May/June 2011

BAR BEAT

Genesee County Bar Association

32nd Annual Golf Outing 1st place winners: Tim MacDonald; Tom Waun; Mike Parillo; and Jim Wascha

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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, call (517) 346-6315.

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As My Term Ends ...

By B.D."Chris" Christenson, President

B.D."Chris" Christenson

Turmoil. Change. Uncertainty. These words collectively sum up some of the elements of life. As we go through our lives and deal with challenges that arise, we look to the things of stability in our world that give us a foundational support. One of the sources of that support in our professional lives for over the past 100 years has been the Genesee County Bar Association. Judges and lawyers come and go, but the GCBA has been here as a foundation and a common thread from one generation of lawyers to the next.

The interesting thing about foundational support is that it is not immune from uncertainty and instability, and how these issues are coped with speaks volumes about the character of the organization, its staff, and its members. This year the GCBA faced many challenges. Our longtime executive director retired and had to be replaced; there was the search and installation of a new executive director; the displacement of our district courts for most of the year and a challenging economy had to be dealt with. Through it all, our GCBA was able to thrive and successfully continue to provide substantive seminars for our members; programs for the public through our series with the public library; and the charitable efforts, which include the holiday dinner, Law Day, and social events for its members that were large (*To Kill A Mockingbird* program) and small (various receptions).

In reviewing my year as bar president and wrapping it up, I would like to ask a favor of all of the GCBA members. The next time you see the GCBA staff, Tina, Eileen and Star, give them a special thank you because, hopefully, very few of you noticed the turmoil that our association went through during the past year, and I believe all of the credit for that smooth transition goes to the staff and their professionalism.

With that stable foundation in place, it is my sincere hope that the GCBA remains strong for the next 100 years. It was a pleasure serving as president, and I wish all of you good luck in the future.

Are You Tired of the Involuntary Pro Bono Services You Provide?

By James C. Dillard

James C. Dillard

While we didn't go to law school to become rich and famous (there are some of us who did), we didn't expect to perform legal services for clients who could afford to pay and who don't. In order to ensure that you can recover some of the receivables that are due your office, I am writing this article to give you a few pointers on the collection practice, what you can and should do, and what you should not do.

First of all, there is no such thing as too much information with respect to the client you are about to represent. All of you have gone to see a new doctor or a new dentist and have experienced filling out your life history, including the names of your children, on the information sheet you are provided before you can even think about seeing the doctor or the dentist. You need to do the same thing in your own practice when you are taking on a new client, particularly in the area of consumer matters and family law. At the very least you should obtain the client's Social Security Number, date of birth, employment, and if possible, a bank reference.

So that there is no mistake or surprise when you send out your monthly statements, you should have a written retainer agreement setting forth your hourly rate, your billing practice, and whether or not you charge for making substantial copies or incurring substantial mailing costs. If you are charging the client a flat fee, you need to spell out specifically what you are agreeing to do for the client so that if your services are over and above what is set forth in the retainer agreement, you can point that out to the client when you bill him or her for the extras.

Now that you have completed the work and the client hasn't paid you, what steps should you take? I believe that the number one rule in collecting the account is do not let the account get stale. Old accounts are difficult, if not impossible, to collect without litigation. If an account is approaching 60 days past due, you need to send the client a firm letter asking him or her to begin making regular monthly payments on the account and setting a deadline for the client to make the first payment. If that deadline passes and you still have not received any money or have not heard from the client, you need to make a decision whether to collect the account yourself or turn it over to an attorney who specializes in collection work. If you are going to collect the account yourself, you should be aware of the Michigan Collection Practices Act and also the Federal Fair Debt Practices Act.

The balance of this article will only be concerned with the Michigan Collection Practices Act. When you are collecting your own accounts, you are not subject to the Michigan Collection Practices Act; however, the Act sets forth certain prohibited practices which you should adhere to for ethical reasons alone. The prohibited actions are set forth in MCL 445.252 and include:

- Communicating with a debtor in a misleading or deceptive manner;
- Using forms or instruments which simulate the appearance of judicial process;
- Using seals or printed forms of a governmental agency;
- Using forms that induce the belief that they have judicial or official sanctions;
- Making inaccurate, misleading, untrue or deceptive statements;
- Misrepresenting in a communication with a debtor:
  - The legal status of a legal action that is threatened;
  - The debtor's legal rights;
  - That non-payment may result in an arrest;
- Communicating with a debtor except through billing procedures when the debtor is represented by an attorney;
- Communicating information to a debtor's employer;
- Publishing, or causing to be published, or threatening to publish, a list containing the debtor's name;
- Using harassing, oppressive, or abusive language; and
- Calling a debtor at unusual hours.

The foregoing list is not exhaustive. You are referred to the Michigan Correction Practices Act and the Federal Fair Debt Practices Act for additional actions that are prohibited. Remember, you can't get too much credit information about a new client and you can't let an unpaid account become stale.

Fair Debt Collection Practices Act

By Rex C. Anderson

Rex C. Anderson

It has been more than 33 years since the original enactment of the Fair Debt Collection Practices Act ("FDCPA") in 1977 and arguably, it is still one of the finest federal consumer protection laws ever conceived. The FDCPA protects you, me, or anyone else who owes a "consumer" debt from harmful, abusive, and deceptive treatment by debt collectors. Before the enactment of this law, Congress found that debt collection harassment and abuses were "abundant." In response, the FDCPA was fashioned by consumer advocates despite a voracious national opposition by the collection and banking industry. President Jimmy Carter then signed the law into effect on March 20, 1978. The Act was subsequently amended in 1986, 1996, and 2006.

Because the federal government did not have the resources to monitor and regulate the debt collection industry, it created a private right of action allowing enforcement by consumers and their lawyers. The Act provided for the payment of attorney fees to compensate lawyers who stepped in to make sure that debt collectors complied with federal law.

The FDCPA is the debt collector's rulebook on how it should conduct itself. It applies to all types of communications with debtors, whether written, verbal, in person, by telephone, or any other medium.

A lawsuit under the FDCPA requires four essential elements:

1) A consumer—"any natural person obligated or allegedly obligated to pay any debt;"
2) A consumer debt—"any obligation…incurred primarily for personal, family or household purposes;"
3) A debt collector—"any person using interstate commerce who regularly collects debts;" and
4) A violation of the FDCPA.

Simply put, the FDCPA protects consumers and those persons caught in the crossfire of the collection process who do not owe the debt but are getting harassed anyway. These include family, friends, and neighbors. The FDCPA applies to third party debt collectors who regularly collect debts owed to another. The FDCPA does not apply to creditors collecting their own debts unless they hold themselves out to be debt collectors. Lawyers and law firms handling consumer collections are regulated by the Act.

As a result of this strict liability statutory scheme, the collection industry is now heavily regulated. It is costly for the collector to violate the FDCPA. The civil liability for violating the FDCPA includes: 1) actual damages, 2) statutory damages of up to $1000.00, 3) class action damages of $500,000.00 or one percent of net worth, and 4) reasonable attorney fees. There is no such thing as a "technical" violation under the FDCPA. The standard is whether or not the collector is compliant with the FDCPA. If the collector is found to be non-compliant, the judge or jury may award actual damages arising from the collector's conduct, including emotional distress. If the consumer is unable to prove actual damages, she may still be awarded statutory damages and her attorney fees under the lodestar method. (Lodestar Rule: "In determining the amount of statutorily authorized attorneys' fees, 'lodestar' is equal to number of hours reasonably expended multiplied by

prevailing hourly rate in community for similar work and is then adjusted to reflect other factors such as contingent nature of suit and quality of representation. *Cooper Liquor, Inc. v Adolph Coors Co.,* C.A. Tex. 684 F.2d 1087, 1092. Black's Law Dictionary 6th Edition.) Statutory damages are essentially a punishment of the debt collector who gets "caught." As with other consumer laws, the attorney fees are often the real hammer which deters collectors from violating the FDCPA.

Debt collectors are prohibited from "harassing, oppressing or abusing" a consumer while attempting to collect a debt. This includes threatening violence, using profanity, and causing the phone to ring repeatedly.

Debt collectors may not use any "false, deceptive, or misleading representations" in the collection of a debt. For instance, the FDCPA prohibits debt collectors from threatening legal action that the debt collector or attorney does not intend to take. A collector's threat to sue on a time-barred debt is also a violation. The collector may not misrepresent that he is an attorney, a government official, or a credit bureau agency or that the consumer is guilty of crime for owing the debt. Failure to tell the credit reporting agencies that a debt is disputed also violates the FDCPA.

Collectors are prohibited from calling consumers, 1) at unusual or inconvenient times and places, 2) when they know the consumer has legal representation, 3) at the consumer's place of employment if they know the employer prohibits it, or 4) after written notification that consumer refuses to pay debt or the consumer wants the collector to cease communication.

Collectors are prohibited from calling third parties and disclosing the consumer's debt. A collector may only speak with a third party to confirm the consumer's *location information*. Location information means confirming *home address, home telephone and place of employment* ONLY. Even asking such seemingly innocuous questions such as, "When will she be home?" or "Where is he?" or "What's his cell phone number?" is illegal.

If the consumer has not provided her cell phone number to the creditor, it is a violation for the collector to call it unless the consumer has given express written consent. The collector is liable for $500.00 for each such call under the Telephone Consumer Protection Act.

The collection industry generates more consumer complaints than any other business in the United States. Many agencies, if not blatantly encouraging collectors to operate illegally, simply turn a blind eye to it. Top collectors can earn six-figure commission-based incomes. There are strong incentives for collectors to break the law to get consumers to pay. Consumers should pay their just and owing debts, and collectors have a right to collect. Unfortunately, some collectors operate in the murky waters of illegal collection activities. Many cannot resist crossing over into the easy money afforded by such tactics.

The only rational response is for even stronger incentive to enforce private rights of action under state and federal consumer protection statutes.

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One of Top 25 is One of Our Own

By Roberta J.F. Wray

Tom Pabst (middle) with sons Jarrett (left) and Justin

Congratulations to Tom R. Pabst, GCBA member, named one of the Top 25 "Leaders in the Law 2011," by *Michigan Lawyers Weekly*. Criteria for the selection include: possessing the ability to achieve success in one's practice; being passionate and aggressive on behalf of both clients and the legal community; a record of winning cases, solving problems, or coming to judicial conclusions that reflect the utmost integrity. The article in *Michigan Lawyers Weekly* cited Pabst's decision, following combat injury in the Vietnam War, to return home and "fight for the American dream." His path took him to Wayne State University Law School and then to a career specializing in Whistle Blower Protection Act, sexual harassment, reverse discrimination, and labor and employment litigation.

Pabst recorded 14 wins out of 17 cases starting in 2004 with a jury award against a local bank. In that case, an employee was fired for being discourteous to bank customers and using bank phones for his personal repossession business. The plaintiff, who was white, claimed he was fired for complaining that the bank treated black and white clients differently. The jury found against the bank.

"I just love fighting for those people"

After that case, Pabst also successfully sued several units of government for wrongful discharge of employees, including two police chiefs and a deputy chief, based on the Whistle Blowers Act; a school district for passing over a male administrator while making positions available at higher pay for female administrators; a doctor who left half of a woman's diseased appendix behind resulting in the need for a second operation to correct the first; a female reporter for a local broadcaster who reported security concerns to corporate headquarters, going over the head of her immediate supervisor; and a former county employee who "was fired in retaliation for voicing concerns over a method the county was using to replace insulation in older homes." The method being used was blowing in insulation, thus displacing asbestos and creating a health hazard.

Tom Pabst says he likes taking on people, companies, and government agencies when they abuse their power. He likes fighting for the underdog and standing up for people who try to do the right thing and get pounded for it by their bully bosses. "I just love fighting for those people," he said.

Report of the Genesee County Bar Foundation

By Walter P. Griffin,
President, Genesee County Bar Foundation

Walter P. Griffin

The Genesee County Bar Foundation Board of Trustees met on March 10, 2011. Among the requests for financial support to promote legal education within Genesee County, Barbara Menear, court administrator, requested assistance for the Genesee County Law Library. As you are already aware, the county has made significant cutbacks. For the law library to continue functioning at a high level and enable attorneys to educate themselves, Barbara Menear requested a $20,040 donation to be used toward the maintenance of a second computer terminal for legal research.

In response to this request, the following resolution was supported and adopted by the Board:

RESOLVED: The Genesee County Bar Foundation shall pay the sum of $6,680.00 annually, for the next three years, for a total of $20,040.00, to support legal research and education via a computer terminal in the Genesee County Law Library. Said sums will be paid from the McGregor Funds.

The Genesee County Bar Foundation is able to support such causes because of contributions to the Foundation. I would suggest to all members of the Genesee County Bar Association that *any* contribution made to the Foundation will be used in a prudent and worthy manner by the Board of Directors.

A contribution in any amount is appreciated.

Increased Protection for Whistleblowers in Michigan

By Tom R. Pabst

Tom R. Pabst

Suppose a cheapskate business dumps hazardous waste into our fields, streams or school playgrounds during the night because it doesn't want to pay the expenses of properly disposing of the waste. Or suppose a male shareholder of a corporate employer rapes a woman employee at night, after work, on a date, and he is prosecuted for the rape. Now suppose that a male employee of the corporate employer reports the illegal dumping and/or testifies as a witness for the prosecution against the rapist shareholder, and the employer fires him for it. The plain language of the Whistleblower Protection Act ("WPA") passed in 1981, MCLA 15.361, *et. seq.,* says the fired plaintiff employee is "engaged in protected activity" and is therefore protected from retaliation for having the courage to do the right thing.

Courageous whistleblowers in Michigan were not always protected the way the plain language of the WPA intended. For example, early appellate court decisions declared that the employee had to report or be about to report violations of law *by his or her employer,* **only**, to be afforded protection, despite the plain wording of the Act that did not limit its applicability to violations of law by the employer or to investigations involving the employer.[1]

Fortunately for employees who have the courage to risk their jobs by reporting violations of *any* laws, or telling the truth when involved in an investigation by a public body, these early appellate decisions have, *sub silentio*, been eroded by important Supreme Court and Court of Appeals decisions over the last two decades.

Specifically, in *Dudewicz v Norris-Schmid, Inc.,* 443 Mich 68, 74-75 (1993), the Supreme Court held that the WPA protects reports made against a *co-worker*, not only an employer. In other words, an employee's reporting of an assault and battery by a co-worker to the prosecuting attorney's office was found to be "protected activity," even though the employer itself did nothing *per se* illegal.

Courageous whistleblowers in Michigan were not always protected the way the plain language of the WPA intended.

Next, in *Dolan v Continental Airlines/ Continental Express*, 454 Mich 373, 378 (1997), the Michigan Supreme Court further applied and extended the Act to protect an employee who was fired for reporting the names of two *passengers* who fit a "suspect profile" to the DEA. As the Supreme Court in *Dolan, supra*, explained:

> ...Frequently, a close connection exists between the reported violation and the employment setting, although no such limitation is found in the statute. *Id. at p. 384.*

In other words, the Supreme Court in *Dolan, supra,* protected an employee from retaliation by an employer even if his report of illegal activities was not based on illegal activities by the employer itself.

Then, in an important WPA case right out of Genesee County, *Trepanier v National Amusements, Inc.*, 250 Mich App 578, 583-588 (2002), the employee's obtaining of a personal protection order against another employee allegedly concerning a personal relationship outside the workplace was "protected activity" under the WPA. Local attorney Glen Lenhoff represented the plaintiff in this important published case in which the employee's protection under the WPA extended even farther away from the workplace setting.

Recently, in the case of *Kimmelman v Heather Down Mgmt, Ltd.,* 278 Mich App 569 (2008), the Court of Appeals came out and stated what should have been obvious from the beginning:

> There is absolutely nothing express or implied, in the plain wording of the statute that *limits* its applicability to violations of law *by the employer* or to investigations *involving the employer.* 278 Mich at p. 575.

In other words, after more than 20 years of case law interpreting the WPA, whistleblowers have finally received the protection the legislature originally intended. It is now crystal clear that a plaintiff employee is protected from retaliation under the WPA whenever he (1) reports a violation, or suspected violation of law, or (2) participates in a protected proceeding/court proceeding, even if the protected proceeding/court proceeding does not involve the employer itself, and even though the employer itself did not commit the violation of law being reported.

Endnotes

1 See, for example, *Dickson v Oakland University*, 171 Mich App 68, 70 (1988).

Who's on the Bench? Judge Judith A. Fullerton

By Roberta J.F. Wray

Hon. Judith A. Fullerton

In 1982, Judge Judith A. Fullerton was elected to the circuit court bench. In the nearly 30 years since, Judge Fullerton has established a reputation as tough, fair, and thorough. She expects no less from the attorneys who practice before her.

Her greatest satisfaction, she says, "is in presiding over a case where the attorneys are well prepared and proficient" in presenting their arguments. She does not have great sympathy for lawyers who come into her court without having done the research and preparation required to move efficiently through the system.

Her greatest frustration, on the other hand, comes in the form of MCL 6.500 motions, hand written in pencil on prison-supplied paper by *In Pro Per* defendants. The cases are often old, sometimes 10 years or more. Frequently, the paper barely holds together. The handwriting is often impossible to decipher, and the grammar and spelling are challenging to interpret. "They are time-consuming and tax both the memory and the eye-sight," she says, but they require the same scrutiny as motions prepared by attorneys.

During her years on the bench Judge Fullerton has noticed an increasing volume of cases. She says it seems as if more cases, especially homicides, go unsolved. She finds that "distressing" and attributes it to dwindling manpower in the Flint Police Department.

The Tulsa, Oklahoma, native is a graduate of Vassar College and the George Washington University Law School. Her first job out of law school was with the Securities and Exchange Commission. In 1972, she moved to Michigan, passed her second (Michigan) bar exam, and thought she might go to work as attorney for a bank. She says she was convinced to try the Genesee County Prosecutor's Office by former assistant prosecutors Larry Stecco, now 67th District Court judge, and retired Judge Arthalu Lancaster. She never regretted that decision.

In 1980, she was elected judge of the 68th District Court. Two years later, she took the step to the Seventh Circuit Court, only the second woman in Genesee County history to do so. Since then she has seen the look of court change from a male dominated bastion to one where women are increasingly involved. Female prosecuting attorneys currently staff five of the nine courtrooms. The number of women practicing law is growing annually.

When asked which lawyer, judge, or justice in history she admired most, Judge Fullerton enthusiastically cited Supreme Court Justice Sandra Day O'Connor. Her similar background and the fact she came from a different region of the country from most members of the Court were among the reasons. Judge Fullerton also admired her for the role she played on the Court. The judge once seized an opportunity to speak with the justice at an event they were both attending at the Kennedy Center.

While she claims to have no hobbies, Judge Fullerton says she enjoys gardening. Until recently, she was a dedicated runner, as well. She is married to GCBA member Ward Chapman. They have a daughter who is about to finish her degree at the University of Michigan.

(The judge plans to run for one more term on the Seventh Circuit Court.)

Family Court Seminar

By Barbara C. Dawes

On March 29, 2011, the Family Court Committee held a "Family Court Issues" seminar. Judge Barkey spoke on "A Judge's Perspective," including dos and don'ts in a courtroom: be courteous and on time, be prepared, dress appropriately, do not lie (especially since she would be required to report you to the State Bar).

Attorney Lori Morran spoke on adoption, including the types of adoptions, the Interstate Compact on the Placement of Children, and Indian Child Welfare Act.

Jim Bauer spoke on juvenile guardianships and conservatorships, including the types of minor guardianships (full, limited, and parental appointed), identified the required forms to file, and identified the duties of guardians and conservators.

Shayla Blankenship and Pam Wistrand gave tips on being a guardian ad litem, such as the difference between a citizen GAL and a lawyer GAL, contents in an order appointing a GAL, how to interview children (i.e., making them comfortable and asking open ended questions), and how to make sure the children know the judge does want to hear the children's voices. Both attorneys stressed that being a GAL is a very rewarding area of law. It is, however, a demanding one as the GAL must be available every day at any time—whenever a child wants to talk to you.

Ed Henneke spoke on adult guardianships and conservatorships, including the paperwork necessary to file a guardianship or conservatorship and the duties of a guardian or conservator. He also stressed the fiduciary responsibilities of guardians and conservators.

About 30 members attended the seminar and appreciated the information provided.

A Breathtaking Moment: Impressions from Washington D.C.

By Erwin F. Meiers III

The Korean War Memorial, Washington, D.C.

This year's bar-sponsored trip to Washington, D.C. was filled with historic and memorable events. We went to be sworn into practice before the United States Supreme Court. We actually got a lot more than we bargained for.

Our small group got to Washington at the height of the Wisconsin protests. It was impressive to watch as, all around us, union members and supporters brought their demonstrations against the actions of the governor of Wisconsin to the nation's capital.

Our hotel, The Mayflower, breathes history and is within walking distance of countless historic locations around the Capitol and the White House. We arrived on the weekend so there was plenty of time for sightseeing before our Monday morning ceremony at the Court.

Everyone who has gone to Washington for this ceremony at the Court has come away with his/her own indelible memories. For me the most important came on Sunday. On The Mall, between the Washington and Lincoln Memorials, are monuments to the fallen in America's twentieth century wars. One is a group of soldiers in ponchos walking carefully through a field. They are reflected in a nearby wall making it appear that there are 38 of them. Nearby I saw a woman weeping. She told me the monument was to the Korean War. It took my breath away for a moment. My dad fought in the Korean War.

On Monday we were greeted at the Supreme Court by our own guide who took us on a tour of the building that included the lower level and supreme court museum. The sense of history was pervasive.

The moment we came for arrived. Our group was escorted to the well of the court to sit within a few feet of the members of the Supreme Court. Of special significance was the reading of an opinion in a Michigan case, *Michigan* v *Bryant*, having to do with the admissibility of "dying declarations." The Court ruled, 6-2, that a dying declaration is admissible in a murder trial in spite of the right of a defendant to "confront" his accusers.

I stood nearly close enough to touch Justices Kagan and Thomas as the oath was administered that admitted the four of us to practice before the highest court in the land. Whether any of us ever gets the opportunity to argue a Supreme Court case, the trip to Washington to have the right granted was worth the cost. I would hope that every member of the GCBA would take the opportunity to go.

Meet Our New Members

Adrienne DeFord

Adrienne DeFord is originally from Bad Axe, Michigan. She graduated from Michigan State University with a B.S. in environmental policy and economics in 2003, and from MSU College of Law in 2006. She previously practiced in Cass City, Michigan, at Amanda L. Roggenbuck & Associates, and was also an instructor for Davenport University's paralegal studies program. Adrienne has practiced at Legal Services of Eastern Michigan since 2007, first as the family law staff attorney, and now as the senior law staff attorney. She recently moved to the Flint area with her husband, Seth, and eight-month-old son, Larsen.

LaToya Larkin

LaToya Larkin, a Detroit native, is an attorney with Legal Services of Eastern Michigan, where she practices bankruptcy law. She has also practiced family law with Legal Services. LaToya graduated from Grand Valley State University in 2003 with a B.A. in journalism and from University of Michigan Law School in 2007. In her spare time she enjoys reading and writing short stories.

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