September/October 2011

BAR BEAT

Genesee County Bar Association

Robert M. Crites
Adventures in Namibia
See page 10

Genesee County Bar Association
315 E. Court St., Flint, Michigan 48502-1611
(810) 232-6012
For editorial information, call (810) 232-6000.

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.

Table of Contents

Advertisers

Strategic Planning

By Karen L. Folks, President

Karen L. Folks

On June 15, 2006, members of the Genesee County Bar Association Board of Directors met and established the framework for the 2006 – 2009 GCBA Strategic Plan Matrix. We determined the following statement would guide our activities:

> *In three years, the Genesee County Bar Association will be a welcoming and inclusive community that fosters collegiality and professional development, promotes a constructive partnership with the bench, and elevates the visibility of the bar and its members' expertise in the community.*

Our goals included working to increase GCBA member retention and participation, facilitating professional development, engaging in strategic community outreach, enhancing GCBA member communication and feedback, and continuing to strengthen the GCBA's governance by refining the work of its Board of Directors. Much has been accomplished in these intervening years. A GCBA welcome package is distributed to new attorneys. New members are profiled in *Bar Beat*. More educational seminars are offered at extremely competitive prices. We present more free legal seminars to the community. We have retained the Holiday Dinner, the nursing home and hospice program, Law Day events, and increased communication with GCBA members.

Now, two years beyond its time frame, we are again engaged in strategic planning. What possible reason could there be to chuck it and begin all over again? As I attempt to answer that $64,000 question, consider this: Have you ever cleaned out your basement or garage? All of those cherished treasures, home improvement project materials, unique gifts, and cracked or broken household items were so valued that you kept them all. Cleaning forced you to evaluate their current usefulness, cost of repair, their priority and whether a fresh approach, a re-arrangement of parts, or a creative re-purposing of these items could meet your present day needs.

We live and work in a rapidly changing world, and the practice of law has been impacted in ways large and small. Beginning about three years ago the bottom fell out of the economy, and with no bounce back in sight business has plummeted. Collecting earned fees is a struggle, and some attorneys are looking for non-traditional opportunities to supplement their practice. Extreme demands on an attorney's time from work, family and community involvement have resulted in a diminishment of formality in favor of a more casual approach and a move toward practice short cuts. Recent advances in communication and business solutions technology leave many attorneys behind, while many young attorneys, feeling the economic pinch, forego a formal office with secretarial services. The pool of potential clients has diminished because more legal information is available online. There is an increased availability of do-it-yourself "legal kits," and piece-meal legal work is the newest development. More attorneys are flooding the profession, an increasing number are reaching retirement age, and some attorneys maintain a regional practice, serving "Mid and Southeast Michigan".

I invite you to add to this list. The point is that strategic planning is about setting aside our comfortable, preconceived ideas and evaluating data

Continued on page 6

Legacy Giving—Preserving the Health of Your Foundation

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

Walter P. Griffin

The Genesee County Bar Foundation, like all foundations, relies on gifts for support. Gifts come in many ways. Gifts made during a person's lifetime are tax deductible. Gifts made upon a person's death, however, provide long-term opportunities for foundations and allow foundations to continue their good work over the long term.

Legacy gift giving provides a win-win opportunity for both donors and charities. Donors and their heirs receive significant tax benefits. Charities receive the funds to allow them to continue to do good work for society.

There are several ways individuals can make a lasting gift to a charity. An individual can establish a trust for the benefit of the charity, giving money to that trust during the individual's lifetime. The individual can receive income from the assets held in trust during his or her lifetime and upon death, the charity receives the balance of the funds held in trust. This method of giving provides the donor with an income tax deduction during the life of the donor.

Legacy gift giving provides a win-win opportunity for both donors and charities.

Another way to make a legacy gift is to designate a charity as a beneficiary in your estate plan. A charitable gift as a part of your estate plan can exempt the money given to the charity from estate or inheritance tax. The most tax efficient way to make a legacy gift is to designate a charity as either the beneficiary of an IRA or retirement plan directly or as part of your estate plan. IRA and retirement plan benefits are taxed to the individual as they are paid out. If IRA or retirement plan assets are given to a charity upon an individual's death, the charity pays no income tax on that gift.

Individuals may give appreciated, publically traded stock assets to a charity during their lifetimes. This gift strategy allows the donor to avoid paying capital gains tax on those assets. The charity pays no tax either. As a result, the charity receives a bigger gift while the donor receives a tax deduction for the full value of the gift. This strategy of giving appreciated, publically traded stock works well during one's lifetime because it helps an individual avoid taxes on appreciated assets.

Until December 31, 2012, individuals may give away up to five million dollars and not pay a gift tax. For individuals with a significant net worth, inheritance tax is payable at the rate of 35 percent upon an individual's death for assets in excess of five million dollars. Making a charitable gift during one's lifetime can avoid this inheritance tax. As of January 1, 2013, the inheritance tax is scheduled to become payable on assets held by individuals in excess of one million dollars at the time of their death. If this law goes into effect, a charitable gift during one's lifetime, or upon one's death, can help avoid the impact of those inheritance taxes.

There are many ways an individual can make a lasting gift to a charity. Benefits abound for both the donor and the charity. Consider the Genesee County Bar Foundation as part of your estate plan.

Reflections on Shade v. Wright *2010 WL 4907746*

By Stephanie E. Satkowiak

Stephanie E. Satkowiak

Shade v. *Wright* follows the trials and tribulations of a divorced couple who bargained for a move by the custodial parent from Midland, Michigan to Ohio. While the judgment of divorce permitted this move, it also, of interest, granted the litigants joint legal and joint physical custody.

As so often happens, the parties became dissatisfied with this arrangement soon after entry of the judgment of divorce and plaintiff, mother, filed a motion to modify the parenting time on the grounds that there had been a sufficient change in circumstances to warrant modification. Defendant, father, filed his own motion for a change in custody. The trial court denied father's motion, but granted mother's motion and altered parenting time accordingly. Father filed a motion for reconsideration that was denied, and he then filed an appeal.

Only two of father's arguments will be discussed: 1) the trial court erred in changing parenting time without a showing of proper cause or a change in circumstances; and 2) the trial court erred in modifying parenting time without a finding of best interest.

As to the first argument, the *Shade* court held that "a more expansive definition of proper cause or change of circumstances is appropriate for determinations regarding parenting time when a modification in parenting time does not alter the established custodial environment."

Mother argued that the simple maturation of the child was a sufficient change in circumstances to warrant a parenting time modification for more flexibility and to better accommodate the child's schedule. Father argued that this was not a sufficient consideration under the requirements in *Vodvarka*. The court actually agreed with both parties acknowledging that the standards set forth in *Vodvarka* were designed to erect a barrier against needless disruption in the life of the minor child. However, simple changes in the child's life due to maturation were exactly the circumstances contemplated for changes in the parenting time schedule. The court further stated that the goal of custody was stability in the child's environment, and the goal of parenting time was to foster a strong bond between the child and his or her parents. "[T]he very normal life change factors that *Vodvarka* finds insufficient to justify a change in custodial environment are precisely the types of considerations that trial courts should consider in making determinations regarding modification of parenting time."

As to the second argument, the court noted that while custody decisions required discussion of all the best interest factors, parenting time decisions were capable of being made with discussion on the contested issues only. While the best interest factors under MCL 722.23 and MCL 722.27a(6) were relevant to parenting time decisions, "[t]he trial court's modification of defendant's parenting time, which was minor and did not significantly alter the number of defendant's parenting time days, was in the minor child's best interests because it allowed the child to participate in social activities and extra-curricular activities that she desired to participate in high school."

Thus, where alteration of the parenting time schedule will not result in significant alteration of the actual number of parenting time days it is not necessary to meet the *Vodvarka* standard for change in circumstances. Instead, simple maturation or the child's desire to "have a life" may be sufficient to support a change in parenting time.

Strategic Planning Continued from page 4

in order to forecast future needs. We know that this process will result in a new road map for the GCBA. How do we ensure that it leads to accessible, innovative, relevant, and responsive opportunities that meet your needs? Please, speak up: Email, text or call! Do not assume that someone else has already suggested your idea. You are the architects, as well as the beneficiaries, of this organization. Together, let's make sure we design the kind of plan that inspires our legal community to live an extraordinary future.

Changes to Michigan's Environmental Cleanup Statute

By Kevin A. Lavalle

Kevin A. Lavalle

The Michigan Department of Environmental Quality ("DEQ") has begun to promulgate guidance documents that dictate how these modifications will be implemented.

Since its last major overhaul in 1995, Michigan's environmental cleanup statute, Part 201, MCL 324.20101 *et seq*., remained essentially unchanged until the waning days of the Granholm administration. Before leaving office, the former governor signed into law a series of bills that significantly modified the State's approach to sites of environmental contamination. The Michigan Department of Environmental Quality ("DEQ") has begun to promulgate guidance documents that dictate how these modifications will be implemented.

One of the most dramatic modifications in the newly amended act involves Baseline Environmental Assessments ("BEAs"). Prior to 1995, owners and operators of real property were subject to strict liability for the cleanup of any contamination present in the soil and/or groundwater of their property. That liability scheme was abolished in 1995 and replaced with one based on fault with one commonly overlooked or ignored exception. Any person acquiring contaminated property after 1995 must perform a BEA or they will be liable for cleanup costs.

The new amendments to Part 201 should make it easier (and cheaper) to perform a BEA. A comparison of the pre-amendment definition of a BEA to the post amendment definition illustrates this point. The 1995 version of Part 201 defined a BEA as:

> [A]n evaluation of environmental conditions which exist at a facility at the time of purchase, occupancy or foreclosure that reasonably defines the existing condition and circumstance at the facility so that, in the event of a subsequent release, there is a means of distinguishing the new release from the existing contamination.

The 2010 amendments modified that definition to read:

> [A] written document that describes the results of an all appropriate inquiry and the sampling and analysis to confirm that the property is a facility.

The term "facility" has a technical definition under Part 201 and means any place where contaminants are present at levels exceeding the cleanup level for unrestricted residential use.

The pre-amendment requirement that a person perform a detailed investigation to define the contamination so as to be able to distinguish any new release from an existing one has been eliminated. A person may still wish to establish a means to distinguish a new release from an old release, but that choice is purely a business decision and not required under Part 201.

Previously, once it was determined that performance of a BEA was necessary to secure liability protection, it became critical to understand the past and future uses of the property in order to choose the proper category of BEA to perform. The new amendments abolished all the former categories and, by implication, created a "one size fits all" BEA.

Prior to the 2010 amendments to Part 201, a person could either submit a BEA to the DEQ with a petition seeking a determination of adequacy or submit it for disclosure only. A person seeking a determination of adequacy was, in essence, asking the DEQ for an up front opinion of the adequacy of the BEA in securing liability protection. Conversely, under the disclosure method, once a report was in the mail, the submittal process was essentially complete. The new amendments eliminated the option of asking for a determination of adequacy and all BEAs must now be submitted under the disclosure option.

Even if a person qualifies for liability protection through the proper completion of a BEA, Part 201 requires that any new owner/operators take steps to protect the public from exposure to any hazardous substances present on the property. These duties are commonly referred to as "due care obligations" and remain with the owner/operator of the property as long as the property is a facility. In extreme situations, "due care obligations" can bear a scary resemblance to cleanup obligations. The new amendments

Continued on next page

extend "due care obligations" to all units of government that allow public access to contaminated properties for an express public purpose, such as a public park or municipal office building.

Even if a person qualifies for liability protection through the proper completion of a BEA, Part 201 requires that any new owner/operators take steps to protect the public from exposure to any hazardous substances present on the property.

A person performing a cleanup is required to comply with certain concentration limits of hazardous substances or risk-based screening levels ("RBSL"). Which set of RBSLs applies depends on the category of the cleanup being performed, which in turn depends on the use of the property. The 1995 version of Part 201 contained ten cleanup categories. The new amendments eliminated all but two. The remaining cleanup categories are residential and everything else (aptly named "non-residential").

Another new change in Part 201 involves the manner in which cleanups proceed. Under the former version, Part 201 followed the "mother may I" theory of environmental cleanups. Persons performing a cleanup were required to submit reports at phased intervals seeking the DEQ's approval to proceed to the next step. The new amendments create an environmental cleanup "express pass" allowing a person to undertake self-implemented response activities. Upon completion of the remedial actions that satisfy the applicable set of RBSLs, a person may submit a "No Further Action Report" to the DEQ. Failure to submit such a report would seem to make it difficult to subsequently sell the property. The DEQ previously flirted with a similar procedure to close leaking underground storage tanks sites. That procedure was discontinued because of abuses and the number of closure reports that failed to meet even the bare minimum requirements.

Finally, the new and improved Part 201 creates a new appeal process for persons feeling aggrieved by a technical decision of the DEQ staff. Upon payment of a $3,500 review fee, decisions can now be appealed to the newly created Response Activity Review Panel. The decision of the review panel is merely a recommendation, however, and the final decision still belongs to the Director of the DEQ.

How Scary is That????

By Roberta J.F. Wray

Kathleen M. Main

Think of your scariest experience. Was it when you were seven or is it yet to come?

GCBA member Kathleen M. Main specializes in scary experiences – has since she was a child. Her favorite holiday is, predictably, Halloween. What started as a home-based hobby amusing the neighborhood children has evolved into a business venture. The hobby got so popular that it was transplanted from the Main's home to Loch Lomond golf course on South Dort Highway north of Grand Blanc.

The normally benign nine-hole golf course is transformed for the month of October into the Thirteenth Realm. A haunted trail dubbed the Nocturnal Nightmare and a maze-like contrivance known as the Twisted Wicket are designed to scare the bejeezus out of anyone older than 12.

The course is populated by 25 to 30 live actors in scary-to-terrifying make-up. Kathy says some seven-year-olds have gone thru accompanied by parents and been thoroughly amused. Some adults, on the other hand, have been unequal to the fright.

The Thirteenth Realm is open weekends from September 30 to October 30 this year, beginning at dusk and running until midnight.

Who's on the Bench? Hon. Nathaniel Perry, III

By Roberta J.F. Wray

Hon. Nathaniel Perry, III

Judge Nathaniel C. Perry, III was first elected to the 68th District Court in 1990 and began his service on January 1, 1991. He obtained his Law degree from Texas Southern University in Houston. He also holds a BA in History from Fisk University in Nashville, TN, and a degree in Education Administration from Eastern Michigan University.

Before entering law school, Judge Perry taught History in the Flint Community Schools for ten years. He has continued his association with Flint schools and currently serves as head basketball coach at Southwestern Academy.

As a judge, Perry says, his best days happen when his rulings "help set people on a better path." Sometimes that means giving them a break. Sometimes that means sending them to jail. His worst days involve seeing victims who are either very young or very old and listening to the bad things that have been done to the most vulnerable of our citizens.

Judge Perry has been generous with his help and advice to new attorneys and judges, when requested. Asked what he would change about the criminal justice system if he could, he said, "People should be more educated about the issues that affect them." Perry said that includes teaching respect for others and better moral values. While those things are not specific to the criminal justice system, he said, better education in general would carry over to the courts and law enforcement.

The judge says he plans to run for reelection in 2014 when his current term ends.

Adventures in Namibia

By Robert M. Crites

Robert M. Crites

My daughter, Kris, and I decided to take a trip to Africa. After considering and then ruling out climbing Kilimanjaro, I booked a hunting and sightseeing tour with a young couple, Danie and Cariena, who are ranchers and outfitters in Namibia (formerly German Southwest Africa).

It is a beautiful semi-arid country with a varied landscape. In the west there is a long Atlantic shoreline (a skeleton coast) bordered by the Kalahari Desert, open plains in the south central region and the north consists of somewhat rugged country with more precipitation and therefore more trees and other types of vegetation.

We hunted two ranches, one containing approximately 15 square miles and the other 31 square miles. We lived at the ranches, ate every meal with our outfitters, traveled with our hosts and had an opportunity to observe the various aspects of ranch life which continued, uninterrupted, all the time we were there.

All the antelope (which is what we were hunting) were completely wild. We spent a lot of time spotting game from the top of rock formations after which, we would typically attempt a stalk. Since the various species have to contend with leopards, cheetahs, jackals, and some hunters, stalking successfully can be a challenge.

In seven days we shot an oryx, a springbok and a red hartebeest. The steaks (prepared by Cariena) from these animals were excellent. Every part of the animals was either eaten or put to other use by ranch staff. Only the skull, horns, and cape were shipped back to the United States for mounting.

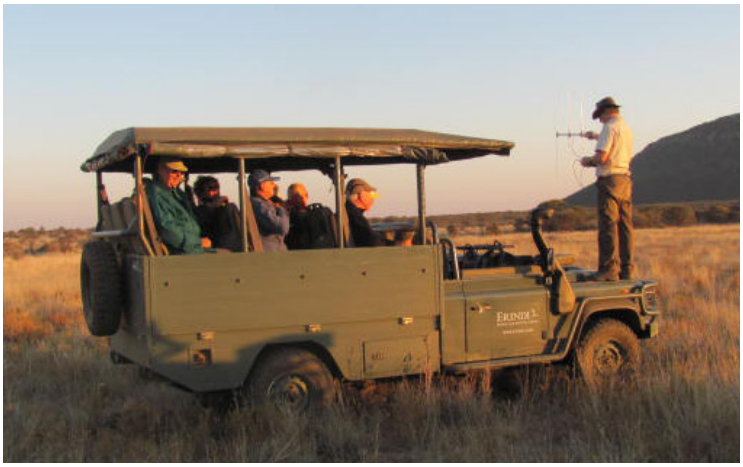
After the hunt was concluded we visited two game parks, one private and the other owned by the government. In both places the accommodations were excellent and completely modern, and the food was as good as I have ever eaten anywhere.

There are two principle ways to observe animal life in the park. At each location, there is a large watering hole near the lodge, which is kept full, and there are viewing areas near these holes. Various species of animals utilize and drink from the sources day and night. At one such hole, we observed a couple of thousand zebra come to the hole and leave over a period of two hours. At another such site, we saw hippopotami and crocodiles as well as elephants and rhinoceros. These large animals would come to the hole and quite often engage in some type of interaction, such as pushing each other around, then drink and ultimately amble away.

Another way to observe the animals is to either drive through the park in a private car (where permitted) or travel on Land Rovers that are especially configured for viewing the wild life in the area. One night we were out looking for a pride of lions, one of which had been collared with a radio transmitter. We had an antenna which was supposed to make it possible to find them.

We joined two other Land Rovers that headed off into the brush looking for the lions. After jouncing around for half an hour or so with no success we headed back out to the road at which point we came upon the lions ambling down the road completely unconcerned.

Although the country is sparsely populated, (2.1 million people, second only to outer Mongolia) the capital, Windhoek, is a modern city of approximately 300,000, and there are dozens of beautiful lodges and parks scattered throughout the country. It is a great country to visit if you want to get off the beaten path and see wild Africa.



Meet Our New Members

Terri Stangl

Terri Stangl is the Executive Director of the Center for Civil Justice, a non-profit organization with offices in Saginaw and Flint. Stangl was previously the Director of Litigation and Training for Legal Services of Eastern Michigan (1987-96). Originally from Ann Arbor, she is a graduate of Yale University and the University of Michigan Law School. She is a past president of the Saginaw County Bar Association (1993-94). She is currently serving her third term on the Representative Assembly and is Co-chair of the State Bar Committee on Justice Initiatives.

Strangl recently served on the Access to Justice work group on the State Bar's Judicial Crossroads Task Force and on the Solutions on Self-Help Task force established by Supreme Court Justice Marilyn Kelly. She also owns Great Lakes Flotation, LLC in Swartz Creek.

Eric Alan Yeaster

Eric Alan Yeaster, a native of Milford, received his BSE in Mechanical Engineering and MBA from Lawrence Technological University. After completing his MBA he continued his education and received his JD from the University of Detroit Mercy School of Law in 2010. Given his technical background Eric is interested in the technical aspect of criminal law, such as internet crime or crimes that involve technical or scientific evidence. Eric also has a strong business background and enjoys advocating for small businesses. Currently Eric is building his own practice focusing on Criminal Defense, Small Business Advocacy, and Mediation. Eric's interests include cooking, photography, biking and traveling with his girlfriend, Debra.

New Legislation Will Limit Michigan Cash Assistance to 48 Months

By Jill L. Nylander

Jill L. Nylander

A new state law that will end cash assistance in the form of Family Independence Program (FIP) benefits for roughly 12,000 Michigan families was passed by the legislature on August 24, 2011, and became effective September 6, 2011 as Public Act 131 of 2011. The law will enforce an existing 48 month lifetime limit on federal money to assist needy families. In Michigan, FIP is administered by the Department of Human Services (DHS), and Genesee County DHS currently has close to 8,000 active FIP cases. It is anticipated that approximately 1,200 of these cases will reach their lifetime assistance level and have their benefits permanently terminated as early as October 1, 2011.

Following October 2011, the impact for the community will be ongoing. In every subsequent month thereafter, additional needy families will reach their lifetime cap and be barred from further assistance.

The law will have retroactive effect allowing DHS to close cases this fall that have been receiving cash assistance for the last four years. While it is still unclear exactly how DHS will interpret the law or apply the 48 month limit, it is anticipated that more about the implementation policy will be known by mid-to-late-September 2011. Earlier this month, DHS notified potentially affected clients of possible termination of their benefits and indicated they could expect confirmation by September 2011.

It is important to note that the 48 month limit will not apply to other forms of DHS benefits such as food assistance, Medicaid, child day care, State Disability Assistance, or county health plan assistance. Clients or community members who may be subject to these terminations should call the local 2-1-1 community referral service for information on alternative health and human services available locally.

The law will have retroactive effect allowing DHS to close cases this fall that have been receiving cash assistance for the last four years.

Genesee County Bar Association
315 East Court Street
Flint, Michigan 48502-1611

RETURN SERVICE REQUESTED

PRSRT STD
U.S. Postage
P A I D
Flint, MI
Permit No. 125