In Memory of the Honorable Robert E. Weiss

By Prosecutor David S. Leyton and Attorney Dennis R. Lazar



Hon. Robert E. Weiss

The Genesee County Bar Association lost one of its finest members the evening of January 7, 2009, when the Honorable Robert E. Weiss passed away suddenly at his home in Grand Blanc. It is with deep sadness and yet fond remembrance that we pay tribute to his life, his career, and his vast contributions to this world.

Just 69 years old, Judge Weiss left us far too soon. Yet he achieved so much during those years that it would be difficult for anyone to say that he did not make the very most of his time with us.

Where does one begin when looking back on the life and times of this great man?

Perhaps it is as a loving husband, father to a son and two daughters, and grandfather to seven cherished grandchildren that Bob would like to be remembered. Most certainly, it is in those roles that he will be missed by his wife Vickie, son Sandy, and daughters Pam and Jan and all their children. From all accounts, they were the apple of his eye and his prized gifts in life.

But for so many others whose lives Bob touched, it would be difficult to say with certainty how he ranked his other competing interests in life.

A graduate of Flint Central High School in 1956, Bob attended Flint Junior College and received his undergraduate degree from Michigan State University before heading off to Detroit College of Law and graduating from the University of Detroit Law School in 1963.

It was that educational foundation that translated into a lifelong love for the law, politics, and Michigan State University.

He started his legal career as an assistant prosecuting attorney conducting criminal trials and

instituting investigations. He then went into private law practice with his father, Arthur Weiss, John Damm, and Zolton Ferency, where he was involved, primarily, in civil and criminal litigation. He also served as Flint city attorney.

A consummate politician for almost his entire adult life, Bob Weiss's appetite for political affairs was whetted in the throes of the Nixon Watergate scandal when he served as special litigation Counsel in the civil proceedings in Washington D.C. on behalf of the Democratic National Committee.

While some thought that Bob's future lie in the nation's capitol, his roots were firmly planted in Genesee County in 1979 when he was appointed Genesee County prosecuting attorney, a position he would hold for 13 years.

Dennis Lazar, chief assistant under Prosecutor Weiss, said "Bob vowed to make the Prosecutor's Office the best 'law firm' in the County by hiring top grade attorneys who excelled in research and trial preparation."

"Bob instilled in us the importance of civility and respect when dealing with our fellow members of the Bar," Lazar continued. He was also an early leader in the crime-victim rights movement and was tireless in his efforts to advocate for all victims, but most notably children and our senior citizens.

As prosecutor, Bob Weiss served as president of the Prosecuting Attorneys Association of Michigan and was also the chairman of the National District Attorneys' Democratic Caucus.

Few would argue that family and children were always number one in Bob's life, but naming his second love is quite a challenge.

As one of his lifelong friends said during his memorial service, politics

was always just under the surface when it

came to Bob Weiss. He reveled in political campaigns, both his own and those of others. He served in various election capacities over the years at the local, state, and national levels. Even though he was an unabashed partisan Democrat, his sincerity in all that he did earned him respect and true friendship on both sides of the political aisle.

However, if there was one thing in this world aside from family that captivated Bob's passion and attention more than his love of politics and the law, it was his deep fondness for all things Michigan State.

From his days as a student in East Lansing up to the night before he died when he attended an MSU basketball game with Prosecutor Leyton, Sheriff Pickell, and Dennis Lazar, all who even moderately knew Bob realized that he bled Green and White.

First appointed by Governor Blanchard and later elected statewide, Bob served with distinction on the MSU Board of Trustees from 1989 to 2002. In the mid-1990s, he played a vital role in bringing the Detroit College of Law to Michigan State, now known as the MSU College of Law.

After being appointed judge and resigning his MSU trustee position, Bob was appointed to the university's law college board in 2002 and was currently serving as the board's vice president.

He was known by many for his love of Michigan State athletics, particularly the Spartan's men's basketball team. A close friend of former coach Jud Heathcote, with whom he would regularly sit with during MSU's NCAA tournament runs, Weiss played a key role in hiring Tom Izzo as head coach in 1995.

In 2002, Bob gave up his seat on the MSU Board of Trustees to accept an appointment from Governor John Engler to the Genesee County Probate Court bench. In 2006, he was appointed Chief Judge by the Michigan Supreme Court and was serving in that position at the time of his passing.

It was only fitting that Bob Weiss was able to finish his career as a Probate Court Judge. It was a position in which he could have a very real, meaningful impact on the lives of children. His number one priority as a probate court jurist was to do what was in the best interest of the child and he would often state those very words with authority from the bench.

"Judge Weiss was my dear friend and I will miss him greatly," Genesee County Prosecutor David Leyton said.

Leyton often sought Bob's counsel.

"Many a time I would climb the stairs to the fifth floor to ask his advice about cases. He sat in my chair for 12 years. He knew what it was like to have to make those critical decisions, and I cherished his integrity, his knowledge and most of all his friendship."

"He had a way of talking that was humorous, irreverent and sincere all at the same time," said Bob's lifelong friend and retired Genesee Circuit Court Judge Robert Ransom.

Ransom said as a probate judge, Weiss was a no-nonsense man but had "incredible compassion for children."

"That's what really motivated him on a daily basis in the family court work that he did," Ransom said. "He really cared for and looked out for the young people, the children and the young in family court."

Bob was one of a kind and left his mark wherever he went. We will greatly miss his service and his presence in the months and years ahead.

The Genesee County Bar Association extends its deepest sympathy and heartfelt condolences to the family of the Honorable Robert E. Weiss.

A New Year . . .

Continued from page 4

labels for the GCBA member list; plus other discounts and much, much more.

Perhaps the best benefits of being a member of the Genesee County Bar Association are the opportunities for fun social interaction and the ability to get involved in worthwhile community service.

Among these opportunities are the annual golf outing, various social events at the Flint Institute of Arts, Sloan Museum, Comerica Park, and many more. Additionally, a bi-annual highlight is a swearing-in ceremony at the United States Supreme Court in Washington, D.C.

We all want to see our community be the best that it can

be, and you can help achieve that by being a participant in one of the bar association's community activities, including the annual Law Day program for students, the Annual Community Holiday Dinner, which serves the needy, our Senior Outreach program, or the Nursing Home and Hospice program, just to name a few.

As we settle into the last year of the decade (wow!), I hope you'll choose to be an optimist and take advantage of all the wonderful benefits that the Genesee County Bar Association has to offer. It will be one positive step you can take in making 2009 the very best that it can be. Happy New Year!

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Why Mediation Often Works When Lawyers Haven't Been Able to Settle

By Richard M. Barron



Richard M. Barron

Mediation forces all attorneys to seriously focus only on settlement. Too often, attorney settlement discussions are merely a short exchange after depositions, vaguely inquiring about whether the other party is ready to throw in the towel. And when more serious settlement discussions are held, they're often attempts by one lawyer to see if the other lawyer is willing to modify his or her best case scenario position with obligating the inquiring lawyer to any corresponding concession. Mediation, on the other hand, requires attorneys and their clients to jointly analyze their cases – both strengths and weaknesses – and to prepare for defending and selling their position to a reluctant buyer and a somewhat skeptical mediator. Thus, mediation is necessarily more likely to succeed than prior negotiations because the mediation process forces the parties to be more focused on, and prepared for, negotiation toward settlement.

A mediator's economic incentive is settling the case. Trial counsel is compensated in different ways, and settlement doesn't always net the maximum fee. Moreover, in most cases, as a party prepares for the actual trial, additional expenses, such as for expert witnesses, are incurred and passed on to the client. And even if a party's counsel prevails, he or she can't guarantee that there will not be an appeal. A mediator has no interest in having a case drag on. On the contrary, a mediator's reputation for resolving cases, on which his or her practice depends, in turn depends on getting the current case resolved quickly. Thus, no matter how able one's trial counsel, it is often preferable to have a professional mediator to help settle the case.

Attorneys have a somewhat different orientation. Trial counsel has an adversarial orientation. Setting aside economic disincentives, it is hard for a lawyer to get into settlement mode as he or she is getting ready for trial. The opponent must believe that he or she is ready, willing, and able to go to trial. There is often a fear that counsel's settlement proposals will be erroneously viewed as evidence of a reluctance to go to trial. There is also a concern about saying anything that might be suggestive of weakness or lack of commitment to the client.

... mediation is necessarily more likely to succeed than prior negotiations because the mediation process forces the parties to be more focused on, and prepared for, negotiation toward settlement.

Mediation is structured to produce agreement. In most cases, mediation allows parties to be in

the same venue but in different rooms for difficult parts of the negotiations. This procedure allows parties to pause before responding, and it encourages all parties to compose their thoughts before communicating their positions to the other side. All parties can evaluate opposing parties and their counsel. Parties can ask questions. Parties can present hypothetical solutions without commitment. Parties can normally negotiate face-to-face, if desired. Parties can obtain impartial feedback from the mediator. Parties can take their time in considering all viable options in a neutral and comfortable setting. The entire process assumes that, with professional assistance, reasonable

Continued on next page

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and knowledgeable participants can jointly arrive at a mutually acceptable resolution of their competing interests.

Mediation puts all players on the field.

The ultimate decision maker for each side is almost always at the

mediation. This is a vital advantage often lacking during regular negotiations. This is especially the case with insurance, corporate, and municipal parties. Legal counsel can, and must, deal with their clients on a real-time basis. This prevents the negotiation momentum from breaking down because of the need to check with someone or something not present.

Mediation is a black box.

Everyone understands that what happens in mediation is totally confidential and will not be discoverable or admissible in a case at a later point. This gives all participants the freedom to explore all possible forms of settlements and even allows them the safety of conceding weaknesses in their case. Parties will not normally share truly sensitive or confidential information nor offer an apology unless they are confident that it will be protected. Mediation is a bit like selecting a pope; the process is subsumed in the result.

Mediators are experts in the process of dispute resolution.

Mediators understand the cognitive, affective, equitable, and legal aspects of getting parties to yes. A good mediator can use his or her status as a neutral newcomer to the case to carefully investigate with each

side the facts, interests, and emotions needed to reach a mutually acceptable agreement. A mediator generally will know from experience what will work and what will not. A good mediator serves as a patient negotiation coach who can keep the parties engaged in the negotiation beyond the point at which the parties become discouraged and are ready to give up.

Mediators can confront parties in ways that their counsel cannot.

Good attorneys normally know when their clients are being objectively unfair or unrealistic, but confronting their client about this is a serious challenge. Mediators can do reality testing with the client without denigrating the legal ability of his or her legal counsel. Mediators point out to clients that approximately 95 percent of all civil cases are settled without a trial. They also remind clients that recent statistical studies demonstrate, at least in California, that in only 15 percent of the civil cases that went to trial did both parties improve their net position over pre-trial offer/demand. Plaintiffs were disappointed much more often than defendants were. Good mediators can often help parties base their evaluations on reality rather than wishful thinking.

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Feb. 16—Presidents' Day



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Cooper Decision

By Orene Bryant

When I served as chair of the Professional Committee, the Board decided that the case of *Grievance Administrator, Attorney Grievance Commission v Patricia Cooper*, involving a retainer agreement malpractice allegation, would be monitored, and at an appropriate time, the GCBA would communicate to the GCBA members the status of the case. On December 12, 2008, the Michigan Supreme Court made a ruling in the case. It held that the Attorney Discipline Board was not correct in determining that the attorney engaged in malpractice. The Court stated:

The Attorney Discipline Board erred in holding that the July 29, 2002 fee agreement was ambiguous as to whether the \$4,000 minimum fee was nonrefundable. As written, the agreement clearly and unambiguously provided that the respondent (attorney Cooper) was retained to represent the client and that the minimum fee was incurred upon execution of the agreement, regardless of whether the representation was terminated by the client before the billings at the stated hourly rate exceeded the minimum. So understood, neither the



Orene Bryant

agreement nor the respondent's retention of the minimum fee after the client terminated the representation violated existing MRPC 1.5(a), MRPC 1.15(b) or MRPC 1.16(d).

Justice Kelly, in her concurring opinion, pointed out that the Attorney Grievance Commission had made a recommendation for using some different language in the fee agreement to lessen grievances. The Commission recommended that:

[T]he agreement explicitly designate the fee the attorney charges for being hired and state that the fee is non-refundable under any circumstances

... [c]ounsel may wish to designate the number of hours the attorney will work without additional charge, and specify an hourly rate to be charged thereafter.

I trust this information proves to be helpful, especially to members who were concerned about the retainer fee agreement that they were using.



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- **Monday, March 16, 2009**
Featuring Edward H. Pappas, State Bar of Michigan President
- **Monday, April 20, 2009**
Featuring Dr. David Hall, Psychologist on "Stresses in a Law Practice"
- **Monday, May 18, 2009**
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The Michigan Lawyers Auxiliary and the State Bar of Michigan Public Outreach Committee announce the availability of an updated "You and the Law" booklet for young people in Michigan. The State Bar offers this booklet to help you be aware of your rights and responsibilities under the law and to be a responsible citizen of Michigan and the United States. It specifically addresses areas of the law that are of concern to young people. The book costs \$2. The booklet is available from the State Bar at www.michbar.org/publications.

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Serving Businesses and Professionals
for over 30 years.

- Named in Barron's in 2006 & 2007 as one of the "***Top 100 Women Financial Advisors***"
- In 2005 Research Magazine named Sherri as one of the "***Top-Ranked Advisors in America***"
- Named as one of the "***150 Best Financial Advisors for Doctors***" in 2004, 2005 & 2006 by Medical Economics

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