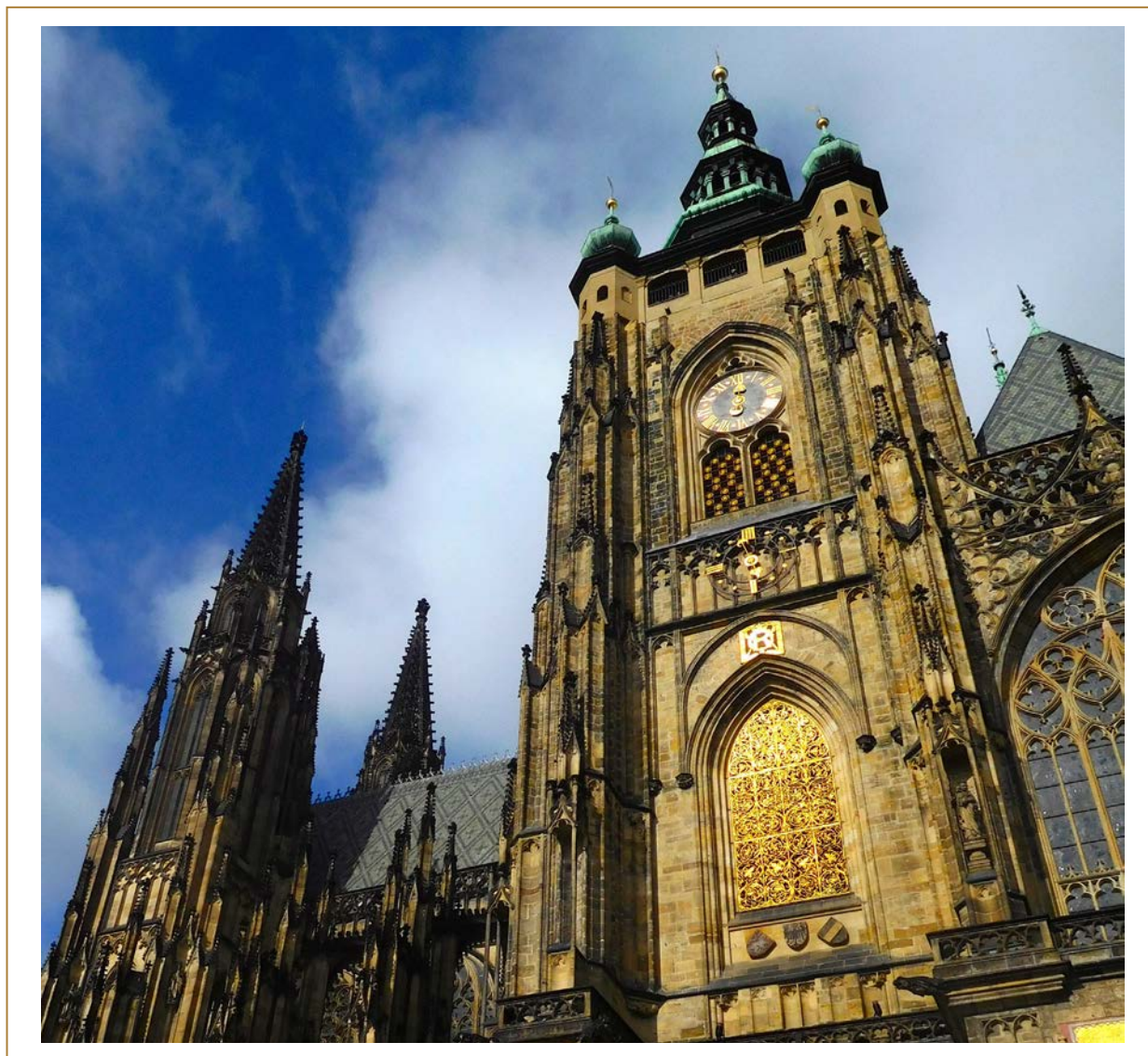


January/February 2017

BARBEAT

Genesee County Bar Association



Young Lawyers: The Future of the GCBA
Law Day Participation Leads to Career Decisions
State and Federal "Expungement Laws"
Setting Aside Criminal Convictions in Michigan
Expungement In a Federal Case? Not So Much!

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Published bimonthly by the State Bar of Michigan,
 306 Townsend St., Lansing, MI 48933, for the
 Genesee County Bar Association. For advertising,
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Table of Contents

4	Young Lawyers: The Future of the GCBA	by Michael A. Kowalko
4	Law Day Participation Leads to Career Decisions	by Roxane Kaye
5	State and Federal "Expungement Laws"	
5	Setting Aside Criminal Convictions in Michigan	by Kristin M. Kurutz
5	Expungement In a Federal Case? Not So Much!	by Glenn M. Simmington
6	One More Thing	
7	Improving Child Support Calculations: The 2017 Michigan Child Support Formula	by Tony McDowell
8	26th Annual Community Holiday Dinner	
9	Cycling Germany's Wine Country	by Shelley R. Spivack
10	2016 In Memoriam	
11	Retirements and a Swearing-In	
12	Welcome New Members	



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St. Vitus Cathedral (Prague Castle)- Czech Republic by Shelley R. Spivack

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Young Lawyers: The Future of the GCBA

By Michael A. Kowalko, President



Michael A. Kowalko

When I spoke as the incoming President of the GCBA at the Past President's luncheon last spring, my main goals were: (1) to continue the great traditions of the Past Presidents, such as the Holiday Dinner; and (2) to increase the number of young lawyers who join the GCBA.

Concerning the former, I am writing this article early in the morning of the day of the Holiday Dinner, which will begin at 4 pm. I am optimistic that by the time this Bar Beat edition comes out we will have served more dinners and have given out more presents than ever before.

Regarding increasing the number of young lawyers who join the GCBA, we have some exciting things planned for the next six months. One is a seminar designed to attract the newer lawyers. As an example, I recently had a young lawyer approach me and ask about how to conduct a deposition as he had never taken one before. I instantly recognized the look on his face. Remember the anxiety we all felt early on in our careers before we took our first deposition? Or,

for the criminal lawyers, before attending a preliminary exam? Many of us were fortunate enough to have mentors from whom we could learn. Too many of the newer lawyers are not so fortunate. We will have some of our more successful veteran attorneys help. And, of course, all of us, even those of us who have been around the block a few times in the practice of law, can *still* learn new things to help better represent our clients.

I am also reaching out to all of you for more topic ideas for this and other seminars. After all, we must attract the new lawyers to the GCBA or else there will be no GCBA. I strive to be worthy of GCBA's great legacy. Please feel free to call me at my office, (810) 732-6792, at any time with your ideas to increase the young lawyers' membership in our organization so that we can continue its great legacy.

Law Day Participation Leads to Career Decisions

By Roxane Kaye

It is the time of year when the Law Day Committee rallies to plan the annual Law Day events. Law Day delivers lifelong impact for many participants. This is the true story of one such participant:

My name is Roxane Kaye. I have been an attorney since 2002 and in private practice for the last two years.

I can still remember my teacher's name, Mrs. Coleman at Lake Fenton High School, who encouraged the class to participate in Law Day. At the time I was considering several possibilities for my future.

I participated in Law Day as the prosecuting attorney for Lake Fenton. While I don't remember the exact facts of the case I can still remember the witness names, such as Candy Cane. After that experience I decided that I wanted to become a lawyer, at the time a prosecuting attorney.

Law Day teaches participants to pay attention to the smallest details and work with others to strategize. As a student developing questions, you try to put

yourself in another person's mindset to look at facts from a different perspective. This can help students through any college classes, no matter what their profession will be.



Roxane Kaye

After graduating from law school I worked for UAW/GM Legal Services for 12 years, being able to help people without the worry of collecting money. After the plan closed I went into private practice in Grand Blanc and now strive to make the legal process smooth for my clients.

I became more active with the Genesee County Bar Association and realized the Law Day experience continues to be offered to High School Students. I then joined the Law Day Committee to provide any assistance when needed. Today the cases are targeted to address real issues that people may experience. It exposes students to the law, how it may relate to them today, and exposes them to the legal process.

State and Federal “Expungement Laws”

A recent actual situation in Flint arose where a local attorney provided advice (for a fee, of course) to a client who needed federal expungement, but based it on state expungement procedures. Of course, the client’s deposit was forfeit even though the attorney’s lack of knowledge was at fault.

These two articles explain the differences between state and federal expungement opportunities.
—Ed.

Setting Aside Criminal Convictions in Michigan

By Kristin M. Kurutz, Legal Services of Eastern Michigan

The consequences of criminal convictions can last years or even decades after a sentence is completed. Michigan’s Set Aside Statute, MCL 780.621 *et seq.*, affords individuals an opportunity to rid themselves of road blocks to housing, employment, and financing. The “Expungement Statue” (common name) allows past convictions to be removed from public records of individuals who have paid their debt to society and demonstrated that their circumstances and behavior since conviction warrant a second chance. The path to that second chance is riddled with obstacles, but with every passing amendment to the Statute the legislature is lessening those roadblocks.

Two questions summarize the criteria for setting aside adult conviction(s):

- Was the applicant convicted of more than one felony?
- Was the applicant convicted of more than two misdemeanors?¹

When evaluating the conviction for which an individual is seeking set aside, the eligibility criteria can be met by simply asking:

- A. Is an individual seeking to set aside:
- a felony or attempt to commit a felony, that was punishable by life imprisonment?
 - a conviction of criminal sexual conduct (first, second, or third degree) or attempt to commit criminal sexual conduct?²



Kristin M. Kurutz

Expungement In a Federal Case? Not So Much!

By Glenn Simmington

There is no federal statute (as there is a Michigan statute) providing for expungement of any federal conviction, even a misdemeanor. Such expungements have been granted in only “extreme circumstances,” and amount, really, only to a *sealing* of the federal record of conviction. That record, of course, is hardly ever what (for example) a prospective employer sees when evaluating a job applicant. Instead, most people access private services/sites to investigate such applicant’s criminal records.

Most clients would not meet the “extreme circumstances” test.

On the other hand, in the Second Circuit, (which includes the State of New York), a district court *has* ruled that deserving persons can be granted something called a federal “certificate of rehabilitation.” Key to that decision, however, was the fact that New York has statutes that allow for such. Michigan, though, has no such statute.

Even in the Second Circuit case, however, while the judge was willing to go way out on a limb to grant the certificate to the petitioner, he was unable to conclude that the petitioner’s circumstances met the “extreme circumstances test” that might have allowed him to grant a federal “expungement,” (as above described).

If someone wished to make a situation a Sixth Circuit “test case,” unless (s)he could persuade some organization like the National Lawyers Guild to take on the case, (s)he could expect to spend thousands of dollars, maybe tens of thousands, trying to obtain the relief (s)he would like to seek, and all with what is a very low prospect of success.



Glenn Simmington

Continued on next page

Setting Aside ...

continued from page 5

- a conviction of child abuse?
- a conviction for a traffic offense?
- a felony conviction for domestic violence, where (s)he has a previous misdemeanor conviction for domestic violence?

B. Has it been less than five years from when an individual's sentence was imposed or completed—whichever is later?³

If an individual can answer “no” to *all* of the preceding questions, (s)he may be eligible to file an application with the convicting court seeking an order expunging conviction.

Recent amendments to the set aside statute have expanded protection for victims of human trafficking (MCL 780.621 (4)), as well as eased eligibility restrictions by adding and defining “misdemeanor.”

However, the most helpful tool is the clarification allowing up to two (2) misdemeanor convictions rather than “minor offenses.” That definition can be found in MCL 780.621(16)(f).

Under prior versions of the act, offenses like Driving While License Suspended (DWLS) and No Operators License in Possession (NOIP) would have fit under “minor offense” and barred an individual from applying for a set aside. However, with the recent amendments and the new definition section, those crimes no longer fit and cannot be considered when evaluating set aside eligibility.

The legislature defined “misdemeanor” for purposes of expungement in a substantially similar manner to the Sentencing Guidelines definition of “prior misdemeanor” convictions (PRV 5) for purposes of criminal sentencing. Thus, if a prior conviction will not count when scoring a defendant's crime for purposes of sentencing it will not count when determining the eligibility to apply for an expungement.

This is not a free pass for offenders with an extensive history of breaking these laws. If an applicant has regularly violated these laws, the court may consider the behavior when determining if the applicant deserves that second

chance they are asking the court to grant.

For those individuals who are potentially eligible to apply to set aside their conviction, it becomes a matter of filing the appropriate forms with the requisite verification of eligibility. To do this an individual must follow the steps set forth in MCL 780.621, *et seq.*

A background check performed by Michigan State Police (MSP) will be sent to the Attorney General's Office which will provide an opinion on the applicant's eligibility. The MSP findings and the Attorney General position will be sent to the convicting court in advance of the hearing on the application.

An expungement is a simple and powerful tool that practitioners can use to greatly benefit those clients who have encountered current barriers to employment, housing, or financing due to an isolated past transgression.

Legal Services of Eastern Michigan (LSEM) has been successful in obtaining criminal set asides for its clients. Over the last year only one application has been denied (a success rate of roughly 96 percent). Some clients have obtained their first full-time employment position in years or obtained housing for the first time as an adult. One woman finished her nursing degree.

Clearing the narrow road to second chances allows individuals the ability to fully participate in the society they have learned to respect.

Endnotes

- 1 “Misdemeanor” conviction is a change from “minor offenses” and vastly broadens the eligibility of individuals seeking a second chance.
- 2 Fourth degree if convicted on after January 12, 2015.
- 3 “Completion” of the sentence is a change from “imposition” of the sentence.

One More Thing

A bad driving record can seriously impact an individual's ability to get a job or a promotion. It's the one thing that cannot be made to disappear by expungement, set aside, or any other name. That includes misdemeanors, like OWI, Driving While Suspended, and Reckless Driving.

It also applies to violations of the Motor Vehicle Code known as Civil Infractions. A speeding ticket, failure to yield, and running a stop sign or red light, all stay on a driver's record for ten years from the date of the infraction. The points that go with each of these moving violations drop off after two years (three years for insurance purposes), but the violations, themselves, are there for the full ten years.



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Improving Child Support Calculations: The 2017 Michigan Child Support Formula

By Tony McDowell, Deputy Friend of the Court, Genesee County



Tony McDowell

Everyone's favorite quadrennial event is finally here. Not the Olympics. Not the World Cup. Not the Presidential Election. The 2017 Michigan Child Support Formula Manual has arrived. The 2017 Manual includes significant changes that will impact family law practitioners and the Court.

For those less familiar with the MCSF Manual, courts are required to use the Manual unless the facts permit a deviation from the formula. Most child support calculation questions can be answered by reviewing the MCSF. The Manual defines income and deductions for the purposes of calculating support, which is not always the same as for other purposes. Additionally, the Manual describes how to address potential income, health insurance, child care, third party custodians, and many other issues.

While the 2017 MCSF Manual includes many updates and is worth reviewing in its entirety, the major updates fall into four categories: *economic*, *income*, *medical*, and *parenting time*.

Economic updates occur with every update to reflect changes over the past four years in cost of living, inflation, and medical costs. As a result, the base support for one child is slightly higher than under the previous manual and the annual ordinary medical has increased from \$357 to \$403 for one child.

The largest number of changes in the 2017 Manual relate to **income**. Deductions and income are both clarified under the guidelines. Employer reimbursement and contributions to tuition, uniforms, and health savings accounts are not considered income for calculating support. Employer contributions to retirement are not considered income until the parent withdraws those funds. Employee voluntary retirement contributions are not deducted from income, but mandatory contributions are deducted. Similarly, required union dues are deducted from income, but most union dues are no longer required.

Medical. Under the 2017 MCSF Manual, all dependent benefits from government insurance programs are treated the same as Social Security benefits have been treated under previous Manuals. This means the benefits received by the dependents will be considered income for the payer, but the payer will receive a credit on his or her monthly obligation.

Parenting Time. The 2017 MCSF Manual provides direction on how to address high and low income cases. The 2017 Manual removes the high income deviation factor and instead provides that if the net income greatly exceeds

\$9,684 per month, the court may wish to exercise its discretion. For lower income cases, the Manual adds a deviation factor for when the "amount calculated does not exceed \$15, and the administrative cost to enforce ... outweighs the benefits of the minimal amounts." This could be used when support payers have very low income and the guidelines include a minimum support obligation which may be difficult to enforce.

The most controversial income update in the child support world is related to the imputation of income. Specifically, the Manual identifies barred practices, including 1) using a standardized calculation, 2) assuming a person has an unexercised ability to earn, absent any information or indication concerning a parent's ability and 3) failing to articulate how each imputation factor applies. Those practitioners with cases where imputation of income is common, should become familiar with the imputation factors and start using them whenever income is imputed.

Previous Manuals have required every support order to include an ordinary medical expense. The 2017 MCSF Manual changes this requirement by indicating there may be extremely rare situations where including ordinary medical may be inappropriate. This would be considered a deviation and should only be used when both parents routinely incur medical expenses or the support payer incurs most out of pocket costs.

The 2017 MCSF Manual clarifies issues related to reasonable cost of coverage and which parent should maintain health care coverage. The Manual states that courts should avoid routinely requiring both parties to provide coverage and outlines which parent should be selected to maintain health care coverage by looking into the reasonable cost of health care. The 2017 MCSF Manual changes the reasonable cost of coverage percentage from 5% of the providing parent's gross income to 6%.

The 2017 Manual includes an updated formula for parental time offset that provides support payers with a more significant credit based on the overnights they exercise.

The changes in the MCSF should make child support calculations more accurate and should help provide guidance on difficult cases. Family law practitioners can review the 2017 MCSF at www.courts.mi.gov/mcsf. For more information regarding the 2017 MCSF contact Tony McDowell at tmcdowell@co.genesee.mi.us.

26th Annual Community Holiday Dinner

Thank you! Thank you! Thank you!
 Because of you our 26th Annual Community Holiday Dinner was a great success. We were able to meet and exceed our donation goal. We served 865 people and 398 kids received a gift and had their picture taken with Santa.

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Cycling Germany's Wine Country

By Shelley R. Spivack



Shelley R. Spivack

While Germany was not on my “bucket list,” when a friend suggested a barge and bike tour along the Mosel River, a tributary of the Rhine and one of Germany’s premiere wine-growing regions, my ears perked up. To spend seven days in late September leisurely cycling along a picturesque European river trail seemed the perfect way to end a hectic summer.



SS. Patria on the Mosel River

Our “home” for the week was the *Patria*, a re-furbished barge holding 60 primarily German-speaking passengers. We slept and dined on the barge, while spending our days cycling the approximately 150-mile bike path along the Saar and Mosel Rivers. Our 7-speed cruiser bikes, made for comfort and not speed, allowed us to slow down and savor the pastoral beauty of the region.

Fog engulfed the river each morning, evoking a sense of mystery and intrigue as we made our way up to the outside deck. After breakfast and a briefing from our tour guide, we embarked on our bikes to join the hundreds of other cyclists, both young and old, riding along the rivers’ shores. Our first day took us into Luxembourg and ended in Trier, Germany’s oldest city. Complete with a Roman gate, the city resembled a movie set, as the facades of houses had been rebuilt after World War II. A small Jewish Quarter was tucked away in an alley, where signs told us Jews had been expelled in the 14th century, long before Hitler’s forces ravaged the country.

As the morning’s fog lifted, the valley appeared to be carpeted in green. The river twisted and turned, offering magnificent vistas of steep cliffs sculpted with rows of vineyards. Around each bend, a church steeple, with its mirror image reflected in the river, caught our eyes. Small, quaint villages met us every few kilometers, each offering its own unique cafe, bakery, and wineries -- no Starbucks in the Mosel Valley!

Each day as we arrived back at the barge at about 4:00 pm, an array of tortes, pastries and teas greeted us. After touring the town, we sat down to a 4-course dinner featuring local German specialties and, of course, Mosel Valley wines. Tastings at local wineries, accompanied by accordions and robust singing, were in store for us on many evenings.

The last few days of riding brought castles galore -- remote medieval fortresses where you would expect to see



Neumagen-Dhron, Germany



Cochem Castle, Germany

Cycling Germany's Wine Country

continued from page 9

Rapunzel trapped in a tower or the animated characters from "Frozen" belting out "Let It Go." As we reached our destination in Koblenz, where the Mosel meets the Rhine, a modern city awaited us as we disembarked from the *Patria*.

Here I left my traveling companions, taking an additional week to visit the cities of Vienna and Prague. The highly efficient German rail system brought me across Germany and into Austria in comfort and style. Staying with local hosts in Airbnb apartments, I was able to experience for a few days what it was like to live in each of these cities.

In Vienna I absorbed the beauty that the power and wealth of the Hapsburg empire brought to this city. A city made for walking, cathedrals, palaces, concert halls, and world class museums could be found steps away from each other. On my last night, \$20 bought me a ticket in the upper reaches of the Vienna Concert Hall to hear Beethoven, Wagner and Mendelssohn.

Prague, while still shedding the remains of its history behind the Iron Curtain, is an up and coming city filled with tourists delighting in its affordable prices and old world charm. Staying in a working-class neighborhood, I toured the city by tram and on foot. Prague's Old Town, a maze of medieval streets bordering the river, is home to its renowned Jewish Quarter. In addition to the medieval synagogues and cemeteries, the Jewish Quarter houses a synagogue in which the name of each Czechoslovakian Jew killed during the Holocaust is inscribed on its walls and an exhibit of children's artwork created at the Terezin "transit" camp is displayed. While the art classes gave these children (most of whom later perished in death camps) a means of self-expression and a way to channel their imagination and emotions, it gives us the means to better understand and commemorate their short lives.

The serenity of the Mosel Valley, the glory of Vienna, and the somber reminders in Prague will remain imprinted in my memory for years to come. My photo collection from this trip can be viewed at: <https://www.flickr.com/photos/shoshannarobin/albums>.

2016 In Memoriam

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Admission Ceremony: (L-R) President Michael A. Kowalko, Hon. Duncan M. Beagle, Daniel Bacon, and Craig Faye.

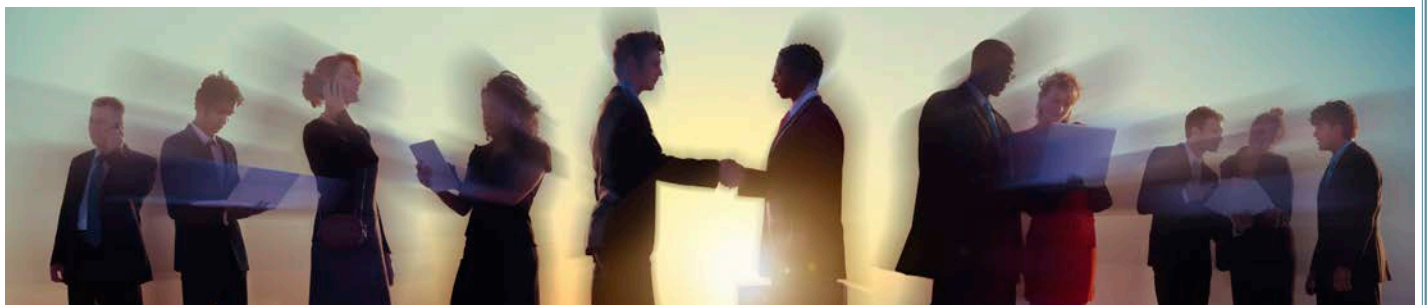


Hon. M. Cathy Dowd and family at her retirement party.

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