MICHIGAN DEFENSE
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Articles: All articles published in the Michigan Defense Quarterly reflect the views of the individual authors. The Quarterly always welcomes articles and opinions on any topic that will be of interest to MDTC members in their practices. Although MDTC is an association of lawyers who primarily practice on the defense side, the Quarterly always emphasizes analysis over advocacy and favors the expression of a broad range of views, so articles from a plaintiff's perspective are always welcome. Author's Guidelines are available from Lee Khachaturian (dkhachaturian@dickinsonwright.com) or Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).

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President's Corner

By: Mark A. Gilchrist, *Smith Haughey Rice & Roegge*

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It is with great honor and humility that I write my first President's Corner to address and inform our membership about recent happenings with MDTC, and to share some of my goals for the upcoming year. Groucho Marx famously quipped "I would never join a club that would have me as a member." At least with respect to this organization, Groucho was wrong and I appreciate the trust and confidence placed in me by being selected to head this esteemed group of attorneys.

For the many unaware of my background, my Father is a lawyer who continues to practice today. I grew up among lawyers and am comfortable in their company. Most of my practice is devoted to representing lawyers and their firms accused of malpractice or ethical violations. I recognize what an incredible privilege it is being tapped to lead an organization tasked with improving the quality of civil litigation in Michigan.

Regarding my intentions for the upcoming year, I have goals directed both inward in the sense of fostering and expanding the strength of the organization itself, and outward to broaden the reach and influence of the organization in the legislative and policy making process.

As everyone knows, membership is the lynchpin of an organization like ours. Through the wise direction of my predecessors, hard work of MDTC's leadership and creative decision making of our Executive Director, Madelyne Lawry, our membership numbers are just under all-time highs. When viewed in the context of recent economic times when many firms are scaling back paying for the professional affiliations of their attorneys, this is an enormous accomplishment. We should be very proud of this achievement under these trying conditions and I think it speaks to the tangible benefits we are able to provide our members, including high level and timely educational programming, access to the judiciary invariably present at our events and the educational and informative articles published in the Quarterly and e-Newsletter.

Also, to foster our growth we have expanded practice areas from those typically associated with our historical base. Given the success of tort reform in reducing the number of personal injury lawsuits and the attendant decline in attorneys practicing strictly in tort, MDTC has made a concerted effort at courting commercial attorneys who are just as likely to work on the plaintiff side of the "v" as the defendants. We have prioritized tailoring our educational offerings toward topics of interest to commercial litigators as well as inviting more purely commercial practioners in to the leadership of the organization. Continuing MDTC's efforts to broaden our historical areas of practice will remain a priority throughout the next year.

Regarding our outward focus, MDTC has taken a more active role in the legislative process in recent years. Of course, our activities have been limited to only those issues which impact the quality and accessibility of the civil justice system. We have partnered with the Negligence Section of the State Bar who continue to remain an indispensable ally. Sometimes we have taken positions in concert with MAJ, sometimes we have interpreted issues differently. MDTC's leadership recognizes that taking a more active role in the public policy arena is not without risk or consequence. MDTC will often take a position contrary to that of a member, or that attorney's client or carrier. While we take the interests of each member seriously, our organizational focus has to remain broader. We are a group comprised of attorneys and will remain dedicated to advancing the interests of our membership as a whole, the practice of civil litigation in Michigan and the overall advancement of our profession.

I very much look forward to the challenge of leading this organization in the upcoming year. I will work hard on behalf of the membership and the organization to try and advance their interests. I am inspired by the stature of my predecessors who have held this title and can only hope to follow adequately in their footsteps. I look forward to seeing each of you at our various events throughout the upcoming year.

The Detroit Bankruptcy:

The Olympics of Restructuring[1]

By: Jason W. Bank, Kerr, *Russell and Weber, PLC*

Executive Summary

The City of Detroit is the largest municipality to file for bankruptcy in the United States. This article discusses municipal bankruptcy under Chapter 9 of the Bankruptcy Code and analyzes some of the issues that will be critical in determining the City's ability to successfully emerge from bankruptcy.

Jason W. Bank leads Kerr, Russell and Weber, PLC's bankruptcy and restructuring practice. He has represented numerous distressed companies in a wide variety of industries through the Chapter 11 and out-of-court restructuring process from beginning to end. Mr. Bank has also represented creditors' committees, trustees, receivers, secured lenders, landlords, purchasers of assets and trade creditors in bankruptcy proceedings and workouts. Mr. Bank has lectured extensively regarding Chapter 9 municipal bankruptcy proceedings and Michigan's emergency financial manager statutes. Since 2005, Mr. Bank has been an adjunct professor at Michigan State University College of Law and has taught classes in bankruptcy and Chapter 11 reorganization.

INTRODUCTION

On the day of his appointment as Detroit's emergency financial manager, Kevyn Orr referred to the herculean task of fixing the City's financial woes as the "Olympics of Restructuring." Mr. Orr has officially entered the medal round based upon the recent filing of the City of Detroit's Plan of Adjustment, which sets forth his proposal for repayment of creditors and his vision for improving services for City residents. Very shortly, Mr. Orr will attempt to earn the gold medal of restructuring by obtaining Bankruptcy Court approval of his plan. These materials provide an overview of municipal bankruptcy and Debtor's bankruptcy filing and examine some of the critical issues in Detroit's upcoming plan confirmation hearing.

I. AUTHORITY FOR A MUNICIPALITY TO FILE CHAPTER 9

A. Who May File Chapter 9?

"Municipality" is defined very broadly under the U.S. Bankruptcy Code. It means a "political subdivision or public agency or instrumentality of a State."[2] A "political subdivision of a State" includes cities, towns, counties, parishes, townships, villages and the like.[3] Courts have held that where a state grants "express sovereign powers" to an entity that performs governmental functions, such as a county, it is a "political subdivision."[4]

"Instrumentality of a State" has a broad meaning as well and includes school districts, public utility boards and bridge and highway authorities. Courts have held that a transit district and even an off-track betting company may be considered instrumentalities of states.[5]

B. Authority to File Chapter 9

Chapter 9 is drafted to carefully navigate thorny constitutional and political issues. Article I of the U.S. Constitution authorizes Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States." As a result, while state law comes into play at times (e.g., issues involving property rights), bankruptcy law is federal law. However, the Tenth Amendment guarantees the sovereign powers of states over their local units. So the drafters of Chapter 9 were charged with incorporating the principles of federal bankruptcy law without infringing on a state's constitutionally mandated authority.

In Michigan, municipalities are authorized to file Chapter 9. But that does not mean a municipality has an easy path to bankruptcy court. A local governmental entity and school district in Michigan may only file Chapter 9 through an emergency financial manager who must be authorized by the

governor to sign and file a Chapter 9 petition.

The emergency financial manager laws have a complicated history in the State. In 1990, the Michigan Legislature enacted Public Act 72 of 1990, the "Local Government Fiscal Responsibility Act." ("PA 72"). This Act empowered the State to intervene with respect to municipalities facing financial crisis through the appointment of an emergency financial manager who would assume many of the powers ordinarily held by local elected officials. Effective March 16, 2011, PA 72 was repealed and replaced with Public Act 4 of 2011, the "Local Government and School District Fiscal Accountability Act." ("PA 4"). On November 5, 2012, the Michigan voters rejected PA 4 by referendum. This rejection revived PA 72.

PA 72 remained in effect until March 28, 2013, when Public Act 436 of 2012, the "Local Financial Stability and Choice Act" went into effect. ("PA 436"). The Legislature enacted PA 436 on December 13, 2012, and the governor signed the bill into law on December 26, 2012

II. CHAPTER 9 ELIGIBILITY REQUIREMENT

A. Summary of Eligibility Rules

Once a municipality navigates the hurdles at the state level to obtain authority to file a Chapter 9 petition, it still may face a battle over whether it is eligible to be a Chapter 9 debtor. A creditor or interested party may move for dismissal and argue that a local governmental unit is not eligible for Chapter 9 relief. Eligibility requirements in Chapter 9 are much more stringent than in other bankruptcy chapters. It is relatively easy for a business to file a Chapter 11, but it is much harder to emerge from Chapter 11. Once a company files Chapter 11, the burden is on creditors or interested parties to demonstrate that a case should be dismissed.

In Chapter 9, however, a municipality has the burden to demonstrate that it is eligible to file Chapter 9. A municipality must be "insolvent" on a cash-flow basis, meaning it is generally not paying its debts as they become due. Finally, a municipality must intend to effectuate a plan to adjust its debts.

A municipality must also meet at least one of the following four conditions: a) the municipality has obtained an agreement on a plan from creditors holding at least a majority amount of "impaired" claims in each class; b) the municipality has negotiated in good faith with creditors but has failed to obtain an agreement; c) the municipality is unable to negotiate with creditors because negotiation is impracticable; or d) the municipality reasonably believes that a creditor may try to obtain a preferential payment or transfer of the municipality's assets. 11 USC § 109(c).

Once a municipality navigates the hurdles at the state level to obtain authority to file a Chapter 9 petition, it still may face a battle over whether it is eligible to be a Chapter 9 debtor.

B. Detroit Eligibility Trial and Ruling

On March 1, 2013, Governor Snyder announced that a financial emergency existed within the City. On March 15, 2013, the State of Michigan's Local Emergency Financial Assistance Loan Board appointed Kevyn Orr as emergency financial manager ("EM") for the City of Detroit under PA 436. After becoming familiar with the City's balance sheet, Orr commenced a series of negotiations with creditors in an attempt to resolve the City's financial crisis outside of bankruptcy and lay the groundwork for eligibility if he determined that the debts could not be restructured outside of a bankruptcy filing.

After a month of negotiations with some of its creditor constituencies (including a well-publicized June 14 meeting with approximately 150 creditor representatives), Orr concluded that the City was unable to negotiate – and saw no prospect for negotiating – an out-of-court resolution that would address the City's financial woes outside of a Chapter 9 bankruptcy. As a result, Orr submitted a written recommendation to the Governor and the State Treasurer that the City seek relief under Chapter 9 of the Bankruptcy Code. Orr concluded he had no reasonable alternative to rectify the financial emergency of the City in a timely manner.

On July 18, 2013, in accordance with section 18(1) of PA 436, Orr received written authorization from Governor Snyder to commence a Chapter 9 case. On July 18, 2013 at 4:06 p.m. Eastern Time, the City filed a petition for relief under Chapter 9 of the U.S. Bankruptcy Code.

Certain creditors have argued the timing of the bankruptcy filing was designed to prevent rulings that may have been adverse to the City's ability to file Chapter 9. On July 3, 2013, Gracie Webster and Veronica Thomas filed a complaint against the State of Michigan, Governor Snyder and Treasurer Andy Dillon in Ingham County Circuit Court seeking a declaratory judgment that PA 436 was unconstitutional because it permits accrued pension benefits to be diminished or impaired in violation of article IX, section 24 of the Michigan

Constitution. The complaint also sought an injunction enjoining the governor and treasurer from authorizing the Detroit EM to commence proceedings under Chapter 9 of the Bankruptcy Code.

On July 18, the Ingham Circuit Court commenced a hearing at 4:15 p.m. (after the bankruptcy filing) to consider relief requested by the plaintiffs. Thereafter, the judge entered an Order of Declaratory Relief, which provided that "PA 436 is unconstitutional . . . to the extent that it permits the Governor to authorize an emergency manager to proceed under Chapter 9 in any manner which threatens to diminish or impair accrued pension benefits," and Governor Snyder had no authority under Michigan law to authorize the EM to proceed under Chapter 9 to diminish or impair accrued pension benefits. Finally, the judge ordered the Governor to direct the EM to immediately withdraw the Chapter 9 petition filed on July 18. [6]

The Bankruptcy Court held initial hearings on the scope of the bankruptcy stay and ultimately determined that the stay applies to Mr. Orr, Governor Snyder and other related city and state officials. Thereafter, the Court set trial dates to determine whether the City was eligible for Chapter 9 relief.

Over 100 creditors or interested parties filed objections alleging that the City of Detroit was not eligible for Chapter 9 or that the bankruptcy should be dismissed based upon the threatened impairment of pension benefits. The Bankruptcy Court held a trial that lasted several days and determined that the City of Detroit was eligible for relief under Chapter 9.

On December 5, 2013, the Bankruptcy Court issued a 150-page Opinion Regarding Eligibility (Doc 1945, Case No. 13-53846-swr). In its Opinion, the court wrote that the City of Detroit had established that it met the requirements for eligibility under 11 USC § 109(c) by issuing the following findings:

- The City of Detroit is a "municipality" as defined in 11 USC § 101(40).
- The City was specifically authorized to be a debtor under chapter 9 by a governmental officer empowered by State law to authorize the City to be a debtor under chapter 9.

After becoming familiar with the City's balance sheet, Orr commenced a series of negotiations with creditors in an attempt to resolve the City's financial crisis outside of bankruptcy and lay the groundwork for eligibility if he determined that the debts could not be restructured outside of a bankruptcy filing.

- The City is "insolvent" as defined in 11 USC § 101(32)(C).
- The City desires to effect a plan to adjust its debts.
- The City did not negotiate in good faith with creditors but was not required to because such negotiation was impracticable.

The court further held that the City filed the petition in good faith and that therefore the petition is not subject to dismissal under 11 USC § 921(c).

The court determined that the Ingham Court declaratory judgment was void because it was entered after the City filed its petition, and that 28 USC § 1334(a) gave the Bankruptcy Court exclusive jurisdiction to determine all issues relating to the City's eligibility to be a Chapter 9 debtor. The court also held the entry of the judgment violated 11 USC § 362(a)(3).

In a widely publicized portion of the opinion, the court held that the Bankruptcy Code permits the court to potentially impair the financial benefits of pension plans, despite a prohibition against diminishing such benefits under the Michigan Constitution. However, the court further stated that this ruling was not a signal that the court would approve a plan of adjustment that impaired pensions and indicated that any impaired treatment would be subject to the "fair and equitable" requirements of confirmation (discussed further below).

III. CREDITOR TREATMENT: SECURED AND UNSECURED DEBT

Similar to personal and business bankruptcy proceedings, the characterization over whether a debt is a secured or unsecured debt is a critical feature of the Chapter 9 process. In Chapter 11 business cases, a creditor who has a valid lien against assets is entitled to receive as a distribution the value of the collateral (or a stream of payments equal to the present value of the collateral). For example, a secured creditor with a first priority security interest in a piece of equipment valued at $200,000 should at least receive $200,000 or payments equal to the present value of $200,000 through the bankruptcy process.

Municipalities typically incur debt by selling bonds. The largest claims in a Chapter 9 case are usually held by bond holders or insurance companies who insure the bonds. The two primary types of bonds are general obligation bonds and special revenue bonds.

A municipal debtor has a significant amount of leverage to

adjust general obligation debts based upon its secured status.

A. General Obligation Bonds

General obligation bonds are backed by the full faith and credit of the issuer, payable from general tax revenues and other income of the debtor, but are not secured by a pledge of specific revenue or other identifiable assets. Creditors holding general obligation bonds are unsecured creditors in a Chapter 9 case. As general unsecured creditors, these creditors face the risk of receiving pennies on the dollar towards their claims.

B. Special Revenue Bonds

This stream of income arises from identifiable tax fees generated by a specific utility or project that the bonds financed. Special revenue bonds are the most common form of secured debt in the Chapter 9 case. Typically, special revenue bonds are usually nonrecourse. In other words, the bonds are payable only from the pledged revenue, and in the event of default, the bond holders have no claim against the municipality's general fund or other non-pledged revenues or assets.

Section 902(2) of the Bankruptcy Code defines special revenue to include any of the following:

- Receipts from the ownership, operation or disposition of transportation, utility or other projects or systems of the debtor, including proceeds of borrowings to finance the projects or systems.
- Special excise taxes imposed on particular activities or transactions.
- Incremental tax receipts from areas benefitted by tax-increment financing.
- Other revenue or receipts derived from particular functions of the debtor.
- Taxes levied to support specific projects, excluding general taxes levied to finance general purposes of the debtor.

C. Detroit Bankruptcy

Legal arguments concerning the secured status of various bonds and other obligations have played a significant role in the bankruptcy proceeding. Initially, the City argued that unlimited tax general obligation bonds ("UTGO") were unsecured, which bondholders argued was contrary to established legal precedents in municipal law. Recently, the City has reached a tentative settlement with UTGO holders and their insurers. Bond insurers will be paid 74 cents on the dollar and the bondholders will be made whole by the insurers.

In a widely publicized portion of the opinion, the court held that the Bankruptcy Code permits the court to potentially impair the financial benefits of pension plans, despite a prohibition against diminishing such benefits under the Michigan Constitution.

A significant focus of the Chapter 9 proceeding has been the ill-fated Swaps deal that the City of Detroit entered into in 2005 to avoid a $400 million termination penalty. The City's first two attempts to settle its "Swaps" obligations with Bank of America, Merrill Lynch and UBS were rejected by the court. Finally, the court approved the City's $84 million settlement with these banks, which ensured that the City would receive a stream of critical casino revenue going forward.

IV. PLAN OF ADJUSTMENT AND CONFIRMATION PROCESS

A. Key Components

In a Chapter 11 business, the debtor is required to file a plan which sets forth its proposed restructuring (or sale) of its business operations or assets and proposed treatment of creditors under the plan. Creditors have the right to vote on the plan or file objections to the plan. Ultimately, the Bankruptcy Court determines whether to approve the plan at a confirmation hearing.

In order to successfully emerge from Chapter 9, the municipal debtor is required to file a plan of adjustment, which is similar to the Chapter 11 plan and incorporates many of the Chapter 11 statutory provisions. Section 901 provides that § 1123(a)(1)-(5) applies in Chapter 9 cases.

The plan *must* include the following:

- The plan must divide creditor claims into classes. To be in the same class, claims must be substantially similar; however, not all substantially similar claims must be in the same class. Creditors may challenge the separate classification of similar claims if the debtor is attempting to manipulate votes (voting on a plan is by class).
- The plan must specify classes of claims that are not impaired by the plan. A class of claims is not impaired if the plan leaves its legal, equitable and contractual rights unaltered.
- The plan must specify the treatment of classes of claims that are impaired.
- The plan must treat all claims in a

class equally (unless particular claimants agree to less-favorable treatment).

- The plan must provide adequate means for the plan's implementation.[7]

The plan *may* include, but is not required to include, the following:

- The plan may impair or leave unimpaired any class of secured or unsecured claims.
- The plan may provide for the assumption, rejection or assignment of executory contracts and unexpired leases.
- The plan may provide for the settlement of claims held by the debtor against third parties, or the retention and enforcement of such claims.
- The plan may provide for the sale of property to fund the plan.
- The plan may modify the rights of secured creditors (but may not interfere with a special revenue pledge).
- The plan may provide other provisions not inconsistent with the Bankruptcy Code.[8]

Section 901 incorporates § 1129(a)(2), which requires that the proponent of the plan comply with the applicable provisions of the Code. Section 901 also incorporates § 1125, which requires the municipal debtor to file and obtain approval of a disclosure statement under § 1125 and transmit the disclosure statement to all creditors entitled to vote on the plan, along with a ballot for voting and other materials.

Some of the key provisions of the Chapter 9 confirmation process are set forth below.

1. Good faith

Section 901 incorporates § 1129(a)(3), which requires that the plan be proposed in good faith and not by any means forbidden by law (including nonbankruptcy law). Courts considering a Chapter 9 plan will likely apply a totality of the circumstances test to determine the debtor's good faith in filing a plan. Like certain other areas of the law, the good faith test often resembles a "smell test" or a "know it when you see it" test. A plan which prefers one class of general unsecured creditors over another class that is similarly situated without a justifiable business reason, may be an example of bad faith.

2. Impairment of claims and acceptance of plan

Section 901 requires that each class of claims that is impaired under the plan has accepted the plan. A class of claims is impaired unless the plan leaves unaltered the legal, equitable and contractual rights of creditors in the class. A class of claims that is not impaired by the plan conclusively is presumed to have accepted the plan and is not entitled to vote. A class accepts a plan if the plan is accepted by holders of at least two-thirds of the total amount of claims voting and a majority in number of claims actually voting. Only claims that vote count in determining whether a plan has garnered the required acceptance.

3. Cramdown

If all impaired classes do not accept the plan, the court may nevertheless confirm the plan if the plan does not discriminate unfairly and is fair and equitable with respect to each impaired class that has not accepted the plan. A plan does not discriminate unfairly if it "[p]rotects the legal rights of a dissenting class in a manner consistent with the treatment of other classes whose legal rights are intertwined with those of the dissenting class."

4. Best interest of creditors test

Under § 943(b)(7) of the Bankruptcy Code, a Chapter 9 debtor must demonstrate that its plan satisfies the best interest of creditors test. The best interest test requires that the court find that the proposed plan provides a better alternative for creditors than what they already have. Since creditors cannot propose a plan or convert a case to Chapter 7, the only alternative to a debtor's plan is dismissal. Often, any possibility of payment under a Chapter 9 plan is perceived by creditors as a better alternative.[9]

5. Feasibility test

In order to confirm a plan, the bankruptcy court must find that the plan is feasible. Chapter 9 does not incorporate the Chapter 11 feasibility test under § 1129(a)(11). However, the Supreme Court case, *Kelley v Everglades Grainage Dist*,[10] set forth the test in Chapter 9 regarding feasibility. Kelley requires a bankruptcy judge to evaluate a proposed plan of adjustment and engage in detailed fact-finding to determine the assets and liabilities of the debtor. In addition, the judge is required to analyze the proposed plan of adjustment with respect to projected revenues and expenses. The court is required to evaluate the likelihood of performance and the availability of funds and revenues to meet the debtor's obligations under the plan. In a nutshell, the feasibility requirement sets a ceiling in order to "prevent the Chapter 9 debtor from promising more than it can deliver."[11]

The best interest test is a "floor requiring reasonable effort at payment of the creditors by the municipal debtor" and the feasibility requirement is a ceiling that "prevents the chapter 9 debtor from promising more than it can deliver."[12] In order to determine

feasibility, the court is also required to find that a plan must allow a debtor to repay its pre-petition debts and continue to provide essential governmental services. "Although success need not be certain or guaranteed, more is required than mere hopes, desires and speculation."[13]

B. Detroit's Plan of Adjustment

The City of Detroit filed its first Plan of Adjustment on February 21, 2014. Just two months later, on April 25, 2014, the City filed its Third Amended Plan of Adjustment. As settlements are reached, the City will continue to file amended plans. It is highly likely that the City will continue to file amended plans up to the date of the confirmation hearing on the plan. The confirmation process is extremely fluid, and deals are often reached on the courthouse steps prior to a confirmation hearing.

Anyone may review Detroit's plan or any documents filed in the bankruptcy case, free of charge, at www.kccllc.net/Detroit.

1. Update regarding plan process and settlement discussions

After significant negotiation and facilitative mediation, Detroit's pension boards and a retiree group reached tentative agreements with the City. Municipal retirees' pension checks will be reduced by 4.5%, far less than the initial proposal of a 26% cut. Retired police officers and firefighters would not receive any cuts to their current pension checks. Cost of living increases will be eliminated for municipal retirees while retired police officers and firefighters would receive small increases. In addition, the retirees committee in bankruptcy reached an agreement with the City which capped total cuts to monthly pension benefits at 20% and set up a $450 million fund for retiree health care.

Previously, mediators on the bankruptcy case worked out an agreement with the City, the State, the Detroit Institute of Arts and various local charitable foundations regarding a "Grand Bargain" to save the DIA collection and infuse cash for retirees and City workers. Under the agreement, various entities would contribute $815 million into a rescue fund aimed at softening pension cuts and safeguarding the art. The rescue fund would include $365 million from national and local charitable foundations, a $100 million fund-raising commitment from the DIA and $350 million in State matching funds that must be approved by the Michigan Legislature.

Effectuation of the tentative agreements is dependent upon the finalization of various settlement documents and approval by the creditors subject to the pension reductions or modifications who get to vote to accept or reject the plan. Nevertheless, the agreements, if they receive a favorable vote by pensioners and are approved by the Bankruptcy Court, would provide the City with an impaired accepting class that the City will need in order to confirm the plan under the cram-down provisions.

Nevertheless, there are still major creditors and interested parties who may continue to be a thorn in the City's efforts to emerge from bankruptcy. Syncora Guarantee Inc. and its affiliates and the Financial Guaranty Insurance Co. have filed numerous objections to various motions and appeals of various orders. They are also insisting that the City take more aggressive action to market and sell the DIA art collection. There is also significant work that needs to be done relating to the Detroit Water and Sewerage Department and the creation of a potential regional water authority.

2. Important dates

The court has scheduled the City's plan confirmation hearing to start on August 14, 2014 at 9:00 a.m., with additional dates set for August 15, August 18-22, August 25-29, September 2-5, September 8-12, September 15-19, and September 22-23, 2014.

Conclusion

There is still a significant amount of heavy-lifting that is required in order for the City to emerge from bankruptcy. Nevertheless, the deals struck with various creditor constituents in recent days demonstrate a positive momentum toward approval of the plan of adjustment. While the confirmation hearing will likely be lengthy and require significant testimony and evidence, the City of Detroit's goal to emerge from bankruptcy by the fall appears to be very realistic.

1 *Presented at MDTC's 2014 Annual Meeting and Conference, reprinted with the author's permission.*

2 *11 USC § 101(40).*

3 *2 Collier on Bankruptcy ¶ 101.40, 16th ed.*

4 *See, e.g., In re County of Orange, 183 BR 594, 601 n 11 (Bankr CD Cal, 1995).*

5 *See In re Westport Transit Dist, 165 BR 93, 95-96 (Bankr D Conn, 1994) (transit district); In re New York City Off-Track Betting Corp, 427 BR 256, 265 (Bankr SDNY, 2010) (off-track betting company).*

6 *See Webster v State of Michigan, No. 13-734-CZ (July 19, 2013).*

7 *See H. Dabney Slayton, Jr., Patrick Darby, Daniel G. Egan, Marc A. Levinson, George B. South, III, and Emily J. Tidmore, Municipalities in Peril: The ABI Guide to Chapter 9, American Bankruptcy Institute, 2d ed.*

8 *Id.*

9 *In re Mount Carbon Metro Dist, 242 BR 18, 34 (Bankr D Colo, 1999).*

10 *319 US 415 (1943).*

11 *Mount Carbon, 242 BR at 34.*

12 *Id.*

13 *Id at 35.*

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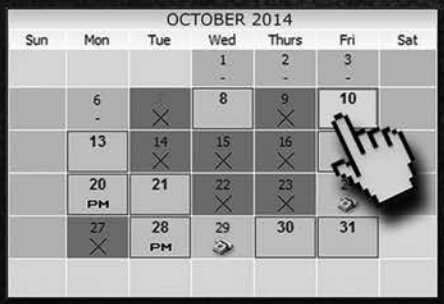

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Channeling your inner Napoleon:

Applying the Principles of War to Your Litigation Campaigns

By: Edward Perdue, *Dickinson Wright PLLC*

Executive Summary

This article, written from the perspective of a lawyer who served as an artillery officer in the United States Marine Corps, outlines the principles of war Napoleon employed in battle, briefly describes their military meaning, and suggests how each strategic concept may apply to civil litigation.

Edward Perdue is a member at Dickinson Wright PLLC's Grand Rapids, Michigan office. He served as an artillery officer in the United States Marine Corps including service as a forward observer and forward air controller with the 2nd Battalion, 8th Marine Regiment during the Persian Gulf War. Ed practices in the areas of complex commercial litigation, creditors' rights, real estate litigation, product liability and insurance defense. Dickinson Wright has five offices throughout Michigan as well as offices in Washington D.C., Nashville, Phoenix, Toronto, Las Vegas, and Columbus, OH. Ed can be reached at eperdue@dickinsonwright.com, 616-336-1038.

In the late 1980s, in the course of embracing a philosophy known as Maneuver Warfare, the United States Marine Corps formalized a policy of educating its junior officers not only with respect to leadership and small unit tactics, but also in what can be loosely termed "the art of war." No longer would such lofty ground be reserved to War College curriculums designed for senior officers.

Consequently, irrespective of their future operational specialties, all lieutenants attending the Marine Corp's Basic School in Quantico, VA (including the author) were exposed to a course of study that included an extensive reading list and a curriculum involving certain largely universal strategic maxims known as "the principles of war." Most people associate the principles of war with the French general and emperor Napoleon, and make the further assumption that he was the father of such principles.

In actuality, Napoleon was the father of only one tactical innovation (the divisional square). His greatness stemmed not from the development of any strategic concepts, but from his unique ability to compile, understand and apply in the course of his campaigns the principles he learned from exhaustive study of such masters as Julius Caesar, Hannibal and Alexander. He had an unequaled ability to apply those strategic tools to the particular enemy, terrain and disposition of forces he was facing to conceive and execute a winning strategy.

Napoleon fought over sixty major battles in his career, and only near the end of his reign when his physical, spiritual and mental powers began to wane would he experience major defeats. He was ultimately deposed (for a second time) after being eclipsed at Waterloo by Great Britain's Duke of Wellington. There Wellington, at the height of his powers, had to some extent deciphered Napoleon's tendencies and developed his own tactical innovation (the use of reverse slopes to reduce the impact of artillery bombardment) which contributed greatly to his success at Waterloo.

The principles of war Napoleon so expertly employed in battle are in many cases applicable to civil actions and business. What follows below is a listing of each principle of war as adopted by the United States military (as other nations collate and categorize them differently), a brief synopsis of its military meaning, and some suggestions on how that strategic concept may apply to civil litigation. These principles are taught to Marines using the acronym MOOSE MUSS: Mass, Objective, Offensive, Surprise, Economy of Force, Maneuver, Unity of Command, Security and Simplicity.

Mass involves the concentration of a decisive amount of combat

power at a critical time and location. In the age of the Napoleonic wars, that typically involved the massing of actual troops, cavalry and artillery at the critical juncture. Today this concept is spoken of in terms of massing effects (and not troops), given the lethality of modern weapon systems and the need for dispersement to minimize the danger to massed troops. Either way, the concept involves bringing as much decisive force to bear as possible, in the right spot and at the key moment.

In litigation matters, very often the trial date or start of arbitration is the critical point in time. Examples of how counsel can mass his assets for employment at that juncture include a) ensuring that one has engaged and prepared all necessary experts; b) staffing the case with sufficient attorneys and paralegals; c) arranging for specialists needed to prepare or present animations or demonstrative aids; and d) coordinating the efforts of all these players to ensure their work product or assistance is ready and available at that critical moment. Mass can also be achieved by being fully and completely prepared for all phases of trial on the first day.

Objective is the need to direct all of one's operations toward a well-defined and dispositive goal. The military no longer thinks in linear terms of strictly gaining geographical objectives, but rather of destroying an enemy's ability and will to fight. Napoleon fully understood that destruction of the enemy force was always his main purpose, while his Austrian and Prussian opponents were in many cases blinded by the perceived need to hold and defend strategically meaningless fortresses or other ground.

In similar fashion, it behooves litigation counsel to avoid linear focus on merely obtaining a judgment or no cause verdict. The ultimate objective may be more akin to obtaining a certain amount of money (by whatever means), or of resolving the defense of a matter in a way that lowers the transaction costs to the client well below that of obtaining a summary judgment or no cause verdict. Irrespective of what that goal is, lead counsel must ensure that his efforts (and those of his team) are strictly focused on meeting the objective and not on tangential or ethereal benefits that prove to be a distraction of effort and manpower.

> Napoleon fought over sixty major battles in his career, and only near the end of his reign when his physical, spiritual and mental powers began to wane would he experience major defeats.

During the early stages of a case it may also be helpful to confer with the client to form a consensus on what the objective is, and to then plan backwards from the trial date by identifying the tasks and intermediate objectives that need to be accomplished along the way and when those need to be done.

Offensive is arguably the most important of the principles discussed here. It can be summarized as the process of seizing and maintaining the initiative in a way that disrupts the enemy's ability to engage in effective operations. For example, often through the speed of his advances and the unusually quick tempo of his operations, Napoleon was able to surprise and confuse his enemy, and thereby gain and maintain the initiative. By gaining the initiative he was able to impose his will on the enemy, and correspondingly deny the enemy the time and clarity needed to effectively execute operations which could interfere with the achievement of his objective.

Having identified and communicated the objective for the civil action, and drafted a plan or work list to achieve that end, how can counsel seize and maintain the initiative? One method is to begin dropping proverbial bombs (provided there is a need for them and they are not advanced for some improper purpose). The determined, methodical and timely execution of the tasks on the work list will serve this purpose.

If serving a pleading in state court, perhaps one attaches requests to admit, interrogatories and discovery requests to the service package. If required to wait until the meet and confer as required by the federal rules of civil procedure, those papers can go out immediately after the meet and confer is concluded. Depositions are requested to immediately follow the deadlines for the discovery responses. Third party witnesses are contacted, interviewed and favorable affidavits are obtained. Motions in limine are prepared well in advance. In all, the whirlwind of your execution makes it difficult for opposing counsel to effectively formulate his own plans and meet his own objectives. If executed correctly, an up tempo offensive breeds rewards disproportionate to its substantive merits.

A related concept is getting "inside" your opponent's "OODA Loop." The OODA loop is the moniker for a conceptual decision

making sequence consisting of the following steps: Observe, Orient, Decide, and Act. The OODA Loop concept was developed by Air Force Colonel and strategist John Boyd to help war fighters understand the ways their decision making process can help them win and survive in combat situations.

Originally designed to explain the thought process of a single actor, such as a fighter pilot engaged in a dog fight, the OODA concept has been expanded to tactical and strategic level military decision making, and is now applied to the civilian world's commercial operations and learning processes.

The OODA is actually a recurring decision making cycle, or a series of loops, that is generated with each new changing factor or development.

"Getting inside" your opponent's loop means that you are processing and reacting to information at a pace faster than he will ultimately be able to respond to. Stated another way, if you maintain a rapid decision making tempo (which is faster than your opponent's), you will ultimately defeat your opponent's ability to effectively react to your actions. The inherent chaos and confusion of a situation is effectively embraced and funneled toward the opponent while you continue to take actions which are designed to achieve your objective. Applying this concept to litigation, one can see how an offensive mind set and aggressive tempo are critical elements to keep in mind when designing and prosecuting the campaign.

Surprise, which in military terms goes hand in hand with deception, is a force multiplying concept. Achieving surprise, either with respect to tempo, direction or location of main effort, timing, or the size of force, can result in success which is disproportionate to the amount of effort expended. Napoleon's troops, for example, though weary from long and repeated forced marches, marveled at his ability to win battles with their feet instead of by force of arms. Confounding his enemies on many occasions by seemingly appearing out of nowhere well in their rear or astride their lines of communications, Napoleon won as many battles through unexpected maneuver, deception and surprise as he did through application of fire power.

Irrespective of what that goal is, lead counsel must ensure that his efforts (and those of his team) are strictly focused on meeting the objective and not on tangential or ethereal benefits that prove to be a distraction of effort and manpower.

In the litigation context, counsel should make every effort to keep his opponent off balance. Consider how you can best surprise opposing counsel with the focus of your proofs or argument. It is often said that by the time of trial, it is clear to both sides exactly what the opposing line of attack will be. If true with respect to your presentation, that is a disservice to your client. This is not advocating "trial by surprise," but rather the maintenance of confidentiality about the focus of one's main effort at trial.

As an example, surprise can be achieved by allowing opposing counsel to believe your focus will be subject A when in fact it will be subject B. One can ethically and appropriately disclose all facts and exhibits to opposing counsel without revealing one's strategy. Powerful demonstrative exhibits may also be useful to achieve surprise though one must satisfy any disclosure obligations and err on the side of disclosure to ensure such visual aids are not excluded.

Economy of Force is the counterbalance to the principle of Mass. If one is to concentrate critical resources at a decisive place and time, there must be a corresponding drawing of assets from other, non-critical areas. Combat power should not be wasted on secondary or non-essential efforts. Napoleon once allowed a junior staff officer to suggest the allocation of forces at the outset of a campaign. The staff officer aligned the troops in carefully equal measures at equal distances along the boundary of the frontier. Commenting on the disposition, Napoleon stated: "Very pretty, but what do you expect them to do? Collect customs duties?"

As crunch time approaches in a case, should lead counsel be engaged in typing up voluminous deposition designation submissions or other ministerial tasks? Applying Economy of Force would dictate that such tasks be assigned to legal assistants or paralegals. To the extent lead counsel has the support of second or third chair attorneys, he may be able to delegate the laborious review of voluminous deposition transcripts used in the preparation of cross examination outlines. Lead counsel could instead be focused on the coordination and marshalling of all his litigation support assets, and of crafting and fine tuning the delivery of his central message at trial through his direct examinations and

opening and closing statements.

Maneuver in its most basic form refers to the movement of forces in relation to the position of the enemy. Effective tactics often involve the employment of "fire and maneuver." With fire and maneuver enemy forces are fixed (prevented from moving) and mentally occupied by fire (such as artillery or machine gun fire), while one's own forces approach the enemy from an unexpected direction to deliver the decisive blow in close quarters. One of Napoleon's two favorite strategies was known as the manoeuvre sur les derrieres, and that involved the above mentioned method of positioning his main force behind the enemy or across his lines of communication.

The other successful strategy employed by Napoleon time and again was the "central position." That strategy was designed to allow French forces to be moved along interior lines so that they were able to concentrate superior forces at the critical place and time to defeat a divided enemy, even though they were outnumbered overall in the theater of operations. Napoleon's First Italian campaign (1796-97) and the opening phases of the Waterloo Campaign (Ligny and Quatre Bras) are good examples of his employment of this line of thinking. One can easily see how the central position philosophy could be used to focus on and sequentially dispose of two or more opponents in the same civil action.

As mentioned in the opening above, the concept of Maneuver has more globally come to represent an arguably "new" way of thinking about the prosecution of strategic campaigns. However, because (as Napoleon shows us) it is factually incorrect to suggest that the concept of maneuver is in any sense "new," it is more accurate to describe the philosophy of maneuver as one which is the antithesis to the "old" tired, bloody and largely ineffective practice of making frontal assaults. It is in that sense that litigators can embrace this somewhat nebulous concept. Do what is unexpected and do not make your approach where your opponent expects you to. Use permissible surprise and deception to make your points in an unexpected manner, with new or unrevealed technology or in some other method that your opponent is not expecting. The possibilities for application of this principle are limited only by one's imagination.

In a military sense Unity of Command addresses the need for an effective campaign to be led by one individual with the authority to direct all aspects of the operation. Unity of Command is the antithesis of rule by committee. It has proven true over the ages that forces which are led by one person who can exercise a singular and cohesive concept will fare better than campaigns which are subject to divided command. The advantage of a unified command is that it allows the commander to direct operations toward a singular purpose without the demoralizing and potentially disastrous effect of having conflicting directives issued to the command.

It is no less important for a legal campaign to be directed toward a well-defined goal by a single designated leader. Exercising unity of command, lead counsel can ensure that what is contained in the trial brief is consistent with what is in the proofs. He may synchronize the arguments to be made on opening with the arguments and demands being made in the closing. The proofs and damages sought must be consistent with the expert conclusions. The motions in limine must be advanced to shape and focus the presentation of evidence at trial in a way that maximizes the chances of achieving the overall objective. All of these pieces must be coordinated to support the message and theme being communicated to the fact finder. The best way to present these elements harmoniously is to have one person clearly in charge.

The principle of Simplicity applies in warfare in much the same way it applies in other contexts. One must understand that no plan survives first contact with the enemy in its entirety. Effective commanders anticipate that in the heat of battle there will be a certain level of confusion and misunderstanding – commonly referred to as the "fog of war." Accordingly, one's orders must be simple and precise. Once the plan of attack is revealed and committed to, it should be aggressively pursued without distraction.

With regard to planning, one need not take a frontal approach in order to keep things relatively simple. For example, one can employ a simple plan of fire and maneuver with two elements, a base of fire and a maneuver element, without overly complicating matters with intricate movements or delicate timing. Napoleon's opponents in his early campaigns, particularly the Austrians, Russians and Prussians, were repeatedly guilty of foolishly attempting to execute extremely complicated plans with many moving parts in the face of a comparably singular mind and purpose.

Similarly, on a case, tangential and secondary points and arguments should be avoided.

There is only so much that a fact finder can be expected to grasp in the heat of the trial, and counsel should focus on how to bring all his assets to bear to hammer home those key facts and arguments. To the extent you are working with second or third chairs, or are managing a staff while on trial, attempt to make your instructions and assignments clear and understandable. Communicate the intent underlying your instructions to allow for improvisation and independent thinking by subordinates as necessary. Finally, do your best to anticipate the unexpected by, for example, allocating resources and time to respond to motions in limine and by generally being completely prepared for trial in advance of the trial date.

When you are engaged in the relatively simple act of executing a prepared and well-rehearsed plan, trial is less stressful and you will be in a much better position to react to the inevitable surprises and unanticipated challenges which will arise during trial.

Lastly, the principle of security is a counterpart to the principle of surprise. It involves taking measures to deny the enemy knowledge and information about your own forces. Napoleon regularly concealed the disposition and line of march of his forces through the employment of an extensive cavalry screen.

From the outset of a civil action lead counsel can set the tone for establishing the security of one's own strategies. Consider enforcing a policy of allowing only one point of contact for communications and negotiations with opposing counsel. Communicate the need for your team to keep your plan, strategy, anticipated motions, and even the nature of your demonstrative exhibits confidential within the bounds of ethics and local rules/ practice. There is little purpose served in revealing such matters prematurely to opposing counsel, even if asked. The time for unveiling one's massed attack is at the point in time when your opponent can no longer effectively respond - not so early that he can shore up his proofs,

demonstrative evidence or witness line up.

In sum, the principles outlined here are tools which can be fitted to the circumstances and challenges of each individual case. They may not all be brought to bear in one civil action, and their application must be tailored to fit the nature of the case. In addition, application of strategic thinking does not suggest the need for discourtesy or unpleasantness. Rather, one can employ the principles of war while exercising the utmost courtesy to opposing counsel and the closest adherence to the rules of procedure and professional conduct.

Take the time upon receiving a new litigation file to identify your client's objective. Formulate a plan which puts the pieces together that will achieve that goal. Execute the plan with vigor. Be bold and aggressive, and keep your trial strategy confidential. Try to anticipate your opponent's moves and keep him off balance. Whatever you do, do it with élan and be decisive - seize your day in court.

Three Ways for Corporate Counsel to Mitigate Litigation Risk: An Accounting Expert's Perspective

By: Barry Jay Epstein, Ph.D., CPA, CFF, *Cendrowski Corporate Advisors LLC*

On the most basic level, the role of the general counsel is to ensure that the organization is acting within the limits of the law. Additionally, corporate counsel should be concerned with minimizing the risks of litigation against the company, including those pertaining to disputes about the company's accounting for specific transactions or events. Oftentimes, such conflicts require or would benefit from the use of accounting professionals in the role of consultant, expert or third-party trier of fact.

Based on the author's experience as a CPA involved in litigation for over thirty years, presented below are three key ways that corporate counsel can mitigate the risk of litigation in their organizations:

1. Encourage the implementation of a comprehensive system of internal controls

Almost all matters that could evolve into litigation over the company's accounting practices – such as allegations of revenue recognition fraud, using "cookie jar reserves" to smooth earnings, or failure to recognize expenses such as employee stock option grants – implicate internal control weaknesses that should have previously been addressed and resolved by management. Corporate counsel can play a role in ensuring that appropriate controls are developed, implemented and monitored.

In 1992, the Committee of Sponsoring Organizations of the Treadway Commission (COSO) published Internal Control -- Integrated Framework, an updated version of which was released in mid-2013.[1] The COSO Framework defines internal control as "a process, effected by an entity's board of directors, management and other personnel, designed to provide reasonable assurance regarding the achievement of objectives" in three categories: (i) effectiveness and efficiency of operations; (ii) reliability of financial reporting; and (iii) compliance with applicable laws and regulations. The scope of internal control therefore extends to policies, plans, procedures, processes, systems, activities, functions, projects, initiatives, and endeavors of all types at all levels of a company.

Most publicly-held companies, subject to Sarbanes-Oxley Act[2] reporting requirements, use the COSO Framework as the benchmark for evaluation of their controls, although this is not mandatory. Many privately-held companies striving for effectiveness of controls also employ either the full COSO Framework or a small company variant published by

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COSO in 2006.[3]

The Association of Certified Fraud Examiners (ACFE) notes that lack of internal controls is by a large margin the most commonly cited factor that allows fraud schemes to succeed, followed by absence of management review and over-ride of existing controls).[4] This is corroborated by the fact that smaller companies, typically having fewer or weaker controls, are victimized more often than their larger brethren. Smaller companies tend to rely most heavily on external audits to find or prevent fraud, but statistics compiled by ACFE clearly show that audits are rarely effective at detecting fraud – one reason there are many accountants' negligence suits.

Clearly, if fraud is to be prevented or detected in a timely manner, the entity must have comprehensive, effective internal controls, about which counsel can and should be a force for educating the board and management. Properly designed, implemented and maintained controls can not only largely prevent the occurrence of fraud, but can aide forensic accountants in detecting fraud, should it occur, and in identifying the guilty parties.

2. Be proactive in dealing with external auditors

Financial statements are the responsibility of management, but a review of the auditors' working papers can be vital to understanding the extent of management's reliance on and acquiescence to the auditors' advice. Although management alone is responsible for making financial reporting policy decisions, when it seeks the auditors' advice on technical issues the auditors will typically prepare a "memo to file" on the advice sought and offered.

Corporate counsel should advise management to also fully document its own understanding of consultations with its outside auditors. In the event of allegations of financial reporting improprieties, this documentation will aid the litigation team defending management, as it can help to illuminate management's intentions and motivations, as well as the extent to which it was diligent in seeking expert guidance.

When acquisitions are largely based on projected future profitability, the use of contingent payout arrangements – most commonly earn-out agreements – can help mitigate the effects of information asymmetry which otherwise may hinder the buyer's ability to reach a fair transaction price.

In the event of litigation, a review of the auditors' working papers can assist defense attorneys in understanding how the auditors came to render an unqualified audit opinion on financial statements that are later contended to have contained material errors or deliberate irregularities. Counsel, acting through the board audit committee if appropriate, should seek to impress upon the auditors the need to communicate and memorialize all such deliberations.

3. Control the risks inherent in mergers and acquisitions

Many accounting fraud allegations arise in connection with mergers and acquisitions, (M&A), including the use of so-called "cookie jar reserves" as a vehicle to provide for future reporting of profitable operations.

When acquisitions are largely based on projected future profitability, the use of contingent payout arrangements – most commonly earn-out agreements – can help mitigate the effects of information asymmetry which otherwise may hinder the buyer's ability to reach a fair transaction price. However, the biggest concern in devising earn-outs pertains to how future profitability is to be measured.

Many contracting parties believe that, by specifying the use of Generally Accepted Accounting Principles (GAAP) to measure future performance, disputes can be obviated. However, a surprisingly large number of disagreements develop even when GAAP is the agreed-upon metric, in part because there still remains a significant amount of flexibility within GAAP. For that reason, the sellers have a duty to complete comprehensive due diligence of the buyers' financial reporting practices, and specifically of the accounting treatments accorded to those business transactions and events that may play a roll in ultimate payments under earn-out agreements.

An understanding of recent and forthcoming accounting pronouncements that could alter future measurements of performance will be important to protecting the seller's rights. Additionally, consideration should be given to stipulating to the use of "frozen GAAP," which allows

any agreement to be evaluated in the future based on current GAAP regulations at the time it was signed, for the duration of the earn-out period.

Another option is explicitly defining accounting recognition and measurement methods for those accounting standards that permit choices among alternative treatments, such as for inventory costing, depreciation methods and computation of bad debt reserves for valuing customer receivables.

Counsel for both seller and buyer have roles to play in assuring that their client or employer is protected from unanticipated effects of creative accounting interpretations by counter-parties in such circumstances.

[1] *Committee of Sponsoring Organizations of the Treadway Commission. Internal Control – Integrated Framework(2013). By Everson, Miles. E.A. et al. May 2013.*

[2] *Sarbanes-Oxley Public Company Accounting Reform and Investor Protection Act of 2002 (SOX), Pub. L. No. 107-204, 116 Stat. 745 (2002), codified at 15 U.S.C. §7262.*

[3] *Committee of Sponsoring Organizations of the Treadway Commission. Internal Control – over Financial Reporting – Guidance for Smaller Public Companies. By Everson, Miles et al. American Institute of Certified Public Accountants, June 2006.*

[4] *Association of Certified Fraud Examiners. Report to the Nations on Occupational Fraud and Abuse – 2012 Global Fraud Study. 2012.*

Diversity, Civility, and Dialogue

By: Brian D. Einhorn, State Bar of Michigan President, *Collins Einhorn Farrell PC*

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Brian D. Einhorn

If there is a single unifying principle behind American law and politics, it's this: listening to opposing views makes us wiser.

The art of listening is at the heart of our daily work as lawyers and judges. We work up cases by seeking colleagues' advice and testing ideas—maybe over a cup of coffee (or a steaming double latte mocha with two sugars). We emphasize diversity when we recruit new attorneys to our law firms because we want people who bring different experiences and a different view.

Judges are ethically obligated to make their decisions only after hearing from both sides, ensuring that their decision-making benefits from the back-and-forth of advocacy. Appellate judges engage in dialogue with other judges before and after hearing arguments. Written appellate opinions are accompanied by concurrences and dissents.

In all these ways, our work as attorneys embodies the belief that vetting ideas among those whose views may differ from our own helps expose weaknesses and promote sound thinking. Dialogue makes us better.

An attorney cannot develop a successful practice without entertaining others' ideas. It is the reason we review bar-sponsored listservs, attend discussions at meetings and professional organizations, and consult professional journals on a regular basis. My point: you cannot be effective as a lawyer if you exist in an echo chamber of your own thoughts; debate is the laboratory of law.

Democracy, too, depends on debate. Candidates for political office compete in the marketplace of ideas, vying with others within their political parties and beyond to convince voters that their positions are the most sound. Once elected, the time-honored tradition is that they debate issues on the legislative floor or submit to questioning from skeptical journalists.

There are sharp elbows in politics, but they are thrown with a purpose. At their best, the political jabs expose the weaknesses in candidates' ideas and highlight the propositions that, in the public's judgment, have the most promise. It isn't a perfect system. But the rough-and-tumble of debate in the political arena has mostly served our nation for more than two centuries.

Discussion of opposing views is so essential to our legal and political systems that it is not an exaggeration to say it is central to what we mean by the "rule of law." A fair and just government—indeed, a legitimate

government—must foster the airing of different views. When a commitment to real dialogue and open debate breaks down, strange things can happen. Michigan has just witnessed such an event.

On October 24, 2013, state senators introduced Senate Bill 652. This bill transferred all actions against the state from the Lansing-based Court of Claims to a new panel composed of four judges from the Michigan Court of Appeals. Reasonable minds can differ about whether it was a good idea to have five or six judges—from one county representing about 3 percent of the state population—deciding all cases that are filed against the state of Michigan. But regardless of your view of the wisdom of the fundamental change the legislation makes, you should be troubled by the way it became law.

The bill came up so quickly that even lobbyists were caught unaware. It was introduced in the Senate on October 24, and reported out of committee and passed by the Senate six days later. The Senate committee heard testimony from only two individuals—Bob LaBrant, senior counsel for the Sterling Corporation supporting the bill,[1] and Bruce Timmons,[2] recently retired legislative counsel who worked for legislative Republicans for several decades, opposing it. Attorney General Bill Schuette filed a card in support of the bill, but did not testify.

The state constitution requires that a bill be in the possession of each house for at least five days before the House can pass it. When the House received the bill from the Senate on the sixth day after its introduction, word about the bill had begun to spread throughout the legal community. In the House, the bill was referred to the rarely used Government Operations Committee rather than the Judiciary Committee that typically considers bills affecting the court system. The committee heard testimony from the SBM Appellate Practice Section, the Michigan Association of Justice, the Oakland County Bar Association, individual attorneys, and judges of the 30th Circuit Court (from whose court the bill transferred Court of Claims jurisdiction), and accepted written statements from the SBM Negligence Law and Appellate Practice sections. The thrust of most of the testimony was to ask that the process be slowed so a more complete analysis of the bill could be provided to answer many of the questions surrounding the legislation.

The House Government Operations Committee was asked to consider and listen to ways the bill could accomplish what was apparently the primary purpose of the legislation—moving cases from the Ingham County bench—without burdening the Court of Appeals or affecting rights of litigants. But the bill passed without any changes.

The State Bar did not have an opportunity to weigh in on the bill. Michigan Supreme Court Administrative Order 2004-01 prohibits the Bar from considering pending legislation for at least 14 days after posting notice on its website. The enactment of the bill, from proposal to signing by the Governor, was so swift—13 days—that we did not have a chance to post the notice and wait the requisite 14 days before it became law.

In enacting what is now Public Act 164 in such summary fashion, the legislature ignited needless innuendo and cynicism and, more importantly, deprived itself of an essential ingredient to an optimal result—a meaningful airing of opposing viewpoints and constructive input.

Obvious and important questions were left unanswered as the bill sped toward enactment. At the time the Senate and House "considered" and then passed Public Act 164, they did not know—and, in some cases, still do not know—the following:

- The exact scope of the jurisdictional expansion of the new Court of Claims
- The number of cases immediately transferred to the Court of Claims
- The constitutional implications of the bill; specifically, the bill's impact on the right to jury trial[3]
- How jury trials in the Court of Claims would be handled (jury boxes, court reporters, etc.)
- The due process implications of assigning appellate review to judges in the same court
- How appeals from the Court of Claims would be handled
- Whether the Court of Claims judges would also be in regular Court of Appeals panel rotation
- An assessment of the relative convenience for parties throughout the state
- How costs of the new Court of Claims system would be assigned
- How joinder works if the Court of Claims cases are/were assigned to a special master

- The bill's fiscal impact
- The role of special master and who appoints the special master, and who is responsible for assessment and assignment of costs relating to the special master
- How to address the practical and conceptual difficulties of mixing an appellate court with the role of a trial court of record, including (1) how hearing panels will be selected to hear and decide appeals from decisions of fellow Court of Appeals judges and (2) how to accommodate jury trials
- How to handle the joinder of the Court of Claims with related circuit court actions when one or more of the parties has a right to jury trial

Had these questions been asked and answered and opposing viewpoints fully aired as the bill moved through the legislative process, surely we would have arrived at a bill that accomplished what the majority wanted—moving cases away from a single circuit court bench—but in a way that did not burden the Court of Appeals, stress the court system, and cause widespread confusion and disruption throughout the legal community.

In 1998, Portuguese writer Jose Saramago won the Nobel Prize for his novel Blindness.[4] It's a jarring work built on a simple premise: an epidemic of blindness sweeps through a town. The afflicted are locked away in an asylum where, existing in the invisibility of universal blindness, they inflict horrible acts on each other.

The small-scale violence of Blindness invokes the still-unimaginable violence of the twentieth century, suggesting that the root of both is an inability to

perceive others' shared humanity. Saramago's allegory comes full circle toward the novel's end, when a doctor hints that the epidemic was one of the heart rather than the eyes or the head: "I don't think we did go blind, I think we are blind, Blind but seeing, Blind people who can see, but do not see."[5]

The same epidemic is spreading throughout our political system—in Washington and in state legislatures, and in civic discourse everywhere. But instead of robbing us of our sight, it robs us of hearing—or worse, wanting to hear.

Saramago's painfully apt allegory for the twentieth century sometimes seems to fit twenty-first century politics, with only a small alteration: We are deaf. Deaf people who can hear, but do not hear.

Just as scorched-earth litigation strategies are inimical to long-term success and good law, the view that ideological purity on either side of the aisle is more important than open inquiry and meaningful dialogue is a danger to good public policy. It rejects the wisdom that is embodied in our legal and political traditions.

I've practiced long enough to know that nothing lasts forever. Perhaps the downside of steamroller politics will soon become obvious enough to prompt national and state lawmakers and Washington to stop, reflect, and return to first principles. And to listen.

In the meantime, we must insist of our politicians and in our own lives and practices that diversity, civility, and dialogue matter. We can lead by example and cheer on the lawmakers of both parties who recognize that healthy laws are the product of healthy debate.

[1] His testimony before the Senate committee is available at http://www.senate.michigan.gov/committees/Default.aspx?commid=62 (accessed December 19, 2013).

[2] His testimony before the House committee is available at: http://house.michigan.gov/MHRPublic/Committeelnfo.aspx?comkey=229 (accessed December 19, 2013).

[3] This was an issue specifically flagged by the governor before he signed the bill as needing quick resolution. The House has now passed HB 5156 to preserve rights to a jury trial.

[4] Saramago, Blindness (New York: Harvest Books, 1999).

[5] *Id.* at 326.

Spring Cleaning and Your Important Documents

By: Tara L. Bachner, *Willingham & Cote, P.C.*

With spring cleaning upon us, several clients have asked what types of documents should be kept and for how long. The following are some of the most common documents you are likely to have and suggestions about the appropriate amount of time to retain them.

- **Deeds:** Even if the deed has been recorded, you need to keep it in a safe place. If the deed has not been recorded, it is advisable that you have the deed recorded and then kept in a safe place.
- **Title Policy on Real Estate:** Only keep the title policy for real estate that you currently own. If you have sold the real estate, you do not need to keep the title policy.
- **Loan Documents:** Only keep these if they relate to real estate you currently own or any obligation that is still outstanding.
- **Tax Returns:** These need to be retained for seven years, as well as any associated documentation that was used in the preparation of the returns.
- **Brokerage Statements:** Year-end statements need to be kept for seven years. As soon as you receive the yearly statement and have reviewed it against the monthly or quarterly statements, the monthly or quarterly statements can be discarded.
- **Bank Statements/Cancelled Checks (if you get these):** The statements need to be retained for seven years if they relate to any tax issues that are included on any returns filed for the past seven years.
- **Explanation of Benefits or other Healthcare Information:** These should be retained for two years or until the medical bill has been paid in full.
- **Utility Bills:** Once the bill has been paid, there is no need to keep these.
- **Credit Card Bills:** Review them monthly and keep them for seven years if any of the purchases are related to any tax deductions taken in the past seven years.
- **Estate Planning Documents:** Always keep your estate planning documents in a safe place where you and your family can easily find them.

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Transferring Cottage Property to Your Children Without Tax Increases

By: Scott A. Breen, *Willingham & Cote, P.C.*

A Michigan law was recently enacted which will allow parents to transfer residential real estate (including cottages) to their children without certain property tax increases. The substance of this law went into effect December 31, 2013. It is important to keep this law in mind when considering decisions regarding the transfer of real estate to your children.

What Is the Problem?

The transfer of real estate often causes an increase in the amount of property taxes that the new owner will have to pay in the future. In order to understand the problem, it is important to consider how the taxable value is calculated.

Real estate has both a "state equalized value (SEV)" and a "taxable value." The state equalized value represents one-half of the fair market value of the property as determined by the local assessor. The taxable value is the amount that is subject to property taxes. In the year after you acquire real estate, the SEV and taxable value are the same. In determining your property taxes, municipalities multiply the taxable value (not the SEV) of your property by the millage rate. Michigan law limits the yearly increase of the taxable value of real estate (not the SEV) to the rate of inflation or 5%, whichever is less. Since the SEV is always based on fair market value, the SEV often increases more than the taxable value.

Why Does this Matter?

Generally, the longer that real estate is owned, the greater the gap between the SEV and the taxable value (since property values have generally increased over time). Upon a "transfer of ownership" (as defined by Michigan law), the taxable value is adjusted upward to equal the SEV. This is commonly called "uncapping" of the taxable value. This property transfer and the resulting "uncapping" can greatly increase the amount of property taxes that will be owed.

The Good News

Historically, a transfer of real estate from a parent to a child was considered a "transfer of ownership" that uncapped the taxable value of the real estate. That often caused large increases in the property taxes that a child would have to pay. This is especially true for cottage property that has been owned by the same family for many years.

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TRANSFERRING COTTAGE PROPERTY TO YOUR CHILDREN WITHOUT TAX INCREASES

As of December 31, 2013, there is no longer an uncapping of the taxable value of real estate if: (1) a parent transfers residential real estate to a child (or from a child to the parent); and (2) the use of the property does not change following the transfer. This law allows parents to transfer property characterized as "homestead" property as well as other types of residential property such as cottages. The child would have to use the property in the same manner as the parents. For example, the child would likely not be able to lease a cottage to a third party if the parents were not doing so prior to the transfer.

The Bad News

As is often the case, there is some bad news to follow the good news. There is one major problem with the new law. It is currently unclear whether the law allows a personal representative of the parent's estate (or a successor trustee of the parent's trust) to transfer the property to the child after the death of the parent. Tax practitioners are attempting to get clarification on this issue through an amendment to the law.

This uncertainty makes estate planning even more essential because there are other planning techniques that may be used to address these concerns. Given this new law, if you own real estate and intend to transfer it to your children (either before or after death), it would be wise to take another look at your estate plan.

MDTC Legislative Section

By: Graham K. Crabtree, *Fraser, Trebilcock, Davis & Dunlap, PC*
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MDTC Legislative Report

In the days since my last report in March, our state legislators have been busy completing their work on the next fiscal year's budget, and having done so, they have left town to hit the campaign trail. They'll be back for a day or two in July and August, but it is safe to predict that nothing of substance will be addressed until the Legislature reconvenes in September. There was the usual flurry of activity leading up to the summer adjournment on June 12th. Important issues were addressed and agreement was reached on some, with others left for another day.

It is appropriate to give credit where credit is due, so it must be suggested that a round of applause is deserved for the bipartisan effort that yielded a significant state contribution to the "grand bargain" in the pending Detroit bankruptcy. The no-fault insurance reform legislation dropped from the radar while matters financial were being addressed, and our legislators tried without success to craft a "revenue neutral" solution to the state's 1.5 billion dollar road repair problem. These and other issues will await further consideration in the fall.

2014 Public Acts

As of this writing on June 18, 2014, there are 180 Public Acts of 2014. The new acts which may be of interest include:

2014 PA 52 – Senate Bill 636 (Nofs – R), which has amended the Michigan Telecommunications Act to create new procedures to allow telephone service providers to discontinue traditional land line telephone service in favor of voice over internet or wireless service, effective January 1, 2017.

2014 PA 138 – Senate Bill 934 (Richardville – R), which has **created a new "Workforce Opportunity Wage Act" to repeal and replace the existing minimum wage law of 1964.** Under the new law, the standard hourly minimum wage will be increased from $7.40 to $9.25 by January 1, 2018, in four steps, with subsequent annual increases tied to the rate of inflation if the rate of unemployment does not exceed 8.5%. The minimum hourly wage for tipped employees will be increased from $2.65 to 38% of the standard minimum wage, beginning September 1, 2014.

This legislation was introduced and quickly passed to scuttle an effort to provide a significantly higher increase by way of a voter-initiated amendment to the 1964 Act – an effort which has now been rendered moot by the repeal of the former act. It provides a good example of how a legislative log jam can be broken by pressure brought to bear elsewhere. Many of those who stood outside on street corners to collect signatures for the ballot proposal were angered by the legislative nullification of their effort, and yet, it is fairly safe to assume that the Legislature would not have addressed this issue at all without their help.

2014 PA 159 – Senate Bill 714 (Schuitmaker – R), which has **created a new "Uniform Collaborative Law Act" providing new procedures for facilitation of family law and domestic relations issues** by lawyers representing parties as "collaborative lawyers" in the newly-defined "collaborative law process."

2014 PA 101, 102, 103 and 105 – Senate Bills 547, 548 and 549 (Booher – R) and House Bill 5119 (VerHuelen – R), which have **amended Articles 3, 4 and 4a of the Uniform Commercial Code and the Uniform Electronic Transactions Act** to effect a number of amendments concerning commercial paper and electronic transactions. 2014 PA 104 – Senate Bill 551 (Booher – R) has **amended Article 9 of the Uniform Commercial Code** to impose limitations on recoveries by debtors and secondary obligors for default of obligations under Article 9.

Old Business and New Initiatives

There are a number of interesting issues in the pipeline. They include:

Senate Bill 743 (Meekhof – R), which **proposes elimination of compulsory membership in the State Bar of Michigan.** As I mentioned in my last report, the Supreme Court convened a special Commission in response to this legislation to study objections to the State Bar's political activities and consider whether membership in the State Bar should be a voluntary choice. Further consideration of Senate Bill 743 has been held in abeyance pending consideration of the Commission's recommendations, which were published on June 2nd.

House Bill 5511 (McCready – R), which proposes amendment of MCL 600.6458 to establish **new provisions to facilitate the collection of support, amounts owed to the state or its subdivisions, and amounts due under court orders for restitution, fines, reimburse-**

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It is appropriate to give credit where credit is due, so it must be suggested that a round of applause is deserved for the bipartisan effort that yielded a significant state contribution to the "grand bargain" in the pending Detroit bankruptcy.

ments, penalties or assessments, from payments made in satisfaction of Court of Claims judgments against the state or its political subdivisions. This bill was reported by the House Committee on Families, Children and Seniors with a Substitute (H-1) on May 21st, and now awaits consideration by the full House on the Second Reading Calendar.

House Bill 5505 (Walsh – R), which would amend the Revised Judicature Act, MCL 600.308a, to **allow local units of government to bring an action to enforce provisions of the Headlee Amendment** (Const 1963, art 9, §§ 25 to 31), and to require that all such actions, and all actions brought by taxpayers under Const 1963, art 9, § 32, be filed as original actions in the Court of Appeals. The bill would also add six new sections establishing procedures for processing and adjudication of those actions. This bill was introduced on April 30, 2014, and referred to the House Committee on Financial Liability Reform.

House Bill 5558 (Leonard – R), which would **amend the Michigan Consumer Protection Act, MCL 445.904, to specify that the act does not apply to create a cause of action for unfair, unconscionable or deceptive methods, acts or practices made unlawful under Chapter 20 of the Insurance Code of 1956, if the method, act or practice in question occurred on or after March 28, 2001**, or to such methods, acts or practices occurring before that date if an action based upon those methods, acts or practices is filed after June 5, 2014. The purpose of this legislation is to require a retroactive application of 2000 PA 432, the legislation which originally excluded unconscionable or deceptive methods, acts or practices made unlawful under Chapter 20 of the Insurance Code from the protections afforded by the Consumer Protection Act. The bill has been passed by both houses, and was ordered enrolled, without immediate effect, on June 12th.

House Joint Resolution FF (McBroom – R), which proposes an **amendment of Const 1963, art 4, § 27, to reform the constitutional process for granting immediate effect to legislation.** In its current form, this section provides that no act may take effect until the expiration of 90 days after the end of the session in which it was passed, unless the Legislature gives immediate effect to the act by a two-thirds vote of the members elected and serving in each house. In practice, this has meant that bills not given immediate effect by a separate two-thirds vote do not take effect until 90 days after the last adjournment of the year, which typically occurs during the week between Christmas and New Year's Day. If the two-thirds approval can be obtained, the act may take effect immediately upon filing with the Secretary of State, or at any time specified therein.

The problem addressed by the proposed amendment has arisen from the longstanding practice in the House of declaring the existence of the constitutionally required two-thirds majority vote by fast action of the presiding officer's gavel on a voice vote, without any reliable proof of concurrence by two-thirds of the members. This practice has been utilized over the years by presiding officers of both parties, and has often been used by the party in control to declare immediate effect when the required supermajority vote cannot be legitimately obtained. The practice was recently employed last fall to grant immediate effect to Senate Bill 652, the controversial Court of Claims legislation, in spite of compelling evidence that the motion was not supported by the required two-thirds majority.

HJR FF would advance the default effective date by the addition of new language providing that legislation cannot take effect until 90 days after the date of filing with the Secretary of State (instead of 90 days after the final adjournment of the session) unless given immediate effect by a two-thirds vote. As introduced, this joint resolution would end the abusive "fast gavel" practice with a new requirement that the two-thirds approval be secured by a roll call vote.

This joint resolution was reported by the House Government Operations Committee without amendment on June 4th, but a Substitute (H-2) was adopted on second reading. The substitute eliminated the requirement of a roll call vote in favor of a less precise requirement that the vote tally be recorded in the journal. The substitute also included new language to ensure that the amendment would not be applied retroactively. On June 12th, in the flurry of activity leading up to the summer adjournment, the amended resolution was defeated amid concerns that 90 days of lead time would be inadequate in many cases, and protests that a roll call vote should be required, as originally proposed. A motion for reconsideration of the vote has been made and deferred for another day

Online Resources

Our members are reminded that copies of legislative materials, including bills, resolutions, legislative analyses, the House and Senate Journals, and a detailed history of each bill and resolution, may be found on the Legislature's very excellent website. The website includes copies of all public acts and the official compilation of Michigan statutory law. The available bills and resolutions include the versions as originally introduced and as passed by each house, and the site has recently been improved to include links to bill substitutes which have been reported from the House and Senate Committees or adopted in proceedings before the full House or Senate.

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Medical Malpractice Report

Notices of Intent and the 182-Day Waiting Period

Furr v McLeod, ___ Mich App ___; ___ NW2d ___ (2014). Application for leave to appeal to the Supreme Court pending. This opinion was issued by a special panel of the Court of Appeals convened after the court declared a conflict with *Tyra v Organ Procurement Agency of Michigan*, 302 Mich App 208; 840 NW2d 730 (2013) in *Furr v McLeod*, 303 Mich App 801 (2013) vacated, conflict panel convened 303 Mich App 801 (2013).

The Facts: The plaintiffs filed their complaint 181 days after serving a notice of intent ("NOI"), instead of the 182 days required under MCL 600.2912b. The trial court denied defendants' motion for summary disposition, relying on *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009) (invoking MCL 600.2301 to excuse a complaint filed 1 day too soon). After that ruling the defendants filed an application for leave to appeal to the Court of Appeals. In the interim, the Supreme Court decided *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011), which reaffirmed that *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005) still applied despite the Supreme Court's decision in *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009) (permitting a court to either ignore or allow a plaintiff to remedy defects in the substance of NOIs). In lieu of granting leave, the Court of Appeals remanded to the trial court for reconsideration of the summary disposition motion under *Driver* and *Burton*. After the trial court again denied summary disposition, the Court of Appeals granted leave to appeal.

The Ruling: The Court of Appeals, in an opinion authored by Judge William Whitbeck and joined by Judge Michael J. Kelly, concluded that *Driver* and *Burton* compelled the dismissal of the plaintiff's complaint, and essentially invalidated *Zwiers* and the proposition that MCL 600.2301 could somehow be used to change the date of service of an NOI or the filing of a complaint. The panel noted, however, that *Tyra*, *supra*, which compelled the opposite conclusion, was binding under the "first-out" rule of MCR 7.215(J). Accordingly, it held that though it would have reversed the denial of summary disposition, it was constrained by *Tyra* to affirm instead. The Court of Appeals invoked the conflict-resolution procedure and entered an order vacating *Furr* under MCR 7.215(J)(5), and convened a special panel to resolve the conflict between the *Tyra and Furr* decisions.

The seven-member conflict panel ruled 4-3 in favor of affirming the trial court's denial of summary disposition (and thus resolving the conflict in favor of *Tyra*). The majority opinion, authored by Chief Judge William Murphy, and joined by Judges Jane Markey, Stephen Borrello, and Jane Beckering, held that the majority could not "discern with any certitude whether the *Driver* Court effectively overruled *Zwiers*." The majority reasoned that the Supreme Court had not made clear that it meant to "preclude the application of MCL 600.2301 under any circumstances entailing a *Burton*-type situation in which a complaint is prematurely filed" before the time permitted under MCL 600.2912b.

The majority distinguished *Driver* by pointing out that in *Driver*, the plaintiff sought to sue parties against whom the statute of limitations had already run by using MCL 600.2301 to "amend" the NOI and add the party in. The *Furr* majority focused heavily on the *Driver* Court's analysis of whether the plaintiff could rely on MCL 600.2301 through consideration of the statutory language. The *Furr* majority inferred that this tacitly implied that the court was contemplating that in a different situation, where the plaintiff timely served an NOI, MCL 600.2301 might be used to excuse noncompliance with the notice waiting period set forth in MCL 600.2912b.

Curiously, however, the *Furr* majority discussed—and indeed went as far as block-quoting—the portion of the *Driver* case in which the Court stressed that *Bush* explicitly confirmed that *Burton* was good law and that all plaintiffs were required to strictly comply with the notice waiting period. That notwithstanding, the *Furr*

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The Court of Appeals invoked the conflict-resolution procedure and entered an order vacating Furr under MCR 7.215(J)(5), and convened a special panel to resolve the conflict between the *Tyra* and *Furr* decisions.

majority concluded that the *Driver* Court somehow left the door open to allowing noncompliance with the notice waiting period to be excused under MCL 600.2301. Accordingly, the Furr majority did exactly that: held that MCL 600.2301 excused noncompliance with the waiting period.

Judge Peter O'Connell issued a dissenting opinion joined by Judge Michael Talbot. The dissent concluded that it would have reversed the denial of summary disposition for the reasons stated in Judge Whitbeck's opinion in the earlier *Furr* case as well as those set forth in the dissenting opinion in *Tyra*. Judge Patrick Meter issued a separate dissenting opinion in which he joined Judge O'Connell's dissent. But Judge Meter, a member of the panel that issued the *Zwiers* opinion, disagreed with the *Furr* majority and felt that Driver had implicitly overruled *Zwiers*.

Practice Tip: Five years after the Supreme Court's decision in Bush, there is still quite a bit of uncertainty about how much compliance—if any at all—with the NOI waiting period is required. Even in *Bush*, the Court seems to be clear that a plaintiff must strictly comply with that period. The results in *Zwiers*, *Tyra*, and *Furr*, and similar cases, however, would suggest otherwise. The *Furr* majority, in closing its opinion, supported its decision to hold that *Driver* did not overrule *Zwiers* by explaining its view that "the sound legal course for this Court is to leave the issue for a future definitive decision by the Michigan Supreme Court, should the Court have the opportunity and inclination to address the matter."

Applications for leave to appeal from the Court of Appeals' opinions in both *Tyra* and *Furr* are pending, so the Supreme Court will have the opportunity to resolve the issue if it has the inclination to do so. Given the obvious conflict among the Court of Appeals judges on whether *Zwiers* continues to be good law, it would not be surprising to see the Supreme Court grant leave to appeal. While Bush has turned a content-based NOI challenge into all but a fool's errand, it is probably not yet time to throw in the towel on Burton-related challenges to complaints filed prematurely, before the expiration of the NOI waiting period.

See Michigan Defense Quarterly, Vol. 30, No. 3, p. 38, for more discussion of the earlier opinion in *Furr*, and the opinion in *Tyra*.

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Appellate Practice Report

Does a Decision that Has Been "Vacated," even if on "Other Grounds," Have Precedential Effect?

When writing a brief, many practitioners find themselves citing a decision that was either reversed or vacated "on other grounds." When it comes to a decision's precedential value, does it matter whether a decision was "reversed" or "vacated"? It appears that the answer is yes. As a general matter, decisions that have been "vacated," even if on other grounds or without addressing the merits of the decision being vacated, are not precedentially binding. Such decisions are, however, commonly cited, including in judicial opinions.

It is commonly recognized that "[a] decision may be reversed on other grounds, but a decision that has been vacated has no precedential authority whatsoever." *Durning v Citibank, N A*, 950 F2d 1419, 1424 n 2 (CA 9, 1991), citing *O'Connor v Donaldson*, 422 US 563, 578 n 12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case."). See also 5 Am Jur 2d Appellate Review § 791 ("The vacation of the judgment or order of the court below generally deprives such judgment or order of any effect, including precedential effect.").

This is the general rule both in Michigan and in the federal courts. As the Michigan Court of Appeals has explained: "[A] Court of Appeals opinion that has been vacated by the majority of the Supreme Court without an expression of approval or disapproval of this Court's reasoning is not precedentially binding." *People v Mungo*, 295 Mich App 537, 554; 813 NW2d 792 (2012). Federal courts have likewise observed that "[w]hen imposed by the Supreme Court, vacatur eliminates an appellate precedent that would otherwise control decision on a contested question throughout the circuit." *Russman v Bd of Educ*, 260 F3d 114, 121 n 2 (CA 2, 2001).

Of course, this is not to say that such decisions are never cited. The Michigan Supreme Court and Court of Appeals have regularly cited decisions that have been "vacated on other grounds." See, e.g., *People v Hendrickson*, 459 Mich 229, 237; 586 NW2d 906 (1998) (citing *United States v Hawkins*, 59 F3d 723, 730 (CA 8, 1995), vacated on other grounds 516 US 1168 (1996)); *Bennett v Mackinac Bridge Auth*, 289 Mich App 616, 630; 808 NW2d 471 (2010) (citing *Juncaj v C & H Industries*, 161 Mich App 724, 734; 411 NW2d 839 (1987), vacated on other grounds 432 Mich 1219; 434 NW2d 644 (1989)). The same is true for the Sixth Circuit Court of Appeals. See, e.g., *Talley v Family Dollar Stores of Ohio, Inc*, 542 F3d 1099, 1110 (CA 6, 2008) (relying on a decision that had been "vacated on other grounds"); *U S ex rel Snapp, Inc v Ford Motor Co*, 532 F3d 496, 499 n 2 (CA 6, 2008) (same).

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As a general matter, decisions that have been "vacated," even if on other grounds or without addressing the merits of the decision being vacated, are not precedentially binding.

So what does this mean for practitioners? Practitioners should certainly use caution when citing any decision that has been vacated, recognizing that even if the higher court did not pass on the merits of the decision, it technically does not have precedential value (unlike a decision that has merely been "reversed" on other grounds). At the same time, such decisions may still have persuasive value. See, e.g., *Jackson v Georgia Dep't of Transp*, 16 F3d 1573, 1578 n 7 (CA 11, 1994) (noting that although an opinion from another circuit had been "vacated on unrelated grounds . . . its reasoning does have persuasive value").

Taking Judicial Notice of Facts on Appeal

Both the federal and Michigan rules of evidence provide for taking judicial notice of facts that are not reasonably in dispute and whose accuracy can readily be determined. See Fed R Evid 201; MRE 201. Although judicial notice is probably taken most often at the trial court level, it is well recognized that appellate courts are likewise empowered to do so. See, e.g., *People v Goecke*, 457 Mich 442, 448 n 2; 579 NW2d 868 (1998) ("A court may take judicial notice of facts not noticed below, whether requested or not, at any stage of the proceeding."); *United States v Ferguson*, 681 F3d 826, 834 (CA 6, 2012) (observing that the standard under Rule 201 for taking judicial notice of facts "applies to appellate courts taking judicial notice of facts supported by documents not included in the record on appeal").

Examples of matters of which appellate courts in Michigan and other jurisdictions have taken judicial notice on appeal include (but are certainly not limited to):

- Records of judicial proceedings in other courts. See Chilingirian v Miro, Wiener & Kramer, P C, No. 247798; 2004 Mich App LEXIS 3156, *1 n 1 (Mich App, Nov 18, 2004); Ferguson, 681 F3d at 834;
- Matters of public record. See Wolverine Golf Club v Sec of State, 24 Mich App 711, 715 n 2; 180 NW2d 820 (1970) (Secretary of State filing); In re Watson, 517 F2d 465, 474 (CCPA, 1975) (FDA order);
- Market data. See Thomas v Thomas, 176 Mich App 90, 93; 439 NW2d 270 (1989) (Consumer Price Index); Boston Prop Exch Transfer Co v Iantosca, 720 F3d 1, 1 n 9 (CA 1, 2013) (stock market movements);
- Geographical information. See McCroskey v Gene Demings Motor Sales, 94 Mich App 309, 311; 288 NW2d 418 (1979) (distance between two cities); United States v Leveto, 540 F3d 200, 206 n 2 (CA 3, 2008) (same);
- Census figures. See United States v Phillips, 287 F3d 1053, 1055 n 1 (CA 11, 2002); AFSCME Council 25 v County of Wayne, 292 Mich App 68, 92; 811 NW2d 4 (2011) ("We take judicial notice under MRE 201 that Wayne County has a population that exceeds 1,000,000 . . . .");
- Historical events. See Schnitz v Grand River Ave Development Co, 271 Mich 253, 258; 259 NW 900 (1935) (the Great Depression); McDonnell Douglas Corp v Islamic Republic of Iran, 758 F2d 341, 346 (CA 8, 1985) ("[W]e take judicial notice of the recent escalation of the war between Iran and Iraq, the bombing of Tehran by the Iraqi Air Force, Iraq's threat to shoot down all commercial planes over Iran, and the suspension of flights to Iran, by several commercial air lines . . . .");
- Statements on a website. See In re Application of Indiana Michigan Power Co, 275 Mich App 369, 371 n 2; 738 NW2d 289 (2007) (taking judicial notice of statements contained on the U.S. Department of Energy's website); Gent v Cuna Mut Ins Soc'y, 611 F3d 79, (CA 1, 2010) (CDC's website);
- Other well-accepted or easily verifiable facts. See Elizabeth Lake Estates v Waterford Twp, 317 Mich 359, 365; 26 NW2d 788 (1947) (rising cost of con struction during World War II); People v Burt, 89 Mich App 293, 297-298; 279 NW2d 299 (1979) ("We take judicial notice that, in fact, no football game between Washington and

Although judicial notice is probably taken most often at the trial court level, it is well recognized that appellate courts are likewise empowered to do so.

Dallas, or between any other professional football teams, was televised on the date in ques tion, namely, December 24, 1976"); United States v Arney, 248 F3d 984, 989 (CA 10, 2001) ("We take judicial notice of the fact that days are shorter and darkness comes earlier in December than in other months."); United States v Anderson, 584 F2d 369, 374 (CA 10, 1978) ("[W]e take judi cial notice of the fact that fed eral reserve notes are valued in dollars.").

No Brief Is an Island: An Introduction to Hyperlinking Appellate Briefs

John Donne once wrote that no man is an island. The same is increasingly true of documents. Books and articles were once islands unto themselves. They may have referenced other sources but they were not connected to those sources in any meaningful way. If a reader wanted to review content cited in a book, he or she had to close the book, get up, and locate the referenced volume.

The same has been true for legal briefs for about as long as legal briefs have been written. But it may not be the case much longer.

It is no secret that judges (like attorneys) are increasingly reading briefs on screen, both on computers or iPads. This change in our reading habits calls for changes in our writing habits. Attorneys no longer have to give directions for readers to track down references on their own. With hyperlinks, attorneys can place key documents directly in front of judges and their clerks.

If you do any reading on the Internet, you've no doubt seen hyperlinks. They are portals to other content — text, usually in another color or underlined, that the reader can click to be taken directly to the referenced source. If the New York Times cites a report from Reuters, for example, it can provide a hyperlink to give the reader an easy path to source material:

Almost all of the sources that attorneys use are available online now. And just about any exhibit to an appellate brief can take the form of an electronic document. Consequently, an advocate can put all the materials that support his or her arguments just one click away for the judge or law clerk reading a brief.

This shouldn't be news for most appellate lawyers; leading legal research services like Lexis and Westlaw already hyperlink legal authorities cited in legal opinions. We've seen firsthand how hyperlinks facilitate analysis. We simply have to provide for judges the same level of convenience we expect for ourselves.

If you've followed this far, you probably have three main questions: (1) how do I hyperlink, (2) in which courts can I use hyperlinking, and (3) what are the pitfalls for my clients? Although complete answers are beyond the scope of this article, this article will provide enough information to get you started – and perhaps encourage you to seek more resources on how to use hyperlinks as an advocacy tool.

1. How do I hyperlink?

There's no one-size-fits-all answer, since we all use different software to draft briefs. But Microsoft Word provides a useful starting point.

Essentially, hyperlinking requires two skills: (1) copying URLs for the sources you want to link to and (2) inserting a reference into a Word document. Suppose you want to link to Cnty of Wayne v Hathcock, 471 Mich 445 (2004). If you're confident that the court where you'll be filing uses Westlaw, you can simply search for "471 Mich 445" in Westlaw and then copy the URL for the resulting page:

If you want to refer your reader to a specific page in Hathcock, substitute your pin cite for the case's initial page. So, for example, if you want to cite page 468 from the Michigan Reporter's printing of Hathcock, search Westlaw for 471 Mich 468. Then copy the URL for that page:

Once the URL is copied, return to Word, select the text you want to hyperlink, and right-click. "Hyperlink" will be one of the options that appears in the dialog box. Make sure "existing file or webpage" is selected in the left-hand "link to" column, and paste the URL into the box that follows "address."

Alternatively, you can use the "hyperlink" tab under "insert" in Microsoft Word:

It is no secret that judges (like attorneys) are increasingly reading briefs on screen, both on computers or iPads. This change in our reading habits calls for changes in our writing habits.

You can also hyperlink to other parts of your brief. For example, you might allow your reader to click on a portion of your introduction to jump directly to the referenced argument. First, you'll need a target for your internal hyperlink. Instead of using the URL to an external website, you will use either a header (if your text is formatted in Word) or a bookmark created specifically for this purpose.

Taking Chief Justice Young's opinion in Hathcock as a text, suppose we wanted to add a link in the introduction to the constitutional analysis that follows the Court's statutory analysis. We start by adding a bookmark to the beginning of the constitutional analysis.

Select the "target" text, click the "insert" tab on at top, and choose "bookmark."

Type a short name for the bookmark – it has to be one word — and click "add."

Now return to the text that you were using as a jumping-off point. Highlight the text you want to convert to a hyperlink, right-click or select "hyperlink" under the "insert" tab, and choose "place in this document" in the "link to" tab. Then select the name of the bookmark you just created.

Note that you can hyperlink in PDFs as well. But PDF software is variable enough that you'll have to consult an online user manual (or your IT department) to learn how to do this after a Word document becomes a PDF.

2. Where can I file hyperlinked briefs?

Many federal courts allow hyperlinking and have adopted specific local rules to address this practice. The United States District Court for the District of Kansas has put together a helpful guide to federal courts' local rules on this issue.[1]

The Michigan Court of Appeals currently does not allow external hyperlinks. But parties can use *internal* hyperlinks — links that lead to different sections of a brief or to key exhibits — to great advantage. Given the number of Court of Appeals judges who use iPads to read cases and prepare for argument, a properly bookmarked and hyperlinked brief may be a powerful advocacy tool.

Not every court is ready and willing to accept hyperlinked briefs at this point. In fact, many state courts do not accept electronically filed briefs *at all*. There's no substitute for knowing the court at issue and taking the time to call the clerk's office to find out whether a hyperlinked brief is acceptable. A judge (or a judge's clerk) might be more than happy to accept a hyperlinked and bookmarked copy of a brief.

3. What pitfalls should I watch for?

Observing a few guidelines will help ensure that the use of hyperlinks helps rather than hinders your case.

Don't jettison traditional citations. Even if you use hyperlinks, you'll be expected — at least for now — to continue using traditional citation methods as well. In fact, the United States District Court for the Eastern District of Michigan has the local rule specifically reminding practitioners to use traditional citation methods with hyperlinks.

Check every single link — and make sure your links stay active after your brief is converted to PDF. Obviously, a hyperlink won't be very helpful if it takes the reader to the wrong site. And because some PDF programs are set by default to deactivate links when a document is converted from Word to PDF, you'll need to make sure your links remain live after a document is converted.

Check with chambers and consult local rules. Hyperlinks can be extremely helpful — but courts are not equally open to the use of new technology. Check the local rules for any guidelines about the use of hyperlinks and consider calling chambers to see whether a judge will be open to receiving a hyperlinked brief.

Sometimes less is more. Hyperlinks are just a method for getting the reader from one place to another. Used well, they can highlight key arguments and attract the reader's attention. This is especially the case when you are limited to the use of internal hyperlinks, such as at the Michigan Court of Appeals. Attaching just the key cases and key exhibits and linking to them from strategic points within a brief can be a powerful way to enhance your legal arguments. After all, hyperlinking allows you to put the material that supports your client's cause just

The Michigan Court of Appeals currently does not allow external hyperlinks. But parties can use internal hyperlinks — links that lead to different sections of a brief or to key exhibits — to great advantage.

one click away. The judge may be grateful for the easy access to key documents.

It is unlikely that the use of computers and tablets will decrease. If the last decade is a guide, lawyers will see less and less paper and will perform more of their reading on computer screens. This has its drawbacks, to be sure. But the ability to put key material right in front of a judge —to have critical exhibits and cases just one click away — is a powerful advocacy tool. Most likely, the use of hyperlinks will increase until it becomes a standard part of legal briefing.

Ten Questions about Post-Arbitration Motions and Appeals under Michigan's Uniform Arbitration Act

Michigan's Uniform Arbitration Act, MCL 691.1683, *et seq.*, has been in effect since 2013. Although appeals from an arbitration award are similar to appeals from ordinary civil judgments in some ways, there are some important differences. It is important for appellate practitioners to be aware of both the unique opportunities for advocacy and the unique pitfalls created by this Act. The following discussion addresses ten common post-arbitration questions.

1. Can the arbitrator rule on post-arbitration motions?

Yes — to a point. The arbitrator retains limited authority after rendering an award. He or she can modify this award on certain grounds, such as (a) to correct a mathematical error or an "evident mistake" in a description of a person or thing, (b) if the award "is imperfect in a matter of form not affecting the merits of the decision," (c) if the award is not yet final, or (d) if the award needs clarification. MCL 691.1700. Once a party files a motion for a circuit court to confirm, vacate, or modify an arbitrator's award, however, the arbitrator can modify an award only if the court directs him or her to consider doing so. Id.

2. Can I enforce the arbitrator's judgment itself, or does it become effective only once it is confirmed by a court?

Arbitration awards are much like other private agreements. They can be honored without any judicial intervention. But when a party refuses to abide by an arbitration award, the aggrieved party can invoke state machinery to enforce the arbitration award only once a court confirms it. MCL 691.1702.

3. Can a court vacate an arbitration award and send the parties back for further arbitration?

Yes. Courts may vacate arbitration awards on grounds such as corruption, fraud, "evident partiality," or misconduct by the arbitrator. A court may also vacate an award if the arbitrator exceeds his or her powers. MCL 691.1703(1). Unless the court finds that there was no valid agreement to arbitrate in the first place, a court vacating an arbitration award may order further arbitration. MCL 691.1703(2).

4. Can the court simply correct an award?

Yes. In addition to asking the court to vacate an arbitration award, parties may ask the court to modify or correct an award. A court may modify or correct an award if (a) there is a "mathematical miscalculation" or "evident mistake in a description," (b) the arbitrator made an award on a claim that wasn't subject to arbitration and the error can be corrected without affecting the merits of the claims that were submitted, or (c) the award is "imperfect in a matter of form" not affecting the merits. MCL 691.1704. Parties may join a motion to modify or correct an award with a request to vacate the award. MCL 691.1704(3).

5. When do I need to file a motion to vacate, correct, or modify an award?

Motions for the court to modify or correct an award must be filed within 90 days after the movant receives notice of the award, or 90 days after notice of a corrected or modified award. MCL 691.1704(1).

Motions for a court to vacate an award are subject to the same limitations, with one exception. If a party alleges that an arbitration award is the product of corruption, fraud, or other undue means, a motion must be made within 90 days "after the ground is known or by the exercise of reasonable care would have been known by the moving party." MCL 691.1703.

Check the local rules for any guidelines about the use of hyperlinks and consider calling chambers to see whether a judge will be open to receiving a hyperlinked brief.

6. Can a party appeal an arbitration award to the Court of Appeals?

Yes — but only after the circuit court weighs in. Pursuant to MCL 691.1708, a party can file an appeal from:

(a) An order denying a motion to compel arbitration.
(b) An order granting a motion to stay arbitration.
(c) An order confirming or denying confirmation of an award.
(d) An order modifying or correcting an award.
(e) An order vacating an award without directing a rehearing.
(f) A final judgment entered under this act.

7. Can parties to an arbitration agreement modify appeal rights by agreement?

Parties have a limited ability to waive the right to appeal under the Uniform Arbitration Act. The Act itself states that certain sections cannot be waived, including the trial court's ability to confirm, vacate, or modify an arbitration award. MCL 600.1684. Parties can, however, waive review by the Court of Appeals. Id.

8. What relief is available if an arbitrator unreasonably delays issuing a ruling?

Unlike courts, arbitrators can be required to render a written opinion by a certain time, either through agreement or by court order. An order from the court or a stipulation from the parties can extend this time. If a party believes that an arbitration award was untimely, it must raise that objection before receiving notice of the award.

9. Can a party obtain the equivalent of summary judgment from an arbitrator — and, if so, what appellate rights will the aggrieved party hold?

Parties may request that an arbitrator incorporate a "preaward ruling" into a final decision, and may also file a motion for expedited confirmation of this award. MCL 691.1698. In essence, these rules allow parties to shortcut the usual arbitration process. Once a court enters an order confirming an award on an expedited basis, an aggrieved party may seek review from the Court of Appeals under MCL 691.1708.

10. Do the ordinary rules about attorney fees apply to post-arbitration proceedings before a circuit court?

Maybe not. The Uniform Arbitration Act provides that, if a prevailing party requests them, a court "may add reasonable attorney fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award." MCL 691.1705. Consequently, parties who refuse to comply with an arbitration award without court intervention run the risk of increasing their liability.

Read together, these provisions point to a general theme underlying the Uniform Arbitration Act. The factual and legal merits of a dispute are largely matters for arbitrators. Circuit courts — and, therefore, higher courts reviewing circuit courts' judgments — are largely limited to ensuring the integrity of arbitration proceedings.

[1] Available at: http://federalcourthyperlinking.org/wp-content/uploads/2013/05/6-10-13-Hyperlinking-Electronic-Submissions-in-the-Federal-Courts.pdf (last visited June 14, 2014).

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Legal Malpractice Update

Joint enterprise theory of liability not viable where each attorney does not have an equal right to control the client's legal representation and joint responsibility for decision-making

Souden v Attorney Defendant, unpublished opinion per curiam of the Court of Appeals, issued April 17, 2014 (Docket No. 314143)

The Facts: Plaintiff sued to divorce his wife in Berrien County. Plaintiff retained the attorney defendant and, against the attorney defendant's advice, plaintiff voluntarily dismissed his complaint. Shortly after, plaintiff's then-wife sued for divorce in Oakland County, seeking a judgment of divorce. The attorney defendant filed a special appearance, limited to contesting the issues of venue and jurisdiction in Oakland County, and filed an answer to the complaint as well as a motion contesting venue and jurisdiction.

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The attorney defendant contacted an attorney located in Oakland County ("successor counsel"). The attorney defendant asked successor counsel to "enter [an] appearance as co-counsel and handle the motion and the case if it's in Oakland County." The attorney defendant also forwarded successor counsel a check in the amount of $500, which represented an unused portion of a retainer fee that plaintiff previously paid to the attorney defendant. Plaintiff contacted successor counsel, discussed the case, and agreed that successor counsel would argue the motion regarding venue and jurisdiction.

The attorney defendant subsequently sent plaintiff a letter, advising that successor counsel handle the case if it remained in Oakland County. Plaintiff and successor counsel discussed mediation or arbitration to settle the divorce. Plaintiff also contacted the attorney defendant via telephone, and asked his opinion regarding mediation and arbitration. According to plaintiff, the attorney defendant responded by stating that "there's no downside at this point" to mediation. Plaintiff discussed possible mediators with successor counsel. Plaintiff never discussed the selection of a mediator with the attorney defendant.

Eventually, a retired judge was selected to mediate the dispute. Plaintiff and successor counsel prepared for the mediation, and when the mediation occurred, only successor counsel attended, as plaintiff expected. After mediation was unsuccessful, successor counsel advised plaintiff to agree to binding arbitration. Plaintiff did not consult with the attorney defendant regarding this decision, and agreed to go forward with arbitration. Plaintiff contacted the attorney defendant after the arbitration concluded and advised him of what had taken place.

The arbitration judgment was unfavorable to plaintiff. Plaintiff first consulted with successor counsel about what action could be taken. Plaintiff also met with the attorney defendant and showed him the arbitration award. The attorney defendant indicated his disagreement with the award and pointed out language in the arbitration agreement providing for a time limit on a motion for reconsideration of the judgment. According to plaintiff, "[the attorney defendant] told me [successor counsel] knew about this, and he handed it back to me." It was plaintiff's understanding that the attorney defendant had directed successor counsel to handle any subsequent action regarding the arbitration award.

Successor counsel never filed a motion to reconsider the award. A judgment of divorce incorporating the award was entered. Plaintiff and successor counsel later selected an appellate attorney who successfully appealed a portion of the arbitration agreement.

Plaintiff filed suit against the attorney defendant and successor counsel. Plaintiff's complaint alleged that successor counsel's conduct during the mediation and arbitration proceedings, as well as his failure to timely file a motion for reconsideration of the arbitration award, caused plaintiff

While Michigan has not recognized a cause of action for negligent referral, it is important for an attorney referring a matter to another attorney to be cognizant of potential liability under a joint enterprise or joint venture theory, especially if he or she continues providing advice to the client.

significant financial and emotional injuries. Plaintiff alleged that the attorney defendant was liable for successor counsel's acts and omissions under a theory of ostensible agency.

The attorney defendant moved for summary disposition. Plaintiff argued that defendant could be liable for successor counsel's conduct under a joint enterprise theory. The trial court granted the attorney defendant's summary disposition motion in regard to plaintiff's ostensible agency claim, but denied summary disposition regarding plaintiff's joint enterprise theory, finding that "[p]laintiff has come forward with sufficient evidence to create an issue of fact regarding whether [the attorney defendant] and successor counsel were engaged in a joint enterprise such that both can be liable for the alleged malpractice." The attorney defendant filed an application for leave to appeal and it was granted.

The Ruling: The Court of Appeals reversed the trial court and remanded the case for entry of an order granting summary disposition in the attorney defendant's favor.

The court noted that the terms "joint enterprise" and "joint venture" are sometimes used interchangeably but are distinct concepts in the law. A joint venture is "an association to carry out a single business enterprise for a profit" and has six elements: (1) an agreement indicating an intention to undertake a joint venture; (2) a joint undertaking of; (3) a single project for profit; (4) a sharing of profits as well as losses; (5) contribution of skills or property by the parties; and (6) community interest and control over the subject matter of the enterprise.

A joint enterprise, on the other hand, is based on principal and agent laws, and "requires that every member have management and control of the enterprise, a right to be heard, and an equal right of control and joint responsibility for decision making and expenses." There is no requirement that the parties share in profits and losses under a joint enterprise theory.

The court concluded that the attorney defendant could not be held vicariously liable for successor counsel's conduct under a joint enterprise theory. Once successor counsel was involved, the attorney defendant no longer had an equal right to control plaintiff's legal representation, nor did he share responsibility for any decision making. It was successor counsel who suggested mediation to plaintiff. While plaintiff sought the attorney defendant's opinion on utilizing this option, plaintiff only consulted with successor counsel regarding the selection of a mediator, and to prepare for the mediation, plaintiff consulted only with successor counsel. Additionally, only successor counsel attended the mediation, only successor counsel was consulted about whether to proceed to arbitration, and plaintiff first discussed the award and what options were available with successor counsel. There was no evidence that the attorney defendant controlled the proceedings once successor counsel got involved and, accordingly, liability for successor counsel's conduct could not be imputed to the attorney defendant under a joint enterprise theory.

Practice Note: While Michigan has not recognized a cause of action for negligent referral, it is important for an attorney referring a matter to another attorney to be cognizant of potential liability under a joint enterprise or joint venture theory, especially if he or she continues providing advice to the client. Explaining each attorney's roles and responsibilities and clearly setting forth the scope of the representation is not only helpful toward establishing client expectations but also toward avoiding liability for another attorney's acts or omissions.

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Supreme Court Update

An Employer's Decision Regarding the Renewal of Fixed-Term Employment Contracts is not Actionable Under the Whistleblowers' Protection Act

On April 25, 2014, the Michigan Supreme Court held that the Whistleblowers' Protection Act ("WPA"), MCL 15.361, et seq., does not apply to prospective employees or fixed-term contract employees whose employment contracts are not renewed. Wurtz v Beecher Metro Dist, 495 Mich 242 (2014).

Facts: The plaintiff was the district administrator for the Beecher Metropolitan District, which manages water and sewage for a portion of Genesee County. He was subject to a 10-year employment contract with the District, which expired on February 1, 2010.

During his employment, the plaintiff reported to the Genesee County Prosecutor an alleged violation of the Open Meetings Act by three of the District's five board members. The prosecutor declined to prosecute. Several months later, the plaintiff also reported to the prosecutor travel reimbursements for board members that he felt were inappropriate. Criminal charges were brought, but all board members were either acquitted or otherwise had the charges against them dropped.

Notwithstanding the tumultuous relationship with the board, the plaintiff served out the remainder of his ten-year employment contract, for which he was paid all wages and benefits earned. The board, however, declined the plaintiff's request to have his employment contract renewed or extended. As a result, the plaintiff filed a WPA claim against the District and three individual board members, alleging that the District's decision to not renew his employment contract constituted unlawful retaliation for his prior reports of allegedly unlawful behavior by the District's board members.

The trial court granted the defendants' motion for summary disposition, holding that the plaintiff could not meet the necessary elements of the WPA because he was not discharged prior to the expiration of his employment contract.

The Court of Appeals reversed and held that the failure to renew a fixed-term employment contract constituted an adverse employment action for which relief may be sought under the WPA.

Holding: The Supreme Court reversed the decision of the Court of Appeals and held that, unlike other state and federal discrimination statutes, the WPA applies only to those individuals who are current employees at the time of the alleged retaliation. By its express language, the WPA does not apply to prospective employees or job applicants.

The court explained that a fixed-term employee who seeks new employment after the expiration of his or her employment contract is, in material respect, no different than a new job applicant for which the WPA does not apply. This is particularly true because, absent some express obligation otherwise, "a contract employee has absolutely no claim to continued employment after his or her contract expires."

Because the plaintiff had completed the term of his employment contract and was

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The Supreme Court reversed the decision of the Court of Appeals and held that, unlike other state and federal discrimination statutes, the WPA applies only to those individuals who are current employees at the time of the alleged retaliation.

claiming retaliation only in relation to his request for renewal of his employment contract, he, like a new job applicant seeking to be hired for the first time, was not entitled to recover under the WPA.

Significance: The court limited its holding to cases in which an individual is no longer an employee. An individual subject to a fixed-term contract is still protected from retaliation under the WPA during the individual's term of employment. The court also emphasized that, although at-will employees generally have no interest in future employment, they, too, are protected by the WPA during the term of their employment.

A City Ordinance Imposing a Rebuttable Presumption that Unsafe Structures be Demolished if the Cost of Repairs Would Exceed the Structures' Prior True Cash Value is Constitutionally Valid

The Michigan Supreme Court held on April 24, 2014, that a City of Brighton Ordinance, which creates a rebuttable presumption that an "unsafe structure" may be demolished if it is deemed a public nuisance and the cost to repair the structure would exceed its true cash value prior to it becoming unsafe, did not violate the plaintiffs' substantive or procedural due process rights. Bonner v City of Brighton, 495 Mich 209 (2014).

Facts: The plaintiffs own two residential properties in downtown Brighton, containing three structures which have been largely unoccupied and neglected for 30 years. The City's building and code enforcement official informed the plaintiffs by letter that the structures were unsafe under the City's ordinance regarding unsafe structures. The building official listed various defects and code violations and informed the plaintiffs that, under the ordinance, it would be unreasonable to repair the structures because the cost of repairs would exceed the structures' true cash value. The plaintiffs were ordered to demolish the structures with no option for repair within 60 days.

The plaintiffs appealed to the City Council and presented evidence from structural engineers and contractors that the structures were readily repairable. The City ultimately denied the plaintiffs' requests for building permits needed to perform the repairs, and determined that, because the cost to repair the structures exceeded the true cash value of the structures, demolition was warranted under the ordinance.

The plaintiffs then filed the instant action, alleging violations of procedural and substantive due process, equal protection, and inverse condemnation. The plaintiffs filed a motion for partial summary disposition on their due process and takings claims, which the trial court granted in part and denied in part.

The trial court concluded that questions of fact existed with respect to the plaintiffs' takings claim, but determined that the ordinance violated substantive and procedural due process because it precluded property owners from having the opportunity to repair their property. The trial court explained that, while the demolition of unsafe properties promoted the legitimate interest of public health, that interest is equally advanced by allowing an owner to repair a property to bring it up to code.

The Court of Appeals affirmed and concluded that the ordinance was arbitrary and unreasonable because it allows for the option to repair property only when the owner "overcomes or rebuts the presumption of economic unreasonableness, regardless of whether the property owner is otherwise willing and able to timely make the necessary repairs." The court also held that the ordinance lacked procedural safeguards to protect against deprivations of property where the owner is willing to repair his or her property.

Holding: The Supreme Court reversed, holding that the plaintiffs' substantive and procedural due process claims were distinct and should be treated as such. In analyzing the claims together, the Court of Appeals conflated the issues and ultimately erred in its decision.

As to the substantive due process claim, the Supreme Court held that the ordinance was not unconstitutional because it was reasonably related to the legitimate government interest of protecting the health and welfare of its citizens. The court held that the right to repair one's property is not a fundamental right and thus the ordinance need only bear a reasonable relationship to the governmental interest. The court also held that the unreasonable-to-repair presumption was not arbitrary, as it could be overcome and did not serve as an absolute prohibition on a property owner's ability to repair an unsafe structure.

The Supreme Court further held that the ordinance did not violate the plaintiffs' procedural due process rights

The Supreme Court reversed, holding that the plaintiffs' substantive and procedural due process claims were distinct and should be treated as such. In analyzing the claims together, the Court of Appeals conflated the issues and ultimately erred in its decision.

because it provided plaintiffs with notice of demolition, as well as an opportunity to appeal the decision. The court found that the appeal process provided plaintiffs with an adequate opportunity to be heard.

Significance: The court emphasized that the case involved a facial challenge to the ordinance and, as such, the plaintiffs confronted "an extremely rigorous standard" that was not dependent on the particular facts of the case, but rather on the ordinance alone.

The Sport Shooting Range Act Precludes Enforcement of Local Zoning Ordinances with Respect to Certain Shooting Ranges that Existed as of the Effective Date of the Act

On April 1, 2014, the Michigan Supreme Court held that a sport shooting range is entitled to the protection of the Sport Shooting Range Act ("SSRA") MCL 691.1541 et seq., so long as it was in existence as of July 5, 1994, and it operates in accordance with generally accepted operation practices, regardless of whether the shooting range is used for commercial purposes. Addison Twp v Barnhart, 495 Mich 90; 845 NW2d 88 (2014).

Facts: In 1993, Addison Township granted the defendant permission to build a shooting range on his property based on an agreement that the shooting range would be used solely by the defendant and his family. The defendant later expanded his shooting range for commercial uses. Eventually, the Township issued a citation to the defendant for operating a commercial shooting range without a zoning compliance permit.

The defendant claimed that he was within his rights to use the shooting range for commercial purposes under the SSRA, MCL 691.1542a, which expressly grants to existing shooting ranges that meet generally accepted operation standards the right to expand opportunities for public participation.

At the initial trial, the district court granted the defendant's motion for a directed verdict, concluding that the defendant's commercial use of the shooting range was protected by the SSRA.

After a series of appeals, the Court of Appeals concluded that even though defendant's shooting range was in existence on the effective date of the SSRA, it was not entitled to protection due to the commercial nature of the range, which the court concluded fell outside the intended definition of "sport shooting range."

Holding: The Supreme Court reversed and held that the defendant's shooting range is entitled to protection under the SSRA, even though it was used for commercial purposes and might otherwise violate the Township's ordinance. The court explained that the Court of Appeals erred in considering the commercial nature of the sport shooting range, and clarified that the relevant inquiry is simply whether the shooting range was designed and operated for sport shooting purposes.

The court further explained that to qualify as a sport shooting range for which the SSRA was meant to apply, it must have qualified as a sport shooting range at the time the SSRA became effective (July 5, 1994), and must operate in accordance with generally accepted operation practices for such ranges, as established by the Natural Resources Commission. The Supreme Court concluded that the defendant's shooting range met those requirements and was, thus, entitled under the SSRA to expand for commercial uses, even if that meant it would not comply with the Township's ordinance.

Significance: The court clarified that the standards set forth in the National Rifle Association's Manual, which is in some form relied upon by the Natural Resources Commission, were guidelines and not absolute requirements. As such, an admission that a shooting range fails to meet one or more of those standards does not automatically preclude a finding that the shooting range otherwise complies with generally accepted operation practices as required by the SSRA.

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Court Rules Update

By: M. Sean Fosmire, *Garan Lucow Miller, P.C.*
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Proposed Amendments to Federal and State Rules

For additional information on these and other amendments, visit the Court's official site at:

http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Pages/default.aspx

Federal Rules of Civil Procedure

A series of proposed amendments has been approved by the "Standing Committee" of the Judicial Conference in a May 2 report. The amendments will now be sent to Congress for its approval. An overview of some of the changes is as follows:

- Changes to Rule 1, relating to the declaration of the purpose of the Rules;
- A revision of Rule 26(b)(1), the general statement of what is discover able, including importing the concept of proportionality into the pri mary definition; and
- A new form of Rule 37(e), to authorize courts to take action if a party fails to properly preserve electronic evidence and if the court finds that that failure has resulted in prejudice to the opponent's legal position.

For more information, see the article at Law Technology Newshttp://www.lawtechnologynews.com/id=1202657565227/Standing+Committee+OKs+Federal+Discovery+Amendments%3Fmcode=0&curindex=0&curpage=ALL

Michigan Court Rules

2012-02 - Discovery-only depositions of expert witnesses

Court Rule:	MCR 2.302
Issued:	March 1, 2014 (reissue)
Comments to:	July 1, 2014

This is a revision of a previous proposal, with two alternatives. Alternative A would state that a deposition of an expert witness may be used for any purpose unless there had been a previous stipulation or order limiting it to discovery, and allocating the costs and fees. Alternative B would permit the deposition to be noticed for discovery purposes only, without the need for a stipulation or order.

MDTC member Brian Whitelaw of Grand Rapids led a group of defense attorneys in writing two letters to the Supreme Court in response to the initial proposal, and it appears that their comments led to the addition of Alternative B as a less costly alternative.

Sean Fosmire is a 1976 graduate of Michigan State University's James Madison College and received his J.D. from American University, Washington College of Law in 1980. He is a partner with Garan Lucow Miller, P.C., manning its Upper Peninsula office.

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2013-27 - New parties to counter-claims and cross-claims

Court Rule:	MCR 2.203
Issued:	May 21, 2014
Comments to:	September 1, 2014

This would permit the addition of new parties to counterclaims and cross-claims and authorize the issuance of a summons in that case.

Member News – Work, Life, and All that Matters

Member News is a member-to-member exchange of news of work (a good verdict, a promotion, or a move to a new firm), life (a new member of the family, an engagement, or a death) and all that matters (a ski trip to Colorado, a hole in one, or excellent food at a local restaurant). Send your member news item to Lee Khachaturian (dkhachaturian@dickinsonwright.com) or Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).

MDTC Welcomes New Members!

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MDTC Schedule of Events 2014

2014

September 12	Golf Outing — Mystic Creek
September 17	Respected Advocate Award Presentation — Grand Rapids
September 17–19	SBM Annual Meeting — Grand Rapids
September 25	Board Meeting — Okemos *Special Guest — John Hohman, State Court Administrator*
October 2	Meet the Judges — Hotel Baronette, Novi
October 22–26	DRI Annual meeting — San Francisco, CA
November 6	Past Presidents Dinner – Marriott, Troy
November 7	Winter Meeting – Marriott, Troy

2015

March 26	Board Meeting – Okemos
May 14–15	Annual Meeting – The H Hotel, Midland
September 11	Golf Outing – Mystic Creek
October 7	Respected Advocate Award Presentation – Novi
October 7–11	DRI Annual Meeting – Washington, D.C.
October 7–9	SBM Annual Meeting – Novi Expo Center
November 12	Past Presidents Dinner – Sheraton, Novi
November 13	Winter Meeting – Sheraton, Novi

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