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Genesee County Bar Association



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Focus on the Positive

Civility: What is it – and Where Did it Go?

Holiday Dinner – A New Twist

The Genesee County Sobriety Court

Circuit Split: Section 1983 and the Contracts Clause

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Focus on the Positive

By Hon Mark W. Latchana, President



Hon. Mark W. Latchana

As I sit down to write this month's Bar Beat article, the country is reeling from successive hurricanes in the South, Southeast, and Puerto Rico, as well as wild fires that seem to be burning vast areas of the West on a perpetual basis. Closer to home, mid-Michigan was hit first by flash flooding, and then by oppressive heat. These recent events have given me a chance to reflect on how we as a community and society react to such tragic events.

Unfortunately, there always seems to be one segment of the population that attempts to profit from the suffering of others. It might be the stores and merchants who mark up the price of gas, water and other staples by 100-200%, or those that choose to ransack and loot businesses and homes. These seem to be the stories that we see on the evening news and receive as alerts on our smartphones.

Fortunately, there are many hundreds of thousands of people around the country and world who contribute to help those in need. There are those who donate money to fund relief efforts. There are still other individuals, civic organizations, and church groups who donate supplies, time, and effort to assist those in need. Those who give of themselves are the ones deserving of our recognition and attention. While it seems so elementary a point, this situation repeats itself time and again after each natural disaster or other tragic event. We as a society seem to place emphasis on the negative while ignoring all the good that goes on in response.

As the stories of hardship and destruction spread after the recent events in Houston, I was heartened to see our local media covering the story of a husband and wife in Owosso who spent several days collecting donations to fill a semi-trailer. They then drove those supplies to Houston themselves. While it did not receive widespread coverage, there were also members of Michigan State University's football team who traveled to Houston on their off-week to volunteer. The young men who, in the midst of busy school and sports obligations, took time to help others, are an example to all of what service to our fellow man means.

At a time when this country seems to be at a crossroads, and people and political parties cannot agree on a path forward, these examples of service to others should be our guide. When I was growing up, my parents taught me to treat others as I would like to be treated. My wife and I have tried to instill that belief in our children. It is my belief that if we focus more on treating all people with respect and dignity, and celebrate examples of such behavior, then the problems, issues and controversies of the day will be easier to resolve with negotiation and compromise. If we are able to accomplish that, our communities and country will be better for it.

Civility: What is it – and Where Did it Go?

By Sandra K. Carlson

As part of its Civility Month, the American Inns of Court hosted a National Conversation on Civility on Saturday, October 21st, in Washington, DC, to address the importance and role of civility in the legal profession.

I had the opportunity to attend this conference and speak about civility with judges and attorneys from across the nation. The morning began with a panel discussion moderated by Kannon Shanmugam, Esq. The panelists included Hon. Benes Aldana, President of the National Judicial College; Hon. Patricia Millett, U.S. Court of Appeals District of Columbia Circuit; Hon. William Koch Jr, Dean of Nashville School of Law; and Kim Askew, Esq, partner at K&L Gates. It was a lively discussion and the panelists had strong opinions about civility in the court room, between attorneys on cases during discovery, and civility on the bench. There

was also discussion about the lack of civility in politics and its impact on the practice of law.

The highlight was the next panel presentation featuring the newly appointed Supreme Court Justice Neil M. Gorsuch and retired Hon. Deanell Reece Tacha, who had previously served on the bench together. The discussion was fascinating, with many stories and laughs. However, Justice Gorsuch emphasized that civility does not mean being polite at the expense of withholding an opposing point of view. In fact, Justice Gorsuch stated that suppressing disagreement in the name of civility is wrong.

As I returned to Genesee County, I thought, what does civility really mean? More importantly, is it alive and well in



Sandra K. Carlson

the legal profession here in Genesee County?

Civility comes from the word *civilis*, which is Latin for “relating to citizens.” Early use of the term meant the state of being a citizen and hence good citizenship or orderly behavior. In the 16th century, civility began to be defined as “politeness,” signifying the added importance of acting with respect, courtesy, and graciousness as a citizen.

When I watch the news or listen to the radio, I wonder where civility has gone.

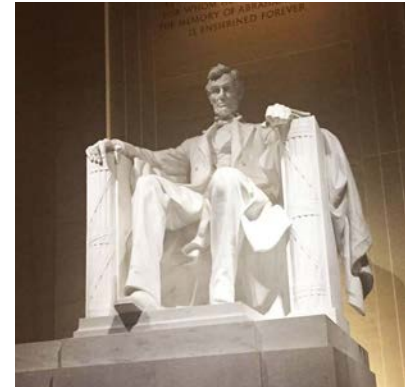
People can now anonymously lash out on social media without considering the impact of their words. Cell phones allow instant streaming of videos and photos of injustices. And tweets seem to be setting our nation’s political agenda.

Granted, social media and current technologies may be revealing raw views and emotional truths to which we didn’t have access in the past. In my view, what we seem to end up with is information overload and uncensored reactions.

As lawyers, our profession requires us to set a higher standard for our behavior.

When we are admitted to the bar, we take an oath of office. At the Neithercut Family Tribute with the Genesee County Bar Association, we read the Lawyer’s Oath that requires us to “never seek to mislead the judge or jury by any artifice or false statement of fact or law,” to “abstain from all offensive personality, and advance no fact prejudicial to

the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged” and to “in all other respects conduct myself personally and professionally in conformity with the high standards of conduct imposed on members of the bar as conditions for



the privilege to practice law in this State.” The American Inns of Court also has a Professional Creed that addresses practicing law with dignity and respect.

Whether you are representing your own agenda or attempting to win your case at all costs, incivility can cost you your reputation – with peers, judges and clients. Ultimately, it can cost you your business.

The cost of incivility at any level is high, but today more than ever our courts, our county and our country need attorneys to commit to and conduct ourselves accordingly.

As Mary W. Montagu, an 18th century poet, so eloquently stated, “*Civility costs nothing and buys everything.*” Civility begins with us.

Holiday Dinner – A New Twist

By Brian M. Barkey

It was 75 degrees outside on that late September day when Tina Burroughs called me to set up the first GCBA Holiday Dinner Committee meeting to plan this year’s event. How could it be that time already?

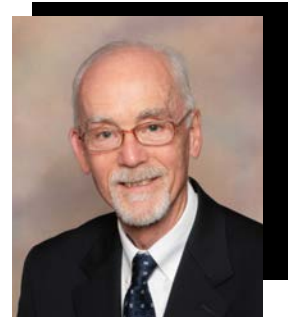
But we got working on it and I am happy to report that we are not only on track to have this event on December 21st but we are actually adding something new.

The usual parts—reserving the venue, recruiting volunteers, serving our guests, buying and wrapping presents, hats, gloves, mittens and scarves—we have done before but still represent a lot of time and work. So why are we looking to add something more?

There are really two reasons for this. First there are long lines and wait times especially downstairs in the Santa area, which is especially hard on the younger people who attend. Second, recent research has shown the tremendous role that literacy has in the development of young minds – the very people we bore the most. So armed with these factors, Linda Pohly went to work and found a free book giveaway program through an entity called First Books.

First Books provides reading material for children in need. It does this by furnishing age appropriate new books to organizations that serve needy children for the cost of shipping. The Holiday Dinner is such a program and the Bar Foundation which funds this program qualifies as an eligible organization. Linda has gone to the Flint Public Library and gotten their help to select appropriate titles for children in categories up to 12 years of age. We have ordered them from firstbooks.org and when they arrive, we will divide them into age categories for distribution the same way we divide presents for distribution by age. And this year, while the children are standing in line to see Santa and singing carols, they will also get a book to read and take home.

Of course, this will also create the need for a few more volunteers to sort and distribute books, and a few more contributions to pay for shipping, but the support of the GCBA has never failed us. Thank you all for your support of this wonderful event.



Brian M. Barkey

The Genesee County Sobriety Court

By Hon. Vikki Bayeh Haley



Hon. Vikki Bayeh Haley

The Genesee County Sobriety Court (GCSC) operates under the authority of Chapter 10A of the Revised Judicature Act; MCL 600.1060 and follows ten principles set forth by the National Association of Drug Court Professionals. (See www.nadcp.org). The objective is to reduce recidivism and restore alcohol dependent offenders to sobriety. According to the NADCP:

- Nationwide, 75% of Drug Court graduates remain arrest-free at least two years after leaving the program.
- FACT: Rigorous studies examining long-term outcomes of individual Drug Courts have found that reductions in crime last at least 3 years and can endure for over 14 years.
- FACT: The most rigorous and conservative scientific “meta-analyses” have all concluded that Drug Courts significantly reduce crime as much as 45 percent more than other sentencing options.

Sobriety Court operates under a “team” concept involving individuals from various disciplines within the criminal justice and social services systems who make recommendations to the Sobriety Court Judge. The team members include Judge Vikki Bayeh Haley, Prosecutor Amanda Doyle, Defense Attorney Jessica Mainprize Hajek, Deputy Thomas Nelson, representatives from Odyssey House, Probation Officers Andrea Johnson and Charlene Sierkowski, and Evaluator Sarah Santini.

Sobriety Court is open to individuals charged with either a felony or misdemeanor, residing in Genesee County who are 17 years of age or older. Violent offenders, as defined by MCL 600.1060g, are ineligible for the program.

The program is not limited to drinking and driving offenses. Alcohol must be either an element of or a contributing factor to the offense. The participant must also have a moderate to severe alcohol addiction, as determined by a standardized assessment administered by a GCSC probation officer.

A defendant may be referred for a sobriety court assessment at any time before sentencing and even before a plea as a condition of bond. After the assessment, the GCSC team determines if the particular defendant will be accepted into the program. If accepted, the case is reassigned to Judge Haley where it will remain. A plea is entered and the defendant is sentenced to Sobriety Court as a condition of probation. Mandatory minimum jail terms are still applicable to sobriety court participants.

The GCSC program is a treatment-based program

implementing many components of rehabilitation. It is divided into four phases. The first requires the participant to attend 90 twelve-step meetings in 90 days, and receive substance abuse counseling. Drug testing twice a week is mandatory. Alcohol use is monitored either through a breath test three times a day or an alcohol tether. Participants in Phase I are required to attend court sessions twice a month and meet regularly with their probation officer.

After completion of Phase I, participants may be eligible for a restricted license. Installation of an interlock device is required.

Over the next 18 to 24 months restrictions and requirements are gradually removed or modified as the defendant moves through the program.

Failure to comply with the requirements of the program may result in a sanction designed for the individual defendant and the nature of the violation. Sanctions include, but are not limited to, being held back from advancing to the next phase, work detail, additional counseling, additional 12-step meetings, jail or expulsion from the program. The GCSC judge decides what type of sanction to impose after receiving input from the team. If jail or termination is a possible sanction, the defendant is afforded full due process rights. In the event of termination, the case remains with Judge Haley for further proceedings.

Participants in sobriety court must pay \$300.00 for the program. Additionally, they are required to pay the costs of drug testing, Breathalyzer devices, interlock, and alcohol tether. Payment programs may be set up, and every effort is made to accommodate the needs of indigent individuals.

The National Center for DWI Courts attributes their success to frequent contact with the court and program intensity. It is also believed that listening to other defendants who have achieved long term sobriety through the program can help motivate defendants to reach their own goals of long term sobriety.

Graduations are celebrated in court. Many GCSC graduates return as observers to offer support and guidance to current participants. As one graduate told a group of new participants, GCSC offers motivated participants a better way of life, and “if you work the program, the program will work for you.”

Circuit Split: Section 1983 and the Contracts Clause

By Alec S. Gibbs



Alec S. Gibbs

The federal Constitution, through the Contracts Clause, prohibits a state from impairing the contractual rights of private parties. But what happens if a private or public contract is rendered null and void by a legislative action? Can those affected seek relief in federal court? Based on a recent decision of the Sixth Circuit Court of Appeals, the answer to that question is “No.”

There is no doubt that federal law provides for liability against any person acting under color of law who deprives another “of any rights, privileges, or immunities secured by the Constitution and laws” of the United States. See 42 U.S.C. § 1983. The Supreme Court has held that the rights guaranteed by section 1983 are to be “liberally and beneficently construed.” *Dennis v. Higgins*, 498 U.S. 439, 443, 112 L. Ed. 2d 969, 111 S. Ct. 865 (1991) (quoting *Monell v. Department of Social Services*, 436 U.S. 658, 684, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)).

Despite this modern approach, the Supreme Court, in the past, restricted the use of Section 1983. In the case of *Carter v. Greenhow*, 114 U.S. 317, 29 L. Ed. 202, 5 S. Ct. 928 (1885), the Court held that the plaintiff could not use the Section 1983 predecessor statute to enforce a rather unusual claim that cited the Contracts Clause. An indebted landowner attempted to pay back taxes through coupons that had been issued by the state. The state treasurer refused to accept the payment, and seized and sold the property to pay for the back taxes. The plaintiff sued in federal court, arguing that he had the right to pay the back taxes with the coupons. In rejecting his claim, the Court held that the Contracts Clause secured individual rights “only indirectly and incidentally.” Because the plaintiff could not show that he had been deprived of a right to a judicial proceeding to adjudicate his rights, he could not state a claim under the Contracts Clause.

The circuit courts are now divided on the continuing vitality of the *Carter* decision. In *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 887 (2003), the Ninth Circuit interpreted *Dennis v Higgins* to limit *Carter* to cases where the pleading only demonstrated a breach of contract claim and did not indicate that a right secured by the Constitution had been impaired by legislative action. In the case of *Crosby v. City of Gastonia*, 635 F.3d 634 (2011), the Fourth Circuit disagreed with this narrow reading, finding instead that the *Carter* case prohibited federal courts from allowing Section 1983 cases based on impairment of contract claims.

In the case of *Kaminski v. Coulter*, 865 F.3d 339 (2017), the Sixth Circuit followed the *Crosby* decision and held that the impairment of contracts by Michigan’s emergency managers, though legislative in nature and denying remedy through the filing of a breach of contract claim, did not create a cause of action through Section 1983. It is noteworthy that this argument was accepted by the Eastern District in the case of *City of Pontiac Retired Employees. Ass’n v. Schimmel*, 726 F.3d 767 (2012), a case that was later vacated by the Sixth Circuit, sitting *en banc*. See *City of Pontiac Retired Employees. Ass’n v. Schimmel*, 751 F.3d 427 (6th Cir. 2014). This decision was not addressed by the *Kaminski* court.

As a result of this decision, any legislative interference with the contractual rights of parties to private or public contracts must be redressed through a breach of contract action. However, this may not be the last that we hear of the *Kaminski* plaintiffs. The plaintiffs have sought *en banc* review and the existence of a clear circuit split may prompt the Supreme Court to resolve this matter. If so, this will be the first time that the United States Supreme Court has an opportunity to weigh in on the constitutionality of Michigan’s Emergency Manager law.

Congratulations!

From The Michigan Supreme Court to Genesee County Probate Court Judge Jennie E. Barkey, celebrating the Tenth Anniversary of Genesee County’s Mental Health Court. The Mental Health Court has graduated 264 participants since 2007 and has 55 current active participants.

For a summary of Mental Health Court activities, see the September/October issue of *Bar Beat*.



Hon. Jennie E. Barkey

“A Kid From Flint”

By Shelley R. Spivack

Flint native and former GCBA president Donald Rockwell was front and center at Cobo Hall on September 28th to take the oath of office as 83rd President of the State Bar of Michigan. His family, friends, and colleagues from Genesee County were there in full force to cheer him on. Traveling by bus and by car, 34 local bar members attended the inaugural luncheon as well as a private reception honoring Don, the second member of the GCBA to serve as president of the State Bar.

In his acceptance speech Don stressed his local connections and the impact growing up in Flint has had on his professional career. Referring to himself as just a “kid from Flint,” Don praised the education he received in the Flint Community Schools and at The University of Michigan-Flint, where he majored in physics and later served as the first president of the UM-Flint Alumni Society. Rockwell also had words of praise for Flint’s Kettering University, where he serves as general counsel.



Donald G. Rockwell

Having practiced for his entire career in the Flint area, Rockwell is well aware of the barriers many Michigan residents face when dealing with the legal system. Breaking down these barriers and making “Access to Justice” a reality, and not just a catchphrase, will be Don’s primary goal during his term of office.

Don’s graciousness and civility were evident to all during his speech as he individually mentioned and thanked all GCBA members and friends who attended the inauguration. Just as Genesee County has been enriched by Don’s presence over the years, we are sure that the State Bar of Michigan will flourish under his leadership.



Don Rockwell with Judge Beagle and Judge Yeotis



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Pre-Employment Testing—New Strategies, Old Concerns

By Gregory M. Meihn



Gregory M. Meihn

Recent Cases

On August 24, 2015, the Equal Employment Opportunity Commission (EEOC) and Target entered into a settlement wherein Target agreed to pay \$2,800,000 to resolve a charge related to discriminatory practices involving the use of three employment assessments. According to the EEOC, the tests were not sufficiently job-related, violated the ADA, and disproportionately screened out applications for positions based on race and sex.

Following the Target case, the EEOC filed suit on August 26, 2016 against an automotive dealership that made a job offer contingent upon a successful drug test. The case is EEOC v Bell Leasing, Inc., Civil No. 16-CV-02848, in the U.S. District Court for the District of Arizona. In this case a prospective employee seeking work as a product specialist tested positive for a single drug. The drug was prescribed by the employee's physician to treat a disability and would not affect her ability do the job. Bell Leasing, Inc. not only rejected the proffered reason, but refused to allow her to change medications and retake the test. According to the EEOC, "[e]ven when drug tests are permitted under the Americans with Disabilities Act (ADA), they cannot be used to discriminate against qualified people with disabilities... Companies need to be mindful that they may need to make exceptions to drug use policies

as a reasonable accommodation."

The EEOC'S Perspective on Pre-Employment Testing

The EEOC recognizes that employers often use tests and other selection procedures to screen applicants for hire and employees for promotion. These include cognitive tests, personality tests, medical examinations, credit checks, and criminal background checks.




However, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, as amended, of 1990, and Age Discrimination in Employment Act of 1967 prohibit the use of discriminatory employment tests and selection procedures. EEOC offers "Best Practices" for employment testing and selection:

- Employers should administer tests and other selection procedures without regard to race, color, national origin, sex, religion, age (40 or older), or disability.
- Employers should ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used. The test or selection procedure must be job-related and its results appropriate for the employer's purpose. While a test vendor's documentation supporting the validity of a

Continued on next page



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Pre-Employment Testing

continued from page 9

test may be helpful, the employer is still responsible for ensuring that its tests are valid under Uniform Guidelines on Employment Selection Procedures (UGESP).

- If a selection procedure screens out a protected group, the employer should determine whether there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure.
- To ensure that a test or selection procedure remains predictive of success in a job, employers should keep abreast of changes in job requirements and update the test specifications or selection procedures accordingly.
- Employers should ensure that tests and selection procedures are not adopted casually by managers who know little about these processes. No test or selection procedure should be implemented without an understanding of its effectiveness and limitations for the organization, its appropriateness for a specific job, and whether it can be appropriately administered and scored.

New Strategies for Pre-Employment Testing

Gamification is the process of using games to evaluate an employee's skills, abilities, and many other important attributes before issuing the offer of employment. "Gamification

takes the essence of games . . . and applies these to a range of real-world processes inside a company from recruiting to learning and development." *Leadership*, Jeanne Meister, March 30, 2015.

Karl Kapp, in *Kapp Notes*, April 24, 2014, says

Games are a great tool for displaying the application of knowledge. . . . This can be coding, operating simulated machinery or even what skills they use to negotiate or close a virtual sale. . . . People are using games to evaluate creativity, problem-solving abilities, ability to multi-task, ability to stay focused. . . . even using them to evaluate the personality of the applicants.

At present, gamification is being used by an increasing number of private and public employers. Despite the successes, it has significant Title VII, ADEA, and ADA problems to overcome as a testing tool. Video games screen out persons with disabilities, temporary and permanent, such as impaired vision or hearing, paralyzed or missing limbs, or mental disabilities. At the time of writing, there are no reported cases nationwide or with the EEOC regarding gamification and pre-employment testing processes. Guidance is needed from the EEOC on this issue.

Cycling North and South of the Border

by Shelley R. Spivack

Colombia

For years I avoided Colombia. Despite claims that it was a modern day Garden of Eden, I had visions of being caught in the cross-fire between the FARC rebels and the government in their decades old war. But in the fall of 2016 peace came to Colombia. The war ended and the country's president was awarded the Nobel Peace Prize. So for me, it was time to pack my bags.

Sitting just four degrees north of the equator, Bogota rises over 8,000 feet above sea level and is the fifth largest city in the Americas. Bogota is also a city that is crazy for cycling and the perfect place to start my 12-day Colombian Andes cycling tour. *Ciclovia*, an event that each Sunday brings up to a million people onto the vehicle-free streets, welcomed us to the world of Colombian cycling. Starting in the winding mural-lined streets of Candelaria, Bogota's historic district, we eventually made it to the top of one

of several mountain peaks surrounding the city. As my legs and lungs cried out in protest, I soon realized that this climb was just a preview of the next 10 days.

A short plane ride took us to Cali where we started our tour through Colombia's scenic coffee growing region. As we rode through the valleys of the Central Range of the Andes, the mountains seemed to magically rise from the ground, verdant green carpets intersected by billowing puffs of white clouds. Villages dotted the landscape as we began our ascent up to towns with names like Buena Vista (Beautiful View) where savory three-course lunches and freshly roasted Colombian coffee nourished our aching bodies.

"Fincas" or guest ranches abound in the Colombian Andes. Several offered luxuries such as spas and poolside bars;



Shelley R. Spivack

others were simple and homey with wrap-around porches and hand-crafted hammocks where you could simply relax and forget the rest of the world.

Our “free” day was spent hiking in the Corcora Valley, part of a national forest where Colombia’s endangered national tree, the towering “wax palm,” is protected from destruction. Four-wheel Jeeps ferry backpackers from around the world to this surreal landscape. On our hike down the mountain, a ‘unicorn’ suddenly seemed to appear in the clearing. But on second look, no horns, just a solitary white horse standing perfectly still.

On day 11 as we relentlessly pedaled uphill towards Anserma, a 16th century city that sits atop one of the Andes’ magnificent peaks, I realized that this ride was the hardest thing I have ever done - even harder than taking the bar exam - but a lot more exciting!



Quebec

This year Canada celebrated its 150th birthday. In observance, my brother and I along with friends from both sides of the border decided to do a self-guided cycling trip through Quebec. Starting in Montreal on Canada Day (July 1st) we spent one week riding along La Route Verte, (The Green Route) a network of bike trails linking Montreal to Quebec City.





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Riding on a trail can be a very relaxing and enjoyable experience—no cars, no traffic, and lots of quirky small towns along the way. And as we were in French Canada, it felt like we were riding in Europe, but without the expense of flying overseas. My high school French enabled me to read the road signs, but whenever I tried to converse, my brain thought I was still in Colombia and the words came out in Spanish.

Along the way we camped in two Canadian national parks. While I am not a fan of sleeping on the ground, our lakeside campsite offered an unrivaled sunset view. Other accommodations included inns and B & B’s catering to cyclists. A French-Canadian specialty, Poutine - made of French Fries topped with cheese curds and gravy, was on the menu at every stop.

To reach Quebec City we rode along the St. Lawrence River and then ferried across. What met us was one of the oldest (1608) walled cities in North America celebrating its Summer Festival. The winding cobblestone streets were jammed with both locals and tourists as the party atmosphere filled the air.

As America seeks to close its borders, our neighbors, north and south, are welcoming us with open arms. I would encourage you to take advantage of their warmth and hospitality.

Photos from both trips can be accessed at: <https://www.flickr.com/photos/shoshannarobin/albums>.

An Evening to Honor 100 Years of Neithercut Lawyers

More than 200 friends and colleagues took note of 100 years of service by the Neithercut family of lawyers to the community and the legal profession. The celebration took place on October 5th at the Flint Golf Club. Pictured left to right are Hon. Geoffrey Neithercut and Edward Neithercut. To view more pictures of this event go to <http://www.gcbalaw.org/gallery.cfm?pageid=56>

Photo credit: Shelley R. Spivack



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Welcome New Admittees



Congratulations to Kelley Kiertzner, Derek Warner, and Amanda White who were recently admitted to the practice of law in Michigan.

Pictured left to right: Angela Wheeler, Kelley Kiertzner, Paul White, Hon. David Newblatt, Derek Warner, Amanda White, Jacinda White, Hon. Mark W. Latchana, and Donald G. Rockwell.

