

# The Mentor

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



*"The voice of trust through experience."*

Winter 2017

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## Message from the Chair

### Greetings to Our Readers

2017 is here and the Master Lawyers Section has a number of educational events scheduled for the year which may be of interest to many of our members. The registration forms for each of the events happening this spring can be found in this newsletter.

Our annual educational seminar will take place at 10:00 a.m. on September 29, 2017, during the State Bar of Michigan Annual meeting at Cobo Center in Detroit. Mark your calendars now. You will not want to miss this seminar. Peter A. Lichtenberg, PhD., ABPP, director of the Institute of Gerontology and Merrill Palmer Skillman Institute, will be the featured presenter. The impact of cognitive deficiencies on financial decision-making and the signs to be aware of and tools that can be used when working with older clients or loved ones will be highlighted.

The MLS sponsored a very informative and much needed two-hour Medicare Seminar in November 2016. This was a sold-out event held at our State Bar of Michigan office building in Lansing. The MLS will co-sponsor a second Medicare Seminar with the Michigan Dental Association in Grand Rapids on May 24. There is no charge for this event. If you are in the area on May 24, please consider attending this educational seminar which will be held from 1–3:30 pm.

On March 30, the MLS is sponsoring at the State Bar of Michigan building: **iLitigate on My iPad & Using SBM Connect to Connect with Master Lawyers** from 10–12 with lunch from 12–1. There is a \$25 fee, which covers your meal.

On April 27 we are partnering with the Oakland County Bar Association LOCA Committee and co-hosting a seminar on **Building a Modern Law Practice to Help Those in Need**. This event will take place at the Oakland County Bar Association Building from 10–12 with lunch from 12–1. There is a fee for this event. See the registration form included in this newsletter.



Cynthia L. Johnson, Chair

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**2016-2017****MASTER LAWYERS SECTION  
SECTION COUNCIL****CHAIR**

Cynthia L. Johnson  
Community Living Services Inc  
35425 W Michigan Ave Ste 1  
Wayne, MI 48184  
P: (313) 850-5077

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**NEWSLETTER EDITOR**

Roberta M. Gubbins, Mason  
(734) 255-9119

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Send correspondence and  
material for publication to:

Roberta M. Gubbins  
[rmgubbins@yahoo.com](mailto:rmgubbins@yahoo.com)

The MLS will continue to identify educational issues that are of interest to our members. If you have some suggestions on topics you would like to see featured in a seminar sponsored by the MLS, please contact any member of the MLS Council.

The council encourages its members to participate in the section's program planning process to help develop and support programs and events. We need your input to be successful.

The section bylaws are posted on the SBM Master Lawyers Section website, under the Council tab. Please visit the website and familiarize yourself with the purpose of the section's four standing committees: Service to Master Lawyers, Protection of the Public, Community Contributions, and Membership. You are invited to join a committee and also participate in the MLS planning process. If you decide to participate, please contact me. If you have any input you would like to share with the council, please let me know. My contact information is listed below.

Thank you.

Cynthia L. M. Johnson  
Chair Cell: (734) 748-1465

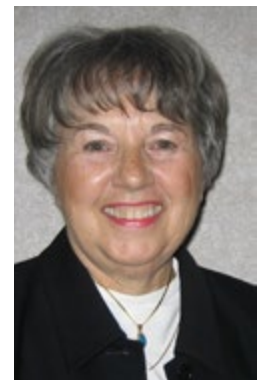
*Cynthia Johnson, JD, M.P.H. is the general counsel and vice president of corporate affairs at Community Living Services, Inc.*

## Notes from the Editor

We are still in the winter months with cold, snow, and dark days, but this has not stopped our members from sending great articles for our winter issue. Thanks to all for the contributions; they make each and every issue interesting, entertaining, and enlightening.

In this issue, you'll find Otto Stockmeyer's article on the six Lansing-area lawyers who have led the State Bar of Michigan since its inception in 1935; a poem, "Livin' in the Street," by Tom Richardson; "Cybercrime & Insurance" by James A. Johnson; a method for transition of your practice by Gary Bauer titled "Solo, Best Exit Strategy for Retirement: Hire to Retire;" and Larry Gagnon reviews and gives his opinion on a 4<sup>th</sup> Circuit Court of Appeals decision on transgender discrimination.

As usual, we thank our writers and the staff of the State Bar of Michigan who put the issue together, making our newsletter the wonderful publication it is. Enjoy this edition, and we will see you again in the spring.



Roberta M. Gubbins, Editor

—Roberta

## PROFILES IN LEADERSHIP

# Six Lansing-area Lawyers Head State Bar of Michigan

By Otto Stockmeyer

Larry Nolan currently presides over the State Bar of Michigan, the sixth Lansing-area lawyer to do so. Who were the earlier ones? What characteristics might they have in common?

## The Oldtimers

### Dean W. Kelley

The State Bar of Michigan, founded in 1935, was in its infancy when Lansing lawyer Dean W. Kelley (1876-1952) became its eighth president in 1942. He was 68 years old at the time. (The following information comes from a profile of Dean Kelley in the October 2013 *Michigan Bar Journal*).



Dean W. Kelley

After serving in the Spanish-American War of 1898, Kelley took a single law course at the University of Michigan, then taught school in St. Johns for several years before taking and passing the bar exam. He served as city attorney for three terms and was thereafter elected Clinton County prosecuting attorney.

Kelley moved to Lansing after World War I, eventually practicing law in partnership with his son Ward. He was very active in philanthropic and civic groups. He was elected president of the Ingham County Bar Association in 1926.

In 1942 the State Bar offices were located on the fourth floor of the Olds Tower, now the Boji Tower. The State Bar had 6,329 members, of which more than 700 were serving in the armed forces during Kelley's term.

After his State Bar presidency ended, Kelley continued to serve on several important committees and was appointed to the Board of Law Examiners by Governor Kim Sigler.

### Joseph W. Planck

Dean Kelley was succeeded as district State Bar commissioner by Joseph W. Planck (1897-1975), who himself became the 16<sup>th</sup> State Bar President in 1950. The State Bar was still headquartered in what was then called the Michigan National Tower.



Joseph W. Planck

Planck graduated from the University of Michigan Law School in 1921 and immediately commenced law practice in Lansing. That fall, in the courthouse attorneys' room, the county sheriff offered a five-dollar gold piece to any of the assembled lawyers who could put him on his back. Planck, a champion heavyweight wrestler in college, took the challenge. "The bout was a draw, but as a result every lawyer in Ingham County immediately knew Joe Planck." (*Michigan Bar Journal*, October 1950).

During his legal career, Planck served six years as Lansing city attorney and two terms as Ingham County prosecuting attorney. He was Ingham County Bar Association president in 1938, and represented the State Bar in the ABA House of Delegates.

A Westlaw search reveals 29 appeals that Planck argued before the Michigan Supreme Court between 1925 and 1965. Leo Farhat identified Planck as "one of the finest lawyers in the county." Michigan Supreme Court Justice Theodore Souris praised Planck as "a superb trial lawyer, and not merely a litigator."

Within a dozen years of his State Bar presidency, Planck's hearing had deteriorated to the point that he could no longer represent clients in court. Justice Eugene Black encouraged him to apply for the newly created position of commissioner. Thus in 1964, with Black's support, did Planck become the Michigan Supreme Court's first commissioner.

Continued on the next page

## The Farhat-Reisig Era

### Leo A. Farhat

It would be almost 30 years before another Lansing-area lawyer headed the State Bar. He was Leo A. Farhat (1926-1991), who became the 44<sup>th</sup> president in 1978. By then the State Bar had moved into a one-story building of its own on Townsend Street.

Farhat, a 1952 graduate of Detroit College of Law, returned to his home town of Lansing to clerk for Michigan Supreme Court Justice Emerson R. Boyle and open his own practice. He recalled that his first client sought help transferring an automobile license; his fee was two dollars. In 1953 Farhat formed a partnership with James Burns. Monte Story joined them in 1971. The firm continues today as Farhat & Story, P.C.

Farhat was elected Ingham County prosecuting attorney in 1960 and served for two terms before returning to private practice. (It was understood in those days that prosecutors had two terms to “make their bones” and make way for someone else.) He was Ingham County Bar president in 1965.

On his election as State Bar president, Farhat was profiled in the October 1978 *Michigan Bar Journal*: “The son of Lebanese immigrants, the 52-year-old Farhat has become—to colleagues who respect him, to adversaries in and out of the courtroom—the quintessential lawyer.”

Farhat was portrayed in the press as a “defender of big names in trouble,” “a kingmaker in Republican circles,” and a “courtroom tough guy.” Ted Swift described Farhat in these terms: “Leo was a prodigious lawyer and an overwhelming presence of a man. He was self-confident, authoritative, occasionally bombastic—and always a woozie at heart. In short, he was our shining light.”

The Ingham County Bar Association named the Leo A. Farhat Outstanding Attorney Award in his honor, and he was its first recipient. He received the Roberts P. Hudson Award, the State Bar’s highest honor, in 1983.

### Donald L. Reisig

Among Leo Farhat’s first acts as Ingham County prosecutor was to appoint Donald L. Reisig (1934-2016) to be an assistant prosecutor. Reisig then followed Farhat as prosecutor, serving the traditional two terms. And 10 years after Farhat, Reisig became the 54<sup>th</sup> president of the State Bar. By then the State Bar had added a four-story

addition to its headquarters building.

A 1958 graduate of the University of Michigan Law School, Reisig became an assistant prosecutor in 1960, and thereafter Lansing city attorney, chief assistant prosecuting attorney, and prosecuting attorney. Just 10 years out of law school, the “boy wonder of Ingham County politics” was elected to the first of two four-year terms as Ingham County circuit judge (1968-1976).

Upon leaving the bench, Reisig joined the Sinas, Dramis law firm. During the ensuing years he chaired the State Bar Representative Assembly (1978-79) and rose to be State Bar president (1988-89). He was in the first group of four professors to teach at the newly formed Thomas M. Cooley Law School (where future State Bar President Lawrence P. Nolan was one of his students).

After his State Bar presidency, Reisig was recruited by Governor James Blanchard to be Michigan’s drug czar, responsible for coordinating the efforts of 13 state agencies involved in drug prevention, enforcement and treatment. In 1995, he served as ABA legal liaison to Ukraine and Georgia, assisting them in converting their legal systems to the rule of law.

Then it was back home to be director of litigation for Central Michigan Legal Services and thereafter, at the request of the judges of the Ingham Circuit Court, to serve as administrator of the new Juvenile Division, which included the office of Friend of the Court. He retired in 2007.

In addition to following Leo Farhat as county prosecutor, in 1989 Reisig became the second recipient of the ICBA’s Leo A. Farhat Distinguished Attorney Award. The State Bar named him a Champion of Justice in 1997.



Leo A. Farhat



Donald L. Reisig

## The Cooley Guys

### Charles R. Toy

Twenty more presidents would come and go before the next Lansing-area lawyer would take the reins, in the person of Charles R. Toy (b. 1950), the State Bar’s 75<sup>th</sup> president. He too was a Leo Farhat protégé. He

Continued on the next page

was also the first Cooley Law School graduate, and first Cooley employee, to hold the office (2009-10).

Toy graduated *summa cum laude* from Cooley (now Western Michigan University Cooley Law School) in 1981. Thereafter he law clerked for Court of Appeals Judge Donald E. Holbrook, Jr. for a year. He spent another two years with the Ingham County Prosecutor's Office before commencing a 24-year career with the Farhat & Story law firm, where he practiced environmental law and civil and criminal litigation.

Toy has said that Farhat advised him on joining the firm, "Learn the court rules, learn the rules of evidence, and serve the State Bar." And he certainly did the latter, serving a total of 18 years in the Representative Assembly and on the Board of Commissioners. He also contributed his service to the Ingham County Bar Association as a member of the Board of Directors.

In 2008 Toy left his law firm to accept appointment as associate dean of career and professional development at his alma mater, a position he continues to hold. Indeed, Toy's childhood home, K-12 schools, law school, and legal jobs are all within one mile of the State Bar building.

Cooley President and Dean Don LeDuc said of Toy, "He is firmly committed to professionalism, public and pro bono service, and helping new lawyers make the transition from school to practice." At his farewell dinner, Toy reiterated the theme of his presidency that "at the very core, the legal profession is a helping profession and that lawyers make a big difference in people's lives and for society."

#### Lawrence P. Nolan

And so we come to the current and 82nd president of the State Bar, Lawrence P. Nolan (b. 1948). He too has Cooley Law School roots, a connection with Leo Farhat, and a strong record of service to the Ingham County Bar Association and the State Bar. But unlike his Lansing-area predecessors, Nolan has never been a prosecutor. (Although he wore a State Police-style uniform while working his way through law school as a court officer at the Michigan Court of Appeals.)



Charles R. Toy



Lawrence P. Nolan

After graduating in Cooley's inaugural class in 1976, Nolan launched a 41-year legal career as founder and president of Nolan, Thomsen & Villas, P.C. in Eaton Rapids. He was president of the Ingham County Bar Association in 2003-04 and is the 2009 recipient of its Leo A. Farhat Outstanding Attorney Award.

Nolan has served on Cooley Law School's Board of Directors since 1983 and was elected to his present position as board chairman in 2012. In the State Bar, he chaired the Young Lawyers Section, served in the Representative Assembly, and, for the past 10 years, has been on the Board of Commissioners.

Like the unfinished look of former-Governor John Swainson's official portrait that hangs in the Capitol, Nolan's story of State Bar service is necessarily incomplete. His stated goals for his year as president are to "push forward the work of the State Bar's 21<sup>st</sup> Century Practice Task Force Report and the Diversity and Inclusion Advisory Committee, to promote pro bono, and to leave the Bar better than he found it."

The author of his profile in the October 2016 *Michigan Bar Journal* says, "Clearly Nolan has set a high bar for himself and has a lot of work ahead of him. But those who know him best say we can rest assured we're in good hands."

#### About the Author

*Otto Stockmeyer retired from Cooley Law School in 2014 after a 37-year teaching career. During his 50-plus years at the Bar, he became acquainted with all of the individuals profiled except Dean Kelley.*



Otto Stockmeyer

Otto Stockmeyer  
[stockmen@cooley.edu](mailto:stockmen@cooley.edu)  
[www.cooley.edu/faculty/stockmeyer.html](http://www.cooley.edu/faculty/stockmeyer.html)  
[www.linkedin.com/in/stockmeyer](http://www.linkedin.com/in/stockmeyer)

# Livin' in the Street



Thomas C.  
Richardson

By Thomas C. Richardson

## **Tom Richardson**

*is a graduate of Kalamazoo College and University of Michigan Law School. He has practiced since 1980 and currently is an attorney with Lewis, Reed & Allen in Kalamazoo and a U. S. bankruptcy trustee. He is married with four children and enjoys playing the piano, reading, and floating in the lake.*

Old man lost in wine. Young girl lost her way.  
Woman's lost her mind. Man who's lost his pay.  
We've left them all behind. Shut out night and day.  
We might as well be blind. Don't see them anyway.

Livin' in the street. Cardboard for a mattress.  
Nothin' much to eat. No place for an address.  
Livin' with defeat, loneliness and sadness.  
Livin' in the street. Can't we stop the madness?

Wife who's lost her mate. Kids who've lost their father.  
At best his checks were late. At worst he didn't bother.  
Their money was all spent on food and clothes and doctors.  
They couldn't pay the rent. Eviction was a shocker.

Livin' in the street. Cardboard for a mattress.  
Nothin' much to eat. No place for an address.  
Livin' with defeat, loneliness and sadness.  
Livin' in the street. Can't we stop the madness?

They're livin' in the street  
But they're livin'  
incomplete.  
Got no place to sleep with walls and ceilings.  
Yah. They're livin' in the roads  
Numbed by drugs and cold.  
But we're the ones who show the lack of feeling.

Some of them are tired. Most of them are poor.  
Yearning for a fire. Huddled by a door.  
They need another start. They need our help to roam less.  
Open up your eyes and heart. Then take in the homeless.

Livin' in the street. Cardboard for a mattress.  
Nothin' much to eat. No place for an address.  
Livin' with defeat, loneliness and sadness.  
Livin' in the street. Can't we stop the madness?

# Cybercrime Liability and Insurance

By James A. Johnson ©2016

The Internet is a part of our daily lives. Almost anything you do on the Internet can be observed by other people. Advancement in computer technology creates new kinds of insurance risks. Enter cybercrimes that create new and different insurance policy forms.

Cybercrime is an emerging risk evidenced by a plethora of news stories of hacking involving Michigan State University, Yahoo, J. P. Morgan, Target, American Express and Kmart. A hacker is one who uses programming skills to gain illegal access to a computer network or file. The purpose of this article is to highlight a new body of insurance coverage law.

Most commercial general liability (CGL) policies specifically exclude data. Cybercrime policies are specifically tailored policy provisions and claims involve intentional bad acts. But by whom: the hacker or the policyholder? In *Lambrecht & Assoc's, Inc. v. State Farm Lloyds*, the court held that a hacker acted intentionally and not the policyholder. Thus, the injury was not intended by the policyholder and there was coverage.<sup>1</sup> A question of coverage arises when criminals give bad information that is legally entered into the policyholder's computer. In *Hudson United Bank v Progressive Cas. Co.*, the court held hacking coverage did not apply because there was no actual breaking into the computer. Fraudulent data was not recoverable because it was not entered into the covered computer. This case demonstrates the difference between hacking a computer and using a computer.<sup>2</sup>

## Coverage

Computer-specific policies provide specific grants of coverage. A common question in cybercrime claims is whether the policy applies to acts of the person who used the computer to cause the injury. Computer-specific policies often limit coverage to the bad acts of persons who are *not authorized* and *exclude acts by employees*.<sup>3</sup> In *Universal American Corp. v. National Union Fire Insurance Co. of Pittsburgh, PA*,<sup>4</sup> a computer system's

fraud policy covered "loss resulting directly from a fraudulent entry of Electronic Data." The insured, a health insurer, lost \$18 million from fraudulent claims submitted by providers. The providers entered fraudulent information. The pivotal question was the meaning of *fraudulent entry*. The court held for the insurer based on the word *entry* which is the act of entering data.

Coverage in most cases is limited to losses directly related to some type of bad act on a computer. In *Retail Ventures, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, criminals used computers to steal credit card information and then stole from the accounts. The losses resulted from a computer hacking scheme that compromised customer credit card and checking account information. The 6<sup>th</sup> Circuit held that the losses resulted directly from computers used by the criminals but the computers were not used to carry out the crimes.<sup>5</sup>

## Law Firms

***Law firms are prime targets for cybercrimes. It is your data that cybercriminals and hackers want.*** A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer. Special circumstances may warrant special precautions depending on the sensitivity of the information. Law firms should use encryption to protect confidential information.

Training your employees not to click on suspicious e-mail, attachments, or links is your first defense. Have a strong password consisting of uppercase and lowercase letters, symbols and numbers. And change your passwords every 60 days. Hackers do research on law firms and may know about your existing cases and the names of principal attorneys. Also have a backup system in place to avoid any significant data loss. Moreover, employees should be required to strictly adhere to company policies on personal use of company computers with severe consequences.

Continued on the next page

### Cybercrimes

As technology continues to advance with mobile devices so do efforts to better protect content from unauthorized access. In addition to its existing privacy features WhatsApp also encrypts voice calls.<sup>6</sup> This accelerated development revolves around the Apple/FBI dispute and accessing encrypted data in the iPhone iOS. The Fifth Amendment of the U. S. Constitution guarantees that no person shall be compelled in any criminal case to be a witness against himself. So compelling a defendant to divulge a passcode on a mobile device is protected. Such evidence is testimonial or communicative.<sup>7</sup> Therein lies the current problem in which the government cannot force an accused to reveal knowledge of facts or share his thoughts or beliefs relating him to the offense that may incriminate him.<sup>8</sup> But what about using a fingerprint? Is that a physical characteristic not protected by the Fifth Amendment? The answer to this question is a topic for another day.

### Conclusion

An effective cybersecurity policy should be a primary policy. A primary policy responds first. Advancement in computer technology creates new kinds of insurance risks. Cybercrimes create new and different insurance policy forms. ***Computer-specific policies often limit coverage to bad acts of persons who are not authorized, and acts of employees are excluded.***

Lawyers need to be aware of how little privacy there is on the Internet if you are not using encryption. Some type of encryption should be used when sending confidential information over the Internet.

### About the Author

**James A. Johnson**, of *James A. Johnson, Esq.* in Southfield is an accomplished attorney and concentrates on insurance coverage, serious personal injury, sports and entertainment law and federal crimes. He is an active member of the Michigan, Massachusetts, Texas and federal court bars. Mr. Johnson can be reached at [www.JamesA-JohnsonEsq.com](http://www.JamesA-JohnsonEsq.com)

### Endnotes

- 1 *Lambrecht & Associates, Inc. v. State Farm Lloyds*, 119 S.W. 3d 16 (Tex. App.2003).
- 2 *Hudson United Bank v. Progressive Cas. Ins. Co.*, 112 F. App'x 170 (3<sup>rd</sup> Cir 2004).
- 3 *Stop & Shop Cos. v Federal Insurance Co.*, 136 F. 3d 71 (1<sup>st</sup> Cir. 1998); *Milwaukee Area Technical College v Frontier Adjusters of Milwaukee*, 752 N.W. 2d 396 (Wis. Ct. App. 2008) - college's claim adjuster stole \$1.6 million.
- 4 *Universal American Corp. v National Union Fire Insurance Co. of Pittsburg, PA.*; 37 N.E. 3d 78 (N.Y. 2015).
- 5 *Retail Ventures, Inc., v. National Union Fire Insurance Co., of Pittsburg, PA*, 691 F. 3d 821.
- 6 Danny Yadron, Facebook, Google and WhatsApp plan to increase encryption of user data, *The Guardian*, <https://www.theguardian.com/technology/2016/mar/14/facebook-google-whatsapp-plan-increase-encryption-fbi-apple>. (last visited 11-7-16)
- 7 *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d. 1149 (U.S. 1967).
- 8 *United States v. Kirschner*, 823 F. Supp. 2d. 665 (E. D. Mich. 2010).





# Solo, Best Exit Strategy for Retirement; Hire to Retire

By Gary Bauer

With an aging population of attorneys it seems that there are more and more articles on selling a law practice that are beginning to emerge. The first inquiry is whether you can sell your practice and what will you need to do to satisfy your obligations on the Rules of Professional Responsibility in your jurisdiction and opinions interpreting those rules. The ABA Model Rule 1.17 is a good place to go to get started, quoted in part below:

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

. . . ((c) The seller gives written notice to each of the seller's clients regarding: (1) the proposed sale; (2) the client's right to retain other counsel or to take possession of the file; and (3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice. If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

For a purchaser, you will need to consider what the good will is worth. For any given practice putting a dollar value to the value of any going concern often depends on ongoing participation in the business for

some time after the sale. Under the Model Rule you are required to send notice to your clients that you are selling your practice; does that mean that a partial equity sale will require the same notice? What about giving an equity position to a new associate while the senior partner continues to work in the firm or leave his or her name on the moniker and continues to take fewer and fewer clients to the point that you are no longer active in the firm?

What I see as a growing trend is not so much a "clean sale" as much as transitioning out of the work environment slowly and gradually for solo practitioners. Giving notice to your clients that you will be selling out to someone else is a prescription for diminishing any goodwill that has been built into a solo practice. In the practice of law the relationship defines the value of representation, not the firm name in most cases. This is particularly true when you are talking about a solo practice or small firm environment.

As my students interview established solos, I can tell you that the vast majority of them say that they rely upon "word of mouth" as their marketing strategy. What happens when the principal is changed to a totally different person with the original owner no longer in the picture?

For that reason, you need to consider a plan that will preserve the good will that you created by staying involved as a partner with shifting equity positions which are less than 50 percent ownership, and when that relationship changes, as it will over time, you will need to review the rules in place for your jurisdiction to determine the type of notice required for your clients and how that shift in ownership is completed so that you can retire from practice entirely.

As a workable strategy, for the sale of a solo practice, I would highly recommend giving consideration to a long-range plan of five years or more to make that

**Continued on the next page**

transition complete while you stay on. That means that you need to start your planning early to make your selection of a person appropriate to take on an equity position. That also means a “working interview” in my opinion. Bring someone in whom you have tested and mentored over time to determine if he will thrive and continue to grow the business rather than run it into the ground. That also means that you will need to invest in him or her and compensate him so that he will not want to leave your firm until you are ready to give him control over time.

Don't judge each day by the harvest you reap, but by the seeds you plant. – Robert Louis Stevenson

We all know that many business fail. The same can be true of a law practice. You need to vet your new associate, not just for how many billable hours he can generate, but even more important, you need to determine if he has the six characteristics identified in my

recently published blog on that topic. For sustainable and predictable success, you need more than a student who showed prowess in academics. He needs to be well rounded and capable of generating revenue over the long haul. He needs to have good business sense as well as being productive and ethical.

Follow my blog for tips and tricks on exit strategies that you might employ and techniques to get the most value from your transition plan to retirement.

### About the Author

**Professor Gary Bauer**, WMU Cooley Law School, has taught wills, trusts and estates, environmental law, and general practice externs, and he currently teaches several clinical courses in the *Sixty Plus, Inc.*, *Elderlaw Clinic*. He is chair, secretary, and council member of the Law Practice Management Section of the State Bar of Michigan.



# Emotion Victorious Over Reason

By Larry Gagnon, [L.gagnon12@comcast.net](mailto:L.gagnon12@comcast.net)

## Adapted from *Labor And Employment Lawnotes* (Fall 2016)

In Case No. 15-2056, partially entitled *G.G. v Gloucester County School Board* (April 19, 2016), the Fourth Circuit Court of Appeals favored emotion over reason. This decision elevates the rights of a sympathetic minority in absolute disregard for the rights of others; results from a horrendous misinterpretation of the law; and could negatively “benefit” the victor. I encourage publication of a critique of this article. Honest discourse elevates reason over emotion. Reason’s pathway leads to just results with frequency envied by emotion.

1. *Gloucester* revolves around G.G.’s desire to use the boys’ school restrooms. The Court defines G.G. as a “transgender boy” –a “biological female” who “identifies as male.” Opinion, pp. 5, 45. The Court does not provide parameters for “identifying as a male” - as to do so would invite rational analysis.

G.G. has not undergone sex-reassignment surgery. The Court does not say whether G.G. plans such surgery.

G.G. is diagnosed with gender dysphoria - distress caused by conflict between gender identity and anatomical gender. Opinion, p. 49. Throughout the freshman year, G.G. attended school as a healthy girl. She has since begun hormone therapy.

Sophomore G.G. told school officials that she was now a “transgender boy.” Officials took steps to ensure that G.G. would be treated as a boy by teachers and staff.

After officials allowed G.G. to use the boys’ restroom, parents asked the School Board to end this practice – voicing privacy concerns. Subsequently, the Board adopted a policy barring G.G.’s use of the boys’ restroom but required that transgender students be provided alternative private facilities. Opinion, p. 50.

G.G. sued, claiming the Board discriminated against her in violation of Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause. The

District Court dismissed G.G.’s Title IX claim, but withheld ruling on the equal protection claim. G.G. appealed.

The Fourth Circuit’s analysis started by correctly identifying the legal issue: “At the heart of this appeal is whether Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity.” Opinion, p. 5.

The Court noted that Title IX generally prohibits discrimination based on sex, but the Department of Education’ contemporaneous implementing regulations permit “separate toilet, locker room, and shower facilities on the basis of sex.” Opinion, p. 6. Almost 40 years later, the Office for Civil Rights (OCR) “interpreted” this regulation: “. . . a school generally must treat transgender students consistent with their gender identity.” Opinion, p. 6. Thus, the OCR decreed a school must allow a “transgender boy” to use the boys’ restrooms, locker rooms and showers.

The government argued that Title IX was ambiguous because Title IX did not define a transgender’s sex. Opinion, p. 17. The Court bought this argument wholeheartedly. Opinion, p. 21.

2. The easiest approach to resolving ambiguity in a rule or law is to look to its purpose. If purpose is clear and can only be effectuated by one interpretation of language, no other approach can be justified. Such is the case here. Totally ignoring this dispositive path, the Court attempted to find a single definition of “sex” applicable in all contexts. Opinion, p. 22-23.

Because every word has different meanings in different contexts, the Court’s search for an all-purpose definition was inevitably a failure. Having reached this ineluctable result, the Court declared the word “sex” to be sufficiently ambiguous to allow the government to conclusively determine that G.G. has joined the male sex. Opinion, p. 26.

Continued on the next page

Ironically, during its impossible quest for a singularity, the Court discovered that “the word ‘sex’ was understood *when the [implementing] regulation was adopted* to refer to ‘biological sex,’ namely reproductive organs”. Opinion, p. 22 (emphasis added). Had the Court not assumed that a word is ambiguous unless it has only one possible meaning regardless of context, the Court would have reached the same conclusion as the purpose-analysis approach.

Why did the government in the 1970s allow schools to provide separate bathrooms, locker rooms, and showers by sex? What difference would justify such patent discrimination? There can be only one answer: anatomical difference as it relates to reproductive organs (exactly as concluded by the district court).

3. How many people involved in the creation of the exception for bathrooms, locker rooms, and showers are in agreement with my justification? Anyone who can momentarily ignore G.G.’s emotional draw and allow reason to control will realize the answer.

4. Will G.G.’s victory benefit her? If it ultimately prevails, this decision will empower her to use boys’ restrooms or single-stall restrooms or girls’ restrooms. Beyond this 3-choice discretion, any benefit to G.G. is speculative. There is no reliable evidence that she will acquire predominantly-male strengths: (1) soap-opera aversion; (2) football-game tolerance; (3) direction-assistance-inquiry trauma; (4) pants-at-half-mast comfort; (5) cell-phone-absence driving; (6) kitchen-skill amnesia; (7) eructation superiority; (8) diaper-change-disappearance expertise; (9) other(?). The anachronistic demonstrably-false prejudices --- that men are “better” than women or “more capable” than women or that

women must dress a certain way or must not compete in sports --- are increasingly being relegated to the rubbish bin. G.G.’s desire to be male has already resulted in chemical therapy to counteract female secondary sexual characteristics. To prevail, chemical therapy must battle G.G.’s genetically-expressed hormones for the rest of her life (but can be reduced if ovaries are removed). Undoing primary sexual characteristics will necessitate complex surgeries. Even routine chemotherapy and surgery carry short-term and long-term risks. The Court’s decision encourages her to continue the superficial metamorphosis. Has anyone encouraged her to consider other ways to achieve her non-bathroom goals?

5. The Court remanded the case for proceedings consistent with its opinion. I look forward to this Court’s decision that the Constitutional right to “bear Arms” guarantees amputees the right to interspecies transplants and requires recognition of hirsute individuals as a protected class.

#### About the Author

*Larry Gagnon is a native Michigander who obtained his JD from the U of M, Order of the Coif, in 1976. Prior thereto, he earned a bachelor of science degree in mathematics, Phi Beta Kappa. He has generally practiced corporate law with an emphasis on pension and tax issues as a law firm partner and as in-house corporate counsel. His hobbies include dissecting judicial opinions devoid of even the semblance of logic. He welcomes constructive comments on any article he authors ([l.gagnon12@comcast.net](mailto:l.gagnon12@comcast.net)).*

### Upcoming education seminars sponsored by the Master Lawyers Section

**March 30** at the State Bar of Michigan Building: **iLitigate on My iPad & Using SBM Connect to Connect with Master Lawyers**, 10 a.m.–12 p.m.; lunch 12–1 p.m.

**April 27** at the Oakland County Bar Association Building: **Build a Modern Law Practice to Help Those in Need**, 10 a.m.–12 p.m.; lunch 12–1 p.m.

**May 24** at the Double Tree by Hilton near Grand Rapids Airport: **Medicare Seminar**, 1–3:30 pm. No lunch, no food, no cost.

*Registration forms on the following pages*

# REGISTRATION

## Masters Mastering Technology: iPad and SBM Connect

March 30, 2017 • 9:30 a.m.-1:00 p.m.  
(Check-in at 9:30 a.m. • Program at 10:00 a.m. • Lunch at Noon)

State Bar of Michigan • 306 Townsend St • Lansing • 48933

### Register One of Two Ways

**Online:** Pay by credit/debit card at <http://e.michbar.org>

**Mail:** your check and completed registration form to:  
State Bar of Michigan  
Attn: MLS Seminar Registration  
306 Townsend Street  
Lansing, MI 48933

Make check payable to: STATE BAR OF MICHIGAN

**Cost (includes lunch)      REGISTRATION DEADLINE: March 27, 2017**

- Master Lawyers Section Member.....\$25
  - Guest of MLS Member .....\$25
- Total: \$ \_\_\_\_\_

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Name: \_\_\_\_\_

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### Agenda

#### iLitigate on my iPad

From powering up to convincing a jury, join us to learn the ins-and-outs of using an iPad in your practice. We'll tour the iPad and explore the latest and greatest in the ever-growing world of iPad accessories and apps to help maximize your iPad user experience.

You'll also learn how you can litigate solely with your iPad to:

- Conduct intake and docketing
- Review documents and take depositions
- Prepare for trial and select a jury
- Present evidence at trial

**Presenter: JoAnn L. Hathaway** is a State Bar of Michigan practice management advisor. She is an Adobe Acrobat certified expert, is certified in LexisNexis Time Matters and Billing Matters software, is a licensed insurance agent, and holds the designation of Registered Professional Liability Underwriter.

#### Using SBM Connect to Connect with Other Master Lawyers

This program will help you better understand how to use SBM Connect, the official website for the Master Lawyer Section. You will learn how to customize your profile and privacy preferences, adjust your subscription settings, start a conversation, and post messages to the discussion group. This is a great opportunity to learn how to network with your fellow Master Lawyers!

**Presenter: Andrew Marks** is a State Bar of Michigan web and digital media specialist. He is part of the web team that works with SBM Connect on a daily basis to add and propose new updates, features, and tutorials for its members. Andrew has previously hosted presentations on SBM Connect in individual, workshop, and conference settings.

### Questions

For additional information regarding the seminar contact Amy Castner at 517-346-6322.

### Cancellation Policy

Cancellations must be received at least 48 business hours before the start of the event and registration refunds are subject to a \$20 cancellation fee. Cancellations must be received in writing by e-mail, or by U.S. mail. No refunds will be made for requests received after that time. That notice can be made by e-mail (tbellinger@mail.michbar.org), fax (517-372-5921 ATTN: Tina Bellinger), or by U.S. mail (306 Townsend St., Lansing, MI 48933 ATTN: Tina Bellinger). Refunds will be issued in the same form payment was made. Please allow two weeks for processing.

STATE BAR OF MICHIGAN | MASTER LAWYERS SECTION  
and the Oakland County Bar Association LOCA Committee

# REGISTRATION

*The Master Lawyers Section of the State Bar of Michigan and the  
Oakland County Bar Association LOCA (Lawyers of a Certain Age) Committee present:*

## Build a Modern Law Practice to Help Those in Need

**April 27, 2017 • 9:30 a.m.-1:00 p.m.**  
(Registration-9:30 a.m. • Program-10:00 a.m. • Lunch-Noon)

**Oakland County Bar Association • 1760 S. Telegraph Rd., Suite 100 • Bloomfield Hills • 48302**

If you became a lawyer to help people facing serious difficulties and you'd like to return to your roots, this seminar will give you the tools to build a successful, efficient law practice so that you can effectively help those in need. Whether you're retired and looking to do pro bono or "low bono" work, or transitioning from a firm to a profitable, part-time solo practice, building a 21st century law practice does not have to be difficult. This seminar will teach you to confidently, efficiently and cost-effectively offer the most common legal services, more affordably, to lower and moderate-income people in person and remotely from a paperless home office, often without the need to go to court. Topics covered in the seminar include unbundled legal services; online marketing, communication and legal service delivery tools; and unique pricing strategies that will help you get paid more consistently, while still lowering the costs of legal services.

Speaker: Bert Tiger Whitehead IV, MBA, Esq.

### Cost (includes lunch) **REGISTRATION DEADLINE: April 24, 2017**

- Master Lawyers Section Member .....\$25
  - LOCA Committee Member.....\$25
  - Guest of MLS or LOCA Member .....\$25
- Total: \$ \_\_\_\_\_

### Questions

For additional information regarding the seminar contact Amy Castner at 517-346-6322.

### Register One of Two Ways

**Online:** Pay by credit/debit card at <http://e.michbar.org>

**Mail** your check and completed registration form to:

State Bar of Michigan  
Attn: MLS Seminar Registration  
306 Townsend Street  
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Make check payable to: STATE BAR OF MICHIGAN

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Telephone: ( \_\_\_\_\_ ) \_\_\_\_\_ E-mail Address: \_\_\_\_\_

Enclosed is check # \_\_\_\_\_ for \$ \_\_\_\_\_

### Cancellation Policy

Cancellations must be received at least 48 business hours before the start of the event and registration refunds are subject to a \$20 cancellation fee. Cancellations must be received in writing by e-mail, or by U.S. mail. No refunds will be made for requests received after that time. That notice can be made by e-mail (tbellinger@mail.michbar.org), fax (517-372-5921 ATTN: Tina Bellinger), or by U.S. mail (306 Townsend St., Lansing, MI 48933 ATTN: Tina Bellinger.) Refunds will be issued in the same form payment was made. Please allow two weeks for processing.



MASTER LAWYERS SECTION

REGISTRATION

What You Need to Know About Medicare But Don't Know Who to Ask

May 24, 2017 • 1:00 p.m.-3:30 p.m.

Doubletree by Hilton—Grand Rapids Airport • 4747 28th Street SE, • Grand Rapids • 49512

This valuable program will educate you on the many nuances of Medicare, such as enrollment periods, the four parts of Medicare, non-covered services, coverage gaps and what you can do about them, etc. You will receive a general overview about Medigap, Medicare Advantage, and Part D prescription drug plans, as well as other important considerations to help maximize your coverage while minimizing your out-of-pocket expenses.

This is considered an "educational event" by the Centers for Medicare and Medicaid Services so individual plan and premium information specific to Medicare plan carriers cannot be presented or discussed.

Speaker: Rick Seely, Account Executive & Medicare Specialist, Member Insurance Solutions

Cost

Registration deadline: May 19, 2017

This event is free, but registration is required to allow for proper facility planning.

- Master Lawyers Section Member ..... FREE
Guest of Master Lawyers Section Member..... FREE

Questions

For additional information regarding the seminar contact Amy Castner at 517-346-6322.

Register One of Three Ways

Online: at http://e.michbar.org

Mail completed registration form to: State Bar of Michigan, Attn: MLS Seminar Registration, 306 Townsend Street, Lansing, MI 48933

FAX: 517-372-5921

P #: \_\_\_\_\_

Name: \_\_\_\_\_

Guest Name: \_\_\_\_\_

Firm: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Telephone: ( \_\_\_\_\_ ) \_\_\_\_\_ E-mail Address: \_\_\_\_\_

Cancellation Policy

As a courtesy to the planners, written notice of your intent not to attend is appreciated. That notice can be made by e-mail (tbellinger@mail.michbar.org), fax (517-372-5921 ATTN: Tina Bellinger), or by U.S. mail (306 Townsend St., Lansing, MI 48933 ATTN: Tina Bellinger.)