INGHAM COUNTY BAR ASSOCIATION

BRIEFS

JUNE 2013

Inside This Issue

ICBA Shrimp Dinner continues tradition of fun

ICBA's Annual Shrimp Dinner was held Wednesday, May 22, continuing the tradition of providing good food and good company, and welcoming the new ICBA president, who this year is **Josh Ard**.

New co-chairs **Louie Kafantaris** and **Robert Refior** provided an excellent meal, and many volunteers helped feed the hungry horde, making the dinner a success.

Shrimp dinner co-chairs Louie Kafantaris and Robert Refior now hold the secret shirmp sauce recipe!

*Please see **Shrimp dinner pix** on page 17*

ICBF Golf Classic June 10! See p. 4

Who let the dogs out?

U.S. Supreme Court rules on drug-sniffing dog cases

by James White & Alexander S. Rusek
jameswhite@whitelawpllc.com
alexanderrusek@whitelawpllc.com

Narcotics sniffing canines Aldo and Franky were immortalized in the recent Supreme Court decisions *Florida v Harris*, ___ US ___, 133 S Ct 1050 (2013) and *Florida v Jardines*, ___ US ___, 133 S Ct 1409 (2013). Decided in February 2013, *Harris* addressed what evidence and standards may be used to determine if there was probable cause to search a vehicle when a narcotics sniffing dog indicated the presence of narcotics in the vehicle (as permitted under *Illinois v Caballes*, 543 US 405, 125 S Ct 834 (2005)). Decided in April 2013, the *Jardines* Court considered whether the use of a narcotics sniffing dog on the front porch of the defendant's home constituted a search under the Fourth Amendment.

*Please see **Sniffer dogs** on page 20*

Ingham County Bar Association

P.O. Box 66
Grand Ledge, MI 48837
http://www.inghambar.org

ICBA Executive Director

Madelyne Lawry, **627-3938** mlawry@inghambar.org

ICBA BOARD OF DIRECTORS

President Stacia Buchanan, **303-1630**
staciabuchanan@yahoo.com
President-Elect Josh Ard, **655-9782,** Josh@ardlaw.com
Vice President Liisa Speaker, **482-8933,**
lspeaker@speakerlaw.com
Secretary Jason Hanselman **374-9181**,
jhanselman@dykema.com
Treasurer Mark Kellogg, **482-5800,**
mkellogg@fraserlawfirm.com
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smandel@fosterswift.com
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thomasbrennanjr@comcast.net
Hon. Clinton Canady III, **483-6524,**
canadylaw@aol.com
Mary Chartier, **482-2000,** mary@alanechartier.com
James Dalton, **351-6200**, jdalton@willinghamcote.com
Jessica Fox, **663-3306,** jsf_law@yahoo.com
Mark Hoover, **333-0306**, mhoover@hghblaw.com

SECTION CHAIRS

Bankruptcy Law
Steven M. Feigelson, **333-3373**,
steve@feigelsonlaw.com
Norm Witte, **485-0070**, ncwitte@wittelaw.com

Child Welfare
Jodi Latuszek, **373-4987**, latuszekj@courts.mi.gov

Criminal Law
Mary Chartier, **482-0222,** mary@alanechartier.com
John Dewane, **483-6108**, jdewane@ingham.org

Family Law
Natalie Alane, **482-2000**, natalie@alanechartier.com
Cynthia Harmon, **337-4600,**
cynthiaharmon@fosterandharmon.com

Probate & Trust
Rosemary H. Buhl, **853-6900**, rhbuhl@lawrhb.com
Marlaine Teahan, **377-0869**,
mteahan@fraserlawfirm.com

Real Estate
Michael Behan, **347-3500**

Young Lawyer Section (YLS)
President Shenique Moss, **373-1130,**
mosss@michigan.gov
President-Elect Christopher Wickman, **529-2733,**
chrisbwickman@gmail.com
Treasurer Michael Hill, **853-1517,**
MSH@thegallagherlawfirm.com

BRIEFS

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Publications Committee Co-Chairs

Liisa Speaker
482-8933; fax **482-8936**
lspeaker@speakerlaw.com

Jessica Fox
663-3306
jsf_law@yahoo.com

Editor

Becky Scott
290-3158
ICBABriefs@gmail.com

Author Guidelines

Writing for BRIEFS is an excellent way to publicize your expertise, and we encourage your submissions! Please send ideas for articles or completed articles to the editor via e-mail. If you do not receive e-mail confirmation within 24 hours that your article has been received, please follow up with a phone call.

Include your byline, your e-mail address, and a 2- to 3-sentence biography. Please also send a photo of yourself in .jpg or .png format, in color if possible.

Submissions are due the 15th of the month for the following month's issue, e.g. April 15 for the May issue. Exception: the deadline for the December/January issue is November 30. Guidelines for article length:

IN BRIEF notices: 100 to 200 words
Local legal notices: 100 to 150 words
Columns: 300 to 500 words
Articles: 700 to 1000 words
Ads: 20 to 60 words

Advertising

To place an ad, contact ICBA Executive Director Madelyne Lawry at **627-3938**, mlawry@inghambar.org.

BRIEFS Committee

BRIEFS publication meetings are held the 2nd Monday of the month at noon, usually at Speaker Law Firm, 230 Sycamore in Lansing. Committee members:

Chair: Liisa Speaker, **482-8933**, lspeaker@speakerlaw.com
Josh Ard, **655-9782**, Josh@ardlaw.com
Lisa Babcock, **580-3485**, lisa.babcock.jd@gmail.com
Christine Caswell, **282-1406**, christine@caswellpllc.com
Brett DeGroff, **313-256-9833**, bdegroff@sado.org
Derrick Etheridge, **325-3031**, derrick@derricketheridge.com
Jessica Fox, **663-3306**, jsf_law@yahoo.com
Jason T. Hanselman, **374-9181**, jhanselman@dykema.com
Kara Jennings, **394-2985**, kjjennin@lsscm.org
Michael J. Nichols, **432-9000**, mnichols@nicholslaw.net
Lori Pourzan, **394-2985 x240**, lpourzan@lsscm.org
Amy Timmer, **371-5140**, timmera@cooley.edu
Tony Snyder, **332-5323**, tsnyder@tonysnyder.com
Otto Stockmeyer, **371-5140 x2727**, stockmen@cooley.edu

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On the Docket

For all ICBA events and registration links, go to https://inghambar.org/calendar/cEvent.php
Avoid higher on-site registration costs by securing your registration with advance payment!

Program	Start Time	Location	Cost	RSVP
Monday June 10	11 a.m.	**ICBF 9th Annual Memorial Golf Classic** Come support ICBF charitable giving in this fun event at Country Club of Lansing, 2200 Moores River Drive. Lunch: 11 a.m.- 1 p.m. Shot Gun Start: 1 p.m. Awards Ceremony: 5 p.m. Sponsorship $100 or $500, download form	$135 Individual $500 4-Person Team $60 Award ceremony only	RSVP here
Wednesday June 12	7:15 a.m.	**ICBA Board Meeting** Alane & Chartier PLC 403 Seymore Ave., Lansing. map	Open to all section chairs	
Friday July 12	6-9 p.m.	**ICBA Third Annual Lawyers Got Talent** Wine, cheese, and a whole lotta ham! Sponsorship $125, download form Lexington Lansing Hotel 925 S. Creyts, Lansing, map	$30 Member $40 Non-member $15 Law student $45 at the door Judges attend for free	by July 11 RSVP here
Monday August 12	Noon	**BRIEFS Committee Meeting** (bring own lunch) Speaker Law Firm 230 N. Sycamore. Lansing. map	Open to all BRIEFS contributors	

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Local Legal Events

For legal events hosted by ICBA, see "On the Docket" on page 3.

ICBF Memorial Golf Classic to be June 10

ICBF's 9th Annual Memorial Golf Classic will be held **Monday, June 10** at the Country Club of Lansing, 2200 Moores River Drive.

Registration and lunch is from 11 a.m. to 1 p.m. At 1 p.m., there will be a Shot Gun Start, and a program/awards reception will be held at 5 p.m.

The cost per individual is $135. The cost for a team of four is $500. For those who cannot golf but would like to attend the awards ceremony at 5 p.m., the cost is $60.

To register in advance, please download the form here.

You and your firm are also welcome to sponsor the event. All sponsors will receive recognition in marketing before and after the event, and in the E-newsletter. You can donate a prize, sponsor a hole for $100, or give a corporate sponsorship for $500, which includes your name in the on-site program, as well as a hole sponsor. For sponsorship, download the form here or contact Madelyne Lawry at 627-8700.

*Please see **Local Legal Events** on the next page*

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Local Legal Events (cont.)

For legal events hosted by ICBA, see "On the Docket" on page 3.

Free tax law training by SBM on June 8 in Lansing

The State Bar of Michigan Pro Bono Initiative (PBI) and Taxation Law Section, in partnership with the Low Income Tax Payer Clinics at the MSU College of Law and U-M Law School, will offer an in-person tax law training from **9 a.m. to noon on Saturday, June 8 at Cooley Law School**, 300 S. Capitol Ave in Lansing.

The training will be presented by law school professors with many years of hands-on tax law experience, and will provide the basics for handling a tax case and an overview of the extensive reference and mentoring resources available to attorneys participating in the program. Topics that will be covered include IRS liens and levies, offers in compromise, installment agreements, innocent and injured spouse relief, collection due process hearings and appeal conferences, poverty exemptions, tax audits, and individual taxpayer identification number (ITIN) issues.

The training is free with a commitment to join the Pro Bono Referral Panel and accept one pro bono tax case referral within six months of the date of the training. To register, visit http://www.michbar.org/programs/tax_reg.cfm. Contact Robert Mathis at 346-6412 or rmathis@mail.michbar.org for details.

SBM Young Lawyers Section Sixth Annual Summit June 7-8

The State Bar of Michigan Young Lawyers Section (YLS) will host its sixth annual Summit **June 7-8 at Greektown Casino & Hotel in Detroit**.

The Summit is a statewide event to foster professional development and networking opportunities. The Honorable Dennis W. Archer will serve as the keynote speaker; seminar topics include criminal law, legal writing, oral advocacy, evidence, depositions, technology, social media and more.

Attendees can also join the YLS at 7 p.m. Friday, June 7 to watch the Detroit Tigers take on the Cleveland Indians at Comerica Park. Tickets must be purchased by May 5 for $30 each.

Prior to April 30, the registration fee is $45 for section members and $30 for guests. After April 30, registration is $60 for section members and $45 for guests. Section members get access to seminars, meals and the reception. Guests get access to meals and the reception. Register online at https://e.michbar.org/eCommerce. See details at http://www.michbar.org/younglawyers/.

For more information, contact Felicia Johnson at fojohnson@yahoo.com or (313) 549-6329.

SBM to present marketing seminar on June 11

The State Bar of Michigan General Practice – Solo and Small Firm Section will present a seminar entitled "Marketing: The Art of Getting and Keeping Good Clients" at noon on **Tuesday, June 11 at Ginopolis Bar B Q Smokehouse in Farmington Hills.**

The seminar will teach attendees how to use Facebook, Twitter, blogs and other sites to target marketing directly to individuals and companies. Seminar leaders include Julie Fershtman,who used marketing techniques to turn herself into a renowned expert on equine law in Michigan and across the nation. The other seminar leader is Arnold Reed. Reed used marketing techniques to attract and keep such big-name clients as entertainers R. Kelly, Aretha Franklin and Tavis Smiley.

The seminar costs $30 for members of the General Practice Section and $40 for non-members. Visit www.michbar.org/general/calendar.cfm to register for the seminar. Contact Elizabeth A. Silverman at asatty@aol.com or (248) 538-1177 for more information.

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In BRIEF

Frederick Baker, Jr., announces his retirement from the Supreme Court Commissioners' office and his reentry into private practice with Willingham & Cote, P.C. He has had several careers, teaching at Wayne Law School as a research attorney, clerk to the late Chief Judge Danhof at the Court of Appeals, teaching at Cooley Law School, practicing with Willingham & Cote and the Honigman firm, and as a Supreme Court Commissioner.

Fred Baker Jr.

Recipient of the State Bar of Michigan's Roberts P. Hudson and John W. Cummiskey Awards for his outstanding service to the Bar and the public, and of the ICBA's Distinguished Volunteer of the Year Award, Baker is admitted to practice before all courts, state and federal, in the states of Michigan and Washington, and to the U.S. Court of Federal Claims.

He will concentrate on litigation and appeals, including insurance and insurance coverage; Michigan state property, use, sales, Headlee Amendment, and Proposal A tax matters; real property and zoning; contract, business, and commercial disputes; beer, wine, and spirit distribution; state contracting; and bar appeal and character and fitness matters.

Bernick, Omer, Radner & Ouellette, P.C., is pleased to announce the addition of **Raymond Harris** as an associate attorney.

Raymond Harris

Ray practices in the areas of Medicaid, disability, elder law, estate planning, probate and trust administration, and probate litigation. He is a member of the National Association of Elder Law Attorneys, as well as the elder law and probate and estate planning sections of the State Bar of Michigan and the Ingham County Bar Association.

Ray is the author of *Litigation on d(4)(C) Trusts and Food Stamps,* which was published in the National Academy of Elder Law Attorneys Spring 2008 Newsletter. He also authored *A Primer on Medicare (September 2009) and Medicaid and Estate Planning Overview (January 2010) for CoSozo Living*. He is active in numerous community groups, including the Rotary Club of South Lansing-Holt, Kiwanis Club of South Lansing, and has served on the board of directors for the Lansing Educational Advancement Foundation, Lansing Retired & Senior Volunteer Program, and the R.J. Scheffel Memorial Toys Project.

Ray graduated from The Thomas M. Cooley Law School in 2007 and obtained his Bachelor of Science degree from the South Dakota State University in 2003.

*Please see **In BRIEF** on next page*

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In BRIEF (cont.)

Fraser Trebilcock attorney **Mark Kellogg** has been elected to the Board of Directors for the International Association of Attorneys for Family-Held Enterprises (AFHE). Mark has been a member of AFHE for six years.

Mark Kellogg

AFHE is an independent, non-profit association of attorneys practicing in the areas of corporate litigation, taxation, and trusts and estates who provide multi-disciplinary legal counsel and advice to privately-held, including family-held enterprises, their owner-managers, and family members. AFHE members focus on the establishment, growth, and success of family-held enterprises, the engine behind entrepreneurship. The attorneys who practice in family business law are reestablishing the traditional role of legal counselor to these businesses, viewing the entire business life-cycle of their clients' firms as relevant to business and legal decisions made today.

Mark has devoted his 27 years of practice to the needs of family- and closely-held enterprises.

In addition to his new position on the Board of Directors, Kellogg will also serve on the membership committee.

Varnum attorney **Bruce Goodman** was recently elected secretary to the Michigan Energy Innovators Business Council (MiEIBC), a state-wide organization dedicated to accelerating the growth of Michigan's advanced energy sector.

Bruce Goodman

MiEIBC, formed in 2012, is made up of Michigan companies and businesses at the forefront of the new energy economy. Its goal is to accelerate the growth of Michigan's advanced energy sector and create partnerships to expand business opportunities. Members are engaged in clean energy manufacturing and other areas of new energy initiatives in order to create opportunities and jobs in Michigan.

Goodman practiced environmental law for more than 20 years before turning his focus to the advanced energy industry. In addition to his law practice, he has been a strong advocate for energy manufacturers in Michigan, organizing and convening the West Michigan Bio Energy Consortium, the West Michigan Wind Manufacturing Network, and the West Michigan Solar Supply Chain.

"The Board of Directors elected by the membership represents the full spectrum of advanced energy companies in Michigan, and positions the Michigan Energy Innovation Business Council as *the* business voice of advanced energy in Michigan," said MiEIBC President Dan Scripps. "From global leaders like The Dow Chemical Company to start-ups like TOGGLED and Sakti3, and companies in the wind, solar, bioenergy, geothermal, energy storage and energy efficiency businesses, board members bring a rich mix of backgrounds and perspectives to guide MiEIBC's continued growth and development."

More information about EIBC can be found at their website, www.mieibc.org.

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Stacia Buchanan

President's Message: A successful year!

by Stacia Buchanan

staciabuchanan@yahoo.com

It is hard to believe that a year has gone by and this is my last president's message. The goal for this year was to maintain and improve our great programs. We have done that. Our year was filed with education, networking and social events for our members.

I want to thank our section chairs who rose to the task of planning and arranging for the section meetings in the midst of the change from catered to restaurant format. The sections fulfilled their educational purpose with wonderful speakers throughout the year. This year we are making another change — there will no longer be a charge to join a section. And, I know I speak for the section leaders when I remind you that if you have a topic you want to present or have covered, please contact them.

The goal for the year was to maintain and improve our great programs. We have done that. Our year was filled with education, networking, and social events for members.

There were a number of events over the past year. In October of 2012, judges and lawyers came together for our Bench-Bar conference, an event scheduled in even years, where we learned about the technology available in our Ingham County Courts. November was the time for our annual awards dinner, held in a new location, the Lexington Hotel. I was pleased to present awards to our honorees, Hon. James R. Giddings, Ret., Ted W. Stroud, Richard C. Kraus, Hon. David L. Jordan, and Holly Rosen. They are a credit to our organization, which is recognized for its many outstanding professional lawyers.

The Meet the Judges evening was a success thanks to committee members Judge Clinton Canady III, Lisa Babcock, Charles Lawler, Kevin Tyrrell, Chad Battle, and Tara Bachner. To bring in new members, the committee initiated a special rate for those attending the Meet the Judges event that included attendance and membership.

Members of the Young Lawyers section, led by Shenique Moss, learned new practice techniques at the Expand your Practice seminar titled "Keys to Running a Successful Plaintiff's Personal Injury Practice and the Effects of Tort Reform," with personal injury attorney Ven Johnson. The section also traveled to Washington, DC to be sworn in before the U.S. Supreme Court.

The "Top 5 Under 35" were honored at the Fourth Annual Barristers' Night. My last social event as President was the 70th Annual Shrimp Dinner, now ably chaired by Elias (AKA Louie) Kafantaris and Robert Refior, the latest chairs to receive the secret sauce recipe.

The ICBA will continue as a strong organization under the guidance of Josh Ard, who will make a great president. Our board will continue to find new ways for our association to assist our members. Madelyne Lawry will continue as our wonderful executive director, always ready to help us execute our plans.

I am looking forward to a great new ICBA year. Thanks to all for your help and efforts during the year. And, as always, your suggestions and comments for improvements are welcomed.

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ICBF accepting grant applications

The Ingham County Bar Foundation is accepting grant applications until August 31, 2013, to support programs which:

- Demonstrate innovative approaches or new ideas
- Benefit Ingham, Eaton and/or Clinton County residents
- Have potential for independent continuity
- Demonstrate community support
- Avoid duplication of services
- Address underserved needs or populations
- Use challenge grants or other fund-matching arrangements to augment

Applicants must meet the following criteria:

- Have a history of service reflecting clear ability to deliver quality service
- Demonstrate cooperative efforts between service providers in their area
- Request funds for services rather than capital expenses
- Have sources of income in addition to the Foundation funds requested

To download grant guideline details, click here. To download the grant application, click here.

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Ron Richards

Nine tips to negotiate a contract efficiently

By Ron Richards
RRichards@fosterswift.com

Much of my practice involves negotiating contracts, mostly by swapping contract proposals via e-mail. Here are some easy and straightforward practices that make negotiating contracts via e-mail more efficient. If you have ever negotiated a contract with a lawyer who does not follow these practices, you know about the inefficiencies and frustrating delays that result.

1. Use Track Changes in MS Word

The first step to adding efficiency in negotiating a contract via e-mail is to get Microsoft Word and use its "Track Changes" feature. Track Changes is a way for Word to track revisions in a document.

When you receive a draft proposed contract, you and your client will decide whether to accept or reject the proposed terms, or add other terms. If there are parts you want to change, using the Track Changes feature allows proposed changes to be quickly visible to others. Some refer to Track Changes as "redlining" a document because when turned on, Track Changes shows text deletions by drawing a horizontal line through the proposed text to be stricken and shows in red the proposed text to be added.

Using the Track Changes feature allows proposed changes to be quickly visible to others.

Turning on Track Changes is easy. In Word 2010, click on "Review" in the ribbon, then click on "Track Changes." After you turn Track Changes on, Word tracks every change you make to a document. It's that simple.

When you revise with Track Changes on, you help the other side pinpoint the proposed changes by letting them see quickly what has been changed so they can focus on the "redlined" language in the new version.

Failing to use Track Changes leads to inefficiency. If one party makes changes without turning Track Changes on, the other party will have no easy way to figure out what terms are proposed to be revised and will face a tedious time figuring out the proposed changes.

2. Accept (blackline) proposed revisions that are acceptable

Most attorneys use Track Changes to identify contract revisions they propose. But when parties swap multiple back-and-forth proposals, the process bogs down, throwing efficiency out the window.

Efficiency does not end with using Track Changes to track revisions. A party who receives a contract proposal should accept all revisions that are acceptable. The accepted revisions will no longer be colored but will convert to black just like text that has not been disturbed.

Accepting proposed revisions is simple. In Word 2010, click the "Review" tab in the ribbon, then click "Accept." You have the choice to accept one proposed revision at a time or accept all proposed revisions in the document.

*Please see **Efficiency** on page 24*

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PROBATE LAW SECTION

Estate Planning Forensics

by Christine Caswell
christine@caswellpllc.com

Christine Caswell

While the media has glorified forensics to consist of blood spatter and gunshot residue, for estate planners and probate attorneys, forensic research is needed to test the validity of signatures and documents.

"I am formally trained in document analysis," said **Michael J. Sinke** of **Speckin Forensic Laboratories** at the May 21 Probate & Estate Planning Section meeting. "I've been doing document analysis for the past 14 years." Sinke tries to verify whether someone signed or wrote a document, such as a holographic will or an amendment to a will or trust.

"I had a will that was four pages long," he said. "Some of it was printed and some cursive with notes everywhere and no signature. I was asked to verify if the person wrote it. I said the person probably wrote it."

Sinke said Speckin has a nine-point scale of identification or elimination as to whether a document was written by the person in question. "Sometimes, we have no conclusion because we don't have enough questionable writing or not enough previous writing or we are dealing with machine copies. Many times, we can't come to a positive conclusion based on the evidence we have. We may have to give a client bad news."

For handwriting analysis, it is best to have an original document to determine if additional writings were contemporaneous, since there are minute handwriting habits that are hard to see in a copy.

Sinke said it is best if clients have an original document to determine if additional writings were contemporaneous with the original document. Sinke looks at paper impressions and analyzes handwriting stroke microscopically. "There are minute handwriting habits we may not be able to see in a copy. But if it's a good copy, we can give an opinion based on that. But an opinion can change if we see the original."

Sinke also said clients need to provide "known writing" or written documents that were made a little before the period in which the questionable document was supposedly written, during that same period, and a little after that time period. "We want to compare printing to printing and cursive to cursive and have to have like letters and letter combinations to see if it's the same writer or not.

"In older individuals," he continued, "age and medical conditions can affect writing. But people still remember how they form their letters. It's not cognitive." However, a person who has had a stroke may not be able to remember how he or she previously wrote.

"We don't like a lot of background information," Sinke said. "We're not going to slant our response to what you report. We will give you the range of our opinion and the criteria for it."

Sinke said ink has a three to three-and-a-half-year drying period. He can tell within a six-month period when something was written. "We have one of the largest ink chemistries outside of the secret service," he said.

Before joining Speckin, Sinke worked in the crime lab for the Michigan Department of State Police. In additional to handwriting analysis, Speckin can do crime scene reconstruction, DNA and firearms analyses, computer forensics, cell phone tracking, and "trace" such as soil analyses and matching tire tracks and shoe prints.

Christine Caswell is a Lansing attorney practicing in the areas of elder law, probate and estate planning, and family law.

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PROBATE LAW

Probate Case Update 2013

by Christine Caswell
christine@caswellpllc.com

Christine Caswell

Under Social Security Survivor's Benefits, an applicant must be able to prove that he or she is the child of a deceased wage earner and was dependent on that wage earner at the time of that person's death.

In Gwendoline Louise Stillwell Trust, *the court accepted the settlor's written but unsigned notes as amendments to her trust.*

Phillip E. Harter, former probate judge and currently with Chalgian & Tripp Law Offices PLLC, gave his annual probate case review at the opening of the 53rd ICLE (Institute of Continuing Legal Education) Probate and Estate Planning Conference on May 9.

Social Security and after-fertilized heirs

In re Certified Questions, from the U.S. District Court for the Western District of Michigan (*Mattison v Security Commissioner*) _____ Mich _____ (2012), #144385, 11/15/12, Harter explained that the District Court found that children who were conceived through *in vitro* fertilization after one parent had died were not entitled to Social Security benefits from that parent. In *Mattison*, a widow conceived twin children from eggs inseminated with her deceased husband's sperm after his death. The widow then applied for Social Security benefits for the twins. The benefits were denied. and the ALJ determined that the twins were not entitled to benefits because they did not meet the definition of heirs under EPIC (Estates and Protected Individual Code).

Under Social Security Survivor's Benefits, the court cited that an applicant must be able to prove that he or she is the child of the deceased wage earner and was dependent on that wage earner at the time of that person's death. Also, in reviewing EPIC, the court found that individuals must be alive at the time of the decedent's death and live more 120 hours after the decedent in order to qualify under Michigan's intestate laws. However, children who are in gestation at the time of the person's death and live 120 hours after birth also qualify. But, in the present case, the *in vitro* fertilization did not occur until after the husband died, so the court found that the children could not inherit under the rules of intestacy and, therefore, were not entitled to survivor benefits from Social Security.

Trust Amendments

In re *Gwendoline Louise Stillwell Trust*, _____ Mich App _____ (2013), #307822, 1/24/13, Harter explained that the court accepted the settlor's written but unsigned notes as amendments to her trust. In *Stillwell*, the settlor executed a revocable trust in 2001, transferring all of her property, except for joint property, into the trust. Language in the trust included the statement that "[t]he Grantor may by instrument in writing delivered to the Trustee…modify or alter this Agreement in any manner…."

When the settlor died in 2010, her grandson, as he had been instructed, gave a large envelope to the trustee. The envelope was addressed to the trustee and included several handwritten notes that were dated but not signed. Because the notes conflicted in some instances with the trust language, it was up to the court to decide if

Please see ***Probate Update*** *on page 22*

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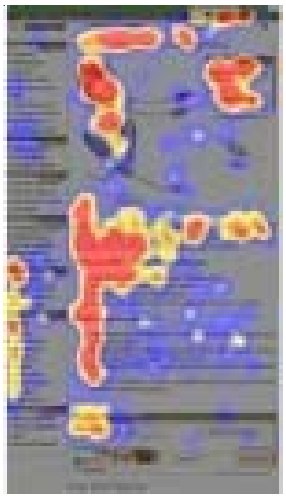
Roberta Gubbins



Eye-tracking pattern of web page

The writer should remember that readers want the information presented in a clean, easy to read style that they can absorb quickly.

Writing for the screen

by Roberta M. Gubbins
roberta@robertamgubbins.com

The "biggest change to law practice in our lifetime has been the switch from paper to screens," said Robert Dubose, attorney from Texas, speaking at the Michigan Appellate Bench Bar conference.

If your audience is reading on screens, such as you are doing right now, you, the writer, he said, need to be aware of how people read on their e-reader, iPad or Smartphone.

Quoting from Jakob Nielsen's research on reader's eye-tracking, he said **one**, people don't read, they scan; and, **two**, they scan in an F shape pattern. Readers start in the upper left corner, take two horizontal swipes across the page, then swipe vertically down the left. And, **three**, readers look most above the fold or at the top of the page.

How does that affect your webpage design?

- Put the most important content first — no need for a fancy introduction
- Don't center text and keep headers flush to the left margin
- Make webpage text easy to scan by using bold headers and bullet lists

Credibility is important to web visitors. They will ignore a page that looks like an ad or uses market hype. They are busy people who want the straight facts.

Dubose recommended lawyers design legal documents to look like a web page using the same principles:

- Short text
- Focus on headings
- Bookmarks over to the side, and include
- Summaries, which should be no more than one page.

The goal for the lawyer writing a brief for a screen is to make it "as easy to get information from our brief as possible." He recommends using white space and omit needless words but do not omit important information.

Using visuals such as charts or photos adds to the words. While he advised against the use of all caps for emphasis, because they are hard to read, he did recommend bolding headlines and adding a hyperlink to the part of the contract, for example, that you are discussing. The writer should remember that readers want the information presented in a clear, easy to read style that they can absorb quickly.

Perhaps not all of us have the talent or time to go as far as Bob Kohn, the chairman and chief executive of RoyaltyShare, who was ordered by the Federal District Court in Manhattan to reduce over ninety pages of arguments into five pages. Thinking the idea absurd, he filed a five-page cartoon strip as his amicus filing. Kohn called upon his daughter, Katie,

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Screen, *continued from previous page*

who is studying for her Ph.D in film studies at Harvard, to help out. Katie enlisted friend Julia Alekseyeva to do the illustrations while Kohn did the script. This is the result:

To make it easy for your blog readers to get your message as quickly and simply as possible, a cartoon might just be the answer.

Cartoon brief filed in appeals court last year

While not many lawyers would go that far for a brief, how about using the technique for your blog? You want to make it easy for your readers to get your message as quickly and as simply as possible. A cartoon might just be the answer. Your readers will appreciate your efforts and you will have fun creating it.

For more information on eye tracking, see www.nngroup.com/topic/eyetracking/. To learn more about the cartoon brief, view http://jonathanturley.org/2012/09/06/amicus-party-filed-cartoon-brief-in-protest-of-five-page-limit-imposed-by-court/

Roberta M. Gubbins is the editor of the Ingham County Legal News and a ghostwriter for lawyers and law firms. Her blog is at www.draftthree.blogspot.com. She can be reached at roberta@robertamgubbins.com or 734-255-9119.

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iPick Technology

Derrick Etheridge

SCOTUSblog is devoted to covering the U.S.Supreme Court without bias and according to the highest journalistic and legal ethical standards.

The PocketJustice app allows access to details on more than 600 constitutional law cases.

SCOTUSblog and PocketJustice

by Derrick Etheridge
derrick@derricketheridge.com

This month iPick the United States Supreme Court. Well not the United States Supreme Court specically, but rather, I share two of my favorite ways of keeping up with the United States Supreme Court.

The first way is by following the Supreme Court of the United States Blog (SCOTUSblog). SCOTUSblog was founded in 2002 and is "devoted to comprehensively covering the U.S. Supreme Court without bias and according to the highest journalistic and legal ethical standards." SCOTUSblog reports the merits of a case "prior to argument, after argument, and after the decision." For certain noteworthy cases, SCOTUSblog provides access to briefs and recorded summaries of arguments for podcasts. SCOTUSblog also goes beyond coverage of individual cases. It provides a daily round-up of what is written about the Court. It publishes broader analytical pieces. And it regularly publishes statistics relating to the Court's Term. SCOTUSblog is sponsored by Bloomberg Law. A great way to follow what is happening over on the SCOTUSblog is to follow it on Twitter @SCOTUSblog.

The second way is by downloading the PocketJustice app. The app allows access to details on more than 600 constitutional law cases. It also provides short biographies of all of the Justices. It provides access to audio of cases - both streaming and offline access. And it even allows you to clip and share court audio. You have access to the full text of opinions; access that is fully searchable. One of my favorite features is the ability to access synchronized, searchable transcripts identifying all speakers. That is, the audio is synchronized to the transcript, so you can follow along. The app is available for your iPhone and iPad, as a universal app, for only 99 cents. And it is available for your Android device for only 99 cents. The PocketJustice app is developed and maintained by Oyez Project at Chicago-Kent College of Law.

So, those are my two favorite ways to keep up with the United States Supreme Court. I am sure you have your own favorites. But, if you have not tried mine, give them a shot and let me know what you think.

H. Derrick Etheridge, J.D., LL.M., of the Law Offices of Derrick Etheridge, PLLC, is a solo practitioner, whose law practice focuses on Criminal Defense.

Visit my website at www.derricketheridge.com or my blog, the Michigan Criminal Law Blog at www.micrimlawblog.com. For comments, please send me an e-mail at derrick@derricketheridge.com. Follow me on Twitter at www.twitter.com/micrimlawtweets.

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Book Review

The New Jim Crow: Mass incarceration in the age of colorblindness

by Michelle Alexander

Reviewed by Brett DeGroff
bdegroff@sado.org

Editor's Note: This review was previously published in the National Lawyers Guild Review, Vol. 70, No. 1 (http://www.nlg.org/resource/nlg-review/volume-70-no-1), and is reproduced here with permission, minor edits, and condensed citation.

The policies of mass incarceration have failed as badly as any embarked on in this country. Michelle Alexander's *The New Jim Crow* details those failures from the historic roots of the policies through their misguided modern manifestations. The book shows the perverse financial incentives for law enforcement agencies to incarcerate massive numbers of low-level offenders, discusses unconscionably long sentences which keep people in prison for decades, and examines post-release policies which are creating an undercaste that is detrimental to those within it as well as without. These facts are indisputable, and this book presents sound reasons for dismantling these failed policies.

The book shows the perverse financial incentives to incarcerate massive numbers of low-level offenders, discusses unconscionably long sentences, and examines post-release policies which are creating an undercaste.

However, *The New Jim Crow* goes on to conclude the sum of the policies of mass incarceration is a system of racial control. In so doing, the book attempts to shift the conversation about mass incarceration away from one of statistics and straightforward policy. However, as Alexander herself points out, to the extent that an ulterior motive can be said to underlie the policies of mass incarceration, the point is to make race the "organizing principle of American politics . . . ." Ironically, by arguing that the debate about mass incarceration should focus first on race, the book seems to unwittingly fall into the very trap it exposes.

So much in *The New Jim Crow* is indisputable. The book discusses how in 1982 President Reagan announced the War on Drugs. Federal expenditures for fighting drug trafficking exploded, while spending on drug treatment and prevention dramatically declined. At the same time inner-city economies were collapsing as manufacturing jobs left the country and unemployment climbed. As crack cocaine flooded into American cities, violence climbed and the government's response was to ratchet up "law and order rhetoric" and continue to turn away from treatment. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 49 (2010).

In 1986 federal mandatory minimum sentences for crack cocaine distribution were enacted. Predictably, incarceration rates soared with more than 2 million behind bars by 2000. Between 1985 and 2000, two thirds of the increase in the federal prison population and half the increase in state prison populations were attributable to drug offenses. *The New Jim Crow* reports that "Approximately a half-million people are

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***Shrimp Dinner pix**, continued from page 1*

The Volunteers

Christine Campbell, Diane Smith, Diamond Hayes, and Lori Shemka

Brian Gallagher, Louie Kafantaris, Amanda Pollard, Jim White, George Campbell, Tom Kulick, Robert Refior, Kim Eddie, and Scott Eldridge

Longest-serving Shrimp Dinner volunteers Kim Eddie and The Hon. Hugh Clarke Jr.

George Campbell, The Hon. Charles Felice, Phil Vilella, and David Lick

Amanda Pollard, Diamond Hayes, Jules Hanslovsky, Sean Gallagher, Joseph Yang, Scott Eldrigde, and Brian Gallagher

Volunteers not pictured:
Beverly Bishop
Rhonda Fleming
G. Alan Wallace

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***Shrimp Dinner pix**, continued from previous page*

The Happy Guests

A packed crowd

Photos by Becky Scott

The serving line

Ross Bower, II

Patricia Scott and Jessica Fox

Otto Stockmeyer

*Please see **Shrimp Dinner pix** on next page*

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***Shrimp Dinner pix**, continued from previous page*

The Happy Guests

Photos by Becky Scott

James Dalton and David Nelson

Kimberlee Hillock, Heather Kleinhardt, and Geraldine Brown

David Nelson and Torree Breen

Joshua Richardson and Mark Kellogg

Michael Matheson, Don Nicolucci, The Hon. Don Allen Jr., and Joshua Richardson

Naomi Gaynor Neilsen and Kristen Hintz

Madelyne Lawry and Roberta Gubbins

Keldon Scott and an unsuspecting victim

Link to page 1

James White

Alexander Rusek

In an unanimous opinion, Justice Kagan wrote that a probable cause determination regarding the sufficiency of a narcotics sniffing dog's positive indication should be examined like any other probable cause determination — by looking at the totality of the circumstances of the case.

***Sniffer dogs**, continued from page 1*

In *Harris*, a police officer, patrolling with his K-9 Aldo, pulled over the defendant for an expired license plate. Approaching the vehicle, the officer observed that the defendant was "visibly nervous" and that there was a beer can in the vehicle's cup holder. The officer then conducted a sniff for narcotics with Aldo. Aldo indicated on the driver's side door to the presence of narcotics. The officer searched the vehicle, but found no narcotics that Aldo was trained to detect. However, the officer did find a significant quantity of materials used in the production of methamphetamines. After he was released on bail, the unfortunate defendant had another encounter with the officer and Aldo. Another sniff around the same vehicle indicated the presence of narcotics, but when the officer searched the vehicle, he found no contraband.

In an unanimous opinion, Justice Kagan wrote that a probable cause determination regarding the sufficiency of a narcotics sniffing dog's positive indication should be examined like any other probable cause determination — by looking at the totality of the circumstances of the case. The decision reversed the decision of the Florida Supreme Court wherein the Court found a lack of probable cause because the state only presented evidence of Aldo's training and certification, but presented no records regarding his performance history (Aldo's previous false positives). With its decision, the Florida Supreme Court had established an inflexible, and improper, standard to determine probable cause based on "multiple, independent evidentiary requirements." *Harris* at 1056.

The Supreme Court held that while Aldo's performance history was a factor to consider, Aldo's training and certification in detecting narcotics were sufficient evidence to support a probable cause finding. However, the Court further held that a defendant must have an opportunity to challenge this type of evidence, and may be able to show that the training, certification, or proficiency testing is so deficient as to cast doubt on the dog's abilities.

In *Jardines*, two detectives went to investigate the home of the defendant based on an unverified tip that the defendant was growing marijuana. One of the detectives was a trained canine handler and brought his narcotics sniffing dog Franky to defendant's home. While on the porch of the home, Franky indicated to the presence of narcotics. The police obtained a search warrant based on the positive indication, and found marijuana plants in the home during the subsequent search.

Justice Scalia, writing for the majority and joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan, held that the use of Franky to conduct a sniff on the porch of defendant's home without a warrant constituted an unconstitutional search under the Fourth Amendment. First, the Court held that the porch of defendant's home was protected from unreasonable searches as curtilage of the home under the Fourth Amendment, *People v Oliver*, 466 US 170, 104 S Ct 1735 (1984), and in traditional Justice Scalia style, in accord with Blackstone's Commentaries on the Laws of England 223 (1769). Second, the Court held that a

*Please see **Sniffer dogs** on next page*

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***Sniffer dogs**, continued from previous page*

narcotic dog sniff was not within the realm of permissible activities that private citizens and police are free to engage in on another's property, such as approaching and knocking on a home's door. The Court held that when the police conducted the narcotics sniff they acted with the objective purpose of searching the property with Franky. Therefore, the police conducted a search "within the meaning of the Fourth Amendment." *Jardines* at 1417-18.

Justice Kagan wrote that the use of a narcotic sniffing dog outside of a home is analogous to the impermissible warrantless use of thermal imaging to see inside of a home.

While the *Jardines* majority did not decide whether the sniff violated the defendant's right to privacy under *Katz v United States*, 389 US 347, 88 S Ct 507 (1967), Justice Kagan addressed the issue in her concurrence (joined by Justices Ginsburg and Sotomayor). Justice Kagan wrote that the use of a narcotic sniffing dog outside of a home is analogous to the impermissible warrantless use of thermal imaging to see inside of a home, as was the case in *Kyllo v United States*, 533 US 27, 121 S Ct 2038 (2001). Therefore, according to Justice Kagan, the narcotic sniff was an impermissible invasion of the defendant's privacy rights under *Katz*, and that a majority decision based on this rationale "would make an "easy cas[e] easy" twice over." *Jardines* at 1420; *citing Jardines* at 1417.

Harris and *Jardines* may also indicate an important new trend in Supreme Court jurisprudence. In her unanimous opinion in *Harris*, Justice Kagan approved of the use of the narcotic sniffing dog in the case, and liberally referred to the dog by his name (Aldo) throughout the opinion. Likewise, Justice Alito referred to the dog in *Jardines* by his name (Franky) throughout his dissent wherein he approved of the use of the dog. Conversely, in condemning the use of the dog in *Jardines*, Justice Kagan in her concurrence, and Justice Scalia in his majority opinion, simply referred to Franky as "the dog." Only time will tell if this trend of addressing narcotics sniffing dogs by their name when a justice approves of their handler's actions will continue in the future.

James White is the founder of White Law PLLC in Okemos, MI. His practice focuses on criminal defense and civil litigation.

Alexander S.Rusek is a law clerk at White Law PLLC in Okemos, MI, and a May 2013 graduate of the Michigan State University College of Law.

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these writings constituted valid trust amendments. Also at issue was whether a grandchild adopted by one of the settlor's children after the settlor's death qualified for the class of grandchildren as provided for in the trust.

The Court of Appeals found that the settlor had "substantially complied" with the terms of the trust and affirmed the lower court's ruling that the writings did constitute trust amendments. However, the court did not uphold the trust language that "future born and adopted grandchildren" provided for the adopted child to be included in the class because the court said the class closed at the settlor's death.

Non-judicial v judicial settlement for trusts

The Michigan Court of Appeals found that an agreement among beneficiaries does not constitute a nonjudicial trust settlement.

In re Robert H. Draves Trust and Agnes L. Draves Trust, _____ Mich App _____ (2012), #306014, 12/06/12, the Michigan Court of Appeals found that an agreement among beneficiaries does not constitute a non-judicial trust settlement under MCL § 700.7111(2) once the courts have been involved. Harter explained that this was a marital trust that resulted in multiple lawsuits after the husband died. An agreement was later reached by all of the parties, and the Probate Court said the agreement qualified as a non-judicial agreement under MCL § 700.7111(2). However, the Appellate Court said that MCL § 700.7111(2) is generally limited to administrative details of the trust, and because suits had been filed that this agreement was a judicial settlement and treated it as a trust amendment.

Trust terror clauses

In re Miller Osborne Perry Trust, _____ Mich App _____ (2013), #309725, 2/19/13 is a case of a trust beneficiary seeking declaratory judgment from the probate court that he had "probable cause" under the terror clause to challenge the validity of the trust. His sister, another beneficiary, then asked the court to find her brother's petition for declaratory relief a contest of the trust that violated the terror clause. The trial court did not find probable cause under MCL § 700.7113 but also did not find the brother's request to be a challenge to the terror clause. The sister then appealed claiming it was a challenge, but the Court of Appeals said her brother's petition specifically stated it was not a challenge and found that a challenge was not made. Harter said that this was a "creative" attempt to get "a protective ruling without challenging the terror clause" that should not be used in the future.

Conservator fees and PIP benefits

In re Estate of Edward Carroll, a protected person, _____ Mich App _____ (2013) resolves whether conservator fees are allowable under PIP benefits. The wife of the ward injured in a car crash was paid by the auto insurance company to provide 24-hour care. After she died, the court

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Probate update, *continued from previous page*

appointed a conservator. When the conservator billed the insurance company for his expenses, the insurance company claimed that this "was not an allowable expense under MCL § 500.3107(1)(a) of the no-fault act." The probate court agreed with the insurance company stating that MCL § 500.3107(1)(a) referred to expenses related to a person's recovery, care, or rehabilitation, not the administrative and financial duties of a conservator. The Court of Appeals reversed the probate court and remanded stating the conservator charges were reasonable and related to the ward's care, that these were not "replacement" services which were barred after three years, and referred to *Griffin v State Farm Mut Auto Ins Co*, 472 Mich 521 (2005). The Michigan Supreme Court then remanded back to the Court of Appeals in consideration of two 2012 cases. After reviewing these cases, "the Court of Appeals issued a new opinion finding that the trial court did not err when it determined that [the insurance company] only had to compensate…for those services" as conservator that were not replacement services.

Harter said this case shows that an insurer only has to pay for those services necessitated by the crash. Because the conservator was managing the ward's financial services due to the ward no longer being capable of doing so himself because of the crash, those services were compensable. Harter said this case goes into detail about what constitutes allowable expenses under the law.

Litigating in the wrong trust proceeding

In re Beatrice Rottenberg Living Trust, _____ Mich App _____ (2013), #297984, 4/04/13, several issues arose in a sibling dispute over repayment of loans where a married couple had marital trusts. In this case, the father had loaned money to the daughter's business interests. After he died, his remaining assets poured into his wife's trust. After the wife died, the daughter's businesses filed for Chapter 11 bankruptcy protection. The son then sued for repayment of the loans and to have his sister removed as a fiduciary of the trust. The sister argued that her brother did not have standing and had filed suit under the wrong trust.

The brother, as a beneficiary, did indeed have standing to bring the suit, but the suit was brought regarding the wrong trust, since the father alone had loaned the money to the daughter, and the trustee of the father's trust should have brought up demand for repayment of the loans.

In reviewing the facts of this case, the Court of Appeals looked at three issues: 1) what is a final order in a probate case 2) whether the party had standing to bring the suit and 3) when there are two trusts, whether the case may be dismissed if the case is brought under the wrong trust. In the present case, the court found that the probate court had not issued a final order so there was nothing to appeal, that the brother, as a beneficiary, did indeed have standing to bring the suit, but that the suit was actually brought regarding the wrong trust since the father alone had loaned the money to the daughter and that the trustee of the father's trust should have brought up demand for repayment of the loans. The appellate court vacated and remanded back to the probate court.

Christine Caswell is a Lansing attorney practicing in the areas of elder law, probate and estate planning, and family law.

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***Efficiency**, continued from page 10*

The importance of accepting agreeable language cannot be overstated. The process works best if **every time** a party receives a new contract proposal version, he or she accepts all acceptable revisions. Then neither party has to repeatedly review the language, since it has been agreed to. Blacklining agreeable language allows parties to focus attention on the remaining redlined language that is still in dispute and needs to be negotiated.

The process works best if every time a party receives a new contract proposal version, he or she accepts all acceptable revisions.

Failure to "accept" agreeable language bogs the process down as it causes at least two frustrating inefficiencies: it leaves agreeable language in "redline," which unnecessarily forces the reviewing party to review that language because it is still highlighted even though it is agreeable; and it distracts the reader's attention from the remaining disputed language, wasting the attorney's time and the client's money.

3. Use comments

Word has a very handy feature for transactional attorneys: the "New Comment" feature. This allows a reviewing attorney to highlight text without revising it, and to add a comment about it.

Using this feature is simple: use your mouse to highlight the word or sentence, click on "Review" in the ribbon, and click on "New Comment." The word or sentence will be highlighted, and the highlighting connects to a colored text balloon on the right-hand margin where you can type in your comment.

Using comments lets me tackle many common contract scenarios.

Using comments lets me efficiently tackle many common contract negotiation scenarios:

- •. Asking the other side to clarify its intent behind a sentence
- • Identifying a document that a contract references (e.g. which you want the other side to provide you with a copy of)
- • Highlighting an issue your client wants to further discuss
- •. Reminding the parties to fill in some blanks in the contract before executing it, such as the date when rent is to start.

4. Work only off of the most recent proposed contract version (not prior versions)

This one is common sense. It should go without saying that if you are negotiating a contract, both parties should work off of the most recent version of the contract. Working off of earlier drafts can only lead to confusion.

5. Work with Word versions (save the PDF version for final publication)

Negotiating contracts is fairly straightforward if both parties use Word. But inevitably I receive an initial draft contract proposal in PDF. Depending on what software you have, you may be able to make minor edits to a PDF document (such as inserting a word or two). But revising

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***Efficiency**, continued from previous page*

beyond that is cumbersome. If you are on the receiving end of the contract proposal, your best bet probably is to ask the other side for a MS Word version of the proposal. That way, you can redline your revisions with Track Changes. And if you are starting contract negotiations, sending a party a proposed contract in PDF will not get you off to a good, efficient start. Sending a PDF just slows the process down. PDF versions are best when negotiations are over – for the final, agreed-upon, executable version of the contract.

Editor's Note: Some versions of Adobe Acrobat Pro (such as version 9) allow you to export PDF files to Word. To do so, from the Acrobat menu bar, select File > Export > Word Document.

6. Minimize the number of contract revisers

Negotiating contracts using Track Changes is most straightforward when there is only one person on each side modifying the proposal. But sometimes multiple people are involved in modifying the document – such as the client and the client's lawyer, two lawyers representing a single client, or a lawyer and a secretary working on behalf of a single client. Even if Track Changes are used, receiving a draft contract that has been revised by multiple people can be confusing because each person's revisions will show up in a different color.

To keep contract negotiations moving efficiently, it is best if all proposed revisions are made by a single person so the document does not contain text in multiple colors.

Although most Word versions offer a way to determine who made specific changes, it can still be confusing, time-consuming, and tedious to review a document that multiple people have revised. To keep contract negotiations moving efficiently, it is best if all proposed revisions are made by a single person so the document does not contain text in multiple colors.

7. Become friends with Shauna Kelly

Shauna Kelly is a genius. Or as my firm's IT expert put it, Ms. Kelly is a "Microsoft Word MVP." Ms. Kelly has an extensive and detailed write-up online explaining the nuances of using Track Changes. I guarantee that you will learn tips to help your efficiency.

8. Treat contract amendments just like original contracts

I will never forget the project I worked on earlier this year. My client had an existing contractual relationship with another entity. Over the years, the parties had signed an original agreement and over six amendments to that agreement. One day, the other side e-mailed my client a proposed new contract, which the other side said was aimed at restating the governing terms of the relationship after all those amendments and "cleaning up some language." A noble idea. But the attachment was 99 pages. And it was a clean Word document.

There were no redlines in the attachment. My client and I asked for a redlined version that would show the changes that the other party was proposing to the existing agreement and existing amendments. The other party told us that it had no redline. My client asked that I review the

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***Efficiency**, continued from previous page*

The absence of redlines to show the language proposed to be "cleaned up" made my review tedious and time-consuming.

proposed new contract and advise if it changed any material term of the parties' current contractual relationship. And so I did. But the absence of redlines to show the language proposed to be "cleaned up" made my review tedious and time-consuming. Needless to say, this led to the most inefficient contract review I have ever been involved with.

It didn't have to be that way. To save time and clients' money I suggest following the above tips when negotiating contract amendments too, redlining every change you propose to be made to the existing contract documents.

9. When negotiations via e-mail bog down, pick up the phone

In most contract negotiations I am involved in, the first few rounds of negotiations are done via swapping e-mailed versions of contract proposals. But there inevitably comes a time when swapping redline versions of contract drafts by e-mail no longer moves the negotiations forward.

When this happens, I find that a conference call with the key players on each side is often effective at moving the contract negotiations forward again. Although we may be in the "e-mail era," I find that the good old-fashioned telephone call still has its place and often helps efficiently resolve contract negotiations.

Ron Richards is a shareholder in the Lansing office of Foster, Swift, Collins & Smith, P.C. A large part of his practice includes reviewing and negotiating telecommunications contracts. *He would like to thank Richelle McFate for her help on the technical aspects of this article.* *Ms. McFate is employed in the same Lansing office of Foster, Swift, and works in the firm's Information Technology department.*

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in prison or jail for a drug offense today, compared to an estimated 41,100 in 1980…Drug arrests have tripled since 1980." By 2007, the total number of people in American jails or prisons or on probation or parole was more than 7 million. *Id*. at 53, 58, 60.

Between collecting cash and property through forfeitures, and federal dollars tied to focusing on fighting the War on Drugs, local police departments have been incentivized to quantify their success in terms which have nothing to do with eliminating the causes and consequences of drug abuse.

The New Jim Crow discusses not only how sentencing policy has kept drug offenders in prison much longer than can be defended on policy grounds, but how financial incentives for police have flooded citizens into the system on the front end. Between collecting cash and property through forfeitures, and federal dollars tied to focusing on fighting the War on Drugs, local police departments have been incentivized to quantify their success in terms which have nothing to do with eliminating the causes and consequences of drug abuse. Since 1970 police had been able to seize some assets associated with drug trafficking. However, in 1984 Congress amended federal law to allow state and local agencies to keep up to 80 percent of the proceeds of seized assets. For departments with no control over money coming into their budgets, the possibility of deriving "revenue" from enforcement activities has an obvious attraction. The book reports that from 1988 to 1992, task forces funded with federal money seized more than $1 billion in assets. In 1988 Congress revised federal aid to state agencies to enlist them in the War on Drugs. The book argues that the millions of federal dollars have gone to paramilitary style task forces and stopping drugs as they move across highways. These efforts generally rope in low-level and easily replaceable participants in a criminal drug organization. The book points out that the normal rhetoric that "the War on Drugs targets 'kingpins' " does not jibe with law enforcement's wholesale pursuit of street dealing local offenders. *Id*. at 73, 78-79.

Once a citizen is convicted of a felony they are "ushered into a parallel universe in which discrimination, stigma, and exclusion are perfectly legal, and privileges of citizenship such as voting and jury service are off-limits."

But the damage of these policies goes far beyond mass incarceration itself. As Alexander puts it, once a citizen is convicted of a felony they are "ushered into a parallel universe in which discrimination, stigma, and exclusion are perfectly legal, and privileges of citizenship such as voting and jury service are off-limits." In 2008, while 2.3 million Americans resided in prisons and jails, another 5.1 million were on probation or parole. Even for those who escape lengthy prison sentences, the "collateral consequences" of a conviction can shape the rest of their lives. As an initial matter, the label of "felon" is enough to disqualify someone from consideration for many jobs. Most job applications ask whether the applicant has been convicted of a crime. Prospective employers can easily sift these applications out of a pile without looking any further. *Id*. at 94.

For those fortunate enough to find work, an entirely separate set of barriers stands between them and a peaceful, productive lifestyle. The combination of being barred from public housing, and restricted from living with other felons can seriously limit the housing options of someone who comes from a neighborhood where significant percentages

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of residents have criminal records. This can result in a "spatial mismatch" between home and work that puts miles in between them. Combine this with a revoked or suspended driver's license and the options of getting to work might be limited to spending hours navigating public transportation and/or spending a significant portion of wages just on commuting. *Id*. at 144, 150-151.

A forced "spatial mismatch" between home and work, along with a revoked driver's license, can result in hours navigating public transportation and/or spending a significant portion of wages just on commuting.

Maybe worst of all, former prisoners face obstacles to voting which range from outright bans to bureaucratic nightmares. Forty-eight states and the District of Columbia do not allow prisoners to vote. Most states do not allow parolees to vote. And many states continue to deny the right to vote for a period of years or even for life after a former prisoner completes his or her sentence. Even after a disenfranchised ex-convict becomes eligible to vote, most states require him or her to pay fines, court costs or fees. Additionally, former prisoners may be required to submit fatiguing amounts of paperwork to multiple agencies. All of this is complicated by some of the factors discussed above such as paying large portions of wages and spending inordinate amounts of time just on a commute. Given the myriad obstacles, many never make it to the polls even if they are eligible. As *The New Jim Crow* puts it, for many, the "debt to society is never paid." *Id*. at 158-159, 163.

In 2000, African Americans made up 80 to 90 percent of drug offenders sent to prison in seven states.

That all of this disproportionately impacts African Americans is an undeniable fact. The book points out that in 2000, African Americans made up 80 to 90 percent of drug offenders sent to prison in seven states. *The New Jim Crow* also states that "[i]n at least 15 states, blacks are admitted to prison on drug charges at a rate from 20 to 57 times greater than that of white men." Also, three-fourths of drug offenders imprisoned for drug offenses have been African American or Latino. *Id*. at 98. The book slices the statistics several ways, citing several authorities.

After decades of fighting the War on Drugs, drug abuse and drug-related crime remain in our communities. The policies of the War on Drugs, which have become the policies of mass incarceration, make no sense. Whether they were mistakes, political ploys, or fearful overreactions, the evidence is now indisputable that these policies have not resulted in stopping drug abuse or drug related violence in our country.

The book argues that the policies of mass incarceration have resulted in a "racial caste system."

But this is not the main point of *The New Jim Crow*. Rather, the book argues that the policies of the mass incarceration have resulted in a "racial caste system." The book asserts that the genesis of American racism was a means to justify slavery and extermination of Native Americans. Settlers who had an interest in these goals also used the idea of white supremacy to enlist poor whites who otherwise had nothing to gain to those ends. This dynamic played out through the era of slavery, and then again through the first Jim Crow era. However, as Jim Crow faded away, overt racism faded out of the political mainstream in favor of the coded rhetoric of the Republican Party's "Southern Strategy." The book cites convincing evidence that conservatives employed this "Southern Strategy," using "law and order rhetoric" to capitalize on

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racism for electoral gain in the late 1960s. The result was that "race eclipsed class as the organizing principle of American politics, and by 1972, attitudes on racial issues rather than socioeconomic status were the primary determinant of voters' political self-identification." This was the point. Not because those behind the "Southern Strategy" had a particular interest in the issues of race, but because these issues divided their political opponents and enabled them to gain and maintain power. *Id*. at 3, 23, 25, 27.

The book lays out an ambitious reform agenda which includes reforming financial incentives to enforcement agencies, ending racial profiling, creating a culture of partnership between police and communities, establishing equivalent funding for public defenders and prosecutors, repealing mandatory minimum sentencing schemes, establishing meaningful reentry programs, shifting focus from incarceration and toward treatment, and more.

The New Jim Crow attempts to tie all of these threads together to argue that today's War on Drugs and its policies of mass incarceration are nothing more than another iteration of a system of racial control like slavery and Jim Crow segregation. The book argues that one who would assert that the criminal justice system "is not run by a bunch of racists" is simply an "apologist." Further, the criminal and civil sanctions of the criminal justice system are "now used to control and oppress . . . ." *Id*. at 183, 188.

The book lays out an ambitious reform agenda which includes reforming financial incentives to enforcement agencies, ending racial profiling, creating a culture of partnership between police and communities, establishing equivalent funding for public defenders and prosecutors, repealing mandatory minimum sentencing schemes, establishing meaningful reentry programs, shifting focus from incarceration and toward treatment, and more. But pursuing these reforms isn't enough, Alexander argues. Mass incarceration isn't about failed policies, but rather "a deeply flawed public consensus, one that is indifferent, at best to the experience of poor people of color." Without "overturning the public consensus" which gave rise to mass incarceration policies, reforms will be short-lived because "[t]he caste system will reemerge in a new form." *Id*. at 232-234.

The New Jim Crow goes on to argue against color-blindness and claims to pursue Martin Luther King Jr.'s goals in so doing. The book points out that King argued that "indifference to the plight of other races" supports institutionalized bigotry. The book argues that "racial indifference and blindness—far more than racial hostility—form the sturdy foundation for all racial caste systems." *Id*. at 242.

But here, *The New Jim Crow* conflates indifference toward individuals of other races with indifference to the race of other individuals. King rightly identified the former as a key to perpetuating bigotry. The latter was King's dream. The book quotes King's observation that "some men are segregationists merely for reasons of political expediency and political gain . . ." while others are "inflicted by a terrible blindness." *Id*. at 242 citing *Martin Luther King Jr., Strength to Love 45-48* (1963). King said when "neighborly concern [is limited to] tribe, race, class or nation" the result is that "one does not really mind what happens to the people outside his group." *Id*.

Perhaps *The New Jim Crow* goes wrong by ignoring these distinctions. Those who have used "law and order rhetoric" as racial code toward

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their own political gain, depended on those who were indifferent toward those they perceived as different than themselves. When people stop being indifferent toward individuals of other races, and start being indifferent toward the race of other individuals, the only value to "law and order rhetoric" and the policies of mass incarceration is their value as policies of crime prevention. As the book convincingly explains, the policies of mass incarceration have very little weight in this regard. Which presents the question, how should reforming these failed policies be approached?

How should reforming these failed polices be approached? One choice would be to frame the debate in policy terms and talk about what works in preventing crime and drug abuse.

One choice would be to frame the debate in policy terms and talk about what works in preventing crime and drug abuse. In this debate, the far right of the political spectrum should see a chance to shrink government and cut spending. In this debate, local prosecutors and law enforcement agencies can be enlisted as allies in rebuilding the communities they live and work in. In this debate, much less political capital must be spent because both sides win by making the right choice. In this debate, a policy debate about the best ways to control crime and drug abuse, the failed policies of mass incarceration don't have a chance.

Another choice would be to frame the debate in terms of race and talk about mass incarceration as a system of racial control. In this debate, the far right of the political spectrum is painted as an oppressive, racist regime. In this debate, prosecutors and police who are generally popular with voters are painted as racist villains. In this debate, a political war is required. In this debate, the outcome does not depend on the strength of policy positions, but on political power. In this debate, the outcome is uncertain.

I suspect The New Jim Crow's *answer is that our politics will never allow us to have the first debate.*

I suspect *The New Jim Crow's* answer is that our politics will never allow us to have the first debate. Notwithstanding our election and reelection of President Obama, maybe racial differences in our country are so great that we will never have a political environment in which we can discuss these issues on pure policy grounds – except that we already have one.

Little effort is required to see evidence that the politics of the moment make the time right for a level-headed policy debate. Popular media has explored the senselessness and effect of policies like mandatory minimums, bringing these issues into the mainstream.[1] The powerful chairman of the Senate Judiciary Committee, Patrick Leahy of Vermont, recently called for an end to mandatory minimum sentences and publically remarked that he hoped the federal government would shy away from enforcing marijuana laws where states have decriminalized the drug.[2] The American Bar Association has released a report advocating for reclassifying many drug offenses as civil infractions.[3] Most telling, some of the most extreme elements of the conservative movement have rallied around a "Right on Crime" campaign. Newt Gingrich, Ed Meese, and Grover Norquist, among others, have set out to lead the way on lowering prison populations and paving the way for successful reentry.[4]

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This is not to say that change will be easy. Nor to deny that uneven application of criminal punishment is anything other than wholly unjust. Rather, the point is that American society has moved away from indifference toward those of other races and toward indifference toward race. Obviously, racism persists. But, it is no longer the organizing principle of our politics. The far right of American politics today has chosen tax policy and the size and scope of government as its organizing principles. That makes the politics of the moment perfect for mass incarceration reform to be a bipartisan issue where everyone can win. As a purely political and strategic matter, it just makes more sense to make the debate about the policies of mass incarceration about those policies rather than race.

It's easy to see the War on Drugs and mass incarceration as issues of race. But to end these policies, we should concentrate on the complete lack of merit to these policies rather than sidetracking the discussion toward race.

It's easy to see the War on Drugs and mass incarceration as issues of race. *The New Jim Crow* may be right that making these issues about race was the intent of some architects of these policies from their very inception. But, if what progressives want is to end these policies, then we should seize the politics of the moment and concentrate on the complete lack of merit to these policies rather than sidetracking the discussion toward race. After all, if *The New Jim Crow* is right, turning the discussion toward race is what these policies have been about all along.

Brett DeGroff is a special assistant defender with the State Appellate Defender Office.

(Footnotes)

[1] John Tierney, For Lesser Crimes, Rethinking Life Behind Bars, N.Y. Times, Dec. 12, 2012, http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html (last accessed March 9, 2013).

[2] Stephen Dinan, Leahy: Abolish Mandatory Minimum Sentences, Wash. Times, Jan. 16, 2013, http://www.washingtontimes.com/news/2013/jan/16/leahy-abolish-mandatory-minimum-sentences/ (last accessed March 9, 2013).

[3] Debra Cassens Weiss, Would Decriminalizing Minor Offenses Help Indigent Defense Crisis? ABA Committee Weighs In, A.B.A., Jan. 8, 2013, http://www.abajournal.com/news/article/decriminalizing_minor_offenses_could_help_indigent_defense_crisis_aba_commi/ (last accessed March 9, 2013).

[4] Newt Gingrich & Pat Nolan, Op-Ed., Prison Reform: A Smart Way for States to Save Money and Lives, Wash. Post, Jan. 7, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html (last accessed March 9, 2013).

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