

July/August 2009

BARBEAT

Genesee County Bar Association



Timothy H. Knecht
2009-2010 Bar President

Courthouse Security
Salute to the Unsung Hero
Managing Mountains of E-mail
What Do You Mean I Care Too Much?
Flint Bankruptcy Filings Since BAPCPA
Ricci v Destefano: Summary and Analysis

Investiture and Reception for Hon F. Kay Behm



Awards Ceremony at the Annual Meeting and Election of Officers



William D. Smith

William D. Smith was presented with the Herbert A. Milliken, Jr. Civility of the Year Award by the Genesee County Bar Association. He was nominated by past award recipient Kendall Williams and the Mallory, VanDyne & Scott Bar Association. Smith was praised for his courtesy and civility, and for serving as a role model to other attorneys by offering his guidance and leadership. "As someone who knew Herb Milliken, I am deeply honored to receive this award," said Smith.



M. Susan Schneberger

Legal Services of Eastern Michigan bestowed the Pro Bono Volunteer of the Year Award upon Susan Schneberger. Directing Attorney Jill Nylander presented the award and made note of the commitment Schneberger made to their organization by volunteering six months of her time to clients of modest means. She encouraged others to follow Schneberger's example by sharing their legal expertise to those in need.



David S. Grant, Jr.

The Centennial American Inn of Court awarded David S. Grant, Jr. with the Jerome F. O'Rourke Advocacy of the Year Award. Presenters were President Donald G. Rockwell, Hon. Judith A. Fullerton, and Circuit Court Administrator Barbara A. Menear, who noted that Grant was the first public defender to receive this award. Rockwell and Fullerton expounded on Grant's professional excellence in advocacy.

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

Courthouse Security

By Timothy H. Knecht, President



Timothy H. Knecht

Once again Flint, our fair city, has made national news. Clearly, tensions are running high everywhere and even higher right here. Michigan's unemployment rate is over 15 percent. Flint's unemployment rate is significantly higher. Jobs help people focus their lives on something positive. Perhaps lack of a job has the opposite effect, causing people to focus on the negative. Courthouse brawls seem to be one manifestation of such negative energy.

Whether courthouse brawls are one of the many manifestations of a restless society or not, the fact that we had three violent outbreaks in courtrooms over the past several weeks is something that has garnered the attention of all of us working within the legal system.

Our Genesee County Commissioners have set up a committee to develop security recommendations and funding methods for better court security. The Sheriff's Department is looking for ways to not only prevent further brawls, but to make sure that there is adequate staffing in the event there is another brawl. Our court system, headed by Chief Judge Archie

Hayman, is also making some serious commitments and is working closely with the Sheriff's Department.

Judge Hayman recently informed me of the current plan to deal with courthouse brawls. Here is the outline of that plan:

- Sheriff Pickell is committed to having more deputies in the courthouse.
- For high-profile cases or cases with large numbers of people expected to come into a courtroom, the judge in whose courtroom this will be taking place will notify the sheriff to make sure extra staffing is available within the courtroom and the halls.
- District and circuit court judges have agreed to communicate amongst themselves so that not more than one high-profile case is pending at any one time.
- Serious and FC sentences will be heard in the mornings only.
- There will be a court security training seminar for chief judges

and administration for our various courts.

- Door security at the district court in downtown Flint will move closer to the door, requiring people who are only going to the clerk's office to go through security.
- Security committees will be set up in the court system to include bar members, people from the Prosecutor's office, people from the Sheriff's office, and others.
- Deputies will receive extra training in how to remain alert to potential security issues.

The judges are already beyond discussing how they can implement their part of the plan. Certainly there will be collaboration between all parts of the judicial system, including law enforcement. Funding will undoubtedly be an issue. Now, what can we as bar members do to help?

Lawyers are not necessarily trained to stop brawls. We can stay out of the fights. We can help notify the court when a high-profile case is coming to a certain judge. We can cooperate so that we are part of the solution and not part of the problem.

On a lighter note, I am honored to have been chosen as the president of the Genesee County Bar Association, despite these tough times we are facing. My goal this year is to work toward marketing local lawyers in our community. More on that issue will follow in later articles.

WALTER P. GRIFFIN

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Salute to the Unsung Hero

State Bar of Michigan Recognizes Brian Barkey

By Roberta J.F. Wray



Roberta J.F. Wray

After 17 years of steering us through the process of putting on the annual Holiday Dinner, among many other contributions, Brian Barkey has been named the winner of this year's State Bar of Michigan Unsung Hero Award. He was nominated by Genesee County Bar President David Leyton with the support of former presidents Hon. Larry Stecco and Donald Rockwell, Young Lawyers Section member Shayla Blankenship, and Executive Director Ramona Sain, along with petition signatures of more than 110 members of our Bar.

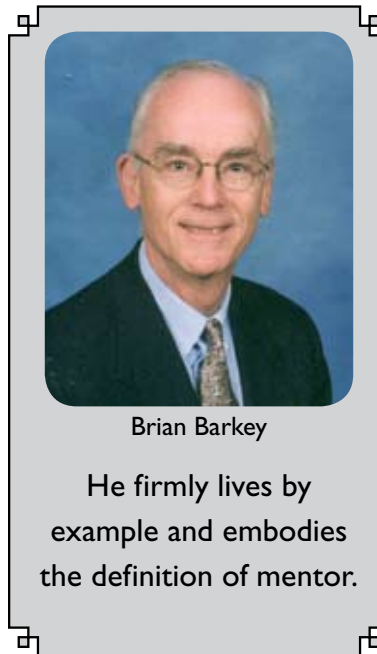
"I well know the numerous contributions Brian has made and continues to make," wrote former GCBA President Donald Rockwell. "Not the least of these is his unwavering commitment to the people in real need in our community ... demonstrated by his commencement and continued leadership of the annual Holiday Dinner, his leadership role in the Crim Fitness Foundation, and his years of service in keeping [the Centennial Inns of Court] dedicated to improving the skills, professionalism, and ethics of the bench and bar."

"At a [1992] board meeting, Brian promoted the idea of hosting an annual dinner to feed the less fortunate in our community," wrote Judge Stecco. "The board of directors was enthusiastic and became even more so when Brian agreed to take on all of the responsibilities. We knew that when Brian volunteered to manage a project, it would be completed—successfully."

In his typical fashion, Brian downplayed the honor when I contacted him.

"There are many lawyers in Genesee County who deserve it more," he said.

"Lots of lawyers in Genesee County do way more than I do. The idea for the holiday dinner was not mine. It was Duncan Beagle's idea."



Brian Barkey

He firmly lives by example and embodies the definition of mentor.

Judge Beagle, according to Brian, pointed out that the Saginaw Bar held a holiday dinner and said, "You and Tom Pabst go to Saginaw and check it out." When the idea was presented here, Brian said, "People took out their checkbooks and provided funding for the first dinner before the meeting ended." He said they also got matching funds from the Genesee County Trial Lawyers Association.

Blankenship's letter says, in part, "I have, on more than one occasion, picked up the phone and called him to ask a question. He never fails to take my call, listen patiently, and provide practical suggestions. He firmly lives by example and embodies the definition of mentor."

In the nominating document, Leyton cites that:

- More than 10,500 residents

served holiday dinners;

- More than 5,000 children photographed with Santa and given a gift;
- More than 1,500 volunteers recruited;
- More than \$75,000 raised to offset costs;
- Untold hours contributed to Crim fitness program;
- Hundreds of lives changed through mentoring of training leaders, runners, and walkers;
- Service on many bar committees, including a term as Genesee County Bar president;
- Mentor to dozens of young lawyers; and
- Service for many years as mediator, arbitrator, and case evaluator for the courts.

Blankenship also points out in her letter that Brian never seeks and, in fact, shuns, recognition for all he does for our community. And Rockwell's letter concludes, "Brian is a real treasure to our legal and non-legal community. [He] is also the last person to believe this as he humbly gives of his time and resources and asks for nothing in return."

When I talked to him about the award, Brian said after the holiday dinners he feels so good that he can hardly go home. He said he believes that 95 percent of people who choose to become lawyers do so because they want to help people.

Managing Mountains of E-mail

By LindaLee Massoud



LindaLee Massoud

Are you deluged with mountains of e-mail? Do you have trouble keeping up and keeping track? Here are a few suggestions that might be helpful.

1. **Process e-mail in batches.** Instead of checking e-mail continuously, check it only once or twice a day. Do not check personal e-mail on work time.
2. **Use the secretary effectively.** Ask your secretary to do the initial processing of your e-mail and "mark" those that require your attention. Likewise, re-mark messages that your secretary should save in the client's folder. (You might use a colored "e-tag" for these purposes. Depending on your e-mail program, you might also move messages to various folders or apply subject tags.)
3. **Use one-step processing.** Instead of reading all messages first and then answering, try to take care of each message as you read it. (That same recommendation applies to snail mail as well.) Using a Blackberry to receive e-mails might present a problem with the one-step system. In that case, the secretary-intermediary or well-developed tagging methods are essential.
4. **Keep messages short and clear.** Leave parts of the original message so the sender will know what you are answering. Provide your answer below each of those parts. Use paragraphs and spacing liberally to increase readability.
5. **Use bridging e-mails.** If you cannot take care of the content of the message immediately, send a polite bridging e-mail to let the sender know that you received the message and when you will respond. (Yes, e-mails do occasionally get lost. It is not wise to depend on them having been received unless you get an "e-receipt" for the mail. There are also online programs to accomplish that purpose.)
6. **Create a dedicated signature.** If you have not already done so, create a dedicated signature to appear at the bottom of each message. It should contain your name and contact information. Many people also include a saying or proverb.
7. **Take time to re-read.** It is tempting to send an e-mail immediately upon completion of the message. This is not wise, however, because you may (a) mistype important information, or (b) unintentionally misrepresent the emotional content of the message. Take the time to re-read it. Sometimes it is better to break the one-step rule and not reply to a message until you have had time to think it through and create a suitable response!

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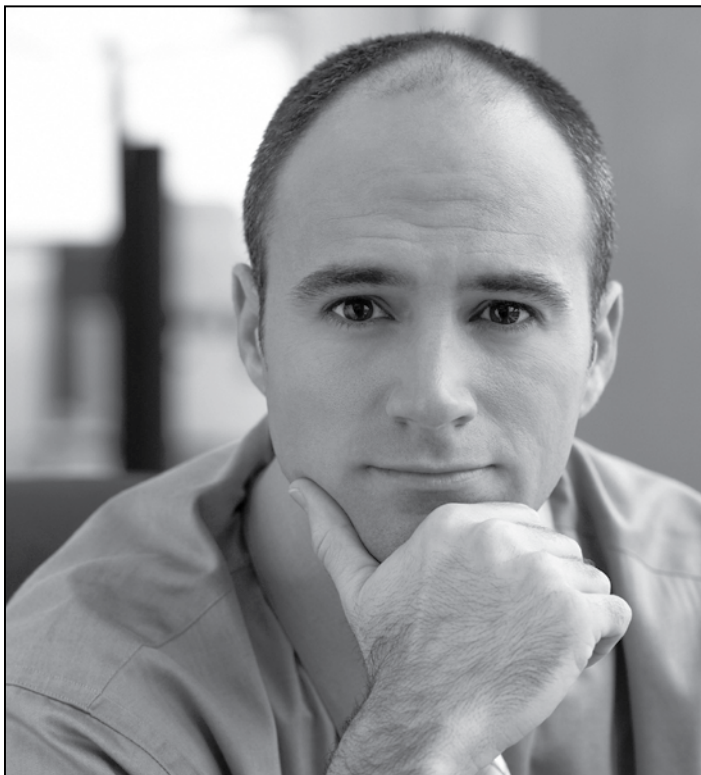
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These few tips will help streamline your e-mail processing. See the full article at <http://dailyblogtips.com/10-tips-for-managing-email-effectively>.



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What Do You Mean I Care Too Much?

My Journey in Learning to be a Better Lawyer

By Shayla Blankenship, Family Law Committee Chair



Shayla Blankenship

The Family Law and the Professional Practice Committees recently hosted a seminar to address a growing concern among practitioners that we, as attorneys, may sometimes allow ourselves to care too much about our clients, usually to our own detriment.

This topic is somewhat personal to me, and I addressed with those in attendance how I recently realized this problem in my own practice. After having represented a client, pro bono, who was leaving a domestic violence situation, I learned all too painfully that I cared too much. I had given up evenings and weekends dealing with phone calls addressing the ongoing abuse. I sent her to my church for food, and even my home for clothes. I worried about her and her children endlessly. And then, without any discussion with me, she reconciled with her husband. I was furious. How could she do this to me? After all I did for her? That's when I realized that I had completely forgotten my boundaries. This woman's husband now knows where I live and worship; a worrisome reminder to me of my caring too much. I was not, as I had told myself, being a good Christian or attorney. I had allowed boundaries to be crossed, I had not detached, and worse, the stress that resulted made me wonder whether I could continue practicing in domestic law for the long term.

With the help of Dr. Barbara Wolf, the objectives of our recent seminar were to identify boundaries, discuss transference and counter-transference, learn about detachment, understand how stress hurts us, and finally establish goals to de-stress.

To start, we were asked the following four questions:

1. During your career, can you identify the case that caused you the most personal distress?
2. Were you able to recognize the distress at the time?
3. How did the distress manifest?
4. Once the case was resolved, did you put it aside?

In my case, I readily identified the case and answered "no" to three of the four questions.

The discussion that took place with the audience at the seminar regarding these questions showed me that we have all had the nightmare case that kept us awake at night with worry about the resolution. Dr. Wolf explained to us that the client transfers his or her feelings toward the lawyer that may not be based in reality. These feelings can be based on the client's past experiences. Likewise, we counter-transfer our emotional reaction to the client based on our own past experiences. The problem: at the time, we are unaware of our own reactions. Thus comes the old phrase: "I am working harder than the client."

As lawyers, we want to solve problems. We like to help people. And sometimes, when the boundaries become blurred, we may feel that we know how to help the client more than the client does, and we sometimes become angry when the client does not follow our advice. But when we see ourselves, or our clients see us, as their "knight in shining armor," we definitely have boundary issues.

We must learn to differentiate between empathy and sympathy. Empathy is the quality of being able to understand the experiences, feelings, emotions, and actions of another person. Sympathy, on the other hand, means to be affected by or suffer alongside a

person out of concern for the person.

Clearly, we need to empathize or respond to our clients' needs and perceived emotions. However, if we sympathize, we lose a boundary and begin to see things as though they are personal, and we suffer along with the client. This clearly is not a healthy attorney-client relationship.

How could she do this to me? After all I did for her? That's when I realized that I had completely forgotten my boundaries.

Thus, we must practice compassionate detachment. We must separate the problem from the person. As an attorney, you can care about a client and not be pulled into the problem by such things as noticing without judging or mindful watching. That is, we accept the client's thoughts and feelings without judging the client thus enhancing how we respond instead of how we react. We listen to the client and respond by taking the appropriate court action. We do not react, as I did, for example, by giving food or clothing.

The end goal of recognizing the boundaries, being aware of the transference and counter-transference, and learning to detach is less stress. It is well known that stress kills and often leads to burn out, and as attorneys we must be vigilant about self-care. I encourage us all to seek out those rituals or practices that will lead to less stress in our work lives. Go play a round of golf, take a vacation, play with the kids, or get a massage. After all, we need you for the long haul.

Flint Bankruptcy Filings Since BAPCPA

By Barbara P. Foley



Barbara P. Foley

On October 17, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act (Public law 109-8, 2005; BAPCPA) went into effect for all bankruptcy filings. Along with other changes to the bankruptcy law, BAPCPA increased the debtor's filing requirements.

These requirements include, among others, attending pre-filing financial counseling and post-filing educational courses, providing detailed summaries of income for months prior to the filing, and providing additional support documents, such as income tax returns and detailed calculations of income at filing.

The additional filing requirements and income testing raised concerns that BAPCPA would reduce the number of bankruptcy filings. However, as the chart below shows, Flint-area bankruptcy filings have not diminished.

Bankruptcy filings for Bankruptcy Court located in Flint¹

YEAR	Chapter 7	Chapter 13
2004	4168	1240
2005	6932	1293
2006	2113	1037
2007	3206	1351
2008	4129	1336
2009 (through 7/09)	2764	882

The question then, is, if filing bankruptcy is more difficult and time consuming now, why are more cases being filed? Several factors that have contributed to the increase.

Income Testing

The income guidelines of BAPCPA have not forced families out of bankruptcy. Under BAPCPA, family income dictates the form of relief (either Chapter 13 or Chapter 7)

available to the debtors. Annual income, based on the debtors' income for the six-month period prior to the filing, is the first-look determiner of bankruptcy remedies. For this purpose, BAPCPA looks to the IRS income data by state.² Currently, the median income for the state of Michigan is as follows:

State	One Earner	Family 2	Family 3	Family 4
Michigan ³	\$44,703	\$53,575	\$63,339	\$76,312

The bankruptcy filing analysis starts with median income. Not surprisingly as the Michigan unemployment rate increases⁴ and income decreases⁵, eligibility for bankruptcy increases. Income criteria does not appear to be a filing deterrent.

Bankruptcy Filing Provides Meaningful Benefits

Bankruptcy continues to provide meaningful benefits to individuals. Bankruptcy provides relief to the debtor from creditors, but there are other benefits. Chapter 13 bankruptcy provides extraordinary benefits to individuals because of Flint's unique economic situation. These are benefits not available in a Chapter 7 case.

Chapter 13 bankruptcy requires repayment of debts by the debtor over a three- to five-year period. Of the many benefits to the individual of a Chapter 13 filing, three are listed below.

1. *Stop the foreclosure sale:* As unemployment and underemployment deepen, failure on the part of individuals to make mortgage payments leads to foreclosure. As the home mortgage payment default rate increases,⁶ Chapter 13 remains the one option for debtors to stop the foreclosure, stay in the

Continued on page 11

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Ricci v Destefano: *Summary and Analysis*

By Sean M. Siebigeroth



Sean M. Siebigeroth

The Senate Judiciary Committee has approved the nomination of Sonia Sotomayor to the Supreme Court. Committee Republicans challenged Judge Sotomayor on *Ricci v DeStefano*, 557 US ____; 2009 U.S. LEXIS 4945 (2009), a recently decided employment discrimination case that reversed a decision of a Second Circuit panel that included Judge Sotomayor. Because of an accident of timing, *Ricci* has received unusually great attention. This article offers a brief summary of *Ricci* and a few observations of what *Ricci* may mean looking forward to a newly composed Supreme Court.

In 2003, the New Haven Fire Department administered examinations to its firefighters for promotion to lieutenant and captain. A private

firm designed the exam, which had a written and an oral component. A total score above 70 percent on the exam was required to pass, and the fire department could select from among the top three performers on the examination. The pass rate for black candidates was approximately half the pass rate for white candidates. No black candidate finished among the top three performers on either examination.

The City of New Haven's Civil Service Board failed to certify the test results, citing a concern that the examinations had a racially disparate impact, and thus the city could have faced liability under Title VII of the federal Civil Rights Act of 1964, 42 USC §2000e et seq. Eighteen white (including one Hispanic) firefighters filed suit in federal district court, alleging that by discarding the test results the city discriminated against the plaintiffs based on their race in violation of Title VII. The city defended its refusal to certify the examinations as a *remedial* action undertaken to avoid disparate impact liability under Title VII.

The district court granted summary judgment to the city, which was affirmed in a short, terse opinion by the Second Circuit Court of Appeals. The United States Supreme Court granted certiorari, and a 5-4 majority concluded that the city's action in discarding the tests did indeed violate Title VII.

Justice Kennedy wrote the majority opinion, which was based on two conclusions:

1. The standard for permissible race-based action under Title VII is that the employer must "demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact

This article offers a brief summary of *Ricci* and a few observations of what *Ricci* may mean looking forward to a newly composed Supreme Court.

statute." *Ricci*, 2009 U.S. LEXIS 4945 at *10-11 (emphasis added). Justice Kennedy drew an analogy to Supreme Court cases arising under the Equal Protection clause of the United States Constitution and determined that under Title VII, where disparate treatment is justified by remediation of disparate impact that would otherwise occur, that justification for disparate treatment must be established by a strong basis in evidence: "absent a strong basis in evidence of an impermissible disparate impact, amounts to the sort of racial preference that Congress has disclaimed . . . and is antithetical to the notion of a workplace where individuals are guaranteed equal opportunity regardless of race." *Id.* at *47.

2. The city did not satisfy the "strong basis in evidence standard," even if assumed that the city "were motivated as a subjective matter by a desire to avoid committing disparate-impact discrimination," *id.* at *48, because "[t]here is no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were *not job-related* or because *other, equally valid and less discriminatory*

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tests were available to the city. Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions." *Id.* at *59 (emphasis added).

Observations

This case's lasting importance may be in the fact that its holding imports a principle used in evaluating race-based actions under the Constitution – the “strong basis in evidence standard” – for use under Title VII. This apparently means that *private entities* that are subject to Title VII now face an identical substantive limitation in justifying race-based employment actions as does the government.

Many have observed that *Ricci* demonstrates the emergence of the author of its majority opinion, Anthony Kennedy, as the “swing justice” on the current court. Evidence that this is true is found in the majority opinion's refusal to accept Justice Antonin Scalia's invitation to confront the constitutional question of whether Title VII's approval of race-conscious remedies in even limited circumstances is “consistent with the Constitution's guarantee of equal protection[.]” *Id.* at *61 (Scalia, J., concurring). Justice Kennedy's position as a necessary fifth vote allowed him to frame the issue settled in *Ricci* more narrowly.

Justice Kennedy's “swing justice” status also suggests that the Supreme Court's consideration of race and the Constitution will continue to be incremental, even after the expected confirmation of Judge Sotomayor. Justice Kennedy's appears to tend away from reaching broad constitutional issues if *Ricci* is any indication, and the ideological balance of the Supreme Court will likely be unaffected by Judge Sotomayor's elevation.

Flint Bankruptcy . .

Continued from page 9

home, and repay the past due mortgage payments while still paying the ongoing mortgage. With a Chapter 13 plan, the debtors repay missed payments, curing the deficit and avoiding foreclosure. To be effective, however, the Chapter 13 filing must take place before the foreclosure sale.⁷

2. *Increase the time on retail installment contracts:* While BAPCPA requires repayment to secured creditors when the debtor retains the personal property collateral, that payment may be made over the course of the Chapter 13 plan in equal monthly payments⁸. A 36-month retail installment contract could be paid over 60 months, thereby reducing the monthly payment. Furthermore, the interest rate on the debt may be adjusted.⁹
3. *Extinguishing second (and third etc.) mortgages:* Two factors create an interesting real estate situation. The first factor is the historic mortgage financing of real estate with little or no owner equity. The second is declining property values.¹⁰ Chapter 13 bankruptcy can be used to the homeowner's benefit here. In a typical case, a homeowner has two mortgages. Because of the declining property values, the first mortgage's principal balance is greater than the value of the home. The second mortgage is completely unsecured. According to the U.S. Supreme Court decision *In re: Nobleman*,¹¹ if no equity exists in a secured debt's collateral, the Chapter 13 debtor can treat that debt as wholly unsecured. In this case, the debtor pays only the first mortgage and treats the second as unsecured. When the debtor completes the Chapter 13 case, the second mortgage is extinguished.

While the 2005 changes in the bankruptcy law created more debtor and attorney tasks in the bankruptcy filing, it appears the changes have not resulted in a reduction in Flint-area filings. Economic forces have created devastating financial situations; bankruptcy relief remains a viable tool for combating these situations.

Endnotes

- 1 The geographical jurisdiction of the bankruptcy court in Flint is Genesee, Shiawassee, Lapeer, and Livingston counties; data from the Eastern District of Michigan Bankruptcy Court.
 - 2 11 USC 707(b) 2 and 11 USC 1322 (d)(1).
 - 3 Income analysis for cases filed after 3-13-09; see: <http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm>.
 - 4 Unemployment rates overall see: <http://www.bls.gov/eag/eag.mi.htm>; unemployment rate as of December of the year indicated, excluding 2009.
- | 2004 | 2005 | 2006 | 2007 | 2008 | May - 2009 |
|------|------|------|------|------|------------|
| 7.2 | 6.6 | 7.1 | 7.3 | 10.2 | 13.9 |
- 5 http://michigan.gov/documents/treasury/April_2009_281444_7.pdf.
 - 6 “Foreclosure tracking firm, Realty-Trac, reports the number of Michigan homes in the foreclosure process rose by 10 percent from January to February.” <http://www.publicbroadcasting.net/michigan/news.newsmain>, March 12, 2009.
 - 7 Sixth Circuit's *Federal Land Bank of Louisville v. Glenn* (In re Glenn), 760 F.2d 1428, 1435 (6th Cir.1985).
 - 8 11 USC 1325 (a) (5) (B) (II)(iii)
 - 9 See *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L.Ed.2d 787 (2004).
 - 10 http://www.zillow.com/local-info/MI-home-value/r_30/
 - 11 *In Re Nobleman, Nobleman v. American Savings Bank* 508 U.S. 324 (1993)

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