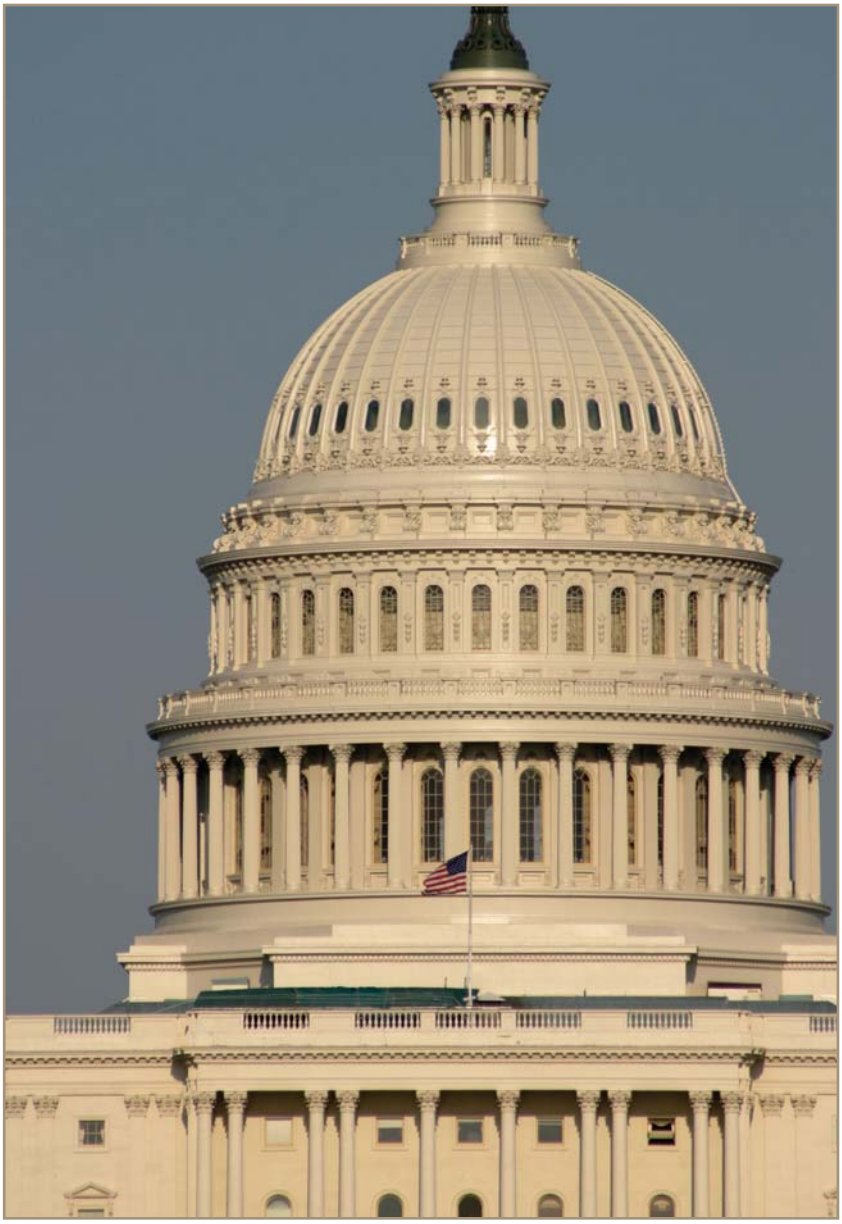
January/February 2008

BARBEAT

Genesee County Bar Association



U.S. Capitol

by Gerald D. Snodgrass, II

Investiture of Tracey Collier-Nix
68th District Court

Retirement of Attorney Magistrate Roberta Wray
67th District Court

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The View from Behind the Wheel

The GCBA Gives Back

By Kurtis L.V. Brown, President

Kurtis L.V. Brown

First of all, I hope the New Year has met each of you in a positive way and that your encounters with the recent mid-Michigan snowstorms have been good ones. More importantly, I hope you will accept wishes from me and my family that 2008 brings each of you all that you need and want.

The waning days of 2007 were VERY busy ones for your bar association. As many of you are aware, the city of Flint began a new parking enforcement program along many of the streets in downtown Flint in November 2007. In response to a number of questions, comments, and requests for action from you, our membership, your board of directors has taken swift and decisive action. An ad-hoc committee consisting of Chairman Jim Wascha, David Leyton, Fred Meiers, Kraig Sippell, and Tony Vance was immediately formed by the board of directors to study the issues surrounding this program, meet with officials at the Downtown Development Authority and City of Flint, and formulate some revisions to that parking enforcement program. This issue has not yet been resolved, but rest assured that meetings are ongoing and your association hopes to have some results to announce in the near future.

December also marked the annual GCBA Holiday Dinner at the Masonic Temple in downtown Flint. As many of you already know, former President Brian Barkey and his committee work tirelessly throughout the year to plan this gala event, and their planning brought us a wonderful evening once again this year. This event is one of the most visible ways that we give back to the city of Flint and its surrounding communities. This event is funded by the legal community, planned by the legal community, and staffed by the legal community. That "staffing" includes everything from food preparation and serving, seating guests, cleaning tables, providing entertainment, and organizing the free gifts and Santa pictures for the children.

As a legal community, we have much to be proud of in the wake of the 2007 Holiday Dinner. Once again, we reached the financial goals through donations by GCBA members. We had many volunteers throughout the evening from every segment of the legal community. The leadership of Mr. Barkey and his committee brought us a well organized event. Most importantly, all of these positives allowed us to serve nearly 1,100 needy men, women, and children over the course of less than three hours!!!

While we should be proud of the fact that our legal community was able to help so many, it also highlights just how desperate the need is within our community. For example, just the evening before the GCBA Holiday Dinner, First Presbyterian Church (across Saginaw Street from the Masonic Temple) served meals to nearly double that many needy people.

Therefore, as we settle in to this New Year, please remember the needs of not only yourselves and your families, but also the needs of the community around you. It is never too early to donate toward the 2008 GCBA Holiday Dinner.

The Michigan Sentencing Guidelines: Why 18 Or Less Means No More Than 12

By Anthony P. Vance, Criminal Law Committee Chair

Enacted by the Michigan legislature in 1998, the Michigan Sentencing Guidelines are applicable to enumerated felonies committed on or after January 1, 1999.[1] The guidelines require a judge to sentence an individual within a predetermined minimum range, while the maximum sentence is either set by statute (the statutory maximum) or it falls within the judge's discretion. This predetermined range is based, primarily, on two factors: (1) a defendant's prior record, and (2) the specific facts underlying the offense for which the defendant is being sentenced.[2] While the guidelines are essentially straight forward, they do contain several nuances of which you and your client should be aware.

One of the most peculiar aspects of the guidelines is where a defendant's upper range of the minimum sentencing guideline range is between 13 and 18 months. For example, assume the defendant's guideline range has been scored as 0 to 17 months. In such a situation, it appears at first glance that the sentencing judge could impose a prison term of at least 17 months on the minimum end. However, such a sentence constitutes a departure under the guidelines and would require an articulation of substantial and compelling reasons for the departure, even though the sentence would be *within* the appropriate sentence guideline range.[3]

In this example, the judge could

not sentence the defendant to prison (absent departing from the guidelines). In fact, the most time the judge could impose in this situation would be 12 months in the county jail.

> MCL 769.34(4)(a) provides:
> If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in [MCL 777.1 *et seq.*] is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

Accordingly, if the upper limit of the appropriate sentence range is 18 months or less, the sentencing court *cannot* impose a prison sentence absent a finding of a substantial and compelling reason.[4] Thus, where a defendant has been scored with a guideline range of 0 to 17 months, the court may impose no more than 12 months in the county jail. As set forth in both MCL 777.1(d) and 769.31(b), "intermediate sanction" means "probation or any sanction, *other than imprisonment in a state prison or state reformatory,* that may be lawfully imposed" (emphasis added). These sections list 15 "intermediate sanctions" that may be imposed where the upper limit of the sentencing guideline range is 18 months or less.[5] Therefore, while an intermediate sanction can include a number of things, it cannot include a prison term. Consequently, even when a defendant is faced with a guideline score where the upper limit exceeds 12 months, but is 18 months or less, that defendant cannot be sentenced to prison absent a departure. This produces the unique situation where a sentence may be within the appropriate range but is nonetheless deemed a departure, thereby requiring the sentencing court to articulate substantial and compelling reasons for its sentence.

In *People v. Stauffer,*[6] the Michigan Supreme Court issued an opinion highlighting this peculiar aspect of the statutory sentencing guidelines. *Stauffer* dealt with a situation similar to the example above, where the defendant's guideline range was 0 to 17 months (subsequently reduced to 16 months) and the trial court imposed a prison term. The Supreme Court, citing the above referenced sections of the Michigan Compiled Laws, held that where the upper limit of the minimum sentence range is 18 months or less, the trial court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the defendant to prison.[7] An intermediate sanction, the Court recognized, may include a jail term that does not exceed the upper limit of the minimum sentence range, or 12 months, whichever is less. The Court went on to state "[a]n 'intermediate sanction' can mean a number of things, but it ***does not*** include a prison sentence."[8] (Emphasis added.)

This aspect of the sentencing guidelines has continued to be adhered to by the courts in a handful of published cases and numerous unpublished cases. In a subsequent published opinion, the Michigan Supreme Court, citing *Stauffer,* validated this feature of the guidelines pointing out that "[i]n at least one circumstance, a sentence may constitute a departure, and thus require the articulation of a substantial and compelling reason, even though the sentence is within the appropriate sentence range."[9] Accordingly, if the upper limit of the sentence range is less than 18 months, the sentencing court cannot impose a prison sentence absent a finding of a substantial and compelling reason.

For more on the Michigan Sentencing Guidelines, please join us for a Sentencing Guidelines Seminar hosted by the Genesee County Bar Association Criminal Law Committee and the Genesee County Public Defender Program on Friday, March 7, 2008, at the Holiday Inn Gateway Centre. Our featured speakers include attorney Sheila Roberston Deming, the Honorable Judith A. Fullerton, and attorney Ann Yantus of the State Appellate Defender Office. Contact the Genesee County Bar Association for more details at (810) 232-6012.

Endnotes

1 1998 PA 317.

2 Other factors are involved as well including the group and class to which the sentencing offense has been assigned.

3 *People v. Stauffer,* 465 Mich. 633, 636 (2002).

4 *People v. Babcock,* 469 Mich. 247, 256 (2003).

5 (i) Inpatient or outpatient treatment;
(ii) Probation with any probation conditions as required by law;
(iii) Residential probation;
(iv) Probation with jail;
(v) Probation with Special Alternative Incarceration;
(vi) Mental health treatment;
(vii) Mental health or substance abuse counseling;
(viii) Jail;
(ix) Jail with work or school release;
(x) Jail, with or without authorization for day parole under 1962 PA 60, MCL 801.251 to 801.258;
(xi) Participation in a community corrections program;
(xii) Community Service;
(xiii) Payment of a fine;
(xiv) House arrest;
(xv) Electronic monitoring.

6 *People v. Stauffer, supra.*

7 *Stauffer* at 635.

8 *Id.*

9 *People v. Babcock, supra* at 255-256, fn. 9 citing *People v. Stauffer, supra* and MCL 769.34(4)(a).

Dolores M. Coulter

Estate Recovery Act

By Dolores M. Coulter, SBM Elder Law and Advocacy Section Chair

In 1993, Congress amended Title XIX of the Social Security Act to require every state that receives federal Medicaid funding (and all states do) to implement an estate recovery program 42 USC 1396p(b). The amendment was part of the Omnibus Budget and Reconciliation Act (OBRA 1993), PL 103-66, Section 13612. Before the 1993 amendment, estate recovery was an optional component of a state's Medicaid program. Despite the change in the law, the federal agency that administers the Medicaid program, formerly the Health Care Financing Administration, now the Centers for Medicare and Medicaid (CMS), did not vigorously enforce the requirement. As of January 2007, every state except Michigan had adopted an estate recovery program. On August 24, 2007, CMS sent a letter to the Michigan Department of Community Health (DCH) giving the State until September 30, 2007 to enact necessary legislation to implement an estate recovery program or face monetary sanctions. On September 30, 2007, Governor Granholm signed PA 74, amending the Social Welfare Act. MCL 400.112g – 400.112k. That legislation requires DCH to establish and operate an estate recovery program, defines certain requirements for the program, and requires DCH to obtain approval from CMS before implementation of its estate recovery program.

Estate recovery is a component of a state's Medicaid program that requires the state to seek recovery from the estate of a deceased Medicaid recipient for the state's payments for certain long-term care services provided to the recipient. Long-term care services include not only Medicaid-funded nursing home care, but also "home and community based waiver services,"[1] and related hospital care and prescription drugs provided to Medicaid recipients age 55 and over. A state is also required to seek recovery for Medicaid payments on behalf of recipients of any age who were determined to be "permanently institutionalized," i.e., the state made a determination that they could not reasonably be expected to return to their homes. States have the option to seek recovery for payments for all other Medicaid services provided to persons age 55 and over. PA 74 does not address this option, and DCH has given no indication at this time as to whether it will include the optional coverage in the plan that it will submit to CMS.

PA 74 limits estate recovery to the assets that are subject to probate administration under article III of the Estates and Protected Individuals Code (EPIC), MCL 700.3101 et seq. It specifically excludes from estate recovery any assets in a revocable trust established by the decedent that are otherwise subject to creditor claims under EPIC, MCL 700.3805(3). Thus, assets held in a trust, as well as other assets that pass upon death outside of the probate estate, such as joint property, property subject to a life estate, and property subject to beneficiary designations, are not subject to estate recovery.

In most cases, the only asset of significant value in the estate of a deceased Medicaid recipient is the recipient's former homestead, because the Medicaid eligibility rules strictly limit the amount of other assets that an individual can keep and still qualify for Medicaid. Under current Medicaid eligibility rules for long-term care services, the recipient's former homestead is an exempt (non-countable) asset if the equity value of the homestead is under $500,000. [2] There is no limit on the equity value of the homestead if the recipient's spouse, minor child, or blind or disabled child is living in the home. PA 74 provides an exemption from estate recovery for that portion of the value of the recipient's

homestead that is equal to 50 percent of the average price of a home in the county in which the homestead is located as of the date of death. It also provides an exemption for the portion of an estate that is the "primary income-producing asset of survivors, including, but not limited to, a family farm or business." It further provides that no recovery against the home can occur if any of the following persons are living in the home: a surviving spouse, a child under age 21, a blind or disabled child of any age, a "caretaker relative" who was residing in the home for at least two years immediately before the recipient's admission to the nursing home and who provided care that allowed the recipient to live at home, or a sibling who has an equity interest in the home and who resided in the home for at least one year immediately before the nursing home admission. The Act specifically prohibits DCH from placing a lien on the recipient's home before death.

DCH is required to develop a definition of hardship and procedures by which a recipient's estate may apply for a waiver of estate recovery if it will cause "undue hardship."

States are required to return a portion of the funds that they collect to the federal government based on the rate at which the federal government matches the state's spending for Medicaid-covered services. The current federal match rate for Michigan is 58 percent. Thus, for every dollar that Michigan collects from estate recovery, $.58 must be returned to the federal government. DCH has estimated that it can recover about $10 million per year from estate recovery, but this amount seems optimistic and probably does not take into consideration the costs of collection. If it did recover that amount, $5.8 million would have to be returned to the federal government, leaving Michigan with a net recovery of $4.2 million.

PA 74 provides that estate recovery shall only apply to Medicaid recipients who begin receiving Medicaid long-term care services after the effective date of the law. The Act was given immediate effect on September 30, 2007. However, since DCH is required to obtain approval from CMS before to implementing an estate recovery program, and one required component of the program is that individuals be provided with notice regarding estate recovery at the time of application, estate recovery should be limited to individuals who began receiving Medicaid long-term care services after CMS approval of the plan and implementation of the notice requirement.

Endnotes

1 In Genesee County, the Home and Community Based Waiver program is administered by the Valley Area Agency on Aging. It is also known as the MI Choice program.

2 Medicaid eligibility polices are contained in the Department of Human Services Program Eligibility Manual, which can be accessed online from the State of Michigan's website, *www.michigan.gov*. Go to the DHS webpage, click on News, Publications, and Information, then Manual and Guides, then Policy and Procedure Manuals, then Program Eligibility Manual. DCH promulgates Medicaid policy, but DHS processes Medicaid applications and

Civil Rights Honor Reception

By Francine Cullari, ATJ Regional Coordinator, SBM Commissioner

When Brian Barkey introduced Gregory Gibbs as the recipient of the 2006 Jerome F. O'Rourke Advocacy Award from the Centennial American Inn of Court, Brian stated that Greg consistently did the civil rights work that the rest of us always wanted to do but did not get around to. That comment triggered some members of GCBA to think about how to acknowledge the attorneys who enhance access to justice by defending constitutional rights.

Over the years, several attorneys in the Inn and GCBA have contributed many hours for civil rights advice, negotiation, and litigation. A notable example is the many hours Max Dean and Bob Segar worked on a U.S. Supreme Court case to overturn the Virginia poll tax, for which they won the State Bar of Michigan Champion of Justice Award.

Several attorneys in the Inn and GCBA will be honored on April 1, 2008, for their pro bono and other legal work upholding the U.S. and Michigan constitutions.

Proceeds will benefit the Access to Justice Fund Endowment, which funds civil legal aid for the poor, including legal assistance for civil rights and other legal needs affecting low-income people. You will receive a mailing in the near future.

For any questions, feel free to contact attorney Francine Cullari, event chairperson, or Ramona Sain, Executive Director, GCBA.

Our Honorees

Carl Bekofske
Daniel Bremer
Orene Bryant
Max Dean
Marvin Failer
Hon. Paul Gadola
Victor Galea
Gregory Gibbs
Peter Goodstein
Henry Hanflik
Olof Karlstrom
Kirk Liebengood
Jeanmarie Miller
Richard Ponsetto
Edward Powers
Linda Pylypiw
C. Frederick Robinson
Robert Segar
Glenn Simmington
Shelly Spivack
J. Dallas Winegarden, Jr.
Barry Wolf
Dean Yeotis

The hosts for the event are:

- GCBA and GCBF
- Centennial American Inn of Court
- SBM ATJ
- ACLU – Flint Chapter
- Young Lawyers of Genesee County
- WLAM Genesee -Shiawassee-Lapeer
- Flint Trial Lawyers
- Mallory VanDyne & Scott

If we have omitted anyone who should be honored, please notify the GCBA office.

EEOC Ruling on Health Care

By Joan N. Pierson, The Williams Firm, P.C.

Joan N. Pierson

On March 30, 2005, a federal judge in the Eastern District of Pennsylvania permanently enjoined the Equal Employment Opportunity Commission (EEOC) from issuing a rule permitting employers to reduce health benefits when a retiree becomes eligible for Medicare without violating the Age Discrimination in Employment Act (ADEA). *AARP v EEOC*, (E.D. Pa. March 30, 2005). Promoting the interests of its business members, the National Chamber Litigation Center joined in filing an amicus brief urging the court to allow the EEOC rule to become final. The decision, if upheld on appeal, could have resulted in difficult choices for employers, and many retirees could have lost their employer-provided health care coverage.

The EEOC proposed the rule to counteract unintended consequences from a Third Circuit U.S. Court of Appeals decision that altered the landscape surrounding the ADEA and retiree health benefits. In *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000), to the surprise of many practitioners, the Third Circuit held that Congress intended for the ADEA's prohibitions against age discrimination to apply to the practice of reducing retiree health benefits when retirees become eligible for Medicare. At that time, the EEOC agreed with the *Erie County* decision and adopted it as its national enforcement policy. However, recognizing that the *Erie County* decision was discouraging employers from providing any retiree health benefits, the EEOC proposed a rule in July 2003 to exempt the coordination of retiree health benefit plans with Medicare from the prohibitions of the ADEA. The EEOC approved the rule in April 2004 and scheduled the rule for publication in the Federal Register. On February 4, 2005, shortly before the rule was expected to be published, the American Association of Retired Persons (AARP) filed suit in federal court in the Eastern District of Pennsylvania—where the *Erie County* decision is controlling—in an effort to prevent the EEOC from publishing the rule.

On March 30, the district court ruled in favor of the AARP, permanently enjoining the EEOC "from publishing or otherwise implementing the regulation at issue." The court found that the EEOC did not have the authority to promulgate such a rule, because the proposed rule violated congressional intent "as expressed in the plain language of the ADEA and as interpreted by the U.S. Court of Appeals for the Third Circuit." In rejecting the EEOC's argument that it had the power to issue the rule because it was "reasonable" and "necessary and proper in the public interest," the court closely followed what it saw as the precedent established by the Third Circuit in *Erie County*, and congressional intent.

The district court's reliance on the *Erie County* decision was misplaced, however,

Continued on page 11

Member Profile of Robert Swartwood

By Ramona L. Sain

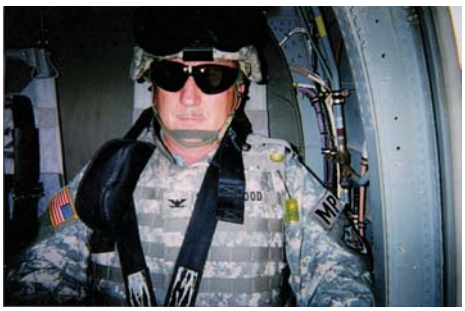
Why did you decide to become an attorney?

I became an attorney later in life than most and did not go to law school until my late 40s. However, I have always worked in the legal system in a variety of careers, including process serving, private investigations, and 11 years in federal law enforcement as a deputy U.S. marshal. I was always fascinated by the legal field and always aspired to become a lawyer, but raising children and making mortgage payments got in the way for many years. I feel that the practice of law allows a person to serve people often in their greatest time of need, and I get tremendous satisfaction in providing that service.

How have you used your law degree?

I took the route that few new lawyers take and opened my own law practice immediately after passing the bar. I received guidance from many lawyer friends and especially from my mentor and long-time personal attorney, Ron Sirna. With my many years in law enforcement as well as running several small businesses, coupled with the mentoring I received as mentioned above, I was able to hit the ground running and be fairly successful in my own practice from the start.

Since I practice in a small town (Clio), I have preferred to stay in general practice and not specialize in any particular area. I like the challenge of not knowing what will be coming through the door next, as well as the need to continuously study and research the law to stay abreast of the myriad issues that general practitioners deal with on a daily basis. I find this intellectual pursuit very stimulating and never boring.



Col. Swartwood in a Blackhawk Helicopter on a mission over Iraq

What suggestions do you have to improve the legal system?

I would encourage all lawyers to periodically look in the mirror and do a self assessment of how they practice their trade. I have done that and have changed a few things I didn't like about myself. I have decided that I don't have to win everything as long as I do my best for my clients and get them justice and fair treatment in all matters. I try to never make another attorney's job any more difficult than it already is as long as I am protecting the rights of my clients. If you need extra time to prepare or adjournments due to conflicts or additional discovery after the deadline, I will accommodate to the best of my ability. I never argue with a judge. After I have been given a fair opportunity to present my case and the judge rules, I accept that ruling without filibustering the court. I try to be respectful to all parties in the system and have often taken opposing counsel to lunch after a particularly contentious hearing just to make sure that there are no hard feelings with my brothers and sisters of the bar. I try to be early for all appointments and call all parties concerned if I cannot be on time as a common courtesy. I appreciate judges who start when they say they will start and are respectful of everyone's time. I have matured as a lawyer and understand that you can litigate aggressively without being unprofessional. I believe that the reputation of the profession could improve if all subscribed to these few basic concepts.

If you had not become an attorney, what career would you have chosen?

If I was not practicing law, I would probably be a captain with a major airline flying international flights. I have been a pilot for over 40 years and flew with the

airlines for two years before becoming a lawyer. I have also flown small jets for several corporations. I hold all the major ratings and have flown all types of aircraft up to a Boeing 737. I still maintain my medical certificate and instructor ratings and own a small aircraft that I use for instruction as well as pleasure. If any members of the bar are interested in going for a flight, call me.

What I really would love to do is missionary work in third world countries, but it is difficult to put two children through college in that career.

Tell us about your life outside of the law.

My life outside the law is similar to my life in the law: the focus is on service to others. That is how I wish to be remembered. I serve my God, my country, my community, and my fellow citizens. I provide free legal services to several churches. I am on two boards: the Clio School Board and Clio Veterans' Park Board. I am still serving in the military and will retire about this time next year with 41 years' service: four years' active duty Air Force, three years' active duty Army, and 34 years' Army Reserve. I have just returned from 15 months on active duty, including 12 months in Baghdad, Iraq.

Is there anything else you would like us to know about you?

I have been married to Sandra for over 38 years, and we have two adult children. Sandra is a nurse at Genesys Hospital. My son, Robert II, is a graduate of the U.S. Military Academy, West Point, New York, and has recently completed his military obligation to include two combat tours with the 82nd Airborne in both Afghanistan and Iraq. He is married and in his second year of law school at the University of Georgia. We are not blessed with any grandchildren yet. My daughter, Cassandra, attends both Delta College and Saginaw Valley University, working on her bachelor's degree and certification as an x-ray technician. She is not married but is aggressively looking.

I have sponsored two Iraqi families that I met in Baghdad and was able to get them permanent visas to the United States.

I assist and support a long time friend from high school who serves as a missionary in third world countries. He ministers to the poorest of the poor, primarily in Africa and India. He goes into places where no Americans have been and lives under very harsh conditions. His latest project is supporting a leper colony in India, and he is not only clothing and providing medical supplies to the residents, but is also building a school there. I consider this the ultimate in serving others, and Pastor Larry Fouts is the biggest hero that I know because of his dedication to these people and their needs. Joining Pastor Larry on the mission field is how I would like to spend my retirement.

EEOC Ruling . . .

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because that decision did not address the EEOC's authority to issue an exemption. Rather, the *Erie County* decision interpreted the ADEA as prohibiting the coordination of retiree health benefits with Medicare eligibility unless the equal benefit or equal cost rule is satisfied. The EEOC did not dispute that decision in the recent district court case. Instead, the EEOC argued that it had the authority to issue an exemption under Section 9 of the ADEA. In Section 9, Congress expressly authorized the EEOC to "establish such reasonable exemptions to and from any or all provisions of [the ADEA] as it may find necessary and proper in the public interest." An appeals court ruled in favor of the EEOC, holding that the EEOC's decision to establish an exemption for the practice of coordinating retiree health benefits with Medicare eligibility was reasonable, and in fact necessary, to ensure that ADEA-based concerns do not cause more employers to reduce or eliminate health benefits for retirees, which would not be in the public interest.

This most recent final ruling puts the status of this issue back to the 2005 rule. Employers who provide retiree health benefits generally "coordinate" those benefits with Medicare by supplementing the government healthcare or by offering retirees a "bridge" benefit to cover health expenses after employees retire until they become Medicare-eligible. Offering an employee paid supplement to Medicare, or no supplement at all, while still providing non-Medicare-eligible retirees with health insurance, is in compliance with the 2007 final ruling.

Editor's Note: The AARP has requested the U.S. Supreme Court to review the decision of the Third Circuit Court of Appeals..

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