

May/June 2013

# BARBEAT

Genesee County Bar Association



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Critique, Refute and Save with Rebuttal  
Reports

Family Court 2013 Seminar

Public Safety Exception to Miranda

New Member Profiles: Brandon Scott Fraim  
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“Who We Are”—Jill L. Nylander

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# The “Spoon of Power” Changes Hands

By James J. Wascha, President

As President of the Genesee County Bar Association, I have had the privilege of working with an outstanding Board of Directors and Staff. Each president brings his/her own agenda, having only a one-year term. This puts a premium on speed and efficiency. The past year has seen traditional programs, as well as some start-ups, worthy of continued support.

Our Board of Directors has been drilling down into the purpose of the Genesee County Bar Association as well as the needs of its members. Many initiatives were started by others before my tenure and have now been implemented. One example would be the technological advancement associated with the Bar Association web page. The Speakers’ Bureau, for a first year start-up, has seen notable community response. This program has been made available to all service organizations and schools throughout the county. The affiliate bar membership for legal support staff was adopted and has experienced a strong response and will, we hope, expand. A

free Community Picnic with all the trappings (much like the Holiday Dinner in concept) is proposed to be offered to the community in the future at a downtown park.

The economics of the law practice have evolved 180 degrees. This alone requires an ever-fresh view of the membership value and needs of our members. The GCBA was established in 1897, and its longevity can be seen in the definition itself. “Association” is defined as “an organized body of people who have an interest, activity, or purpose in common”; and “a mental connection or relation between thoughts, feelings, ideas, or sensations.” Both definitions clearly apply to our Bar Association.

It was a privilege to serve as President of the Bar Association, and I give credit to all those who preceded me and all members of the Board of Directors, respectively.



James J. Wascha

# Covenants Not to Compete in Physician Employment Contracts

By R. Paul Vance

As a healthcare attorney, I have reviewed, drafted and negotiated a multitude of physician employment contracts. One issue that inevitably arises with physician employment contracts is non-compete provisions. Covenants not to compete contained in physician employment contracts often prohibit a physician from establishing a practice or accepting other employment within a certain area for a certain period of time following termination of employment. Restrictions contained in the covenant not to compete also may include prohibitions against recruiting staff members of the practice. Covenants not to compete are most often used when a hospital purchases a physician practice or when a physician group hires a new physician.

The American Medical Association is opposed to covenants not to compete and discourages any agreement between physicians that restricts the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of an employment, partnership or corporate agreement.<sup>1</sup>

Despite the position of the AMA, covenants not to compete are alive and well in Michigan. Specifically, MCL 445.774a(1) states:

An employer may obtain from an employee an agreement or covenant which protects an employer’s reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances of which it was made and specifically enforce the agreement as limited.

In light of the above statute, the Michigan legislature has explicitly assigned the responsibility of determining



R. Paul Vance

whether covenants not to compete are enforceable to trial courts. With this in mind, Michigan courts have indicated that in a medical setting, a covenant not to compete is appropriate to: (1) protect against unfair competition by preventing the loss of patients to departing physicians; (2) protect an employer's investment and specialized training of a physician; and (3) protect an employer's confidential business information or patient lists - as long as the covenant is "reasonable."

In Michigan, there is no bright line test as to what constitutes a "reasonable" duration or distance contained in a covenant not to compete. Rather, the "reasonableness" of the stated duration and/or geographic scope depends upon the interest sought to be protected and is determined by the courts on a case-by-case basis. For example, employers looking to restrict employees from setting up a competing practice within the general service area of the employer are typically enforceable. However, courts may look to where the practice actually obtains the majority of its patients and referrals in order to determine the reasonableness of the provision.

If a court determines any of the terms of a covenant not to compete to be unreasonable, the legislature has given the trial court broad discretion to reform or redraft the unreasonable portion of the restrictive covenant to conform to the court's determination of what is reasonable under the facts and circumstances. The court may then enforce the agreement as modified by its determination. When a court reforms the terms of the covenant, it may do so without the best interest of parties in mind.

In summary, covenants not to compete between employers and physicians are clearly permissible in Michigan. However, the covenant not to compete must be reasonable as to duration, geographic scope and type of employment or line of business/scope of practice. The reasonableness of the terms to any covenant not to compete

contained within a physician employment contract will be determined by a trial court from analyzing the facts and circumstances surrounding the covenant not to compete when it was entered into. As such, careful consideration must be given during negotiation and drafting of the covenant not to compete to ensure its reasonableness and to avoid any misunderstandings between the parties to the contract. Keep in mind, an unreasonable covenant not to compete will likely lead to litigation where there often is no "winner."

#### Endnotes

- 1 American Medical Association, Opinion 9.02 - *Restrictive Covenants and the Practice of Medicine*.

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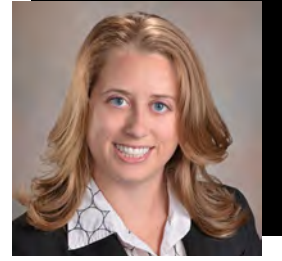
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# Critique, Refute and Save with Rebuttal Reports

By Amy L. Geer, CPA, CVA



Amy L. Geer

In some circumstances, a written rebuttal report can be an alternative to a full-scale written appraisal, reducing the time and cost of obtaining an expert's valuation opinion.

The most common reason experts issue rebuttal reports is to critique someone else's valuation report. For example, a plaintiff or a defendant might hire a valuator to draft a memo that outlines the errors and weaknesses in the opposing expert's report. The rebuttal report also can quantify how the errors affect value. A valuator is going to look for the completeness of a report, the adequacy, relevance, appropriateness and reasonableness.

Some items an appraiser will review to assess a report include:

- Numerical data for math or transposition errors.
- Was the subject interest adequately researched to produce a credible appraisal review?
- Was the appraiser aware of changes in economics, law, technology and other external factors that can have a substantial impact on the subject interest? Does this analysis support their conclusions?
- Were the proper date ranges reviewed and is the effective date of the report appropriate?
- Was the proper standard and premise of value used (fair market value, liquidation value, etc.)?

A rebuttal memo can be entered into evidence as an expert opinion. It can also help the attorney draft cross-examination questions for deposition and trial. In addition, it may serve to expedite legal proceedings.

There are also options for the rebuttal report. A rebuttal report can be to express an opinion on credibility, without expressing an opinion of value. Alternatively, it can express an opinion on credibility and offer another value using the same scope of work or a different scope of work.

Alternatively, if two expert opinions differ significantly, the parties may agree to jointly hire an objective third expert to prepare a rebuttal report. Here, the rebuttal would identify specific sources of the discrepancy, citing authoritative references. Third-party rebuttals often help the parties settle their differences outside of court. An expert may respond to a critique with another rebuttal report that addresses each alleged error. Typically, the expert would acknowledge any legitimate errors and factor them into a modified conclusion. The response would clarify the expert's point of view and defend his or her professional judgment.

## Comply with Accepted Standards

A valuation/appraisal review report should not include personal attacks, gratuitous remarks, a harsh tone, or exaggerations. The review report should be based on information provided by valuation standards and guidelines from industry-accepted sources such as the AICPA SSVS No. 1 (American Institute of Certified Public Accountants, Statement on Standards for Valuation Services), USPAP (Uniform Standards of Professional Appraisal), NACVA (National Association of Certified Valuators and Analysts) or the ASA (American Society of Appraisers).

A valuation review expert should be familiar with all of the accrediting organizations and their standards. Select a reviewer who has experience preparing valuations and is certified by one or more of the industry-accepted organizations.

## Conclusion

A valuation expert will issue rebuttal reports, including critiquing another valuator's report, to help the attorney draft cross-examination questions for deposition and trial, and to help settle differences outside of court. A defendant's expert might use a report prepared by the plaintiff's expert as a starting point for his or her analysis. In this case, the rebuttal report would describe how the expert reviewed the original appraisal and agreed with certain facts and analytical procedures.

It is unnecessary to reinvent the wheel every time an expert appraises a business, especially if time and money are limited. A written rebuttal report can be an alternative to a full-scale written appraisal, reducing the time and cost of obtaining an expert's valuation opinion.

**Amy L. Geer, CPA, CVA**, is a Manager and serves in the Management Advisory Services group of the Saginaw, Michigan, office of Yeo & Yeo. She is a Certified Valuation Analyst. She provides litigation support services and is co-leader of the firm's Valuation & Litigation Support team. She also serves on the firm's Client Accounting Solutions team and is a Certified Advanced QuickBooks ProAdvisor. She has specialization in business consulting for management, financial reporting and tax issues with strong emphasis on small business improvement in all industries.

Contact Amy via e-mail at [amygee@yeoandyeo.com](mailto:amygee@yeoandyeo.com) or call 800.968.0010.

# Family Court 2013 Seminar

By Barbara C. Dawes, Family Court Committee Chair



Barbara C. Dawes

The 2013 Family Court seminar, sponsored by the Family Court Committee, was held on March 19, 2013.

Our first speaker was Robert Treat of QDRO Express. He discussed the various aspects of General Motors' salary and hourly pensions. He also advised the seminar attendees to include language in their judgment awarding the Alternate Payee 100% of the surviving spouse benefits of the pre-retirement and post retirement surviving spouse annuities.

Attorney Kent Weichmann explained the clarifications, rather than changes, in the 2013 Child Support Guidelines. He also noted three new grounds for deviation listed in the 2013 Guidelines.

Judge David J. Newblatt spoke on the topic of Trial Dos and Don'ts; he reminded everyone to remain civil. He noted that he will "fly speck" documents when a motion to change custody is heard in his courtroom. He also stated that an attorney should not conduct him/herself in a manner to harm the lawyer's reputation.

Attorney James N. Bauer spoke on Decedent's Estates and Separate Maintenance and advised the attendees that a

Judgment of Separate Maintenance does not in itself terminate a spouse's rights upon the death of his/her spouse.

Our next speaker was Attorney Referee Shelley Spivack, who spoke on the Revocation of the Paternity Act. Her materials are an excellent outline to use when a lawyer consults with a potential client regarding either revoking a prior paternity order or establishing paternity.

Attorney Daniel J. Andoni took up the issue of a paperless office. This excellent presentation outlined the benefits in implementing today's technology in the practice of law.

Our final speaker was Judge Joseph J. Farah on Family Law and the Rules of Evidence. Judge Farah stressed to the attendees that they should know the rules of evidence, their meaning and their application, particularly if the case proceeds to trial. He had several helpful hints, including SKEET: experts can be qualified by **S**kill, **K**nowledge, **E**ducation, **E**xperience and **T**raining.



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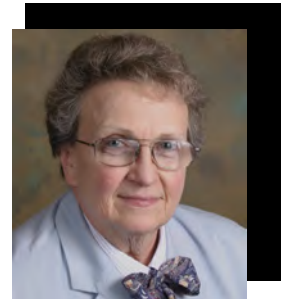
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# Public Safety Exception to Miranda

By Roberta J.F. Wray



Roberta J.F. Wray

The “public safety” exception to the well-established and nearly iron-clad requirement of warnings about self-incrimination before the custodial questioning of criminal suspects can proceed is back in the news. Its use by law enforcement authorities following the arrest of the suspect in the Boston Marathon bombing resulted in renewed interest in its application. As we are all well aware, the case of *Miranda v Arizona*, 384 U.S. 436 (1966), established the ritual, now included in nearly every police and/or lawyer show on TV, as well as on the street.

“You have the right to remain silent. If you give up that right, anything you say can and will be used against you in court. You have the right to have a lawyer present during any questioning you consent to . . .” etc. The surviving suspect in the Boston Marathon bombings *did* not hear those words until 16 hours after his dramatic apprehension and hospitalization.<sup>1</sup> Law enforcement authorities cited the “public safety” exception as justification for the extended period between his arrest and the administration of his advice of rights by a U.S. District Court Magistrate Judge.

According to the FBI’s Law Enforcement Bulletin of February 2011, “the ‘public safety’ exception . . . permits law enforcement to engage in a *limited and focused unwarned interrogation* (emphasis added) and allows the government to introduce the statement as direct evidence.” That exception was carved out by the Supreme Court in *New York v Quarles*, 467 U.S. 649 (1984).<sup>2</sup>

In the *Quarles* case, a man named Benjamin Quarles was arrested in a supermarket after being identified by his alleged rape victim. During the pat down, an officer found an empty shoulder holster and asked, “Where’s the gun?” The suspect pointed to empty milk cartons and said, “The gun is over there.” The New York trial court excluded the statement and the weapon from trial on grounds that there was no “public safety” exception and that the facts of the case *did* not spell out a “public safety” concern.<sup>3</sup> The New York Court of Appeals (equivalent to Michigan’s Supreme Court) upheld the trial court in a 4-3 decision.<sup>4</sup>

The U.S. Supreme Court, however, found that on the facts of *Quarles* there is a “public safety” exception that may be invoked under very narrow construction.<sup>5</sup> The “public safety” exception is triggered when police officers have an objectively reasonable need to protect police or the public from immediate danger. Under those circumstances, the police may ask “only those questions necessary to secure their own safety or the safety of the public.”<sup>6</sup>

“Voluntariness is the lynchpin of the admissibility of any statement obtained as the result of government conduct.”<sup>7</sup> The test requires that a court review the “totality of the circumstances” to determine whether the subject’s will was overborne by police conduct. If the court finds that the questioning of a subject, even in the presence of a situation involving public safety, violated due process standards, the statement will be suppressed.<sup>8</sup>

The questions that will inevitably be raised by the defense in this case are:

1. Whether the 16 hours of questioning between arrest and the advice of rights was reasonably necessary to assure public safety when the event that triggered the arrest took place four days earlier;
2. Whether the suspect felt compelled to make statements against his interest due to any coercive nature of his situation.

It will be interesting to see how it all plays out.

## Endnotes

- 1 <http://Boston.cbslocal.com/2013/04/26/district-attorney-building-murder-case-against-tsarnaev/t-attorney-building-murder-case-against-tsarnaev/>
- 2 Benoit, Carl A., J.D. The “Public Safety” Exception to Miranda; [http://fbi.gov/stats-services/publications/law-enforcement-bulletin/february2011/legal\\_digest](http://fbi.gov/stats-services/publications/law-enforcement-bulletin/february2011/legal_digest)
- 3 Benoit, *op.cit.* p. 2.
- 4 *People v Quarles*, 58 N.Y.2d 664 (1982)
- 5 *New York v Quarles*, 467 U.S. 649, 659 (1984)
- 6 *Id.*
- 7 Benoit, *op. cit.* p.5
- 8 *Id.*



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## *New Member Profiles: Brandon Scott Frain and Juanita L. Johnson*

### **Brandon Scott Frain**

**B**randon Scott Frain is a third-generation attorney, having been influenced by the examples of his father, Scott Frain, and grandfather, Edward Henneke. He says he has been fascinated by “business and the law surrounding it, and becoming a business attorney will allow him to be involved in all aspects of business from employment issues and real estate to mergers and acquisitions.”

Frain says, “In law school I was awarded the Shane Joseph Johnson Memorial Award for being ranked number one in my class during the first year. I was also lucky enough to receive a number of merit awards as well. The one special interest I have above all else is soccer. I played throughout my life and I’m embarrassingly obsessed with all aspects of it. I also love to golf, boat, and visit Michigan breweries to support local entrepreneurs.”

He has a BBA in Finance from Grand Valley State University in Grand Rapids. He graduated Magna Cum Laude from Thomas M. Cooley Law School.

He currently works at Henneke, Frain & Dawes, PC, and sees himself working there for a long time with hopes of eventually becoming a partner and growing with the firm.



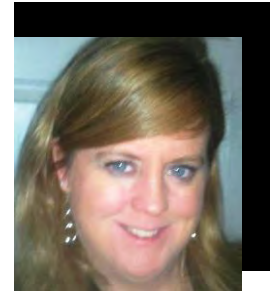
Brandon Scott Frain

### **Juanita L. Johnson**

**J**uanita L. Johnson is the mother of two daughters, aged 19 and 12. She was born and raised in Burton. She says she never had any desire to become an attorney growing up, but eventually decided to go to law school because of a desire to help people in a very direct way.

Juanita’s undergraduate degree is from the University of Michigan-Flint, a BA in Criminal Justice and Sociology. She graduated Cum Laude from Thomas M. Cooley Law School and is licensed to practice law in Michigan, Florida and in the US District Court for the Eastern District of Michigan.

Ms. Johnson has been practicing law for over ten years and has recently opened her own law firm, Juanita L. Johnson, PLLC (in September 2012). She aspires to create a successful law office where she can help people in need for Bankruptcy, Divorce, Family Law, Landlord/Tenant matters and other areas of general practice.



Juanita L. Johnson

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## “Who We Are”—Jill L. Nylander



Jill L. Nylander

### Why did you decide to become an attorney?

When I was in high school, I knew I wanted to be an attorney. It just always seemed like such a direct way to make a difference for others.

### In what area(s) of law do you practice?

As a Directing Attorney for our Flint Office for Legal Services of Eastern Michigan, I am more of a generalist in a lot of areas than a specialist. Our program focuses primarily on basic needs issues: housing, income maintenance including disability benefits, consumer issues, elder law and family law.

### Which area of the law do you like the best and why?

The medical/legal overlap that underlies the practice of disability law has always been especially interesting to me.

### What do you like best about being an attorney?

I enjoy the gratification that comes from helping someone out of a difficult legal situation. I also enjoy the fact that there is always something new to learn under the law in trying to address those difficult situations.

### What part of being an attorney can you do without?

Timekeeping

### What words of advice could you offer to new lawyers?

I would advise them to be confident in their abilities, to be patient and diligent in their case preparation, and to seek out every opportunity to learn from their fellow lawyers.

### What suggestions do you have to improve the legal system?

So many people feel disenfranchised from the justice system. We need to continually look for ways to improve access through self-representation tools, pro bono commitments, and alternative dispute resolution methods where appropriate.

### Offer one suggestion for improving our local Bar.

We need to continue efforts to recruit more young attorneys. (This feels like a loaded question.)

### Tell us about your life outside of the law.

My husband and I met in law school over 20 years ago and we have three wonderful children (ages 17, 14, and 11) who keep us very happily busy. Our two dogs are both a little mischievous and also help keep us entertained and busy.

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

In hindsight, becoming a doctor, a teacher or a chef all would have had some appeal.



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# “Motive Counts in WPA Cases”—Court Of Appeals (2011) “No It Doesn’t”—Michigan Supreme Court (2013)

By Tom R. Pabst, Michael A. Kowalko, Jarrett M. Pabst

Thus ends the unlawful reign of *Shallal v Catholic Social Services*, 455 Mich 604 (1997), a legal weapon of mass destruction for many victims of unlawful discrimination in Michigan. As it turns out, our own Judge Geoffrey Neithercut was correct all along in his approach to interpreting Michigan’s Whistleblower Protection Act, MCLA 15.361, et. seq.

In the case of *Chief of Police Bruce Whitman*, who sued both the City of Burton, and Mayor Smiley for violation of our WPA, Judge Neithercut was being exhorted by defense counsel to engraft and/or write into the statute a disqualifying exception if the plaintiff was “vindictive,” had a “personal motive,” and/or was acting in bad faith, so that Chief Bruce Whitman should not be considered a Whistleblower. However, Judge Neithercut declined to so rule. Instead, he looked for the intent of the statute by examining the actual text of the statute, which he found to be clear and unambiguous. He then applied the clear and unambiguous law that he found the WPA to be. In fact, he opined during the trial on the record:

“THE COURT: Now, here defendant is arguing today the *Shallal* case, and they’re arguing the theory that where the primary motivation of an employee is personal gain or vindictiveness, the employee necessarily fails to establish the requisite protected activity element and is precluding from recovering under a whistleblower statute. And we’ve all looked at *Shallal*. I think it’s decided on a different basis. I don’t see where it makes any mention of personal gain or financial reasons as impediments to bringing a whistleblower claim. **I don’t know that the statute says that, either, and in this age of textual reading, I read the statute exactly, it doesn’t talk about that.**” (emphasis added)

How right he was!

How Judge Neithercut interpreted the WPA was exactly what the Supreme Court said judges should do in



Jarrett M. Pabst, Tom R. Pabst, Michael Kowalko (standing)  
Chief Bruce Whitman (seated)

interpreting that law. No longer are judges to “judicially legislate” a so-called “public concern,” “personal motive,” “vindictiveness,” etc., type of exception into the text of the statute so as to prevent people from being whistleblowers. If people are reporting a violation of the law, motive doesn’t matter whatsoever—period. That is what Judge Neithercut ruled, and the Supreme Court said he was exactly right.

On a personal note, it was exciting to argue in front of the Michigan Supreme Court on November 15, 2012. I was particularly impressed with Justices Markman and Young. It was obvious that all of the Justices were thoroughly prepared, but in my opinion, Justice Markman’s knowledge of civil rights law is second to none. I also felt that Justice Young was engaging, involved in this matter, very interested in the issues, and actually excited to be deciding the issues involved in this case. I thoroughly enjoyed the opportunity to argue this case to the Justices, which was a humbling experience. The actual text of the Supreme Court’s Opinion can be found at <http://goo.gl/HJ7VP>. There is a *Michigan Lawyer’s Weekly* article at <http://milawyersweekly.com/news/2013/05/07/motive-doesnt-matter-in-whistleblower-suits/>.



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