

November/December 2011

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Genesee County Bar Association



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Table of Contents

- | | |
|---|------------------------|
| 4 Happy Holidays! | by Karen L. Folks |
| 6 Tech Talk | by LindaLee Massoud |
| 7 Civil Motions: Be Careful What You Ask For | by Glenn M. Simmington |
| 8 Converting a C Corporation to an S Corporation—Is it the Right Time? | by Suzanne R. Lozano |
| 10 Holiday Dinner | by Brian M. Barkey |
| 10 Who's on the Bench? Hon. Jennie E. Barkey | by Roberta J.F.Wray |
| 11 LJAP Offers Assistance on a Broad Range of Concerns | by Martha D. Burkett |

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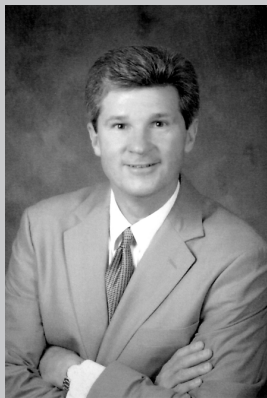
Jakeway, Jakeway & Jakeway, PC 8

Yeo & Yeo
CPAs and Business Consultants 9

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Happy Holidays!

By Karen L. Folks, President



Karen L. Folks

Holiday Dinner 2011

Holiday traditions! The phrase evokes a virtual kaleidoscope of warm memories, spicy scents, joyous music, colorful surprises, and delectable treats. Each of us is immediately reminded of stories that come from our special family holiday traditions. However, by this time each year, chances are pretty good that you are swapping some great stories with your Genesee County Bar Association colleagues that come from one of the most remarkable and generous holiday traditions to grace this greater Flint community.

The annual GCBA Holiday Dinner at the Masonic Temple began in December 1992. We fed about 229 people. Today, with the abundant donations of time and money from at least 100 of Santa's favorite helpers, we feed close to 1000 guests, provide over 356 gifts to children (courtesy of the man himself, Santa Claus), take about 600 pictures, and sing along to the infectious Christmas music. Anyone who has volunteered at this event will tell you that the excitement and energy in the room elevates this charitable community event to one of the most joyous of holiday parties. Come. Volunteer, and be a part of this holly, jolly GCBA family holiday tradition!

Courtroom Drama at the FIA January 25, 2012

Christmas dinner is over and you plan to take a little time off to spend with the family before the New Year's celebrations begin. "Oh, what to do?" If you can't get your fill of courtroom drama the GCBA is here to help. No, you do not need an intervention. The GCBA offers a 3-step plan. First, reserve the evening of January 25, 2012 on your calendar and plan on attending a special showing of the hit 1957 movie, *12 Angry Men* with family and colleagues at the FIA.

Second, select and view as many courtroom dramas as you can. Enjoy with family and friends over the holidays. It will give you an opportunity to occasionally pause the movie at critical moments to lecture to your rapt (or trapped) audience about the finer legal points that the director failed to adequately cover or develop.

Third, and most satisfying, attend the GCBA's presentation of *12 Angry Men* at the FIA on January 25, 2012. As one of the most notable courtroom dramas of all time this film was recently selected for preservation in the United States National Film Registry by the Library of Congress as being "culturally, historically, or aesthetically significant." *12 Angry Men* explores the technique of consensus building, the concept of reasonable doubt and underscores the importance of the jury system. Come, share pre-curtain discussion, drinks, and hors d'oeuvres with friends and colleagues in the galleries of the FIA. Then indulge your passion for courtroom drama with the GCBA's special showing of *12 Angry Men*.



COURTROOM DRAMA

Can't get enough of the courtroom during the week? Want your family to appreciate your work more? Interested in the treatment of attorneys by the media? Try a courtroom drama over the holidays!

1. *And Justice for All* (1979) R
2. *Accused, The* (1988) R
3. *Advocate, The: The Hour of the Pig* (1993) R
4. *American Tragedy* (2000) PG13
5. *Amistad* (1997) R
6. *Anderson Trial, The* (1970) NR
7. *Before and After* (1996) PG13
8. *Body of Evidence* (1993) R
9. *Breaker Morant* (1980) PG

10. *Carlito's Way* (1993) R
11. *City Hall* (1996) R
12. *Civil Action, A* (1998) PG13
13. *Client, The* (1994) PG13
14. *Confession, The* (1999) R
15. *Court-Martial of Billy Mitchell, The: One Man Mutiny* (1955) NR
16. *Cry in the Dark, A: Evil Angels* (1988) PG13
17. *Dance with a Stranger* (1985) R
18. *Dandelion Dead* (1994) NR
19. *Dangerous Evidence: The Loria Jackson Story* (1999) NR
20. *Death Sentence* (1947) NR
21. *Deceiver: Liar* (1997) R
22. *Deliberate Intent* (2000) PG13
23. *Devil and Daniel Webster, The* (1941) NR
24. *Diary of a Serial Killer* (1997) R
25. *Dishonored Lady* (1947) NR
26. *Eight Men Out* (1988) PG
27. *Eureka* (1983) R
28. *Evelyn* (2002) PG
29. *Evidence of Love: A Killing in a Small Town* (1990) R
30. *Evil in Clear River* (1988) PG13
31. *Few Good Men, A* (1992) R
32. *Final Justice* (1998) NR
33. *Firm, The* (1993) R
34. *Ghosts of the Mississippi* (1996) PG13
35. *Gift, The* (2000) R
36. *Gingerbread Man, The* (1998) R
37. *Good Mother, The* (1988) R
38. *Guilty by Suspicion* (1991) PG13
39. *Hart's War* (2002) R
40. *Helter Skelter* (1976) NR
41. *High Crimes* (2002) PG13
42. *In Cold Blood* (1967) R
43. *In the Name of the Father* (1993) R
44. *Indictment: The McMartin Trial* (1995) R
45. *Inherit the Wind* (1960) NR
46. *Jagged Edge, The* (1985) R
47. *Judgment in Berlin* (1988) PG

48. Juror, The (1996) R
49. Jury, The (2002) NR
50. Just Ask My Children (2001) NR
51. Just Cause (1995) R
52. King and Country (1964) NR
53. Kramer vs. Kramer (1979) PG
54. L.A. Law: The Movie (2002) NR
55. Lipstick (1976) R
56. Losing Isaiah (1995) R
57. Madeleine (1950) NR
58. Man in the Glass Booth, The (1975) PG
59. Map of the World, A (1999) R
60. Mesmerized (1947) NR
61. Midnight in the Garden of Good and Evil (1997) R
62. Mistaken Identity: Switched at Birth (1999) NR
63. Music Box (1989) PG13
64. My Cousin Vinny (1992) R
65. Naked Lie (1989) R
66. Nuts (1987) R
67. Paradine Case, The (1947) NR
68. Pelican Brief, The (1993) PG13
69. People vs. Larry Flynt, The (1996) R
70. Philadelphia (1993) PG13
71. Physical Evidence (1989) R
72. Price of a Broken Heart, The (1999) NR
73. Primal Fear (1996) R
74. Prisoner of Honor (1991) PG
75. QB VII (1974) NR
76. Rainmaker, The (1997) NR
77. Red Corner (1997) R
78. Reversal of Fortune (1990) R
79. Rules of Engagement (2000) R
80. Runaway Jury (2003) PG13
81. Separate But Equal (1991) PG
82. Shakedown (1988) PG
83. Shocked: Mesmerized (1986) R
84. Skokie (1981) PG13
85. Sleepers (1996) R
86. Snap Decision (2001) NR
87. Steal This Movie! (2000) R
88. Storyville (1992) R
89. Sweet Hereafter, The (1997) R
90. Thousand Acres, A (1997) R
91. To Kill a Mockingbird (1962) NR
92. Tomorrow (1972) PG
93. Trial (1992) NR
94. Trial and Error (1962) NR
95. Trial by Jury (1994) R
96. True Believer (1989) R
97. Twelve Angry Men (1957) N
98. Vendetta (1999) R
99. Verdict, The (1982) R
100. Where the Truth Lies: 90 Days at Hollyridge (1999) NR
101. Winslow Boy, The (1999) G
102. Word of Honor (2003) NR

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By LindaLee Massoud

Henry Hanflik caught me at the Annual Meeting and wondered when there might be another technology article. (Honestly, I have been so busy putting *Bar Beat* editions together that I had not even thought of it!) He kindly referred me to an article he had read in the *New York Times* online. The URL (Uniform Resource Locator: “address”) for that article is at the bottom. It is a good, quick read.

As I was reading the article, it occurred to me that it might be useful to review some of the services “in the cloud” that you might like to take advantage of. “In the cloud” means that it (files, pictures, etc.) is stored somewhere in cyberspace rather than on your computer. Compare it to the computer server in your office, except it is in “lala land” rather than in your office. With Internet access becoming so ubiquitous and dependable, it is reasonable to consider the possibility of incorporating some cloud computing into your daily life. Here are some ideas:

1. **Back up files.** You already know of the importance of backing up your office data files. Hopefully you have a good plan in place and back up regularly. (If you don’t, start now before you have a catastrophe.) In addition to, or instead of, backing up your files onto the server in your office, you could back them up into the cloud (as your off-site storage location). Numerous services are available, and the monthly fee is quite low. Read more at Google by typing “online file sync services.” I have had good experience with Dropbox (<http://www.dropbox.com>).
2. **Store pictures.** You might also want to use an online service to

host your personal photos. At the very least, it is an excellent way to back them up. An advantage is that you can provide a password and let your family and friends view them privately online. An example of a common photo sharing program is Picasa (<http://www.picasa.com>). Just a word to the wise; make sure you have at least two copies. Don’t trust any company *that* much.

3. **Share files.** If you would like to access files from several locations, or if several people will be working on the same files, you might share them using a file-sharing program. Dropbox, mentioned earlier, is an example. To create the *Bar Beat*, for example, we use a Dropbox account to store and edit the files. It is also possible to access files from a smart phone. Storage space is free or available at a low cost, depending on storage volume.
4. **Purchase/subscribe to software.** SaaS stands for “Software as a Service” and it is becoming more common for programs attorneys might use. Rather than purchasing a CD (license) and installing the software on your computer, one purchases a license (“subscription”) to use the program and access it across the Internet. (Of course, that means if you lose the Internet, you will lose access to the service until you are back online.) Two important categories of software you might consider purchasing online are the office productivity tools (word processor, spreadsheet, etc.) and law office management software.



LindaLee Massoud

With Internet access becoming so ubiquitous and dependable, it is reasonable to consider the possibility of incorporating some cloud computing into your daily life.

Regarding office productivity tools, there are several office-compatible programs available online. Microsoft offers “Office 365” for a low user price. Alternatively, Google has a similar set of tools (<http://documents.google.com>), although a Google e-mail account is required. Documents can be shared with other users and worked on collaboratively.

The second use of an online SaaS program might be for a law office management program. Several law office SaaS programs are available on the market. For more information, contact the Practice Management Resource Center at the State Bar of Michigan. (<http://www.michbar.org/pmrc/content.cfm>).

As time goes on, we will become more and more dependent on the “cloud” for our computing needs, just as we have become more and more dependent on our wireless devices. The limitations are only in the mind of the user!

As promised, the link to the technology article is (all one long address with no hyphens or spaces): <http://tinyurl.com/7po2daf>

Civil Motions:

Be Careful What You Ask For

By Glenn M. Simmington



Glenn M. Simmington

Perhaps the finest lawyer I'll ever know, (and a lawyer I have been privileged to try to emulate from the moment I entered private practice some thirty years ago), shared with me the maxim that "you do not win cases by filing motions." This received wisdom was, of course, a better guide before the "tort reform movement" gained traction in the mid-1980s, making "litigation" a four-letter word.

Today, depending on your specific area of civil practice, it is much more frequently possible (especially if you are defense lawyer) to win a case by filing a motion, if it is a *motion for summary disposition* or dismissal. With relatively rare exceptions, moreover, wins derived from the success of such motions now survive Michigan's appellate processes. Because entire law review articles and book chapters have been devoted to the subject of summary disposition motion practice, however, no effort will be made here to explore the when's, why's or how's of motions filed under MCR 2.116(C).

Neither space nor theme, similarly, allow that much attention be given here to the second category of pretrial motion that is (too) frequently brought; the *discovery motion*. Indeed, the quantum of wisdom I was intended to receive all those years ago, (without doubt, at least some was missed by the rookie lawyer), likely had nothing much to do with the manner or means by which we lawyers might trouble our judges with that class of requested judicial assistance. The giving of sage advice concerning such motions was probably thought (and almost certainly is) unnecessary: if you read them, the court rules regarding discovery motions explain themselves, and if you don't, trial judges will readily impart

their own wisdom (and will do so with both swiftness and certainty).

Because such motions seek to control the adversary—to make opposing counsel, in effect, "play by the rules"—they certainly have their place.

So, in those "old days," (the pre-tort reform era), the "motions that do not win cases" which I was warned about were the third type of commonly filed motions, to wit: *motions in limine*. The suggestion then, which neither the passage of time nor the advent of tort reform have undermined, is that these motions are often of little or no real value, and that they can frequently, instead, garner unintended (and potentially adverse) consequences.

This does not, of course, mean that trial attorneys should not make use of such motions. They should. Because such motions seek to control the adversary—to make opposing counsel, in effect, "play by the rules"—they certainly have their place.

Beyond the purpose of trying to ensure that your opponent complies with the rules, however, *in limine motions* brought, for example, to thwart your opponent's ability to make proper use, by proper means, of (presumptively) admissible evidence which you simply find inconvenient, or even potentially devastating, may do nothing more than expose the degree to which you fear that evidence.

Thus, if the aim of a particular *in limine* motion is to keep such evidence from the jury, but your particular judge generally tends "to let the sun shine in," the prospects for success in

that effort should be considered slim to none. In that case, the "craftier" strategy may be to accept the fact that the evidence is coming in, and then to behave as if the evidence "really doesn't mean anything." (Or, better yet, to suggest that your opponent's reliance on the evidence betrays some ill will, or improper motive, lurking inside your adversary.)

If, on the other hand, the evidence you actually *do fear* simply cannot be safely ignored, and you have no realistic expectation that the judge will exclude the evidence by issuing an *in limine* order, some of the arguments that would have been advanced in an *in limine* motion can be adapted to their best and most effective use *in front of the jury*, i.e., during your objection to opposing counsel's attempt to admit the evidence.

In short, since you will rarely lose a motion *in limine* which merely asks that evidentiary and procedural rules be followed, no harm (and much good) can come from bringing these motions. Motions "to exclude" evidence that is arguably relevant (and not clearly and *unduly prejudicial*), however, can "tip your hand" prematurely, possibly robbing you of the ability to effectively undermine the evidence before your jury. Better to embrace the evidence, "let the sun shine" on those lemons, and, if you can, use the ripened fruit to make your lemonade.

Endnotes

- 1 "Crafty" as in "skillful craftsman," as in Earl J. Cline.

Converting a C Corporation to an S Corporation— Is it the Right Time?

By Suzanne R. Lozano, CPA, CVA



Suzanne R. Lozano

On May 12, 2011, the Michigan Legislature passed two bills that repealed the Michigan Business Tax and created a 6% corporate income tax. Under these bills, S corporations will not be subject to the corporate income tax. Shareholders will pay only the individual income tax on business income. For corporations that have been contemplating electing S corporation status, this may be the time to assess the advantages and disadvantages.

Subchapter S of the Internal Revenue Code allows qualified corporations to be taxed as a flow-through so that income, gains, and losses pass through to the shareholder's return without tax consequences to the corporation. S corporations can provide significant tax advantages over C corporations. However, a few significant

tax consequences should be reviewed before deciding to convert from a C corporation to an S corporation.

Built-in gains tax

Normally, S corporations aren't subject to tax. However, corporations that were previously C corporations are **taxed on the net built-in gains that the C corporation had on the date the S election became effective if those gains are recognized.** An example of this is appreciated property. A corporation holding assets worth \$1,000,000 in market value with an adjusted basis of \$400,000 has \$600,000 of built-in gain on its balance sheet. If those assets are disposed of within 10 years (due to recent tax legislation, 5 or 7 years in certain instances), then those net built-in gains are subject to

the maximum corporate tax rate which is currently 35 percent.

In some instances corporations may be subject to built-in gains tax even if they don't dispose of any assets. If the corporation is a cash-basis taxpayer, then they may be subject to built-in gains tax when they collect an account receivable as an S corporation that accrued during the C corporation period.

It is very important to plan for built-in gains tax in order to minimize its impact. Valuing the corporation's assets and liabilities through appraisals of the assets as of the date of the S corporation election is the crucial first step. *This establishes the value as of the inception of the S corporation to ensure that appreciation*

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that takes place after that date will not be subject to the built-in gains tax.

When a business valuation is done, one thing that should not be overlooked is the value of goodwill and other intangibles. These items may not have a value on the balance sheet but often have a higher value than one would expect. It is important that an accurate appraisal is done as of the date of the S election in the event there is an IRS audit.

Unused losses

If you are a corporation and you have net operating losses that have not been used and they are unable to be carried back to prior years, that must be taken into account when deciding whether to convert to an S Corporation. Those losses do not carry over to the S corporation and do not pass through to the shareholder -- they will be lost. The tax savings of switching to the S corporation will need to be weighed against abandoning the net operating losses.

LIFO inventories

C corporations that convert to S corporations and use LIFO inventories must pay tax on the benefits they derived by using LIFO. The tax may be spread over four years in equal installments. This is one consequence to consider when analyzing the conversion -- the cost of paying the tax versus the possible tax gains from converting to S status.

Passive income

S corporations that were formerly C corporations are subject to a special tax if their passive investment income (such as dividends, interest, rents, royalties, and stock sale gains) exceeds 25% of their gross receipts and the S corporation has accumulated earnings and profits carried over from its C corporation years. If this occurs for three consecutive years the corporation's election to be an S corporation terminates. One way this can be avoided is to distribute the earnings and profits, which would then be taxable to shareholders.

Weigh the factors

Before making a decision to switch from C to S status, it is important to weigh all factors from both the corporation's viewpoint and the owners' or shareholders' viewpoint. A complete understanding of the tax effects is essential. A Certified Public Accountant, Certified Valuation Analyst or tax professional can help you make the right choice.

Suzanne R. Lozano, CPA, CVA, is a Principal in Yeo & Yeo's Saginaw office and a member of the firm's Business Valuation Team and Construction Team. Her expertise is consulting for small businesses, especially for management and tax issues, with an emphasis in the construction, health care, retail and professional services sectors. She is a Certified Valuation Analyst with the National Association of Certified Valuators and Analysts.



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THRIVE.

Holiday Dinner 2011

By Brian M. Barkey

Can you believe we have been doing the Holiday Dinner for 20 years?

20 years ago, a committee of about five people planned the entire thing. After the idea was planted by Judge Duncan Beagle, we raised approximately \$1,000 by taking contributions from around the table at a committee meeting. When we discovered that this was not enough, it was matched by a generous grant from the Genesee County Trial Lawyers Association under Tom Pabst's leadership.

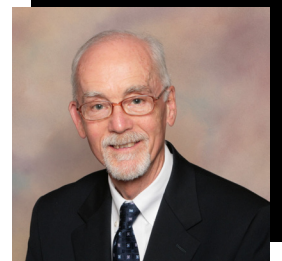
We held the whole affair on the main floor of the Temple Dining Room, with Santa seeing children on stage. We did not think to buy them presents until two years later. We fed 133 people, some of whom Santa went out and recruited by standing outside the Temple on Saginaw Street and waving them in from passing cars. Later he recruited the guys who were sitting in Halo Burger across Saginaw Street to get out of the cold. The entire dinner took less than two hours.

But something happened that night that created a lasting memory for all that were in attendance. There was

only one shelter in those days and the people we fed were on their own after they left us. We were pretty sure that many were spending that cold night in stairwells and empty buildings. They clearly appreciated the warmth and the meal. At the end of the evening, Santa took the microphone on stage and told all those in attendance that we had not forgotten them.

And we have not. We use three floors of the Temple now and we have fed as many as 1073 hungry people in a single night. Santa now hears the Christmas wishes of the children who attend (young and old) and also gives them presents: 356 last year. When I see their parents tell them not to open the present, I know that most likely it will be the only one some of them will get. There are now more GCBA members volunteering to help than attended the first Dinner.

The Christmas season should be a special time for children and we sincerely hope that it will be special in a good way. This year, for an alarming number of them, it looks very bleak. 41,000 people were cut off from public



Brian M. Barkey

assistance on November 1st according to the most recent estimates from Michigan's Department of Health and Human Services. An alarming number of those cut off receive food assistance – half of them children. If there was ever a time when our effort will be needed, this year is it. Agencies like the Food Bank, the shelters, the Salvation Army, and churches that have food programs are in a panic trying to get ready for this. We should get ready too.

It has been a rough year for everyone, including some members of the Genesee County Bar Association. I know you will soon be inundated by requests for your holiday time and money. But if these 20 years have proven anything, it is that we will not forget these people. Please do what you can. If you cannot send a check, please volunteer. This year's holiday dinner will be held the Tuesday before Christmas, December 20th, from 4:00 p.m. to 7:00 p.m. I hope to see you there.

Who's on the Bench? Hon. Jennie E. Barkey

By Roberta J.F.Wray

Passionate: the one word I would choose to describe Probate Judge Jennie E. Barkey if asked to do so. Her love for the job is evident in the tone of her voice and the broad smile she displays when she talks about the court and her work in it.

"I love probate practice for its variety," she said. "I'm thrilled with probate lawyers in Genesee County. They are prepared, well versed, and have schooled me in any number of ways since my appointment. Their courtroom decorum is beyond reproach," she added.

Serving as Genesee County Friend of the Court from 1989 to 2006, Judge

Barkey had established herself as an advocate for the mentally ill, the elderly and the children who are the province of probate practice. Her appointment to the Probate Bench by Governor Jennifer Granholm in February 2006, was a natural progression.

"I particularly enjoy working with mentally ill children and adults," she said. She regrets that "Michigan's law requires people to be in crisis before they can receive court-ordered mental health care," she said in an article she co-authored with the Honorable Milton L. Mack, Jr., of Wayne County Probate Court. The Mental Health Court aspect



Hon. Jennie E. Barkey

of her position gives her an opportunity to try to make things better for people who are caught in the criminal justice system rather than being treated for their mental illnesses.

As for what she finds most personally challenging in her position, Judge Barkey says, "I have to keep my Irish monster

Continued on next page

LJAP Offers Assistance on a Broad Range of Concerns

By Martha D. Burkett, M.P.A., L.P.C., N.C.C., C.A.A.C., BRI-II, A.C.S
LJAP Program Administrator



Martha D. Burkett

Proactive, expansive, confidential, and free are all words that describe a very important State Bar member service. The Lawyers and Judges Assistance Program (LJAP) is one of the oldest lawyers' assistance programs in the country. It employs a total wellness approach in assisting individuals who are faced with issues related to depression, gambling, substance use disorders, stress, marriage and family issues, career transition, life stage adjustment, and other general wellness issues.

Since 1979, the program has been a confidential source of guidance and support to attorneys, judges, and law students throughout the State of Michigan. Through LJAP's confidential toll-free phone line, lawyers or those concerned about them can receive information about ways to address substance abuse and other mental health issues impacting a lawyer's ability to ethically practice law – including referral information and the opportunity to schedule an in-person conversation that may lead to assessment and treatment recommendations.

In recent years LJAP has shifted its focus from merely reactive to preventative. By providing education and support for individuals, families, law schools, and employers, LJAP can assist in circumventing trouble, and/or begin to assist program participants through difficult times, minimizing harm to individuals, families, and the community.

Highly skilled professionals, experienced in dealing with substance use and mental health disorders as well as general wellness issues, are working to ensure that bar members and students are supported and the public is protected. The LJAP clinical staff is devoted to helping individuals get back on track before they begin to experience formal consequences related to difficulties that they face. Where formal consequences have come to fruition, LJAP is ready to provide assistance via its Attorney Monitoring Program.

MCR 9.114 (B) allows a lawyer who has been investigated for professional misconduct relative to a mental health and/or substance use disorder to enter into "contractual probation", which is an agreement with the attorney in question that is implemented by the Attorney Grievance Commission and facilitated in cooperation with LJAP. Under MCR 9.114 (B) a lawyer may consent to a period of probation not to exceed three years. Every attorney referred by the Attorney Grievance Commission to LJAP has an opportunity to address what may be the underlying cause of misconduct. For many, the probationary/monitoring experience results in lasting and positive transformation.

Similarly, law students sometimes incur legal infractions that may be related

to substance use and/or mental health disorders. Some students get referred to LJAP as a result of reporting these infractions to their law schools. Others may be referred once they have begun the bar application process and learned that those offenses will impact their character and fitness evaluation. Because law students are the future of the legal profession, LJAP has sought to extend its preventative education to this population. By continuing to develop and deliver preventative educational programming for students, LJAP seeks to support the students' strengths and help them to eliminate any budding difficulties before they can impact their abilities as lawyers representing clients.

LJAP is a service for State Bar members that is supported by member dues. The LJAP staff recognizes that the issues that bring lawyers, judges, and students to the program are deeply personal and must be handled with the utmost discretion. All inquiries and services are handled in accordance with applicable federal and state privacy guidelines. For more information about the LJAP program and its services, view our website at or call our confidential help line: (800) 996-5522.

Who's on the Bench? Continued

under control with people who take advantage of the elderly."

Judge Barkey is married, with two grown children. She was educated at Oakland University, Class of 1976, and Thomas M. Cooley Law School, Class of 1979.



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