

Forensic Genealogy News

Council for the Advancement of Forensic Genealogy

December 2011

Volume 1, Issue 2

Welcome Mentor Program Enrollees

Council for the Advancement of Forensic Genealogy recognizes that forensic genealogy is an emerging field. It has caught the interest of both experienced professional genealogists and those considering the field as a profession. *However, Forensic Genealogy is an advanced specialty requiring appropriate education, experience, and skills.* It is not an entry-level gateway into professional genealogy.

CAFG offers a special Mentor Program as part of its education component. The Mentor Program is for experienced professional genealogists with introductory experience in forensic work and a commitment to building forensic genealogy as a field of concentration. This program will allow rising professionals to evaluate their suitability, their goals, and their "fit" within the specialty of forensic genealogy, while receiving support from experienced mentors and access to CAFG communication and education tools. As enrollees progress, the opportunity exists to develop work experience through guided assignments from members.

Claudia Breland

I first became interested in genealogy in about 1974, when I inherited a stack of family history papers from my paternal grandfather. While I was at Florida State University getting my Master's in Library Science, I'd write for vital records, and take research trips to Michigan during spring break. I worked for eight years at the downtown Seattle Public Library, and got to look at microfilm during my lunch hour. I became a stay-at-home mom in 1988.

About 2006 my aunt asked me to find some reviews of assisted living facilities in Michigan, and naturally I went to the Library of Michigan website. There was a link that said, "Search the 1870 census of Michigan." So, not really expecting much, I plugged in the name of a great-grandfather that I'd never been able to find. Bingo – it took all of five seconds to find him in a county I'd never thought of looking at. I tried another great-grandfather, and lo and behold, he was living in Lansing! I could see that this had possibilities, and in no time I had researched genealogy software, downloaded *Legacy*, and subscribed to *Ancestry.com*.

Then about three years ago I joined a discernment class at church, where it became obvious that genealogy wasn't just a hobby, it was my passion and a real gift. In no time I had joined the NGS, became a member of the Puget Sound APG (I'm now the secretary), developed my first website, had business cards printed, and much to my surprise, started making money as an Expert on *Ancestry Expert Connect*. I began the NGS Home Study course and joined ProGen 12. I've been to IGHR at Samford the last two summers – taking Writing for Genealogists and Genealogy as a Profession. After I was laid off from my part-time job in January, I decided it was a perfect time to make genealogy a full-time profession. I took some career assessment tests at the unemployment office, and discovered the Paralegal Certificate program at our local community college.

Tina Sansone

I live in Germantown, TN which is right outside Memphis. While documenting for DAR, I got really interested in discovering my ancestry. Shortly thereafter, I was called as a Family History Consultant with the LDS church. I enjoyed helping others discover their ancestry and decided I wanted to do more of it. I hope to become board- certified within the next year or so; I have already started on my portfolio.

I have attended Samford for five years (Intermediate, Professional Genealogy, African American Military, Advanced Methodology and Evidence Analysis, and Military Records Research II: Colonial Wars, French & Indian War, Revolutionary War & War of 1812.) I was in the first ProGen group and also participated in the Transitional Genealogy Group, and the *NGSQ* article chats. I enjoy the webinars that are available now and watch as many as I can get in.

For the past five-plus years, I have been the Genealogy Editor for BellaOnline. Recently, I became their Ebook manager. I enjoy learning and the challenge. I also have my personal blog, “Gtownma’s Genealogy” and am a member of GeneaBloggers. I am a member of TN Genealogical Society and Prentiss Co. MS Society.

I lecture on family history related topics. I am the SouthEast Director for ISFHWE. In 2010 I joined the Unclaimed Persons volunteer site, and hope to be more active on it in the upcoming years. I was privileged to work on WDYTYA, Vanessa Williams’s case where I received lots of hands on experience on records NOT on the internet.

feature article

Fees and Forensic Genealogy

© 2011 Michael S. Ramage, J.D., Certified GenealogistSM

As with most professionals and expert witnesses, forensic genealogists have the option of charging for their work on an hourly fee plus costs, flat fee or contingent fee basis.¹ An hourly fee plus costs basis is just what its name sounds like: the genealogist and client agree to an hourly rate with the client also paying the out of pocket costs involved in the project (usually with a maximum fee cap). The hourly rate charged for in court testimony may or may not be higher than the out of court hourly fee (this is subject to negotiation keeping in mind the added stress involved in appearing in court). The hourly fee plus costs basis is in this author’s opinion the most equitable to the professional and client as it will reflect the exact time and expenses expended on the case.

However, some clients are wary of the professional spending more time than is necessary on a case or the client may be unable or unwilling to spend more than a certain set amount of money in an attempt to resolve the particular forensic problem. In such case, the client and expert may agree on a pre-established set fee (usually plus costs) that the professional bases on the estimated time it will take to complete the case (usually testimony will be charged at an hourly rate as an extra

Certified Genealogist (CG) is a service mark (sm) of the Board for Certification of Genealogists®, conferred to associates who consistently meet ethical and competency standards in accord with peer-reviewed evaluations every five years; the board name is registered in the US Patent & Trademark Office.

¹ There are many variations to these fee types but not all of them will be discussed here. In addition, only representative cases will be cited and the law of each state or country must be researched to determine what those jurisdictions’ views are on the subject.

charge). The fee arrangement is usually referred to as a “set fee.” Although appropriate in some cases if the parties agree this arrangement usually is unfair to one side or the other, that is, to the expert if much greater time is needed to be spent on the case than expected or to the client if the problem is solved in a much shorter time than expected. As long as the flat fee is due without regard to the outcome of the matter no ethical or legal problems would normally arise.

A contingent fee arrangement means that the forensic genealogist would only be paid if the project is successfully concluded as defined in the contingent fee agreement. In the legal profession, “A contingent fee is a fee stipulated to be paid to an attorney for his services in conducting a suit or other forensic proceeding only in case he wins it; it may be a percentage of the amount recovered.”²

Traditionally, “heir finders”³ attempt to collect contingency fees as high as 50 per cent from estate or trust beneficiaries or the estates or trusts themselves. These fees have been referred to as “finder’s fees.” Usually, these contingency agreements are between the heir search firm and the potential beneficiary. Less often, the fee contract is between the heir search firm and the executor or administrator of the estate, or the trustee of the trust. Such fee agreements could also be entered into any other types of forensic case. As will be seen, courts often look with disfavor upon such contractual arrangements.

Some probate courts have determined that finder's fees are improper and unenforceable based upon champerty,⁴ bad faith and unconscionability.⁵ Instead, these courts state that the fees are subject to a reasonableness standard within the discretion of the court (that is, the court looks at the amount of time and effort that the expert put into the case while also considering the success of the work).⁶ In the absence of any fee agreement, the court may deny a finder's fee on any basis.⁷

Many types of conflicts of interest may arise for the contingency fee charging expert in the world of forensic genealogy. In one case, a court looked upon with obvious distaste an heir searcher hired by an executor (presumed to be on a contingency fee basis) who refused to disclose the name and address of a beneficiary until such beneficiary signed the fee agreement.⁸ Such conduct obviously does not serve justice.

The more obvious conflict arises due to the inherent but human problem relating to the tendency of the contingent fee based expert to come to a conclusion that entitles the expert to collect his or her contingent fee (whether well founded or not or while ignoring or failing to discuss conflicting

² Henry Campbell Black, *Black's Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, Revised Fourth Edition* (St. Paul, Minnesota: West Publishing Co., 1968), 741.

³ Heir finders may or may not have professional genealogical training and credentials but they may be distinguished from forensic genealogists in that they do charge their clients on a contingency fee basis.

⁴ “Champerty. A bargain by a stranger with a party to a suit, by which such third person under-takes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered.” *Black's Law Dictionary*, 292. These types of arrangements have long been disfavored by American and British courts.

⁵ *Atkinson Estate*, 2 Fid Rep. 2d 79, 20 Pa.D.&C. 3d at 715 & 728 (Phila. O.C. 1981); *McIlwain's Estate*, 27 Pa.D.&C. 619 (Phila. O.C. 1936); and *In re Estate of Rice*, 24 Ohio Op. 2d 379, 92 Ohio Laws Abs. 449, 193 N.E.2d 566 (P. Ct. 1963). Cf. *Sparne v. Altshuler*, 80 R.I. 96, 90 A.2d 919 (1952) (Court upheld one-third contingency fee agreement in consideration of providing information of a genealogical nature in order to establish plaintiff's right to inheritance); and *Estate of Katze-Miller*, 158 Wisc. 2d 559, 463 N.W.2d 853 (1990) (heirship search and investigative, including attorney services, in exchange for a 40% interest in the heirs distributive share, held not to be champertous; strong dissent).

⁶ *Atkinson Estate*, 2 Fid Rep. 2d 79, 20 Pa.D.&C. 3d at 715; *In re Estate of Devlin*, 182 A.D.2d 322, 588 N.Y.S.2d 316 (1992) (Surrogate reduced heir hunter's fee from 40 to 15 percent).

⁷ *Estate of Hodge*, 22 Pa.D.&C. 4th 458, 15 Fid. Rep. 2d 1 (Chester Co. O.C. 1994) (heir locator company took the case on speculation without entering into a contract with the estate or heirs).

⁸ In *Keen Estate*, 56 Pa. D.&C.2d 470 (Phila. O.C. 1972),

evidence). Most courts have found that an expert's contingent fee is legally invalid.⁹ As one legal commentator aptly put it,

Such fees are prohibited because they create an unacceptable incentive for the expert to tailor her opinion to the needs or interests of the retaining party. In other words, the expert's independence and objectivity become impaired when payment hinges on the success of the litigation.¹⁰

Finally, a contingent fee paid forensic genealogist serving as a witness would be subject to impeachment (i.e., discrediting) on cross-examination due to his or her bias or interest in the outcome of the case.¹¹ This would not favor either the client or the justice system itself.

noteworthy

Forensic genealogist [Leslie Brinkley Lawson](#), Advanced Member, was interviewed by Lisa Louise Cook while at the Northern California Family History Expo in October. The recording is available here: <http://genealogygemspodcast.com/webpage/episode-122-chat-with-a-forensic-genealogist> (Leslie's part starts at just past the 34 minute mark and goes to 45.50).

Advanced Member [Michael S. Ramage](#), J.D., CG, recently published "A Primer on the Use of BCG Trademarks," lead article for Board for Certification of Genealogists *OnBoard* 17 (May 2011): 1.

Forensic genealogist [Dee Dee King](#), CG, Advanced Member, received a Group Achievement Award from the Office of the Secretary of Defense, "As the Navy's sole contract Genealogist, you performed admirably in resolving remaining Korean War, Cold War, and Vietnam War unaccounted for cases pending a Family Reference Sample." King cleared 98.75% of all those cases which had been pending for several years without resolution.

Tina Sansone, Mentor Program, will be the Vice President for the Tennessee Genealogical Society for the 2012 term.

⁹ *Swafford v. Harris*, 967 S.W.2d 319 (Tenn. 1998) (holding a contingency fee void as against public policy); *Belfonte v. Miller*, 212 Pa. Super. 508, 243 A.2d 150 (1968); *In re Schapiro*, 144 A.D. 1, 128 N.Y.S. 852 (1911); and *Goodyear Tire & Rubber Co. v. Overman Cushion Tire Co.*, 95 F.2d 978 (6th Cir. 1937).

¹⁰ Steven Lubet, "Expert Witnesses: Ethics and Professionalism," *Georgetown Journal of Legal Ethics*, volume 12 (1998 – 1999): 265, 277.

¹¹ *See Mohn v. Hahnemann Medical College & Hospital*, 357 Pa. Super. 173, 515 A.2d 920 (1986), app. den. 515 Pa. 582, 527 A.2d 542 (1987); *Reed v. Philadelphia Transp. Co.*, 171 Pa. Super. 60, 90 A.2d 371, 33 A.L.R.2d 1166 (1952).