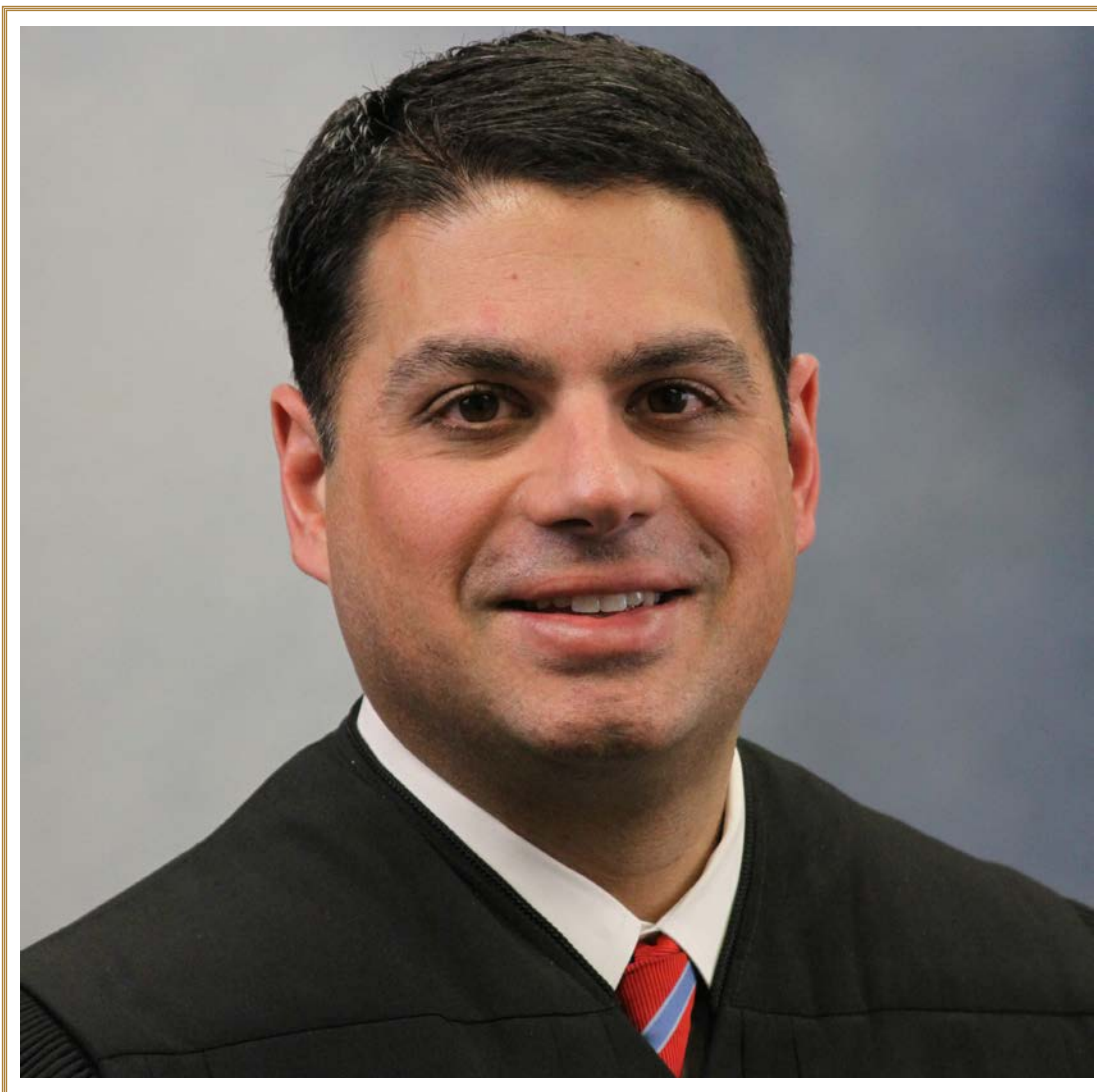


July/August 2017

BARBEAT

Genesee County Bar Association



Hon. Mark W. Latchana, GCBA 2017-2018 President

Working Together to Strengthen
Our Association

New Officers of the Genesee
County Bar Association

GCBA-Inns Awards Night

Supreme Court to Rule on the
Validity of Class and Collective
Action Waivers

After Fifty Years: A Reminiscence

Left-Overs from SCOTUS and
What's Coming Next Term

Michigan Indigent Defense
Commission Progress Report

Government Employee's
Complaints

About Nepotism/Improper Hiring
Practices are Protected Speech

G. David Guinn Sworn in as
New District Court Judge

Save the Date:
Neithercut Family Tribute

Congratulations to New Lawyers
sworn in at the GCBA Admission
Ceremony June 2, 2017

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Working Together to Strengthen Our Association

By Hon Mark W. Latchana, President

I would like to begin my time as president of your bar association with a heartfelt thank you. I am truly humbled to have been selected to lead this organization through the next twelve months. My initial reaction to this news was to hope and pray that I do not do something which would cause the association harm or damage its reputation. After having the privilege of attending the State Bar Leadership Forum, I have a different take on my upcoming time as president.

The Leadership Forum gave me an opportunity to discuss and debate what leadership really means. Does it, as I previously thought, mean keep the course, don't rock the boat and turn it over to someone else after a year? Or, as we discussed at the forum, does it mean to bring people together to discuss, debate and decide how best to move forward? I believe that as

president it is incumbent on me to be a steady guiding hand. At the same time we have a wealth of talent and intelligence on our board and in our membership, and I am determined to use those resources to improve our bar association. I am confident that if we work together, respect each individual's ideas and suggestions and have a debate, we can and will make an impact on the bar in the coming year.

Membership is the lifeblood of any organization. The Bar Association exists to serve its members. To that end, we need our membership to be active and involved. If you want to see something change, speak up and let us know. As your president I will welcome all ideas, comments and suggestions, and make sure that the bar leadership has an honest and open discussion about any issues that arise. It

is only through member participation that we, your leadership, can act to improve the bar. Please feel free to contact me, or any other board member, and share your feelings and thoughts.



Hon. Mark W. Latchana

I am excited about the upcoming year and all the bar association has to offer its membership. Our ongoing legal education opportunities are second to none. Your association will also focus on community through Law Day and the Holiday Dinner. As always, being part of this bar provides networking opportunities for all your business and political goals.

I would also like to acknowledge our immediate past president, Michael Kowalko. Mike did an outstanding job

this past year. Our bar association will be feeling the positive effects from Mike's time as president for years to come. I know that as I become accustomed to my new role, Mike will be there with words of advice and encouragement. If you see Mike around town or in the courthouse, please share a kind word of well-deserved thanks.

The upcoming year will bring some changes to our legal community, to our bench, and I am sure to many different aspects of our members' personal and professional lives. I say embrace the future and be confident that your association will do everything it can to improve and adapt for the benefit of the membership. Thank you again for this opportunity.

New Officers of the Genesee County Bar Association



Pictured: Michael A. Tesner (Secretary), Shayla Blankenship (Past President), Sherri Belknap (Treasurer), Michael A. Kowalko (Immediate Past President), Tatilia "Tina" Burroughs (Executive Director), Judge Mark Latchana (President) and Jessica Hammon (Vice President).

GCBA-Inns Awards Night

Congratulations to Award Recipients

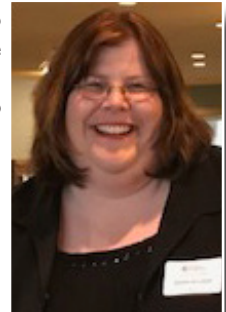


Herbert A. Milliken Jr. Civility Award:
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pictured with
Hon. Larry J. Stecco

Jerome O'Rourke Advocacy Award:
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Hajek



LSEM Pro Bono Attorney of the Year Award:
Sherri L. Belknap



Brian M. Barkey Community Service Award:
Michael A. Tesner
pictured with
Shayla Blankenship

Centennial Inn of Court Outstanding Program Award: Brian M. Barkey
pictured with Sandra Carlson



2017 Genesee County Bar Association and Centennial American Inn of Court joint award ceremony held on Tuesday, May 17, 2017.

Supreme Court to Rule on the Validity of Class and Collective Action Waivers

By Frances Murphy



Frances Murphy

On May 26, 2017, the United States Court of Appeals for the Sixth Circuit issued an opinion, *NLRB v. Alt Ent't, Inc* (Docket No. 16-1385), 2017 US App LEXIS 9272, further dividing the circuit court split over the issue whether class action and collective action waivers in arbitration agreements are enforceable.

In *NLRB*, the Sixth Circuit aligned with the Seventh and Ninth Circuits, holding that these waivers are invalid. This line of decisions is at odds with the position taken by the Fifth, Second, and Eighth Circuits, which have held that such waivers are enforceable.

In January, the Supreme Court agreed to review the issue, promising to resolve this split. Since Donald Trump has taken office, the Department of Justice has changed its stance on these waivers and recently submitted an *amicus* brief supporting the position that these waivers are enforceable. Oral argument before the Supreme Court has not yet been scheduled. Stay tuned for updates!

After Fifty Years: A Reminiscence

By Roberta J.F. Wray

As a young reporter in July, 1967, I covered part of the story of the summer disorder (riots, rebellion) that resulted in dozens of deaths and millions of dollars in property damage in Detroit and other cities around the U.S. The upheaval spilled northward from Clairmont and 12th Street in Detroit to make a mark on Flint as well. And while there was no loss of life in Flint, the city was not spared the scarring.

Groups of young black men began moving along St. John Street and Industrial Ave., throwing rocks and other objects, breaking windows and firebombing storefronts. Smoke rose from burning buildings, and young men sat in the street as police began making arrests. A total of 101 young black men and one white youth were taken to the city jail lockup.

I remember standing with police officers on standby in the parking lot at Dewey School a few blocks away listening to the progress of the disturbances over police radios. There were tense moments as we waited and wondered if the violence would spread.

It might have been worse but for a daring gamble in human relations proposed by some General Motors plant managers and other community leaders and carried out by then Genesee County Prosecutor Robert F. Leonard. The GM officials were worried about their factories on Industrial Avenue.

Reminiscing with Judge Larry Stecco and me at a Senior Attorneys' lunch earlier this year, Leonard described listening to concerned leaders as they discussed options to quiet the situation and save the affected neighborhoods from possible destruction. They suggested he release the young men from jail and have them go to work cooling the situation.

He said, "Are you crazy?" But after getting promises from Willie Nolden, Jr., and the other leaders among those arrested, Leonard agreed. Leaving the meeting he said, "I thought, what the heck did I just agree to?"

The decision outraged police officers, but the young men, members of a social group called the Brougham Club, went to work in the streets. They talked with groups of roving youth and quieted the situation. While rioting, looting and killing continued in other cities, Flint returned to a tense quiet that quickly lead to a cooperative effort between the Brougham Club and the police in carrying out food drives for affected neighbors in Detroit.

The Brougham Club changed its focus from social activities to community activism. They helped form Heart in the City, an organization that assisted in finding employment opportunities for young blacks. Many members of the club became active in local politics, and some were elected to office.

In retrospect, it is not difficult to make the connection between Leonard's human relations gamble and activities that led to the adoption, by referendum, of the city's open housing ordinance the following year. Flint was the first city in the country to adopt "Open Housing" by a vote of the people. It also seems clear that another result was the active recruitment of minorities into the Flint police and fire departments.



Roberta J.F. Wray

Left-Overs from SCOTUS and What's Coming Next Term

By Roberta J.F. Wray



Roberta J.F. Wray

On June 26, 2017 the United States Supreme Court cleared up the remainder of its docket for the 2016-17 term. A number of cases are being carried over to the October 2017 term, including gerrymandering, voter lists, whistleblower protection, and the Trump Immigration cases.

Issues re-listed for argument in the next term include whether applying Colorado's public accommodations law to require the owner of a cake shop to create a wedding cake for a gay couple violates the shop owner's free speech or free exercise clauses due to his sincerely held religious belief about marriage (*Masterpiece Cake Shop, Ltd. v Colorado Civil Rights Commission*); a dispute over state versus federal subject matter jurisdiction in a case involving the Securities Act of 1933 (*Cyan, Inc. v Beaver County Employees Retirement Fund*); two cases from New Jersey over federal contravention of states' ability to regulate private conduct; and some bankruptcy issues.

The Court will also hear argument in *Sessions v Dimaya*, No. 15-1498, an immigration case wherein the issue is whether 18 U.S.C. 16(b), defining a "crime of violence" in

a case governing an alien's removal from the United States, is unconstitutionally vague. Another case involving aliens deals with whether aliens seeking admission to the U.S. who are subject to mandatory detention must be afforded bond hearings with the possibility of release if the detention lasts more than six months, under various sections of the U.S. Code. An exception would apply if government is able to demonstrate by clear and convincing evidence that the alien is a flight risk or a danger to the community (*Jennings v Rodriguez*, No. 15-1204).

As usual, the cases accepted, but not yet scheduled for argument, cover a wide range of subject matter in criminal and civil law, federal and state jurisdiction, regulatory and procedural issues. The list already includes 30+ cases. Last term the stunted court dealt with 70 cases in what observers are calling an unusually quiet session. It is anticipated the fireworks will be heavier during the 2017-18 term.



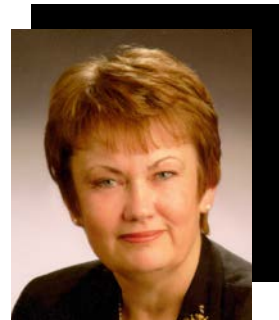
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Michigan Indigent Defense Commission Progress Report

By Barbara A. Menear
(reprinted by permission from "Hearsay" publication of 7th Circuit Court)



Barbara A. Menear

On March 22, 2017, the State of Michigan, Department of Licensing and Regulatory Affairs (LARA) adopted the first four minimum standards for indigent criminal defense services. This followed a public hearing and comment period.

The Michigan Supreme Court conditionally approved the proposed standards on June 1, 2016, subject to legislative amendments to the Michigan Indigent Defense Commission (MIDC) Act.

The legislative amendments went into effect January 4, 2017, shifting the MIDC from an independent agency housed within the Judicial Branch to one within LARA. Local compliance plans and cost projections for compliance are due from each county by November 20, 2017.

The standards apply to adult misdemeanor and felony charges. The first four standards are:

- 1. Education and training of defense counsel** - 12 hours annual CLE and basic skills training for attorneys with less than two years' experience.
- 2. Initial interview of client** - within three business days of assignment, when in custody. If the client is not in custody, prompt communication should be undertaken so that the client can follow up and schedule a meeting. Interviews should be done in a confidential setting to the extent reasonably possible, at either a jail, lock up or courthouse. Counsel should determine if the client is capable of participating in the representation with respect to forensic evaluation related issues and language barriers.
- 3. Investigation and experts** – attorneys have a continuing obligation to investigate the charges and, if appropriate, request funds for investigators and experts.
- 4. Counsel at first appearance** – counsel must be

present for the arraignment on the warrant and at all other proceedings.

Detailed information about MIDC and the adopted standards can be found at <http://michiganidc.gov/>. The Genesee County Board of Commissioners approved membership of a local compliance plan workgroup that will be charged with drafting the Genesee County Compliance Plan. The Board will approve the final submission to MIDC.

The local compliance plan workgroup members are:

- Dena Altheide, Director of Court Operations, 67th District Court
- Philip H. Beauvais III, Criminal Defense Attorney
- F. Jack Belzer, Township Attorney Mundy Township/ Fenton Township
- Marlene Collick, Director, Community Corrections
- Glenn M-D Cotton, Criminal Defense Attorney
- Captain Jason Gould, Office of the Genesee County Sheriff, Jail Administrator,
- Barbara A. Menear, Administrator Defender Program, Circuit Court
- Judge Christopher R. Odette, Presiding Judge, 67th District Court
- Judge Nathaniel C. Perry III, Presiding Judge, 67th District Court/5th Division
- Tammy J. Phillips, Chief Assistant Prosecutor, Advisory Member
- Ashley A. Carter Attorney, South Central Regional Manager, MIDC



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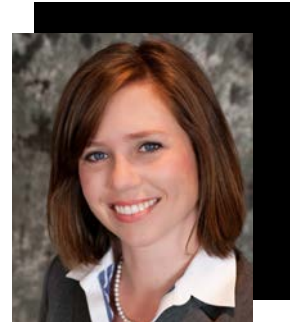
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Government Employee's Complaints About Nepotism/Improper Hiring Practices are Protected Speech

By Frances Murphy



Frances Murphy

Government employers have reason to examine their termination practices in light of the recent opinion issued by the U.S. Court of Appeals for the Sixth Circuit in *Mayhew v Town of Smyrna*, recommended for publication, Docket No. 16-5103 (6th Cir. 2017). In that case, Mark Mayhew sued the Town of Smyrna and its town manager, Harry Gill, alleging he was terminated from his position as lab supervisor of the town's waste-water treatment plant in retaliation for two distinct acts protected by the First Amendment:

- Reporting statutory violations at the town's waste-water treatment plant; and
- Voicing concerns regarding Smyrna's hiring practices.

The Court of Appeals held that reporting statutory/regulatory violations **is not** protected speech under the First Amendment; however, voicing concerns regarding Smyrna's hiring practices **is** protected.

Mayhew was a long-time lab supervisor of Smyrna's waste-water treatment plant and subject to extensive regulation by the EPA, Tennessee Department of Environment and Conservation (TDEC), and other government agencies. His duties included obtaining waste-water treatment certifications requiring him to comply with the laws, rules, permit requirements, or orders of the governmental agency or court governing the waste-water system. Mayhew's certification could be revoked if he failed to notify TDEC of conditions violating the water-quality standard or of prepared laboratory analyses containing inaccurate data.

Plaintiff Mayhew learned one of his fellow supervisors was engaging in questionable conduct related to the plant's collection, recording, and reporting of water samples. In February 2014, he reported his concerns to the then-plant manager who was next in the chain of command. From February to June 2014, the fellow supervisor's improper conduct increased. In June 2014, the plant manager and the plaintiff began reporting his concerns to the plant manager's supervisor.

Some progress was made in investigating the complaints; however, the town manager then promoted his nephew to chief operator of the plant and promoted the offending supervisor to plant manager without requiring them to apply, advertising the positions to the public, or permitting anyone else to apply. Mayhew claimed Gill did so despite the employees' failing to possess the qualifications required by the respective job descriptions.

Mayhew was terminated by Gill after authoring an email expressing concerns about the newly-promoted employees, including his concerns that Gill would promote someone responsible for poor working conditions. Gill claimed he fired the plaintiff because: (1) Mayhew had not fully declared his willingness to work with the fellow supervisor about whom he complained, and (2) Mayhew's work ethics could be compromised if he had to work with the fellow supervisor.

In addressing the issue of retaliation for engaging in protected speech, the Court of Appeals considered whether the plaintiff had satisfied the elements of a First Amendment retaliation claim: (1) the employee's speech must be on "matters of public concern;" (2) the employee must speak as a private citizen and not as an employee pursuant to his official duties; and (3) the employee must show that his speech interest outweighs the interest of the state, as an employer.

The court focused on the second element, whether the plaintiff was speaking as a private citizen or as an employee. It found that the plaintiff was speaking as an employee when he reported violations because his statements were within his "ordinary job responsibilities" and, while not specifically within his job description, state and federal regulations required him to report appropriate situations to management. Accordingly, the Court of Appeals held the plaintiff's retaliatory discharge claim for reporting violations was **not** protected by the First Amendment.

The Court of Appeals, however, reversed the district court's holding that Mayhew did not engage in protected conduct when he complained about the promotion of the supervisor and Gill's nephew in violation of the town's typical hiring practices and irrespective of their lack of qualifications for the positions.

Focusing on the first element, that the employee's speech must be regarding "matters of public concern," the Court of Appeals held Mayhew's speech was mixed speech because it arose in the context of an employment grievance but also touched upon matters of public concern (i.e., nepotism and public corruption). In reviewing the plaintiff's email to the town's HR representative, the court concluded, particularly where the complaint regarded public corruption, such speech demanded strong First Amendment protections. Accordingly, the Court of Appeals found the public-concern prong was met, and reversed and remanded that issue to the district court for further proceedings.

G. David Guinn Sworn in as New District Court Judge

The May meeting of the GCBA was the scene of the swearing in of the newest member of the 67th District Court Bench.

David Guinn, who has served since 1997 as an assistant prosecuting attorney, was appointed by Governor Snyder to fill the vacancy created by the resignation of Judge Tracy Collier-Nix.

Judge Guinn's most recent assignment in the prosecutor's office was in the district court division. He is a graduate of Grand Valley State University and Ohio Northern University Law School.



Hon. G. David Guinn
and family

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Neithercut Family Tribute

for their contributions to the Genesee County Legal Community

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Charles S. Neithercut William A. Neithercut
John G. Neithercut Edward J. Neithercut
and Hon. Geoffrey L. Neithercut

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If there are any retired attorneys, legal secretaries, paralegals, spouses or other individuals who you think might find the experience interesting, and be able to commit to the Information Desk, please contact Barb Menear, 810.424.4355 or email me at bmenear@co.genesee.mi.us.

Thanks for considering the offer.

Congratulations to New Lawyers sworn in at the GCBA Admission Ceremony on June 2, 2017

Pictured left to right: Paul J. White, Young Lawyer Representative; Eric Froats; Precious Boone; Hon. Joseph J. Farah; Daniel Frazier; Patrick Duckett; Timothy H. Knecht, Centennial Inn of Court President; and Immediate Past President Michael A. Kowalko.



The Real Rocky Mountain High!

By William J. Brickley



William J. Brickley

The melting snow pack from the recent dusting of two-to-four feet of snow trickled over rocks and under dead branches as it made its way down the mountain side. On its journey it merged with other such flows, making streams which then formed into rivers as it found the valleys between the mountain peaks.

Sprouting up from beneath the ancient rock formations was a palette of greens stretching up to the sky searching for the light of the warm and wonderful sunshine so long absent during a long winter. As the rivers wound through the meadows below, the elk, strong and casual, grazed on the succulent new life growing beneath them, occasionally raising their heads to curiously glance at those marveling at their beauty.

On the cliffs the big horn sheep peered down to see a group of on-lookers, including your author, scurrying to catch a glimpse of these magnificent creatures before they would retreat to their perilous playground high above, where the average tourist would never journey. Such is just a glimpse of a day in the Rocky Mountain National Park near Estes Park, Colorado on a recent visit in late May.

It was a wonderful contrast to the average day of a law practice. We scheduled little, and allowed ourselves to simply meander, as did the mountain streams and the abundance of wildlife as we soaked in the majesty of the gorgeous vistas. This was truly Rocky Mountain High as John Denver amply captured.



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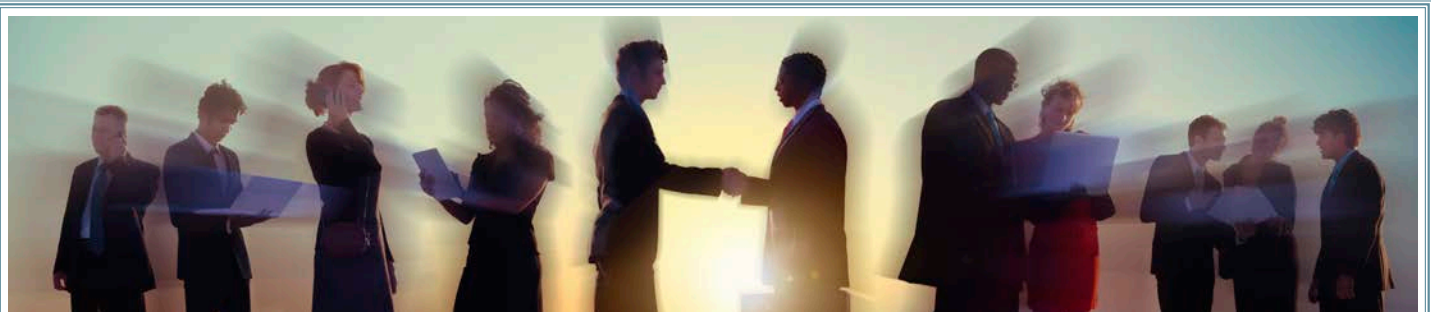
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