

# The Mentor

THE NEWSLETTER OF THE STATE BAR OF MICHIGAN'S  
MASTER LAWYERS SECTION



*"The voice of trust through experience."*

Summer 2016

## Message from the Chair

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Our summer seminar held on June 23, 2016 in Rochester, Michigan was a success. Over 60 persons were in attendance, and most rated the content of the presenters and food served at the Mama Mia Tuscan Grille restaurant as "excellent." Special thanks go to the co-chairs of the Summer Seminar, Kathleen Newell and James Loree, together with committee members Vincent Romano, Ruthmarie Shea, and Charlotte Shoup.



Richard J. Ruhala, Chair

The summer is passing quickly and soon it will be time again for our annual council and section meeting. New officers and council members will be elected to serve during the coming year, September 2016–September 2017. All members of the Master Lawyers Section are welcome to attend this meeting to be held on Friday, September 23, 2016 in the DeVos Convention Center in Grand Rapids.

The annual business meeting is scheduled to begin at 9:30 a.m. on September 23, followed by the section program at 10:30 a.m., featuring noted Michigan trial attorney Tom R. Pabst, who will discuss the topic of "Forced Arbitration." His topic will explain how trials are being eliminated to resolve disputes in most commercial transactions.

The State Bar will present its 50-year "Golden Celebration" membership awards at the luncheon scheduled to begin at 12:00 noon on September 23. You are urged to sign up now to attend the luncheon as it is a highlight of our annual meeting.

As this *Mentor* message will be my final one while serving as the chair of the section, I wish to thank the council for giving me the opportunity this past year to serve the membership of the Master Lawyers Section.

—Richard (Dick) Ruhala, Section Chair

2015-2016

MASTER LAWYERS SECTION

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6289 Tanbark Ct  
Flint, MI 48532-2157  
P: (810) 733-5154

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(734) 255-9119

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Send correspondence and  
material for publication to:

Roberta M. Gubbins

[rmgubbins@yahoo.com](mailto:rmgubbins@yahoo.com)

## Notes from the Editor

Summer is in full bloom in Michigan, and so is our summer issue of the *Mentor*.

Thanks to our talented members we have some enjoyable and diverse articles. Constitution Day activities and volunteer opportunities are described by Dick Fellrath, while Judge David Jordan writes of district court veterans courts and the need for lawyers/volunteers to assist our veterans who find themselves in need of help. If you're uncertain about the type of bar membership to maintain after retirement, Fred Gade's article has some answers for you.

James Johnson continues his discussion of student-athletes' right to publicity (*Michigan's Untold Story, Part II*); Scott Bassett advises using Google's Chromebook laptop because of its imperviousness to viruses, and Judge Giovan describes a will contest case that shows hard cases make bad law. Finally, Sheila McCoy writes of modern-day slavery—sex trafficking.

The committee and I hope you enjoy this month's issue, and we look forward to seeing your article on our roster.

—Roberta



Roberta M. Gubbins, Editor



# Constitution Day

By Dick Fellrath

On September 16, 2016 we celebrate Constitution Day, the day we commemorate the rules which have governed our nation since 1781. It is one of our lesser known federal holidays but one of great importance to us in the legal field. I need not repeat the stories of the creation of this great document which are too numerous to count.

The focus of the Bar's annual celebration is how this document works and its effect on our lives today. Each year attorneys throughout the state meet with grade school students (usually the sixth grade) to guide them in through a debate over the various sections of the Constitution and how they have been resolved, usually in the Supreme Court.

One of the most popular scenarios is the case of the incarceration of Japanese Americans at the beginning of World War II. This presentation deals with the presumed conflict between the right of the president as commander of the armed forces to make war and the right of the individual to due process before incarceration. It is not the first case of suspension of *habeas corpus*; Lincoln used it during the Civil War quite liberally. In any event, the students are divided into several groups which are instructed to defend the positions of the Japanese aliens and citizens and the U.S. government as well as other groups which had positions in the matter. I have found the students take their positions seriously and present good arguments.

I am asking members of the Bar and especially master lawyers to participate in this annual exercise which gives students a "hands on" understanding of how our most important document affects them. There is plenty of room to insert additional facts, if you know of them.

The materials for these presentations are on the state bar website. If you would like to participate in this educational exercise please contact me at 'law-fell@wowway.com'. If you already have a school you

would like to direct, you just need to download and make arrangements to make your presentation. If you need a school, contact me and I will attempt to find you a nearby school where you can present.



Dick Fellrath

## About the Author

**Richard F Fellrath** was born in Dearborn, Michigan on November 30, 1940. He was admitted to the State Bar of Michigan and the United States Court of Military Appeals in 1967, the U.S. Supreme Court in 1970, and the U.S. Claims Court in 1987. Before beginning solo practice in October of 1996, Richard Fellrath was employed by Fitzgerald & Dakmak, P.C. from 1991–1996 and with Miller, Canfield, Paddock and Stone from 1985–1991. Mr. Fellrath was a partner with the firm Milmet, Vecchio, Ward & Carnago, P.C. from 1971–1985 and was an officer in the Army Judge Advocate General's (JAG) Corps 1967–1971. Mr. Fellrath's educational background includes undergraduate study at the University of Notre Dame (BA, 1963) and study in law at the University of Detroit (JD, 1966). He is the author of "Canadian/United States Bankruptcy—Questions of Jurisdiction," 90 Comm LJ 44 (Feb 1985), and "What if the Land Is Polluted," Mich Bus L.J. Vol. XV #4 p. 34 (Jan 1985) and was chairman of the Bankruptcy Section of the Detroit Chapter of the Federal Bar Association during the years 1985 to 1987. Mr. Fellrath specializes in bankruptcy and reorganization. He also does work in the government contracts and environmental areas of law.

Richard F. Fellrath  
Attorney at Law  
4056 Middlebury Dr.  
Troy, Mi 48085  
Tel: (248) 519-5064  
Fax: (248) 519-5065

# Veterans Treatment Courts Across Michigan Need Your Expertise

By Hon. David Jordan, Retired

It is encouraging to know that so many lawyers age 60 and over are looking for pro bono work to keep their skills while winding down and retiring from the law. I believe legal representation to justice-involved military veterans whose cases are being heard in one of Michigan's veteran treatment courts offers an excellent opportunity for such service.

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**Their mission is to hold veterans appropriately accountable for their offense while getting them treatment for the causes of their problems.**

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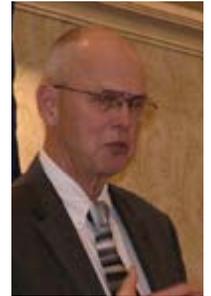
Veterans treatment courts sprang from a Buffalo, New York experiment in 2008. Their mission is to hold veterans appropriately accountable for their offense while getting them treatment for the causes of their problems. This requires a structured probationary term often lasting 18 months to 2 years. Many veterans are self-medicating with alcohol and other substances to deal with underlying issues such as traumatic brain injury and/or post-traumatic stress disorder. A treatment team including judges, prosecutors, defense attorneys, probation officers, the VA and other treatment professionals, and other community resource providers work in a collaborative, non-adversarial way to support justice-involved veterans and get them the help they have earned and so richly deserve. A special feature of a veterans treatment court is the pairing of each veteran with a veteran mentor, who serves as a supporter, motivator and friend. The sacred bond veterans share is of immeasurable help in fulfilling the promise of the veterans treatment court. The goal of veterans treatment courts is to leave no veteran behind.

While veterans are dealing with their criminal case(s), it is common that other legal issues arise which cannot be handled by the veterans court defense attorney. By way of example, these include domestic relations cases involving divorce, child custody, and child support; housing issues involving evictions and foreclosure; driver license issues involving anything you can think of; and employment issues involving hiring, discipline and firing. As experienced practitioners, you know troubles often come in bundles, not neatly separated law school problems. Finances are, more often than not, a barrier for veterans in trouble to pay for legal representation.

An updated list of Michigan's veterans treatment courts is available online, at [courts.mi.gov/vetcourt](http://courts.mi.gov/vetcourt). On this page a current listing of the courts is found in the lower right corner. It is updated twice a year. My experience is that calling the court and asking for the veterans court coordinator will quickly put you in touch with the person you want to talk with. It is further my expectation that these courts will be happy to have available, experienced practitioners to offer pro bono legal services. I urge you to consider reaching out to help veterans who have stood up for us. It's the least we can do.

## About the Author

**Judge David Jordan**, retired, formally served in the 54B District Court in East Lansing. He is a Michigan State University graduate and holds a law degree from the University of Southern California. He is an adjunct professor at WSU Cooley Law School. He is the former judge of the Ingham County Veterans Treatment Court, which began in March, 2010.



Hon. David Jordan

# When I Retire Should I Change My Bar Membership Status to Inactive or Emeritus—or Just Stay Active??

By Alfred Gade

In 2004 the Michigan Supreme Court approved a State Bar request for a new emeritus status for senior lawyers who are over age 70 or hold Bar membership for at least 30 years. Emeritus status is a personal election by the Bar member, and no one is required to elect it. Attorneys who elect emeritus status (although exempt from the payment of Bar dues) *may no longer practice law* in Michigan.

In July 2005, the State Bar took the formal position that the receipt of referral fees was a right limited to lawyers who are licensed to practice law. Thus the receipt of such fees may violate the prohibition of emeritus lawyers practicing law. While the Master Lawyers Section (then known as Senior Lawyers Section) protested this interpretation, as it did not believe an emeritus member was engaged in the practice of law if he did nothing further than refer the matter, this is still an open question.

## What other status can I choose at retirement?

Check the State Bar website under [Dues FAQ](http://www.michbar.org/generalinfo/dues) (<http://www.michbar.org/generalinfo/dues>) for a full definition of the Bar membership options available: *Active Membership, Inactive Membership, Emeritus Membership and Resignation.*

For our part, the Master Lawyers Section Council advised in 2005 and continues to advise today that senior lawyers need to think about this before choosing emeritus status or inactive status. Should you choose inactive status you will not be eligible to practice law in Michigan and if you have less than 50 years of membership you will have to continue to pay dues, but you may return to *active status and the practice of law* if you file a petition, within *three years* of going Inactive, with the Bar demonstrating that no disciplinary action has been taken or is currently pending in any jurisdiction. Once you choose *emeritus status* you are likely never to practice law again, unless you pass the bar exam and

go through the character and fitness process.

## Conclusion

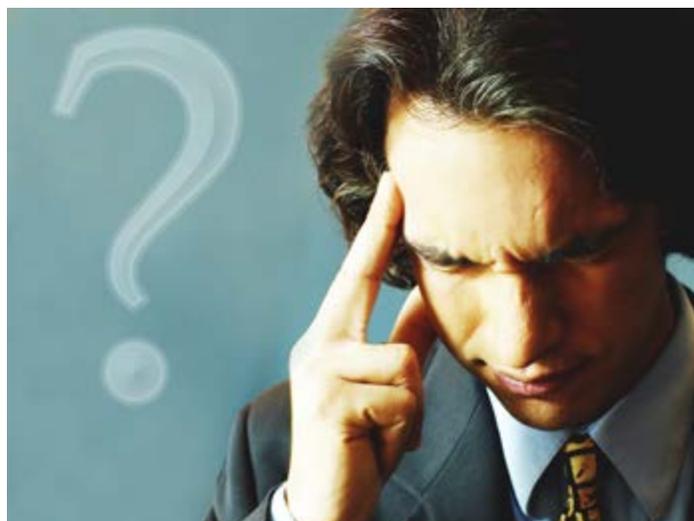
The Master Lawyers Section Council recommends you stay an active status member, or choose Inactive Status for at least the first three years of your retirement and then go to emeritus status (if you wish) with continued State Bar membership benefits (except no practice of law) and continued dues free Master Lawyers Section membership.



Alfred Gade

## About the Author

*Alfred Gade is a retired corporate lawyer who did product liability and complex litigation work for 10 years at Chrysler Corporation and 26 years at Ford Motor Company. He has been a member of the Master Lawyers Section Council since its inception and presently is of counsel with the Detroit firm of Cothorn & Mackley PC, where he does mediation work.*



# Michigan's Untold Story—Part II

By James A. Johnson © 2016

*Dedicated to Sidney B. Williams, Jr., registered patent attorney & of counsel to Flynn, Thiel, Boutell & Tanis, P.C., who was a genuine student-athlete (chemical engineering & quarterback—U. of Wisconsin), NFL/CFL, American Intellectual Property Law Association Board of Directors, ABA Section of Intellectual Property Law Financial Officer, 1987-88 president of the National Investors Hall of Fame, Sidney B. Williams, Jr. Scholarship Program and many other accomplishments.*

Sidney B. Williams, Jr. is the first African-American quarterback in the Big Ten Conference. He played for the University of Wisconsin at Madison in 1956-58. Sidney led Wisconsin to a 7-1-1 record in 1958 losing only to Rose Bowl Champion Iowa. A genuine student-athlete, Sidney majored in chemical engineering and later earned a juris doctor degree at George Washington University in D.C. His legal career includes serving as a patent examiner in the U.S. Patent & Trademark Office and later executive director of trademarks and domestic patents for Upjohn Company.

Today Sidney B. Williams, Jr. is of counsel to Flynn, Thiel, Boutell & Tanis whose principal office is located in Kalamazoo, Michigan. The firm provides a variety of services including patents, trademarks, copyright and other related intellectual property matters.

In 1994 Sidney B. Williams received the University of Wisconsin's Distinguished Alumnus Award. He is married to Carolyn H. Williams, a retired and distinguished judge of the 9<sup>th</sup> Circuit Probate Court, Kalamazoo County.

## Right of Publicity

For years there has been a groundswell of talk that college athletes should be paid and share in the revenue generated by their schools and conferences. The exclusion of student-athletes' rights of publicity has been litigated. Former UCLA basketball star Ed O'Bannon, the principal plaintiff in *O'Bannon v. NCAA*, filed a lawsuit in 2009 against the NCAA and the Collegiate Licensing Company for their failure to compensate him during and after his collegiate athletic career for the use of his

name, image and likeness. Subsequently, *O'Bannon* was consolidated with a lawsuit brought by former University of Nebraska quarterback Sam Keller to form *In re NCAA Student-Athlete Name and Likeness Litigation*. The plaintiffs disputed that the required signing of Form 08-3a by each student athlete gives the NCAA a right of publicity for commercial purposes. On August 8, 2014, Chief Judge Claudia Wilken of the Northern District of California ruled in favor of the plaintiffs in *O'Bannon*, holding that the NCAA rules violate anti-trust laws. Judge Wilken rejected the plaintiff's proposal to receive money for endorsements to protect student athletes from commercial exploitation.

In October 2015 a three-judge panel for the Ninth Circuit Court of Appeals in *O'Bannon* rejected District Judge Claudia Wilken's ruling that colleges in the NCAA should be permitted to pay student-athletes \$5,000 per year for the use of their names and likenesses. The court said that this figure is arbitrary and any payments to athletes threaten the NCAA's amateurism model. However, the court did affirm that the NCAA had violated antitrust rules by restricting players' ability to trade on their images and likenesses.

As of August 1, 2015 the NCAA has permitted member schools to provide up to full cost of attending college for the student-athlete above the athletic scholarship. However, lawyers for the plaintiffs have requested that an 11-member panel of the Ninth Circuit review the three-judge panel's ruling that college players are not entitled to deferred compensation of as much as \$5,000 per year. The question of student-athletes' right of publicity and the sharing of revenue generated from

athletic competition has not been completely resolved. In order to address the student-athlete publicity rights, a brief discussion of the law of the right of publicity is necessary.

### Distinction of Rights

The right of publicity is a protectable property interest in one's name, identity or persona. Every person, celebrity or non-celebrity, has a right of publicity that is the right to own, protect and commercially exploit one's identity. The genesis of the legal right of publicity is rooted in and intertwined with the right of privacy.

The right of privacy protects against intrusions upon one's seclusion or solitude to obtain private facts for public disclosure that would be highly offensive, false or embarrassing to a reasonable person. In short, this is a right to be left alone. However, privacy and publicity rights become entwined when an appropriation of another's name or likeness for one's own benefit occurs without permission. Notwithstanding, the right of privacy is distinguishable because it is a personal right, non-assignable and terminates at death.

### Proprietary Interest

An individual has the right to control, direct and commercially use his or her name, voice, signature, likeness or photograph. Publicity rights may include the right to assign, transfer, license, devise and to enforce the same against third parties. Today, 19 states have publicity statutes which differ widely and at least

25 more, by common law. Thirteen states do not recognize the right of publicity. It is the commercial value, together with the commercial exploitation without prior consent, that triggers a cause of action. The unauthorized use, in a commercial context, engenders money damages or equitable relief by way of an injunction or both.

### Conclusion

Fame is valued. The right of publicity protects the athlete's proprietary interest in the commercial value of his or her identity from exploitation by others. Advertising is the quintessential commercial speech and a violation of the right of publicity is a tort that quintessentially consists of advertising. The crux of the right of publicity is the commercial value of human identity. In order to lawfully and properly exploit this legitimate proprietary interest, it is just like a game—one must know the rules. Although some progress has been made in the student-athletes' publicity rights, many questions remain. In other words, stay tuned.

### About the Author

*James A. Johnson* of *James A. Johnson, Esq. in Southfield, Michigan* concentrates on sports and entertainment law and related intellectual property litigation. Mr. Johnson also handles serious personal injury, insurance coverage cases, and federal crimes. He is an active member of the Michigan, Massachusetts, Texas and Federal Court bars. He can be reached at [www.JamesAJohnsonEsq.com](http://www.JamesAJohnsonEsq.com)



# Want a Secure and Affordable Laptop? Skip Windows and Mac

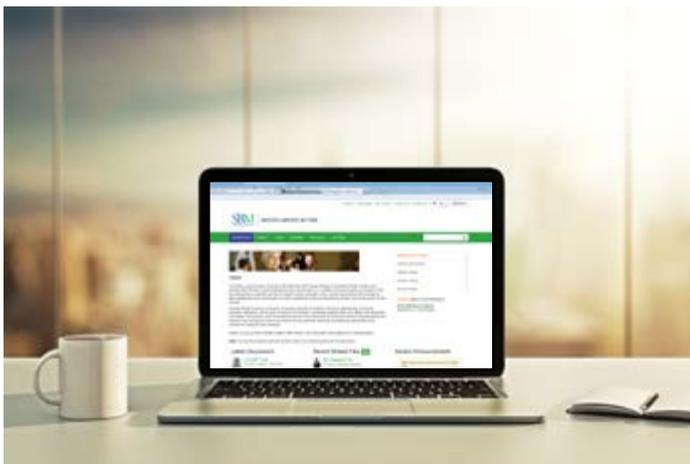
By Scott Bassett

Lawyers (and everyone else, for that matter) should be concerned about the security of their mobile devices. The most secure laptop-style device is not a MacBook or a Windows 10 PC. It is a Google Chromebook. It is impervious to viruses and other malware. And if it ever seems sluggish or malfunctions, just do a “powerwash” to get a fully refreshed operating system complete with a restoration of all of your cloud-based settings, preferences, and data.

But you’ve read that Chromebooks have limitations, right? Unless connected to the Internet, they are useless. That was never entirely true, and is far from true today. Starting this fall, it will be “pants on fire” false.

Most lawyers depend upon Microsoft Word and the other Microsoft Office applications to be productive in our law practices. Until now, if you had a Chromebook and an Internet connection, you could use Word Online. But you couldn’t use it if you were offline. You had to use Google Docs, which is good, but still not exactly Word.

Google announced in May that, starting this summer and expanding this fall, over a million Android apps available for phones and tablets will also be able to run on a Chromebook, whether online or offline.



Lawyers using iPads know how good Microsoft Word is on that platform. Word is similarly good on Android phones and tablets, and actually includes a few more features on Android than on iOS. However, despite its efforts to become a content creation rather than consumption device with the addition of keyboard portfolios and improved styli, the iPad remains hampered by its “tablet-first” form factor. Needing to resort to an add-on keyboard is not ideal for creating or editing Word documents. The same concern applies to most Android tablets (although the [Pixel C](#) with its strong magnetic keyboard comes close to bridging the tablet/laptop gap).



Scott Bassett

A Chromebook is a laptop, first and foremost. Several newer Chromebooks are “convertible” laptops with 360 degree hinges. The keyboard can fold back behind the screen for tablet-style use. A Chromebook is ideally suited to take advantage of the features in [Word for Android](#) and the other MS Office applications such as [Excel for Android](#) and [PowerPoint for Android](#).

Initially, the apps in the Google Play Store are only available on three Chromebook models. Only one of those models is expensive, the [Chromebook Pixel](#). Starting this summer, owners of these three models, if they set their Chromebooks to the [Developer channel](#), are able to download and install Android apps from Google’s Play Store. That capability will spread to most other recent model Chromebooks this fall.

The other two Chromebooks that received Android app capabilities this summer are the [Asus Chromebook Flip](#) (street price \$269), which I have, and the [Acer R11](#) (street price \$254). Both are inexpensive despite being convertible models with touch screens. Each costs about half of what a low-end iPad costs, but promises much

greater productivity because of the keyboard-centric laptop form factor. And Chromebooks are at least as secure as iPads, if not more so.

The [list of Chromebooks that will run Android apps starting this fall](#) includes some ultra-affordable models such as the Hisense C11 that has recently been on sale (refurbished) on [Woot for just \\$89.99](#). Here is a summary of the arguments for choosing a Chromebook over a MacBook or Windows laptop.

### Chromebooks are the most secure laptops a lawyer can carry

Lawyers have special obligations concerning confidentiality of client data. We also have law firm and personal data on our laptops that needs to be protected. It is possible to lock down a Windows 10 laptop (more so than prior Windows versions) or a MacBook to make it relatively secure. But even with your best efforts (and those of your IT people if you work in a firm large enough to have IT people), it will not be [as secure as a Chromebook](#). This is particularly true if you do as you should and enable [two-factor authentication](#) on your Google account as well as the accounts for other services your use on your laptop, such as OneDrive (your Microsoft account) and Dropbox. You should do this on [all of your online accounts](#), no matter what platform you use.

You can and should also use a paid [virtual private network \(VPN\)](#) service when connecting to the Internet via Wi-Fi any time you are away from your office or home network (or maybe even when you are at your office or home). There are [many affordable choices](#).

Chromebooks are [effectively immune from viruses and other sorts of malware](#). However, you still have to worry about socially engineered phishing attacks to convince you to voluntarily give up information to a hacker masquerading as a legitimate site or service.

### Chromebooks are Inexpensive

My Asus Chromebook Flip now costs [\\$266 on Amazon](#) for the 4 GB model. (Tip: Only buy a Chromebook with 4 GB of RAM—especially now that they will be running Android apps in addition to the Chrome operating system. A basic 2 GB model may deliver sluggish performance). If the 10.1-inch screen on the Flip is a bit cramped, there are many choices in the 11.6, 13.3,

and 14-inch screen sizes. (Another tip: Buy only a touch screen model if you plan to run Android apps—Android apps are designed for touch input).

Nearly all [Chromebooks](#), except the high-end [Google Pixel](#), are well under \$500 and have zippy performance compared with low-end Windows laptops because the lightweight Chrome operating system, even when running Android apps, requires little processing power. Ask anyone who has used a \$200 Windows laptop and a \$200 Chromebook which provides a better user experience. The Chromebook will win every time.

### Microsoft Office for Android Works Great on a Chromebook

Microsoft has undergone an amazing transformation the last few years. Its new role as a software and services company focusing on the cloud led it to make its prized Office applications available on both [iOS](#) and [Android](#). While these are not the full-featured versions you run on your Windows or Mac computer, they do nearly everything you need to do with legal documents nearly all of the time. Word, PowerPoint, and Excel are all available for Android. I have all three running on my Chromebook Flip, and they work very well. I am even running the [Outlook Android app](#), which isn't really a replica of the desktop version of Outlook, but is a superb email client in its own right that integrates with Word, Excel and PowerPoint. It also handles contacts and calendaring.

If you do as I do and use [OneDrive](#) as the place where your law practice documents live, everything is available to you from within your Office for Android apps so long as you are online. You can also download files and folders to the (rather limited) storage space on the Chromebook's internal drive. That storage can be expanded with a micro-SD or SD card (depending on which Chromebook model you have), but as of yet, there is no way to access add-in storage directly from Android apps running on a Chromebook. I hope that will change sometime soon.

### Conclusion

To paraphrase VP Biden, Android apps on Chromebooks is a "big \*\*\*\*\* deal." It is a big deal generally in the tech world, but it is a particularly big deal for lawyers given our need for a laptop that is as secure as

possible. The fact that it will save money and ease mobile device management (another Chrome OS strength) is an added bonus.

Not everyone will want the Asus Chromebook Flip, the second generation Chromebook Pixel, or the Acer R11, the first three Chromebooks to run Android apps. And not everyone will want to put his Chromebook on the sometimes-unstable Developer Channel this summer just to get Android apps a few months ahead of the crowd. But all of that will change this fall. The ability to run Android apps will, over the next weeks and months, migrate first to the more stable Chrome OS Beta Channel and ultimately to the regular Stable Channel that nearly everyone uses on his Chromebook.

And the already long list of Chromebooks that will run Android apps this fall will grow. Expect manufacturers to release many new models designed to take advantage of Android apps with larger touch screens, 4 GB or more of RAM, and perhaps even faster processors. We can also expect to see more premium looking and feeling models that lawyers will enjoy carrying as much as they currently like their ThinkPads, Surface Books, and MacBook Airs.

### About the Author

*Scott Bassett operates a virtual Michigan appellate practice focusing on family law cases. He is a 1978 graduate of Wayne State University and earned his JD from the University of Michigan Law School in 1981.*

## Summer Seminar

The Master Lawyers Section held its summer seminar on June 23. Over 60 members came together at the Mamma Mia Tuscan Grille in Rochester, Michigan. Labeled a special seminar about the aging process, the following topics and speakers were featured:

- New Assessment of Financial Decision-Making, by Dr. Peter A. Lichtenberg, PhD, ABPP who spoke on the issue of cognitive impairment. There is a new method of assessing decision-making capacity, he explained, that must be considered when working with the elderly.
- Informed Health Care Decision Making: Know Before You Go, by Ruthmarie Shea, JD, MA, RN, who discussed the pros and cons of the available health care directives.
- Anxiety in Late Life: A Silent Struggle, by Tish Vincent, MSW, JD, who reviewed the causes of regrets and anxiety that occur later in life. She explained the healthy methods of coping with anxiety when it occurs.

Our next meeting will be held on September 23 at the State Bar Annual Meeting in Grand Rapids, Michigan, where the topic of “Forced Arbitration” will be discussed.

### Photos:

1—Mamma Mia Tuscan Grille, Rochester, Michigan, seminar location

2—Left to Right: Richard “Dick” Ruhala, section chair, greets speaker Dr. Peter Lichtenberg



3—Left to Right: Charlotte Shoup, seminar greeter; Kathleen Newell and Jim Loree, co-chairs of seminar

4—Left to Right: speakers Dr. Peter A. Lichtenberg, Tish Vincent, and Ruthmarie Shea

## Hard Cases Make Bad Law

By William J. Giovan, Retired Circuit Judge

In a will contest that claimed that the testator was incompetent, the beneficiary was prohibited from offering in evidence several letters found in the decedent's papers, for the benign but relevant purpose of showing that the letter writers wrote in language that would be addressed to anyone of ordinary intelligence. On appeal by the beneficiary after a verdict against the will, why would learned English judges uphold the exclusion of the letters on the basis that they were hearsay for containing the "implied opinion" of the letter writers that the testator was competent?

That was the result in the famous early nineteenth-century English case of *Wright v Doe d Tatham* that spawned a discussion among legal scholars about whether nonassertive conduct could be classified as hearsay for containing the "implied assertion" of the actor or speaker. While that notion of hearsay was adopted in a small number of cases, it has been overwhelmingly rejected elsewhere for being contrary to the standard definition of hearsay, which says there is no hearsay without an assertion, nor without an assertion being offered to prove the same thing asserted by the out-of-court declarant or actor. In this instance letter-writers had made no assertion about the competence of their recipient, nor had they intended to say anything about it.

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**On appeal by the beneficiary after a verdict against the will, why would learned English judges uphold the exclusion of the letters on the basis that they were hearsay for containing the "implied opinion" of the letter writers that the testator was competent?**

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The claim of an "implied assertion" as hearsay was raised in *People v. Jones (on rehearing)* 228 Mich App 191 (1998), wherein I was assigned to write while a visiting judge on the Court of Appeals. Seeing the opportunity to put to an end to the notion of "implied

assertion" as hearsay, I discussed the *Wright* case in some detail, intending to demonstrate that, besides being contrary to the overwhelming weight of authority, the "implied assertion" ruling was faulty in the very case that originated the notion. Nevertheless, still lurking in the background was the question of *why* the judges who wrote for the exclusion of the letters would do so on such a questionable basis.



William J. Giovan

The contestants to the will were its designated beneficiary, John Marsden's servant, George Wright, and his cousin heir-at-law, "Admiral" Tatham, as the judges referred to him. Could it be, I thought to myself, that the judges were not about to deprive a member of their own class of a favorable verdict that on retrial might go in favor of a commoner, even if he should be a faithful, longtime servant of his master? It wasn't a charitable speculation about the English judiciary, but what other explanation could there be?

Years after the publication of *People v. Jones*, I had a conversation about the *Wright* case with University of Michigan Law School Professor Richard Friedman, a distinguished professor and author of evidence. (My first acquaintance with the *Wright* case occurred in a law school class taught by THE evidence professor, John Reed). After a few minutes, Professor Friedman asked, "Did you know that there's a book about the Marsden will and the court case?"

Astounded, I immediately purchased and read the book *John Marsden's Will*, by Emmeline Garnett, Hambleton Press, 1998; published, coincidentally, the same year as *People v. Jones*.

What appeared in the book was quite different from my musing about a kindly old servant whose rightful bequest was wrenched away from him. As it turns out, George Wright was a young enterprising servant who moved into the Hornsby Castle with John Marsden, the somewhat addled heir of the large estate, and Marsden's aunt, who lived there as Marsden's support and pro-

tectress. The handsome young Wright inveigled himself into a conjugal relationship with the aunt, and he became the virtual master of the estate.

When the aunt died, George Wright was free to take complete control, and he did, treating John Marsden as a subordinate, and not always politely at that. Wright married and raised a family off the estate's earnings. Eventually John Marsden's will was executed. It bequeathed almost everything to George Wright.

When John Marsden died, to the surprise of no one, the will was challenged by Sanford Tatham, Marsden's cousin and heir at law. The litigation became famous in all of England during its tortuous path through all levels

of the court system for many years. The judges were necessarily aware of the circumstances that cast suspicion on the validity of the will.

And so, in the end, rough justice was accomplished by the affirmation of the exclusion of the evidence, when a contrary ruling might have endangered the jury finding against the will. The only victims were, possibly, the consciences of those judges who wrote for exclusion of the letters, and, to be sure, the subsequent path of the law of evidence.

It's a prime example of the adage that "Hard cases make bad law."

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## Human Sex Trafficking—New World Disorder

By Shelia McCoy

Sex trafficking preys upon the most vulnerable individuals through sexual slavery, bondage, and prostitution. This crime is pandemic, exploiting children and women, and even men. Human commercial sex trafficking and "prostitution" have been defined by Michigan statutes since 1885 by Public Act 209, and the statutes MCL 750.448 through MCL 750.462 have been made tougher through 2016 legislation. Reportedly, Nevada ranks number 1, and Michigan ranks *number 2* in the nation for sex trafficking.<sup>1</sup> In 2015, the National Human Trafficking Resource Center logged in 152 *reported* cases of sex and labor trafficking in Michigan. The NHTRC is only one of numerous organizations reporting cases, where thousands of people may have been involved.

Commercial sex trafficking is the sexual use, abuse and exploitation by force, fraud or coercion of a person in exchange for money, drugs, goods, or favors. Often an emotional bond between the perpetrator and victim creates a condition of slavery, where the victim must perform either labor or sex to keep in the good graces of the perpetrator.<sup>2</sup>

Throughout the majority of America, prostitution or sex trafficking is not condoned and is illegal. It is fair to say that the majority of Americans do not approve

of prostitution or sex trafficking, and believe those acts are immoral and degrading to the victims.<sup>3</sup>

However, in some countries, even in the U.S., "controlled" prostitution is allowed. Some believe that prostitutes are simply "consensual sex workers" providing a legitimate service of sex in exchange for payment and they feel that it is a safe and normal employment. Rarely is this true.

Sadly, "consent" does not negate the horrific lifestyle or the danger and destructive nature of the "employment" of sex trafficking. More exposure in the media has brought awareness of the real experience for victims entrapped by perpetrators. Criminal investigations and prosecutions are now highly publicized providing more knowledge about this "hushed up" crime.<sup>4</sup> Human rights advocacy groups are focusing on combating the secrecy of the crime so that victims can be rescued and restored to living a safe life, breaking the control of sex trafficking.<sup>5</sup>

Targeted victims are usually people trapped in poverty, under the age of 18, or older, experiencing physical and emotional abuse. Some may be homeless and have



Shelia McCoy

addictions and are led to believe that their perpetrator will save them by providing a new life.<sup>6</sup> Victims are objectified, reduced to slavery for the perpetrator's selfish sexual perversions.

Runaway children are often abducted and taken to an abuser's "lair," sometimes lured by the Internet or social media, believing they will become rich or famous. They are trafficked with a "john," or purchaser of sex acts. Victims may be solicited on the street, at a business, or public place after being enticed by a "friendly" person offering the victim a meal, ride, or place to stay so as to reduce the victim's fear of talking to a stranger.

When a victim becomes emotionally or romantically involved with a perpetrator by dating or marrying him, once trapped, the victim will be wooed, then the emotional or physical abuse starts with threats, manipulations, beatings, rape and terrorism.<sup>7</sup> The victim feels frightened of being killed, exploited by sexual acts, and may be indebted to the perpetrator and often will be sold into prostitution. She is tragically enslaved with the perpetrator, never to leave, fight back or be free.

One such victim was Theresa Flores of Birmingham, Michigan. She was drugged, raped and tortured for two

long years. Theresa lived at home, but was forced to perform "services" in secret to keep her family safe. Victims are coerced into believing that there is no way out, and that they are worthless creatures, not able to live a normal or healthy life.<sup>8</sup>

Consent to sex trafficking is not a legitimate defense to the crime since the essence of sex trafficking is that it is acquired through illegal acts of force, fraud or coercion.<sup>9</sup> Yet it is difficult to spot those involved. Victims of trafficking will not always appear as portrayed by media—"beaten"—and their abusers do not always look evil.

Perpetrators don't often look like Peter Lorre in Fritz Lang's movie "M," skulking about an alley seeking a victim, breathing heavily with a raspy voice. The usual perpetrator looks like the common, everyday person, often attractive and charismatic, wealthy or successful in business. The usual victim will be attractive, healthy, successful and often appear "happy-go-lucky."<sup>10</sup>

Working with abuse victims for over 35 years, I have met the most wonderful victims and perpetrators—doctors, lawyers, judges, politicians—only to discover their tragic secret lives. Recently, in Michigan, we have seen the devastating effects of perpetrators' hidden lives







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# Master Lawyers—Calgary Stampede, Canadian Rockies & Glaciers



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State Bar of Michigan – Master Lawyers Section  
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