LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

The Past Still Speaks*

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WHEN CLIENTS USE AI: DISCOVERY, PRIVILEGE, AND GUARDRAILS

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Clients are increasingly using generative artificial intelligence before and during litigation. At intake, AI-written inquiries are usually easy to spot: generic headers, long bullet lists, bolded words, emojis, em dashes, and an oddly confident menu of possible claims. At that stage, the problem is mostly practical. No attorney-client relationship has been formed, and the lawyer has time to evaluate the inquiry and decide whether to accept the matter.

The more serious problem arises after the client has retained counsel. A client who turns to ChatGPT, Claude, Gemini, or another consumer AI tool to answer discovery, generate timelines, draft declarations, analyze strategy, or test legal theories may unintentionally create material that is discoverable. Worse, the client may input confidential facts or counsel's advice into a third-party platform under terms of use that do not preserve confidentiality. Plaintiff-side firms should therefore consider a clear policy that prohibits, or at least tightly restricts, client use of AI in pending litigation.

At the same time, it is still very early to know how AI technology will ultimately develop, how consumer AI platforms will handle confidentiality and data retention issues, or how courts across the country will resolve these questions over time. The observations and suggestions in this article are simply that—observations and suggestions—and my own views may evolve as AI advances and as courts, practitioners, and scholars continue to address these issues. The goal of this article is not to discourage the responsible use of AI, but to encourage discussion, caution, and client education regarding the use of consumer AI tools during pending litigation.

1. AI Can Make Clients Less Engaged in Their Own Case

Most client use of AI is well-intended. Clients want to be efficient, helpful, and articulate. They may believe that an AI-generated discovery response will save the lawyer time. In practice, it often does the opposite.

Discovery is not just a paperwork exercise. It is one of the first structured opportunities for the client and lawyer to work through the facts, identify and review key documents, evaluate case strengths and weaknesses, and prepare for deposition. When a client simply pastes interrogatories into an AI system, the client may not meaningfully engage with the facts. The lawyer is then forced to sift through polished but unhelpful prose, vague legal conclusions, and information that may or may not be accurate or applicable.

The discovery process also helps clients understand the rigor of litigation. A client who has personally worked through discovery is often better prepared for deposition, more realistic about risk, and more receptive to settlement discussions when those opportunities arise.

2. AI Can Undermine the Attorney-Client Relationship

AI tools are designed to be responsive to the user. They can be confident, agreeable, and encouraging even when the law or facts require a more nuanced assessment. Friction can arise when a lawyer gives realistic advice and the AI gives the client a more favorable answer. The problem is not merely that the AI may be wrong. The problem is that the client may begin to treat AI as a competing legal adviser, without understanding that the system owes no duty of accuracy, competency, candor, loyalty, or confidentiality.

3. Recent Cases Illustrate the Developing Split

Two recent district court decisions illustrate the developing split and the risk of assuming that AI communications will be protected.

In *United States* v. *Heppner*, 2026 WL 436479 (S.D.N.Y. 2026), Judge Jed S. Rakoff endeavored to answer a question of first impression: "whether, when a user communicates with a publicly available AI platform in connection with a pending criminal investigation, are the AI user's communications protected by attorney-client privilege or the work product doctrine?" *2. The Court held that a criminal defendant's written exchanges with Anthropic's Claude were not protected by either confidentiality privilege. *1-2. Acting on his own initiative, without counsel's direction, the defendant had inputted into Claude information he had received from his defense attorneys, generated reports analyzing his legal exposure and defense strategy, and then shared those AI-generated materials with counsel. *4. The court held that the communications were not privileged because Claude was not counsel, the communications were not confidential, and the user had no reasonable expectation of confidentiality under the applicable privacy policy. *6-10. The court also rejected work-product protection because the materials were not prepared by counsel, or at counsel's direction, and did not reflect counsel's strategy.*10-14.

Heppner is a strong warning for clients who independently use consumer AI tools after litigation is threatened or underway. Materials do not become privileged merely because a client later sends them to a lawyer. Nor does a client's subjective hope that AI output will help counsel necessarily make the communications protected work product.

By contrast, in *Warner* v. *Gilbarco*, Inc., 2026 WL 373043 (E.D. Mich. 2026), Magistrate Judge Anthony P. Patti held that a pro se plaintiff's use of ChatGPT in connection with litigation was protected as work product.*11. The defendants sought

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STATEMENT OF EDITORIAL POLICY

Labor and Employment Lawnotes is a quarterly journal published under the auspices of the Council of the Labor and Employment Law Section of the State Bar of Michigan. Views expressed in articles and case commentaries are those of the authors, and not necessarily those of the Council, the Section, or the State Bar. We encourage Section members and others interested in labor and employment law to submit articles, letters, and other material for possible publication.

John G. Adam, *Editor*
Stuart M. Israel, *Editor Emeritus*

discovery concerning the plaintiff's use of third-party AI tools in the lawsuit. Id. The court denied that request, reasoning that work-product waiver requires disclosure to an adversary or disclosure in a manner likely to reach an adversary. *12. The court described ChatGPT and other generative AI programs as "tools, not persons" and warned that treating AI use as automatic waiver "would nullify work-product protection in nearly every modern drafting environment, a result no court had endorsed." *13.

Warner is important, but it should not be read as a blanket rule that all AI use is protected. It involved a pro se litigant and a work-product analysis. It did not eliminate attorney-client privilege concerns, and it did not decide that every consumer AI platform preserves confidentiality. The safer lesson from *Warner* and *Heppner* together is that the result will be fact-specific, platform-specific, and heavily influenced by whether counsel directed or controlled the AI use, whether confidential information was disclosed, and whether the communications reveal legal strategy or merely the client's independent research.

4. Discovery Requests for AI Use Are Coming

It is easy to imagine discovery requests asking whether a party used AI to draft discovery responses, prepare declarations, summarize facts, identify claims, analyze settlement, or prepare for deposition. (In *Warner* Defendants' request was one for "all documents and information concerning [Plaintiff's] use of third-party AI tools in connection with this lawsuit.") A request for a client's AI prompts and outputs may soon seem as routine as requests for text messages, emails, calendars, phone logs, and other electronically stored information.

The difference is that lawyers cannot safely assume that traditional privilege objections will apply. If the client has disclosed sensitive facts, legal theories, or counsel's advice to a consumer AI tool, privilege and work-product disputes may become another costly and frustratingly time-consuming front in the litigation.

Of course, this development does not nullify the general rules of discovery. The issue is not whether AI-generated material can ever be discoverable, but whether a recognized basis for disclosure exists under traditional discovery rules. The use of AI by a litigant should not automatically render questions, prompts, searches, or communications discoverable by default. Key considerations like relevance, privilege, proportionality, confidentiality, waiver, and whether or to what extent material was relied upon still govern the discoverability of potential evidence. Still, prudent practitioners should not ignore the risks posed by unsupervised client use of AI during litigation, as Courts may become more willing to compel disclosure where AI-generated material is relied upon in discovery responses, sworn statements, damages calculations, or where the communications themselves bear directly on disputed facts.

COVER PHOTOGRAPH*

The banner photograph shows my mother and grandmother in Brussels, Belgium around 1942. This was during the Nazi occupation. My father, an American serviceman who spoke fluent French, was stationed in Brussels in late 1944 following the D-Day invasion. He met my mother in Brussels. — John G. Adam

5. Practical Guardrails

Plaintiff-side firms (and criminal defense firms) should consider adopting written client instructions addressing AI use. The policy can be simple, direct, and introduced at intake, integrated into the retainer agreement, reiterated before discovery, and during deposition preparation. At a minimum, firms should consider the following safeguards:

a. Prohibit clients from using consumer AI tools to answer discovery, draft declarations, summarize privileged communications, strategy, or prepare for deposition unless counsel gives written permission.

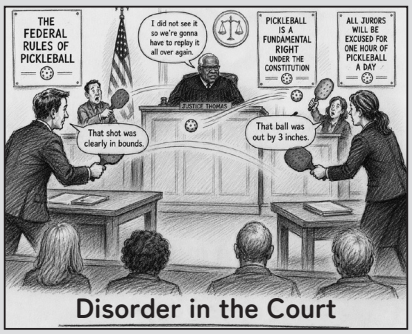
b. Include an AI-use acknowledgment in the retainer agreement, explaining that unauthorized AI use may create discoverable material and may risk waiver of privilege or work-product protection.

c. Tell clients to leave difficult discovery questions blank and ask the lawyer or firm staff for help rather than using AI to generate an answer.

d. When AI use is genuinely helpful, control it through counsel-approved tools, enterprise settings, confidentiality protections, and clear documentation that the work is being performed at counsel's direction.

e. Remind clients that AI output can be inaccurate, incomplete, overly favorable, or written in a tone that does not match the client's actual knowledge or memory.

AI is now part of ordinary client behavior. That does not mean lawyers should ignore it or pretend clients are not using it. It means lawyers need a policy. Until the law develops further, the safest approach is to warn clients early, restrict unsupervised AI use during litigation, and preserve the strength of the attorney-client relationship, confidentiality, and work-product protections.■



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FEDERAL COURTS GRAPPLE WITH RULE 60 AND FINAL JUDGMENTS

"On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding . . . ." — **Fed. R. Civ. P. 60(b)**

"There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." — *Ackermann v. United States*, 340 U.S. 193, 198 (1950).

"Rule 60(b) has an unquestionably valid role to play . . . ." — *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005).

"Rule 60(b)(6) should only be applied in extraordinary circumstances." — *Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847, 864 (1988).

Rule 60 has become one of the hottest topics in federal civil procedure, with the Supreme Court and several federal appellate courts issuing major decisions on finality, reopening judgments, post-dismissal relief, void judgments, and the interaction between Rule 60 and other Federal Rules.

1. *Blom Bank SAL v. Honickman,* 605 U.S. ___, 145 S. Ct. 1612 (2025) (Thomas, J.) (holding Rule 60(b)(6)'s demanding "extraordinary circumstances" standard governs motions seeking to reopen final judgments to amend pleadings under Rule 15(a).)

2. *Waetzig v. Halliburton Energy Servs., Inc.*, 604 U.S. 305 (2025) (Alito, J.) (holding a voluntary dismissal under Rule 41(a) may qualify as a "final proceeding" subject to Rule 60(b) relief.)

3. *Coney Island Auto Parts v. Burton,* 607 U.S. 155 (2026) (Alito, J.) (holding Rule 60(b)(4) motions challenging void judgments remain subject to Rule 60(c)(1)'s "reasonable time" limitation.)

4. *In re Vista-Pro Automotive,* 109 F.4th 438 (6th Cir. 2024) (Sutton, Bush, Murphy, JJ.) (holding Rule 60(b)(4) motions attacking void judgments remain subject to Rule 60(c)(1)'s reasonable-time requirement.)

KERWIN v. TRINITY SERVES AS A REMINDER THAT THE EMPLOYER WITHDRAWAL-OF-RECOGNITION RULE SHOULD BE ABOLISHED

John G. Adam

Kerwin v. Trinity Health Grand Haven Hospital, ___ F.4th ___, 2026 WL 1194768 (6th Cir. 2026) (Readler, Bush, Boggs, JJ.), is the latest reminder that the employer withdrawal-of-recognition doctrine remains both alive and dangerous. The court held that the employer illegally withdrew recognition from the union — then vacated the injunction issued by District Judge Robert J. Jonker on the ground that no irreparable harm had been shown.

This article uses *Kerwin* to make two arguments. First, the employer withdrawal-of-recognition rule cannot be reconciled with the Board's insistence on secret-ballot elections and its obligation to protect employees' uninhibited free choice; employer withdrawal — which bypasses the Board's election machinery altogether — should not be permitted.

Second, and at greater length, the Sixth Circuit majority erred in finding no irreparable harm. As Judge Boggs explained in dissent, the harm caused by unlawful withdrawal is structural, ongoing, and often beyond repair by the time the Board issues a final order — a point *Kerwin* has already made worse by causing at least one district court to deny § 10(j) relief in a subsequent case.

I. The Asymmetry at the Heart of the Withdrawal Doctrine

The National Labor Relations Act is built upon the principle of employee free choice, and for decades the Board and courts have recognized that the preferred method for determining employees' representational wishes is the Board-supervised secret-ballot election. As the Board stated in *General Shoe Corp.*, 77 NLRB 124, 127 (1948), the election process is designed to function as a "laboratory" for determining "the uninhibited desires of the employees" under conditions as nearly ideal as possible.

The doctrine's asymmetry emerged gradually. In *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263 (1949), the Board held that card-based majority support could compel recognition. But by *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and *Linden Lumber Division, Summer & Stinson, Inc. v. NLRB*, 419 U.S. 301 (1974), that rule had been substantially curtailed: a union generally could not force initial recognition through authorization cards alone; the employer could insist on a Board election. Yet the Board left intact the parallel rule, originating in *Celanese Corp. of America*, 95 N.L.R.B. 664 (1951), permitting an employer to withdraw recognition from an incumbent union based on private evidence of lost majority support.

That asymmetry is indefensible. If authorization cards are considered insufficiently reliable to compel an employer to recognize a union without a Board election, the same logic applies with even greater force to withdrawal. An incumbent union has already been recognized, employees have an established bargaining representative, and the Act favors stability in collective-bargaining relationships. The employer should not be permitted to accomplish through unilateral self-help what a union can no longer accomplish through authorization cards: resolving a question of representation outside the Board's secret-ballot election machinery. The question in both settings is the same — do employees wish to be represented by the union? — and it should be answered the same way: through a Board-supervised secret-ballot election.

The Board has had the opportunity to correct this and declined. In *Chelsea Industries*, 331 NLRB 1648 (2000), *enforced*, 285 F.3d 1073 (D.C. Cir. 2002), the General Counsel and I argued that the Board should abandon the withdrawal doctrine altogether and require a Board election before recognition could be withdrawn. The Board reserved the question for *Levitz*, where it imposed a higher evidentiary burden — requiring proof that the union had *actually* lost majority support rather than merely that the employer entertained a good-faith doubt — but declined to bar withdrawal altogether. *Levitz Furniture*, 333 NLRB 717, 725 (2001), overruled in part on other grounds, *Johnson Controls*, 368 NLRB No. 20 (2019). The asymmetry survived.

II. Withdrawal of Recognition Is Worse Than Assisting Decertification

The withdrawal doctrine is inconsistent with the Board's longstanding restrictions on employer involvement in decertification efforts. Board law prohibits employers from starting, steering, sponsoring, or supporting such campaigns — the four S's — permitting only "ministerial aid" in response to unsolicited employee inquiries, because management involvement is inherently coercive. See my article, "The Decertification Bus: When Employer 'Help' Goes Too Far," in this issue. The four S's draw a clear line: the decertification decision belongs to employees, not management, and employer involvement at any point along the continuum taints that choice.

The withdrawal doctrine, however, permits something categorically worse than anything the four S's prohibit. The ministerial aid cases address employer *assistance* — conduct that influences or supports a process still nominally driven by employees. The withdrawal doctrine eliminates even that pretense. The employer receives and reviews antiunion petitions, evaluates employee support, learns who favors the union and who does not, and then acts on that information to terminate bargaining rights unilaterally — often without any election whatsoever. The employer does not assist the decertification effort; it makes the representational decision itself. If employer involvement in decertification campaigns is dangerous because it may influence or expose employee choice, employer reliance on the same kind of petition to withdraw recognition is not merely equally dangerous — it is the more serious violation, because it substitutes the employer's judgment entirely for the employees' free choice.

III. The Biden Board's *Cemex* Rule and Its Instability

The Biden Board's response to the withdrawal doctrine's asymmetry was to attack the other side of the equation. In *Cemex Construction*, 372 NLRB No. 130 (2023), the Board attempted to revive card-based recognition by requiring an employer, once presented with claimed majority support, either to recognize the union or promptly seek a Board election. Rather than eliminating the employer's unilateral power to destroy an existing bargaining relationship, *Cemex* tried to make it easier for unions to establish one in the first place.

That approach is now effectively defunct. The Sixth Circuit rejected a *Cemex*-based bargaining order in *Brown-Forman Corp. v. NLRB*, 169 F.4th 646, 656–57 (6th Cir. 2026), reaffirming that secret-ballot elections remain the preferred method for

determining majority support. The Trump General Counsel has since withdrawn the guidance implementing *Cemex*, and the current Board shows no appetite for defending it.

The collapse of *Cemex* leaves the asymmetry intact and unaddressed. The irony is pointed: in *Brown-Forman*, the Sixth Circuit invoked the primacy of secret-ballot elections to reject card-based recognition — and then in *Kerwin*, decided months later, found no irreparable harm when an employer bypassed a secret-ballot election altogether to withdraw recognition from an incumbent union. The court cannot have it both ways. If secret-ballot elections are the gold standard for establishing majority support, they must equally govern its termination.

IV. The *Kerwin* Chronology

The facts of *Kerwin* illustrate the withdrawal doctrine's failure in operation. Judge Readler's majority opinion sets out a chronology that is worth examining closely:

> September 18–19, 2023 — Employees voted in the Board-supervised decertification election.
>
> September 25, 2023 — The union withdrew its blocking request, and the Board informed the parties that the ballots would be counted on September 29.
>
> September 28, 2023 — Employees presented the employer with a private disaffection petition.
>
> September 28, 2023 — Knowing the ballots would be counted the very next day, the employer withdrew recognition from the union.
>
> September 29, 2023 — The official Board tally showed the union won the election by a substantial margin, 89 to 66.

The employer received a private petition and acted on it within hours — fully aware that a Board-supervised election result would be available the next morning. The withdrawal doctrine made that sequence not only possible but lawful. That is the problem.

V. The Irreparable-Harm Error

The majority's irreparable-harm holding is *Kerwin*'s most damaging feature — not just for this case, but for § 10(j) litigation going forward.

Two years ago, I warned that the Sixth Circuit might overcorrect following its reversal in *Starbucks Corp. v. McKinney*, 602 U.S. 339 (2024), much as it had done in retiree healthcare cases after *M&G Polymers v. Tackett*, 574 U.S. 427 (2015). J. Adam, "Supreme Court in Starbucks Imposes Higher Burden on Board to Secure 10(j) Injunctions," *Labor and Employment Lawnotes*, Vol. 34, No. 2, at 23 (Summer 2024). *Kerwin* confirms that concern. Finding no irreparable harm where an employer has unlawfully withdrawn recognition and refused to bargain — one of the most serious unfair labor practices under the Act — is precisely that overcorrection.

The consequences are already visible. In *Taylor v. Hearthside Food Solutions*, 2026 WL 1398617, at *11 (E.D. Ky. May 19, 2026), a Kentucky district court denied a § 10(j) injunction on the authority of *Kerwin*, concluding that "the Director cannot show that irreparable harm would exist absent an injunction."

Section 10(j) relief is rarely sought — the Board reserves it for its strongest cases. After *Kerwin*, even those cases become harder to win.

VI. Judge Boggs's Dissent and the Structural Nature of the Harm

Judge Boggs's dissent explained that District Judge Jonker did not presume irreparable harm merely because the employer likely violated the Act. Rather, the district court relied on concrete evidence showing that the employer's withdrawal of recognition had already weakened the union and altered the bargaining relationship in specific, documented ways — declining attendance, employee fear, supervisory statements, and unilateral changes to working conditions.

In Judge Boggs's view, the district court permissibly found that, absent interim relief, the union's support and bargaining position would continue to erode long before the Board could issue a final order. His dissent recognizes the practical reality missing from the majority opinion: the harm caused by unlawful withdrawal of recognition is structural, ongoing, and often impossible to fully repair years later through traditional Board remedies.

VII. *Kerwin* and *Gissel*: An Uneasy Tension

Although *Kerwin* arose under § 10(j), the majority's irreparable-harm analysis sits uneasily beside *Gissel*. In *Gissel*, the Supreme Court held that employer misconduct can be so severe that a bargaining order issues without a Board election — meaning courts already accept that certain employer violations cause harm serious enough to override the normal election preference. If that is true where no bargaining relationship yet exists, it is difficult to explain why unlawful withdrawal from an already-recognized incumbent union should be treated as speculative harm. The incumbent union has more, not less, to lose: an established relationship, an existing contract, and employees who have already exercised their free choice.

The majority might respond that *Gissel* bargaining orders arise under a different statutory provision and a different legal standard than § 10(j) irreparable harm. That is true as far as it goes, but the underlying logic is the same: some employer violations are serious enough that waiting for a final Board order leaves employees without a meaningful remedy. Unlawful withdrawal of recognition from an incumbent union is precisely that kind of violation. The injury is immediate — employees lose their chosen representative, bargaining is disrupted, and the employer's unlawful act controls the workplace while litigation drags on.

Kerwin thus exposes a deeper inconsistency: the law is more willing to order recognition of a union that has never been certified than to restore recognition to one that has already won employee support, survived certification, and built an established bargaining relationship. That result is difficult to defend on principle.

VIII. Distinguishing *Kerwin* in Future Section 10(j) Cases

Kerwin should not be read as a categorical rule that unlawful withdrawal of recognition can never constitute irreparable harm. The majority's analysis turned on the adequacy of the Board's evidentiary showing in that case, not on a holding that such harm is inherently speculative. Future courts should read it that way, and the Board should litigate accordingly.

Judge Boggs's dissent provides the roadmap. The district court did not presume irreparable harm — it found it, based on concrete evidence: union meeting attendance had already declined, employees expressed fear and futility, supervisors told workers there was no union and never would be again, and the employer unilaterally changed working conditions after

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(Continued from page 5)

withdrawing recognition. That is precisely the kind of record the Board should build in every future § 10(j) withdrawal case.

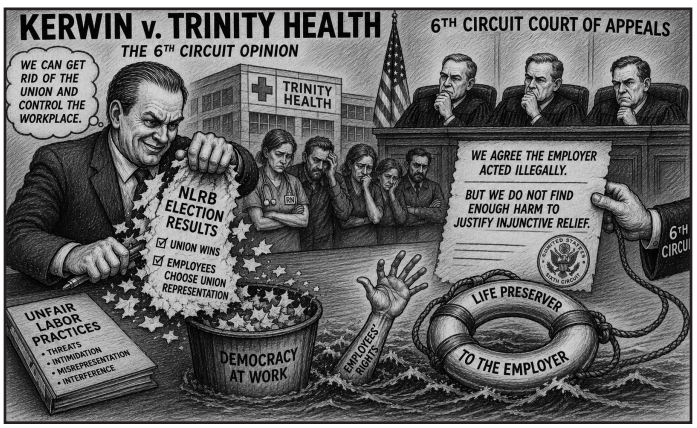
The irreparable nature of these harms is not difficult to explain. Lost bargaining opportunities cannot be reconstructed after the fact — the employer sets wages, benefits, and conditions unilaterally while litigation drags on, and those decisions calcify. Employee confusion and fear erode union support in ways that a back-pay order cannot reverse. Grievances go unfiled, members disengage, and the union's institutional presence weakens month by month. By the time the Board issues a final order — often years later — the bargaining relationship the Act was designed to protect may exist in name only.

The Board's burden, then, is evidentiary, not legal. *Kerwin* leaves room for injunctive relief where the record documents not just the legal violation but the structural erosion already underway. The next time an employer withdraws recognition, the Board should enter the § 10(j) proceeding with that evidence in hand — and with Judge Boggs's dissent as its brief.

Kerwin is more than a cautionary tale about employer timing. It is a demonstration of the withdrawal doctrine's structural flaw: the rule places the representation question in the hands of the party with the greatest incentive to end the bargaining relationship, and then leaves employees and the union to litigate for years while the harm compounds.

The Act's commitment to secret-ballot elections cannot be selectively honored. The Board and the courts have long insisted that a union cannot compel recognition through authorization cards alone — the employees must vote. The same principle should govern withdrawal. If an employer believes employees no longer support the union, the answer is an RM petition and a Board-supervised election, not a unilateral decision based on a privately gathered petition.

The decision whether employees will be represented by a union belongs to employees. It should be made in the ballot box, not in the employer's office. ■



MICHIGAN SUPREME COURT FREEZES ICE'S CIVIL ARREST AUTHORITY IN COURTHOUSES

Benjamin L. King
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On April 29, 2026, the Michigan Supreme Court amended Rule 8.115 of the Michigan Court Rules to prohibit civil arrests in Michigan courthouses. While not explicitly stated, the amended rule, which took effect on May 1, 2026, will restrict US Immigration and Customs Enforcement's ability to arrest individuals in state courthouses.

1.

The amended rule provides that "[p]arties, attorneys, and subpoenaed witnesses are not subject to civil arrest while going to, attending, and returning from the places they are required to attend." MCR 8.115(D)(1). The rule also states that court officers and jurors are not subject to civil arrest while participating in legal proceedings. MCR 8.115(D)(2). The rule defines "civil arrest" as "any detention, restraint, or apprehension of an individual pursuant to a civil legal process. Civil arrest does not include an arrest for a criminal offense based on probable cause or an arrest for any warrant signed by a judge or magistrate." MCR 8.115(D)(3)(a).

2.

The Michigan Supreme Court's newest member, Justice Noah P. Hood, wrote a comment concurring with the adoption of the amendment. Justice Hood wrote that the amendment falls within the Michigan Supreme Court's rulemaking authority because it: "(1) it promotes court safety and accessibility, (2) it does not encroach on the legislative or executive branches' respective mandates to make and execute the law, and (3) in comparison to past examples in which this Court did exceed its rulemaking authority, the amendment is particularly benign." Order, ADM File No. 2025-14, p. 2.

First, Justice Hood explained that trial courts "have inherent authority to maintain control over the courtroom and to properly continue the administration of justice." *Id.* (internal citations and quotations omitted). The Michigan Supreme Court has "interpreted this authority to permit courts to use various practices to protect testifying witnesses, safeguard victims, secure defendants, and otherwise foster the orderly administration of court business." *Id.* The amendment "functions to maintain order in courthouses and courtrooms so that litigants, witnesses, and members of the public may conduct their business without unnecessary interference, including when they are en route to and from the same." *Id.*

Second, Justice Hood wrote that the amendment does not impair law enforcement from executing laws because it does not "in any way impair core police work. This is evidenced by the fact that for decades—if not longer—the police have been able to faithfully execute their duties without disrupting court business." *Id.* Similarly, Justice Hood noted that the amendment does not encroach on the legislative branch's ability to make related laws because the amendment mirrors existing law. See, e.g., MCL

600.1821(2) ("No female shall be imprisoned on any process in any civil action."); MCL 600.1821(3) ("No minor under 16 years of age shall be imprisoned on any process in any civil action.").

Third, Justice Hood reasoned that "when compared to past examples of this Court's exercise of its rulemaking function, the amendment is a modest exercise of our authority." *Id.* Justice Hood noted that "in 1997, this Court, ostensibly under its rulemaking authority, changed the precedential value of Court of Appeals opinions. See AO 1994-4; MCR 7.215(J)(1); MCR 7.215(C)(2). Now, following that rule change, published Court of Appeals cases are strictly binding if issued on or after November 1, 1990. See MCR 7.215(J)(1). But they are binding only under the doctrine of stare decisis if issued before that date. See MCR 7.215(C)(2)." *Id.* Justice Hood explained that the 1997 amendments reflected "a change in substantive law" which was significantly more onerous than the changes to MCR 8.115(D).

In conclusion, Justice Hood wrote that "our courts are service providers. That service only works if the people seeking to use it can actually access it free from undue harassment or interference."

3.

In his dissent, Justice Brian K. Zahra wrote that the amendment "is at best a political statement framed as a solution in search of a problem." *Id.* at p.6. Justice Zahra cautioned that the "the proposed amendment will actually create problems in this state. In particular, the proposal cannot be effectively enforced, and attempting to enforce the proposal will likely have an inimical result." *Id.* Justice Zahra noted that under the Supremacy Clause of the United States Constitution, federal law overrides conflicting state laws. He writes that under the Rule of Naturalization the federal government has exclusive authority over immigration policy. US Const, art I, §8, cl 4. As such, attempts by state courts to hold federal agents accountable in state court would likely be transferred to federal court, where federal supremacy would prevail. As a result, the amendment offers only "false assurance" to those seeking protection from federal immigration enforcement. Citing, the recent conviction of a Wisconsin state court judge who attempted to prevent the arrest of an individual, by federal immigration officers, in her courtroom, Justice Zahra noted there "is no reason to believe that a court rule, such as the one proposed here, would have deterred the Department of Justice from pursuing legal action against the judge, and there is no reason to believe that such a rule would protect law enforcement, judges, and staff from being convicted of obstruction under 18 USC 1505." *Id.*

4.

The proposed amendment received more than 2,500 public comments, many of which were in favor of the rule.

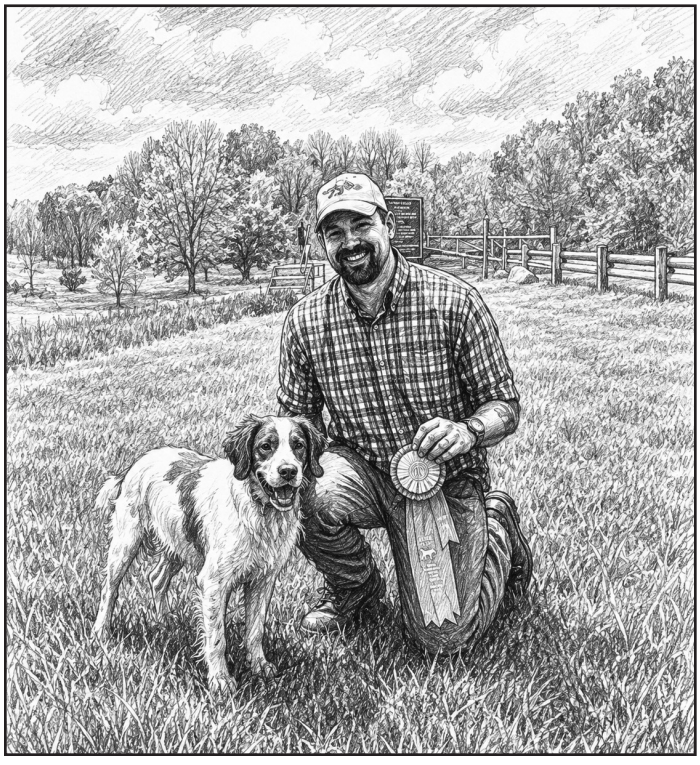
The Executive Committee of the State Bar of Michigan ("SBM") voted unanimously to support the proposed amendment of Rule 8.115. "In its review, the Committee considered recommendations from the Access to Justice Policy Committee, Criminal Jurisprudence & Practice Committee, Civil Procedure & Courts Committee, and Justice Initiatives Committee, as well as the Immigration Law, Labor & Employment Law, and Prisons & Corrections Law Sections. Each of these committees and sections recommended that the State Bar support ADM File No. 2025-14." See SBM Public Comment on ADM File No. 2025-14.

In its public comment in support of the amendment, Michigan's Interagency Migrant Services Committee noted that farmworkers face numerous barriers to justice and that the amendment could remove some of those barriers, making it less burdensome for workers to access courts in "civil matters such as seeking to recover unpaid wages or challenge discrimination." See IMSC Public Comment on ADM File No. 2025-14.

In its public comment in opposition to the amendment, the Michigan Sheriffs' Association ("MSA") noted that the rule "could put Michigan law enforcement officers, tasked with providing security operations to a court, in an untenable position of attempting to enforce the rule, while interfering with a federal officer in the performance of their duties." See MSA Public Comment on ADM File No. 2025-14. The MSA also warned that "the amendment would likely create a schism between local and federal law enforcement, causing a reluctance to share information, which could result in court security and public safety being compromised." *Id.*

Our legal system has to work for everyone or it does not work at all. As noted by the SBM, "[e]nsuring that all individuals can access Michigan's courts free from intimidation or fear should therefore be a paramount concern for all who are entrusted with, or invested in, the fair and effective administration of justice. When parties, witnesses, victims, or members of the general public are deterred from entering courthouses, public safety, the integrity of our judicial system, and constitutional principles are undermined."

While the amended rule will likely face legal challenges and scrutiny, it represents a meaningful effort to safeguard the judicial system and access to it. ■



Ben King with Gus. Guess which one was the author?

THE DECERTIFICATION BUS: WHEN EMPLOYER "HELP" GOES TOO FAR

John G. Adam

1. The Rule

Under the National Labor Relations Act, employees have a Section 7 right to support a union, oppose a union, or seek to remove a union. But a decertification effort must be the employees' own free and uncoerced choice. It cannot be started, directed, sponsored, or materially assisted by the employer.

The National Labor Relations Board generally permits an employer to provide only limited "ministerial aid" to employees seeking decertification. That means neutral, clerical assistance, such as giving employees basic procedural information or directing them to the NLRB. An employer may answer neutral questions. It may not start, steer, sponsor, or support the decertification effort.

2. Only Ministerial Aid

Specifically, the following conduct is generally considered permissible ministerial aid:

1. Directing employees to the NLRB website or regional office for procedural information about decertification.

2. Answering a neutral, unsolicited employee question about the minimum number of signatures required for a petition.

3. Providing, on unsolicited inquiry, the standard wording for a petition or the unit description — without encouraging, facilitating, or endorsing the effort.

4. Confirming, on unsolicited inquiry, the composition of the bargaining unit covered by the existing contract.

The critical modifier for each of the above is that it must occur in response to an unsolicited employee inquiry and in a context free of coercive conduct. See *Eastern States Optical Co*., 275 NLRB 371, 372 (1985).

3. Don't Start It. Don't Steer It. Don't Sponsor It. Don't Support It.

The key question is whether the preparation, circulation, signing, and filing of the petition were the employees' own acts, free from employer pressure or improper assistance. If the employer does more than provide neutral, clerical help, the decertification effort may be unlawful or tainted.

The issue arises when a union files unfair-labor-practice charges seeking to block or dismiss a decertification petition because the employer allegedly tainted the employees' free choice. For example, in Rieth-Riley Construction Co., 371 NLRB No. 109 (2022), a Region 7 case, the Board reaffirmed that the Regional Director may dismiss a decertification petition where meritorious ULP allegations would interfere with a free and fair election. The Board ruled that the election-procedure rules, adopted in 2020, continue to permit merit-determination dismissals of election petitions, despite changes in the Board's blocking-charge policy. This matters to the employer's calculus: when an employer crosses the line from ministerial aid into active support, a meritorious ULP charge by the union can result in the petition being dismissed outright, before any election is held.

The Board in adopting the ALJ's findings in *ADT,* 374 NLRB No. 104 (2026) ruled the employer crossed the line by instigating, directing, and supporting the decertification effort. In other words, the employer can answer the door — it cannot build the door, hand out flyers for the door, and then act surprised when everyone walks through it.

The ALJ explained at 16 (citations omitted):

> An employer violates Section 8(a)(1) and (5) by actively soliciting, encouraging, promoting, or aiding in the initiation, circulation, signing, or filing of a decertification petition. The employer may provide ministerial aid in response to employees' unsolicited inquiries, but beyond that it has no legitimate role in the decertification process. The critical inquiry is whether the conduct at issue constitutes more than permissible ministerial aid. For example, an employer may provide an inquiring employee with general information, such as the wording for the petition, the unit description, and/or the number of signatures needed, but it may not instigate or circulate a petition, encourage employees to sign, or allow circulation of the petition during work time.

When an employer crosses the line, the consequences are real. A meritorious ULP charge can result in dismissal of the decertification petition before any election occurs — putting the employer back at square one, still under the union it hoped employees would decertify. If the employer's conduct is sufficiently serious, the Board may also impose a bargaining order requiring the employer to bargain with the union regardless of employee sentiment. And the employer faces potential liability for the employees' lost wages or benefits if the unlawful conduct is tied to a broader course of coercive conduct. In short, the remedial stakes are asymmetric: the employer gains little from "helping," and risks a great deal.

4. Withdrawal of Recognition: The Far End of the Continuum

The ministerial aid cases exist on a continuum. At one end is the employer who answers a single unsolicited question about the petition process — permissible, so long as the context is free of coercion. Moving along the spectrum are the employers who circulate petitions, encourage signatures, promise benefits, and steer the decertification effort from behind the scenes — all unlawful, and all addressed in the cases collected here.

At the far end of the continuum stands the employer who bypasses the decertification process altogether and simply withdraws recognition on the strength of a privately gathered petition — substituting its own judgment for the employees' free choice entirely. That is the conduct at issue in *Kerwin v. Trinity Health Grand Haven Hospital*, ___ F.4th ___, 2026 WL 1194768 (6th Cir. 2026), discussed separately.

If the four S's — don't start it, steer it, sponsor it, or support it — prohibit an employer from assisting a decertification effort, the withdrawal doctrine permits something far worse: the

employer does not assist the effort; it makes the decision itself. The principle underlying the ministerial aid cases demands that the representational question be answered by employees, in a Board-supervised election, free from employer interference at any point on that continuum.

5. The Cases

The cases summarized below explain the rule or show how quickly an employer's supposedly "helpful" conduct can turn into unlawful assistance.

1. *Geodis Logistics*, 371 NLRB No. 102, Op. 1 (2022) (The "Board long has interpreted the Act to prohibit an employer from providing direct assistance to, or acting on behalf of, its employees in connection with the processing of decertification petitions.").

2. *Wire Products Co*., 326 NLRB 625, 640 (1998) (It is well settled that an employer violates 8(a)(1) by "actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative") *enfd*. 210 F.3d 375 (7th Cir. 2000).

3. *Eastern States Optical Co*., 275 NLRB 371, 372 (1985) (footnotes omitted) (It is "unlawful for an employer to initiate a decertification petition, solicit signatures for the petition, or lend more than minimal support and approval to the securing of signatures and the filing of the petition. In addition, while an employer does not violate the Act by rendering what has been termed 'ministerial aid,' its actions must occur in a 'situational context free of coercive conduct.'").

4. *Leggett & Platt v. NLRB*, 988 F.3d 487, 496 (D.C.Cir. 2021) (citing *Eastern*) "(Anything more than ministerial aid, including allowing signature collection during work, violates the NLRA. Leggett does not dispute that if Day actually directed Roseberry to speak to Purvis to get Roseberry to sign the decertification petition, it would amount to improper aid.")

5. *Dentech Corp*., 294 NLRB 924, 928 (1989) ("The Respondent, acting through its agent Robert Hamilton, has engaged in unfair labor practices within the meaning of Section 8(a)(1) by soliciting employees to sign a petition denouncing the Union[.]").

6. *Sociedad Española,* 342 NLRB 458, 459 (2004) (employer violated 8(a)(1) by advising employees how to collect signatures for a decertification petition, asking them to sign the petition, and telling them they would no longer receive previously promised raises because they had become unionized) *enfd*. 414 F.3d 158 (1st Cir. 2005).

7. *Mickeys Linen & Towel Supply*, 349 NLRB 790, 791 (2007) (citation omitted) ("We are satisfied that, on those facts, [supervisor] Cerda provided 'assistance in the … signing … of [the] employee petition.' Indeed, without [supervisor] Cerda's assistance, there would have been no solicitation of the two employees. In this circumstance, the employees could reasonably feel coerced when Cerda asked whether they wanted to pay dues to the Union and stated they could do better than the Union, and then stayed to watch whether they signed the petition. Accordingly, we reverse the judge and find that the Respondent's assistance violated Section 8(a)(1) of the Act as alleged.").

8. *Mickeys Linen*, 349 NLRB at 791 ("Supervisor Cerda returned to the Hammond facility and asked to speak with Loredo. Cerda asked Loredo whether she 'agreed on keep [sic] having the Union' and whether she was 'happy with the Union.' Contrary to the judge, we find that, in view of all of the circumstances, those questions constituted a coercive interrogation.").

9. *Enterprise Leasing Company,* 362 NLRB 1091, 1093 (2015) (employer violated NLRA and ordered to cease "Encouraging employees to circulate a petition to decertify the Union as their bargaining representative") *enfd*. 831 F.3d 534, 545 (D.C. Cir. 2016).

10. *Gold Bond, Inc.,* 107 NLRB 1059, 1060 (1954) (dismissing petition where employer "took an active part in, fostered, the filing of the decertification petition").

11. *Movie Star, Inc*., 145 NLRB 319, 320 (1963) (finding that more than ministerial aid restrained employees in their Section 7 rights), *enforced in rel. part*, 361 F.2d 346 (5th Cir. 1966).

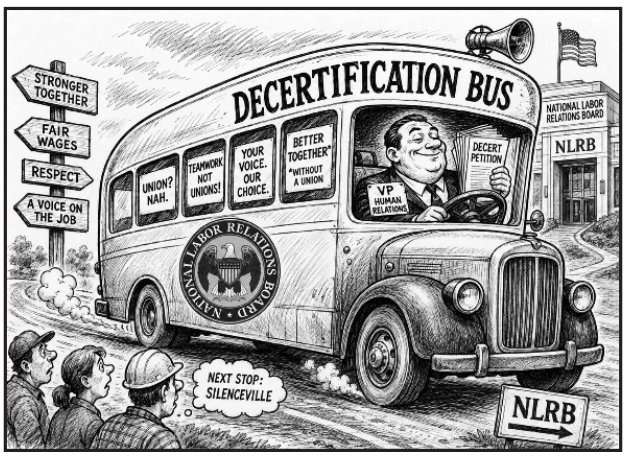
12. *Armored Transport, Inc*. 339 NLRB 374, 377 (2003) (an employer may not solicit its employees to circulate or sign a decertification petition.).

13. *Harding Glass Co*., 316 NLRB 985, 991 (1995) ("Other than to provide general information about the process on the employees' unsolicited inquiry, an employer has no legitimate role in that activity, either to instigate or to facilitate it.").

14. *Fabric Warehouse*, 294 NLRB 189, 191 (1989) (employer violated 8(a)(1) by promising employees that they would receive better benefits if they got rid of the union) *enfd*. 902 F.2d 28 (4th Cir. 1990)._____

The rule is not complicated. Even I understand it. Employees decide whether they no longer want a union. The employer must stay out of the driver's seat, and should not even be in the bus.

The employer can give neutral directions to the NLRB. But it cannot pack the bus, pick the route, pay for the gas, hand out the sandwiches, and then say, "What? Who? I'm not driving. I'm just very interested in transportation." But as *The Who* might put it: "Too much, Magic Bus." ■



SELF-HELP-DECERTIFICATION: WHO NEEDS A SECRET-BALLOT ELECTION ?

Gerry: So now we have a politician — let's call him President Trump, who is into ballots and voting.

Trump: That is right. No stolen elections. We need election integrity! Very important. Nobody loves secret ballots more than me. We cannot have stolen elections. We need safeguards, neutral observers, verified counting! (Crowd applauds wildly.)

Gerry: What about workplace elections and whether employees want union representation?

Trump: Oh… that? No, no. For that, just let the employer decide, fast, cheap, easy, and less paperwork.

Gerry: Wait a second — the EMPLOYER decides?!

Trump: Sure. They can quickly review the petition themselves, decide the union lost support, withdraw recognition, and then maybe somebody challenges it, after four years of litigation the truth may come out.

Gerry: FOUR YEARS?!

Trump: Four years of litigation is nothing. Very common. Happens all the time.

Cramer (bursting through the door): Gerry, I love this system! I'm using it in our apartment elections immediately!

Gerry: What apartment elections are we having?

Cramer: The tenants say they want hot water. I reviewed the evidence myself and determined they no longer support hot water. Hot water is bad for your skin and bad to drink.

Ghislaine: You can't do that!

Cramer: Why not? I'm wearing referee stripes.

Gerry: That's the whole problem! The interested party is making the call!

Cramer: Gerry, please neutrality is outdated, like some old TV-sitcom. We're in the self-help-decertification era now.

Ghislaine: Secret-ballot elections exist precisely because people should vote free from pressure and manipulation.

Gerry: Right! In every other part of life we understand this. You don't let the Yankees count Red Sox votes. You don't let the losing coach operate instant-replay. You don't let the student grade his own exam: "I've conducted a thorough internal investigation and concluded… A-plus."

Trump: I had tremendous grades. Strong grades. The best grades. My teachers loved me. So you see this is not a problem.

Gerry: The whole point of the election is to have a neutral referee. Instead, this rule hands the whistle to management and says: "Try not to abuse it… and if you do, we'll revisit it sometime before your grandchildren retire."

EARNED SICK TIME ACT & MULTI-EMPLOYER FUNDS

Andrew Niedzinski
Wage Hour Division Administrator

Under the Earned Sick Time Act (ESTA), every employee performing work physically within Michigan is entitled to accrue one hour of earned sick time for every 30 hours worked. Employers may choose to provide earned sick time through an accrual method (one hour for every 30 hours worked) or by frontloading the required amount at the beginning of the employer's benefit year.

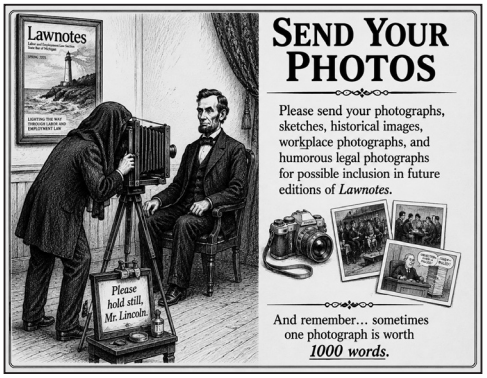
Small businesses; defined as employers with fewer than 10 employees; may cap accrual and use at 40 hours per year. All other employers may cap accrual and use at 72 hours per year. While certain statutory exceptions apply, they are not typical within the construction industry; please refer to our FAQ for additional details.

Employers may not unilaterally add ESTA requirements to policies governing vacation fund or require use of existing benefits for ESTA purposes without proper negotiation where a collective bargaining agreement (CBA) is in place.

The Labor Management Relations Act of 1947 preempts the Michigan Wage & Hour Division's authority to interpret collective bargaining agreements while enforcing state law. In practice, when reviewing ESTA complaints, the Division may determine; without interpreting contract terms; whether a CBA provides sick time, expressly exempts sick time, or is silent on the issue.

If a CBA provides sick time or expressly addresses exemption, the agreement must meet ESTA standards upon expiration. Employers whose CBAs are silent on sick time were required to begin providing paid earned sick time as of February 21, 2025. For a multi-employer plan to satisfy ESTA requirements, the collective bargaining agreement must clearly define that the benefit covers earned sick time and specify its permissible use.

When a multi-employer plan is used for ESTA compliance, earned sick time must be available for immediate use, similar to the frontloading method. A 120-day waiting period is not permitted in that circumstance. However, if an employer uses the accrual method, a waiting period of up to 120 days for use of accrued earned sick time is permitted under the statute.



JACKSON v. USPS: THE SIXTH CIRCUIT REJECTS A HARD CAP ON INTERMITTENT FMLA LEAVE

John G. Adam

Kristopher Jackson v. USPS, 149 F.4th 656 (6th Cir. 2025) (Gibbons, Moore, Murphy, JJ), addressed whether an employer may treat a medical certification estimating intermittent FMLA leave as a fixed numerical ceiling. Jackson suffered from sickle cell anemia, a condition that caused unpredictable flare-ups and hospitalizations. His health-care provider certified that he would need intermittent leave and listed the expected frequency as "2 times per 1 month."

That medical condition was central to the Sixth Circuit's reasoning because the court emphasized that sickle cell flare-ups are inherently unpredictable. As a result, the physician's estimate of "two absences per month" could not be treated as a rigid numerical ceiling on protected leave.

The relevant dates unfolded as follows. In July 2018, Jackson's health-care provider certified that he had sickle cell anemia and other conditions, and listed the frequency of flare-ups as twice per month. The form asked whether he would need intermittent leave for planned treatment or unforeseeable incapacity, and the provider checked "Yes." For frequency, the provider wrote: "2 times per 1 month."

On December 26, 2018, Jackson attended a doctor's appointment and returned with a note clearing him to return to work the next day. USPS forms from that date listed sick leave and a doctor's appointment; a later form said "NOT FMLA," which Jackson contended was added after he signed.

On March 1, 2019, Jackson had been hospitalized on February 28 due to his sickle-cell condition and was discharged the following morning. He brought medical documentation to USPS showing he could not work. USPS HR verified the absence should be FMLA-protected, but it was nonetheless counted against him.

March 11, 2019 presented a more complicated picture. Jackson reported waking up with a flare-up that morning, but the medical records from his afternoon visit showed it was a routine annual exam rather than a visit related to any acute episode. The record on this date raised questions that the court did not resolve, and those questions remain for the district court on remand.

It is worth noting that the factual record on March 11 and March 26 carried an undertone that went beyond the legal certification question. Jackson had a documented attendance history that predated the last chance agreement, and USPS's position on the disputed dates suggested, at least implicitly, that some absences may have been characterized as flare-ups after the fact rather than reflecting genuine medical emergencies. The Sixth Circuit did not weigh in on that question — nor did it need to — but the notice analysis on remand will require the district court to examine those circumstances carefully.

USPS ultimately identified six unscheduled absences plus one AWOL and terminated Jackson on April 30, 2019. Jackson conceded that February 27 and March 8 counted as unexcused, but argued the remaining disputed dates were FMLA-protected. The Sixth Circuit held that March 1 could not count against him at summary judgment, and that the district court erred by treating the "two times per month" certification as a hard cap barring FMLA coverage for March 11 and March 26. USPS had argued that because Jackson had already used two FMLA days in March, later absences that month were unprotected. The Sixth Circuit rejected that argument and held that for an unpredictable medical condition, the certification frequency was an estimate, not a ceiling.

The court's key formulations were:

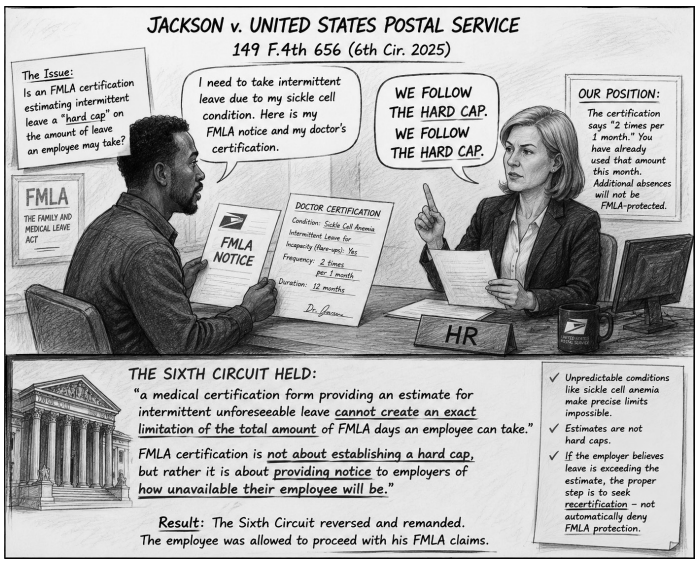
1. "FMLA certification is not about establishing a hard cap, but rather it is about providing notice to employers of how unavailable their employee will be."

2. "A medical certification form providing an estimate for intermittent unforeseeable leave cannot create an exact limitation of the total amount of FMLA days an employee can take."

The court also criticized USPS's hard-cap argument as relying on factual assertions rather than legal authority. The proper course, if the employer believed the employee's absences exceeded the medical estimate, was to seek recertification rather than automatically deny leave or count the absences as discipline-triggering events.

The plaintiff was allowed to proceed. The Sixth Circuit reversed summary judgment for USPS and sent the case back to the district court. The court held there were fact issues about whether several absences should have been protected by FMLA and whether USPS improperly treated the doctor's "two times per month" estimate as a hard cap.

The practical lesson is that intermittent FMLA estimates should be taken seriously, but not mechanically. An employer may investigate, seek clarification, or require recertification when absences materially exceed the certification. But it may not simply transform an estimate for an unpredictable condition into a strict attendance limit without risking an FMLA interference claim. ■



POETICA GESTAE—HAIKU FROM *LAWNOTES* READERS

Stuart M. Israel

In "Legal Haiku Redux—The Fraught State of the Legal-Profession and a Call for Poets," Vol. 36, No.1 *Labor and Employment Lawnotes* pp.16-19 (Spring 2026), I invited readers to share their insightful and evocative Legal Haiku, created according to my 5-7-5 rules, or their own rules. Here are some that rose to the artistic occasion.

From **Becca Zarras**, on technological inefficiency.

Online waiting room.
Does the Court know I am here?
Zoom purgatory.

From **Shel Stark**, on technological efficiency.

Mediation.
Parties have a dispute.
Can't be in the same room.
That's okay; just use Zoom.

From me, on technological risk.

"Hallucinated" Authorities
Perfect way to win:
On-point A.I. cites. *If* the
Cites are not phony.

Two from **Jim Rose**, on trial practice.

Opening statement.
Presenting the evidence.
Please decide my way.

Closing argument.
Why is that juror smirking?
Is he not convinced?

Another from Jim Rose, on time management.

Deadline
Brief due tomorrow.
Why did I procrastinate?
Judge will not applaud.

From **John Runyan**, who is a poet but doesn't know it, on artistic humility.

Need legal haiku.
So just how should I respond?
Tis not my strong suit.

From **Tom Guyer**, on legal writing.

Prior to means before.
Subsequent to means after.
Please write plain English.

Another from Tom Guyer, on trial practice.

I object to the question.
It is so deadly boring,
It must be irrelevant.

From **Joe Danowsky** of Temple University, self-described law school drop-out, and father of poet and poetry-journal editor Mark Danowsky.

If Will Rogers Had Been An Estate Attorney
Never have I met
A usufructuary
That I didn't like.

From **Mark J. Cavanagh**, Michigan Court of Appeals Judge (retired).

Reflections on My Legal Journey
Shelves of venerable books,
At the time, I didn't understand.
Older now, I am those books.

From **Ryan Fantuzzi**, three collective-bargaining haiku.

Act 312 Arbitration
Bargaining ends here.
Public-sector oddity
~ Colonoscopy.

Strike Authorization Vote
All of us vote *yes*.
For pressure, not picketing.
We don't want to walk.

Non-economic Issues
We pretend now,
Until wages and healthcare
Settle the contract.

From **Kevin P. Kales**, Chief Magistrate, Michigan Workers' Compensation Board of Magistrates.

Work comp is simple.
It is all in the statute.
What! You're kidding, right?

Answer all questions.
Briefs, briefs, please send me your briefs.
Must read and decide.

In pro per? Oh no!
Challenges without limits.
A.I. delusions!

From me, ***Anatomy of an Appeal*** (in seven parts, inspired by actual events).

1. Appellant's Argument
May it please the Court,
The trial judge—a bozo!
You must reverse now!

2. Appellee's Argument
We beg to differ.
We have the facts, the law, and
Justice. Please affirm.

3. Appellant's Reply

Wrong! Nonsense! Absurd!
It's unconstitutional!
Overturn! Reverse!

4. The Majority Decision
Not justiciable.
No jurisdiction. Time-bar.
Dismissed. Please go home.

5. The Dissent
The majority,
An existential threat to
The rule of law. Nuts!

6. Litigation's End
En banc rehearing?
No way! And the *cert* request?
Fuhgeddaboudit!

7. The CLE Seminar On What The Case Portends
A new legal trend,
Experts explain in clear terms.
Sign up now and save!

Future issues of *Lawnotes* may publish more Legal Haiku, subject to poets' output and reader demand. Submit your wry, astute, evocative, passionate-but-tasteful Legal Haiku any time. Send them to me or to editor John G. Adam. Three lines, 17 syllables in a 5-7-5 configuration—or otherwise. Original work; no generative A.I. For security and self-esteem purposes, check any box that says "I am not a robot."

Write Legal Haiku for art's sake and the edification of the bench, the bar, and the public. *Ars gratia artis et pro bono publico*. Preserve your insights for posterity. *Ars longa, vita brevis*. Exercise your free-expression rights. Have fun. ■

SIXTH CIRCUIT ON (1) REASONABLE ACCOMMODATION AND (2) HOSTILE WORK ENVIRONMENT

Ahmad A. Chehab and Sara Ojala
Miller Canfield

Night Blindness and Night Shifts: Sixth Circuit Warns Employers to Take Accommodation Requests Seriously

A recent Sixth Circuit decision illustrates the risks employers face when supervisors dismiss an employee's medical concern about a work schedule and then quickly pursue discipline. In *Edwards v. Shelby County*, 159 F.4th 489 (6th Cir. 2025), the court affirmed a jury verdict for an employee who alleged that her employer discriminated and retaliated against her after she requested a schedule modification because her night blindness prevented her from safely driving home after a nighttime shift.

The Sixth Circuit did not hold that night blindness is automatically a disability under the Americans with Disabilities Act ("ADA"). Instead, it held that the employee presented sufficient evidence for a jury to find that her night blindness substantially limited the major life activity of seeing. The decision reinforces that ADA disability determinations are individualized and that employers should proceed carefully when an employee identifies a medical limitation connected to a work assignment.

Rebecca Edwards worked as an Environmentalist Inspector since 2020 for the Shelby County Health Department. She suffered from night blindness (nyctalopia), a condition she first noticed in 2014 that caused car and streetlights to blind her, created halos around light sources, impaired her depth perception, and made it difficult or impossible to read road signs. She had not disclosed the condition in her pre-employment questionnaire, nor did she raise it during her physical examination because the original job description contained no nighttime driving requirement.

In October 2021, her supervisor reassigned her to a solo 3:00 p.m.–11:00 p.m. shift at the Econo Lodge in Lakeland, Tennessee—a location Edwards had flagged for safety concerns—requiring a 20-mile solo drive home in the dark. She immediately disclosed her night blindness to her supervisor, offered to provide a doctor's note, and requested a schedule modification. Her supervisor dismissed the concern, pointing to occasions when Edwards had driven at night. Edwards clarified that those instances involved co-workers or police escorts. The supervisor never followed up. The same day Edwards reported to her new shift under protest, her supervisor had already initiated the process to remove Edwards from her team. Within days, a department administrator forwarded an internal report to HR, asking whether Edwards could be disciplined for "repeated refusal to follow directives." Notably, the supervisor had notified Edwards of a shift change less than 15 minutes before it took effect, causing her to arrive late.

On October 11, 2021—a week after first disclosing her condition—Edwards was terminated for insubordination, attendance, and falsification of information. The Disciplinary Action Form made no mention of her night blindness disclosure,

her offer to provide a doctor's note, or her accommodation request.

Following a two-day jury trial, Edwards prevailed on all three ADA claims. Shelby County appealed, contending that neither night blindness nor asthma qualifies as a disability under the ADA.

The County's primary argument was that night blindness is not a legally cognizable disability under the ADA, and that night driving is not a "major life activity." The Sixth Circuit rejected both contentions. The court noted that the County relied on *Wade v. General Motors Corp.*, 165 F.3d 29 (6th Cir. 1998) (unpublished), a pre-ADAAA decision that found night-driving limitations were too common to constitute a disability. The court explained that the ADAAA's 2008 amendments explicitly superseded that reasoning. Under the ADAAA, "substantially limits" is "not meant to be a demanding standard," and the inquiry must be conducted without applying a severity-based threshold. 29 C.F.R. § 1630.2(j)(1)(i). The court framed the operative question as whether night blindness substantially limits the major life activity of *seeing* and not merely the ability to drive.

And the Sixth Circuit was careful to cabin its holding: night blindness is *not* a *per se* disability. A mild difficulty seeing at night might not substantially limit any major life activity. Thus, the Sixth Circuit concluded that the jury reasonably found Edwards's condition crossed that threshold. The County's argument that Edwards could not be disabled because she occasionally drove at night also failed: the ADA does not require total inability to perform a major life activity, and performing an activity with difficulty, pain, or risk may still constitute a substantial limitation.

The court also affirmed on the retaliation and failure-to-accommodate claims. On retaliation, the County argued that Edwards's accommodation request was not made in good faith because her October 5 email focused on criminal activity at the Econo Lodge rather than her vision. The court found that Edwards's in-person disclosure to her supervisor the prior day—specifically invoking her night blindness by name—was sufficient evidence of a good-faith request, and the jury was entitled to credit that testimony. A retaliation claim can survive even if the plaintiff is ultimately not found to be disabled, so long as the request was made in good faith.

On the failure-to-accommodate claim involving Edwards's asthma, the County contended that a single, isolated flare-up caused by running out of medication could not constitute a disability. The appeals court rejected that argument as inconsistent with the ADAAA, which expressly requires that episodic conditions be assessed based on their severity *when active*, not their frequency, and that medication-controlled conditions must be assessed in their unmitigated state. 42 U.S.C. § 12102(4)(D)–(E). Edwards's testimony that her asthma, when triggered, restricted her ability to breathe, sleep, and walk short distances was sufficient for the jury.

Racial Slurs and Supervisor Misconduct: Sixth Circuit Revives Hostile Work Environment Claims

A workplace anti-harassment policy offers little protection when supervisors allegedly use racial slurs and employee complaints go unanswered. In *Smith v. P.A.M. Transportation, Inc.*, 154 F.4th 375 (6th Cir. 2025), the Sixth Circuit revived hostile work environment claims brought by two Black truck drivers who alleged that their supervisors repeatedly called them "monkey" and "monkey ass," threatened and demeaned them, and subjected them to less favorable working conditions than white drivers.

The Sixth Circuit rejected the district court's conclusion that the alleged slurs were not plainly racial. The court held that, when directed at Black employees, "monkey" and its derivatives are race-specific and derogatory terms that may support a hostile work environment claim. Although the court noted that a single egregious racial slur may, in some circumstances, be severe enough to create an abusive work environment, it relied on the totality of the alleged misconduct here, including repeated slurs by supervisors, threats, screaming, demeaning treatment, and allegedly less favorable work assignments.

Thomas Michael Smith and Monaleto Sneed, both Black men, worked as truck drivers for P.A.M. Transport in Tennessee. They alleged that two supervisors repeatedly called them "monkey" and "monkey ass," threatened and demeaned them, and treated them less favorably than non-Black drivers by assigning them longer routes and hours, among other unfavorable working conditions. Smith and Sneed further alleged that they reported the conduct to management, but P.A.M. did not stop it. Smith eventually resigned, while Sneed was later terminated for alleged performance issues. They sued P.A.M. for maintaining a racially hostile work environment.

The Sixth Circuit reversed the district court's grant of summary judgment. First, it rejected the conclusion that the terms "monkey" and "monkey ass," when directed at Black employees, were not evidence of race-based harassment. The court explained that the term "monkey" has a well-recognized history as a racial slur against Black individuals, and adding the word "ass" did not remove its racial meaning in the circumstances alleged. The court also rejected the argument that the harassment was less likely to be racial because one of the supervisors was also Black. Title VII prohibits race-based harassment regardless of the harasser's race.

The court then addressed whether the alleged harassment was severe or pervasive enough to support a hostile work environment claim. The Sixth Circuit recognized that even a single use of an especially egregious racial slur may be severe enough in some circumstances, particularly when the slur is directed at an employee by a supervisor. Here, Smith and Sneed alleged more than an isolated remark. They testified that their supervisors repeatedly called them racial slurs, threatened them, screamed at them, demeaned them, and treated them less favorably than non-Black drivers. Considering the alleged conduct as a whole, the court concluded that a reasonable jury could find that Smith and Sneed were subjected to a racially hostile work environment.

Finally, the Sixth Circuit rejected P.A.M.'s reliance on its anti-harassment policy at the summary judgment stage. Because the alleged harassment came from supervisors, P.A.M. could be held vicariously liable unless it established an applicable affirmative defense. Merely providing employees with an anti-harassment policy was not enough. The company also had to show that its policy was effective in practice and that it took reasonable steps to promptly correct the alleged harassment. Because Smith and Sneed testified that they reported the conduct and nothing was done to stop it, P.A.M. was not entitled to summary judgment as it created fact issues for trial. ■

AVOID LENGTHY DEFINITIONS AND INSTRUCTIONS IN SUBPOENAS AND DOCUMENT REQUESTS

Lawyers should avoid lengthy definitions and instructions in subpoenas and document requests because they often make discovery harder, not better. The purpose of a subpoena or request is simple: tell the responding party what documents are needed, from what time period, and why they relate to the dispute.

1.

This problem was especially acute in a simple CBA breach arbitration. There, the employer served a subpoena containing a nine-part definition section that consumed more than 600 words before the actual requests even began. Those definitions were improper, unreadable, unintelligible, and disproportionate to the needs of a labor arbitration. The requests attempted to sweep in virtually every conceivable form of communication, record, electronically stored information, metadata, draft, social media message, text message, calendar entry, investigation summary, negotiation summary, and attorney-controlled material.

The Company's sprawling definitions were not tailored to the issue in dispute. Instead, they attempted to convert a labor arbitration into broad civil litigation discovery. The definition of "relating to" was particularly overbroad because it included anything "in any way pertaining to" a subject, "in whole or in part." That language has no meaningful limiting principle and could require review of large categories of marginal or irrelevant material.

2.

Long definition sections can create confusion, invite objections, and make a reasonable request look overbroad. Courts and commentators have repeatedly criticized vague, overbroad, and boilerplate discovery practices because they increase cost, delay, and unnecessary motion practice.

Definitions should also be understandable to the people who actually have to comply with the request. A subpoena or document request is often read not only by lawyers, but also by a party, company employee, HR representative, union staff representative, local officers, IT person, office manager, records clerk, or other non-attorney who must search files and gather documents. If the definitions are too technical, legalistic, or expansive, the people doing the search may not know what they are supposed to look for. Clear definitions improve compliance, reduce mistakes, and make it harder for the responding party to claim confusion.

The better practice is to use ordinary words in their ordinary sense. Definitions should be short, plain, and used only when truly necessary. A subpoena should focus on the specific categories of documents sought and the relevant time period, not on pages of boilerplate instructions.

3.

Federal and Michigan authority support the same practical point. A subpoena or document request should be specific, proportional, and understandable.

The following cases reflect a common practical problem: discovery requests are often drafted for lawyers rather than for the people who must actually gather the documents. Overly long definitions and instructions force parties, HR staff, union representatives, local officers, IT personnel, office managers, and records custodians to guess what must be searched and produced.

New Products Corp. v. Dickinson Wright PLLC (In re Modern Plastics Corp.), 890 F.3d 244, 251 (6th Cir. 2018), emphasized that Rule 45 protects subpoena recipients from undue burden and looks to relevance, need, particularity, time period, and burden.

Michigan courts apply the same common-sense approach under MCR 2.302(B)(1) and MCR 2.310(C)(1), requiring discovery to be proportional and document requests to describe the requested categories with reasonable particularity.

Courts have not merely recited abstract proportionality principles; they have criticized specific drafting practices that make subpoenas and document requests confusing, overbroad, and difficult to answer.

Effyis, Inc. v. Kelly, 2020 WL 4915559, at *2 (E.D. Mich. 2020), criticized a discovery set consisting of a 41-page collection of requests, definitions, and instructions, followed by 98 separate document requests. The court concluded that the "boundless requests" violated Rule 26(g) because they were excessively broad and insufficiently tailored. The case illustrates how sprawling definitions and instructions can transform discovery into an unreasonable burden.

Luxshare, Ltd. v. ZF Automotive US, Inc., 547 F. Supp. 3d 682, 688–89 (E.D. Mich. 2021), *rev'd on other grounds*, 596 U.S. 619 (2022), criticized several discovery definitions as "unreasonably broad." The court specifically noted that the party's expansive "litany style" definitions of ordinary terms such as "concerning" and "relating to" extended so far that they became confusing and disconnected from ordinary usage and ordered portions of the definitions narrowed or stricken.

Flagg v. City of Detroit, 252 F.R.D. 346 (E.D. Mich. 2008), the subpoena was quashed where it sought "any and all" text messages, emails, and communications involving dozens of individuals over an extended time period. The requests potentially swept in massive amounts of irrelevant material and created significant burdens in collection and review. The dispute demonstrates how "any and all" drafting and undefined expansive terminology can create disproportionate discovery obligations.

The best subpoena or document request is usually the simplest one. Lawyers should define only what truly needs defining, keep definitions short, avoid "any and all" phrasing where possible, and draft requests in language that a non-lawyer can understand and apply.

The goal is not to sound comprehensive; the goal is to obtain the documents. ■

BIFURCATED HEARINGS IN ARBITRATION: STRATEGIC CONSIDERATIONS AND PROCEDURAL GUIDANCE

Lisa W. Timmons

Among the procedural tools available to arbitrators and parties, bifurcation remains one of the most useful. The decision to divide an arbitration into distinct phases, most often liability and remedy, or jurisdiction and merits, can shape the cost, pace, and fairness of the proceeding. Used thoughtfully, bifurcation can simplify a complicated case and create meaningful opportunities for settlement. Used reflexively, it can prolong the hearing and increase expense. This article examines bifurcation in arbitration, where the authority to order it originates, and the practical considerations that should inform whether a phased hearing will promote efficiency and fairness.

I. Defining Bifurcation in the Arbitral Context

Bifurcation in arbitration is the process of separating issues within one case into distinct phases, whether for purposes of hearing them separately, deciding them separately, or both. The most familiar model separates liability from damages or remedy. Another common model separates threshold issues, such as arbitrability, jurisdiction, timeliness, or standing, from the merits of the underlying claims. In labor and employment matters, bifurcation often appears in discipline and discharge cases when the parties elect to address just cause first and reserve remedy issues unless they become necessary.

Bifurcation can take several forms. In a labor arbitration, an arbitrator might decide whether the employer had just cause for discipline before hearing evidence on remedy. In an employment dispute, the arbitrator may address an affirmative defense or another threshold issue before proceeding to the full evidentiary presentation. In statutory fee-shifting employment cases, the arbitrator may decide liability first and reserve for a later phase issue of fee entitlement and the reasonableness of the fees and costs sought.

II. The Rationale for Bifurcation

The principal rationale for bifurcation is efficiency. When an early ruling on a threshold issue could dispose of the case, or substantially narrow what remains, a phased hearing may spare the parties and the arbitrator from devoting time and money to evidence that never becomes material. For example, in a discharge case, a finding that the employer had just cause may eliminate the need for a separate remedy phase. By contrast, if the arbitrator finds no just cause, a second phase may still be necessary to address reinstatement, back pay, mitigation, offsets, interest, or other make-whole issues.

Bifurcation may also assist in managing complexity. In matters involving extensive records, multiple categories of damages, expert testimony, or difficult threshold defenses, sequencing the issues can help the arbitrator focus on a discrete set of questions before taking on the next layer of proof. That can improve the clarity of the record and sharpen the parties' presentation.

Fairness is also an important consideration. A claimant may benefit from obtaining an early ruling on a jurisdictional objection or other threshold defense that would otherwise cloud the entire proceeding. A well-considered bifurcation order can therefore promote both efficiency and procedural fairness.

Finally, bifurcation can encourage settlement. Once the arbitrator resolves liability or a threshold defense, the parties often reassess risk more realistically. That recalibration can narrow the issues and create a better environment for resolving the remaining dispute without the cost of a second full presentation.

III. Authority to Bifurcate

The authority to bifurcate may arise from the parties' agreement, from the applicable arbitration rules, or from the arbitrator's procedural authority to manage the hearing. Under the American Arbitration Association Commercial Arbitration Rules, R-33(b), the arbitrator may direct the order of proof and bifurcate proceedings. JAMS rules similarly give the arbitrator broad authority to control the conduct of the hearing, determine the order of proof, and decide jurisdictional and arbitrability issues as a preliminary matter. In most administered cases, therefore, bifurcation fits comfortably within the arbitrator's procedural authority.

Where the parties have agreed in advance to a phased structure, whether in the arbitration clause, a post-dispute submission agreement, or a procedural stipulation, the arbitrator should ordinarily honor that agreement so long as it is consistent with the governing rules and applicable law. Where bifurcation is contested, however, the arbitrator must exercise independent judgment. That judgment should be guided by whether a separate first phase is likely to dispose of the matter, materially narrow the issues, or otherwise improve the fairness and manageability of the proceeding.

In labor and employment arbitration, the collective bargaining agreement, employer policy, or dispute resolution plan may speak directly to hearing procedure. Even when the governing instrument is silent, past practice or the parties' expectations may inform whether a bifurcated structure is appropriate. For that reason, an arbitrator considering bifurcation should consult the governing framework carefully before ordering a phased process sua sponte.

IV. Strategic Considerations for the Parties

From the claimant's perspective, bifurcation can be either advantageous or limiting. When liability is strong and the scope of the harm is important to the overall equity of the case, the claimant may prefer a unified presentation that allows the arbitrator to understand the full practical consequences of the challenged conduct. In other cases, however, a claimant may welcome a first phase focused solely on liability, particularly where an early ruling may promote settlement or avoid disclosure of information that is better reserved for remedy.

For the respondent, bifurcation can provide a meaningful opportunity to limit cost and exposure. A strong threshold defense, or a substantial defense on the merits, may justify asking the arbitrator to hear liability first. At the same time, a respondent may resist bifurcation when remedy evidence would provide context that softens the force of an adverse liability finding or

when the issues are so intertwined that separating them would create duplication rather than efficiency.

Both sides should also consider the evidentiary consequences of a phased proceeding. Some evidence will overlap. Counsel should think carefully about what proof belongs in the first phase, what should be reserved, and how testimony given in phase one may affect the arguments advanced later. Bifurcation requires disciplined presentation and a clear understanding of the relationship between the issues being separated.

V. Procedural Management of the Bifurcated Hearing

When bifurcation is ordered, the arbitrator should memorialize the decision in a clear procedural order. That order should define the issues to be heard in each phase, identify the sequence of presentations, establish any page or time limits, and state how the arbitrator intends to communicate the phase one determination. Precision at the outset reduces the risk of later disputes about scope or sequencing.

The first phase should be conducted with the same rigor as any other arbitration hearing. Each party must have a full opportunity to present evidence, examine and cross examine witnesses, and argue its position on the issues assigned to that phase. Bifurcation is a method of sequencing the inquiry. It is not a justification for abbreviating the parties' right to be heard.

After the first phase, the arbitrator should issue a written ruling that clearly resolves the matters submitted. Depending on the case, that ruling may be labeled an interim decision, an interim award, or a partial award. The ruling should explain the basis for the determination with enough specificity to guide the parties as they prepare for what comes next, while avoiding unnecessary discussion of issues reserved for the second phase.

The question of finality deserves careful treatment. A phase one ruling does not automatically become a final award simply because it resolves liability before remedy. Whether it is treated as final may depend on the parties' agreement, the governing rules, and the law applicable to confirmation or vacatur. For that reason, the arbitrator should address finality expressly in the procedural order and, where appropriate, in the phase one ruling itself. If the parties intend a partial final award, that intent should be stated clearly. If they do not, the order should make plain that the ruling is interlocutory and that additional proceedings remain.

VI. Limitations and Cautions

Bifurcation is not universally beneficial. One risk is that issues separated on paper may prove difficult to separate in practice. Liability and remedy evidence may overlap, and the effort to keep them apart can lead to duplication, piecemeal testimony, or an incomplete picture of the dispute. In such cases, a unified hearing may better serve efficiency and coherence.

Delay is another concern. If the second phase cannot be scheduled promptly, bifurcation may lengthen the overall life of the arbitration rather than shorten it. The possibility of settlement after phase one may justify that risk in some matters, but it should not be assumed. Arbitrators and counsel should assess scheduling realities, witness availability, and the likely time gap between phases before adopting a bifurcated structure.

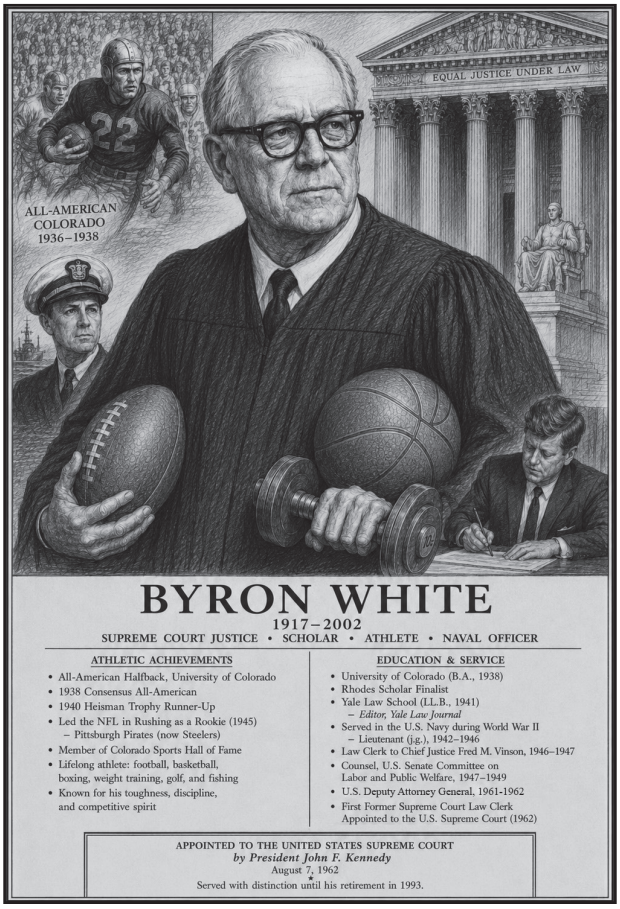
There is also the risk that the expected efficiency gains will not materialize. A first phase may narrow the case only modestly, leaving most of the same evidence and argument for later. In that setting, the administrative burden of two hearings, two rounds of briefing, and two procedural calendars may outweigh the benefit of sequencing.

Finally, the arbitrator should remain attentive to perceptions of fairness. Because bifurcation often benefits one side's strategic position more than the other's, a decision to bifurcate should be transparent, reasoned, and tied to the specific circumstances of the case. A carefully explained procedural order is one of the best safeguards against the appearance that sequencing decisions were made arbitrarily or with favoritism.

VII. Conclusion

Bifurcation is often a valuable procedural tool. When used in the right case, it can reduce costs, sharpen the presentation of threshold issues, and promote settlement. When used in the wrong case, it can create delay, duplication, and unnecessary complexity. Its value therefore lies not in its availability, but in its careful application.

For arbitrators, the decision to bifurcate calls for practical judgment, attention to the governing rules, and a clear articulation of the reasons for the chosen structure. For parties and counsel, it requires a realistic assessment of whether a phased hearing will actually simplify the dispute or merely rearrange it. Approached with deliberation and transparency, bifurcation can serve both the parties and the arbitral process well. ■



AGEISM ON THE ROADS— A BILL THAT WOULD BURDEN OLDER MICHIGAN DRIVERS BASED NOT ON THE CONTENT OF THEIR ABILITIES, BUT SOLELY ON THEIR BIRTHDATES

Stuart M. Israel

The media widely reported last March on Michigan Senate Bill 847, sponsored by Senator Rosemary Bayer. The bill would add new licensing burdens for older drivers. The bill is still in committee. May it perish there of terminal ageism.

1. The bill.

The bill would require drivers "75 years of age or older" to appear "in person" at a Secretary of State **(SOS)** office "not less than 1 time every 4 years" for tests "administered" by SOS staff: a "vision test," a "written knowledge test," and a "driving skills test." Drivers "85 years of age or older" would have to appear "not less than 1 time every year."

There is imprecision in the bill, but the gist is clear: drivers of arbitrarily-selected "senior" ages would have to appear for tests regardless of their abilities and driving-records.

The media, apparently informed by Senator Bayer, report that the costs of the testing would be borne by all taxpayers, not just test-takers. One report expresses concern that the SOS would not be able to handle the new responsibilities imposed by the bill without adding staff and an expanded budget. Reportedly, licensed Michigan drivers age 65 or older is a demographic category that is "growing rapidly."

2. The "important difference" between age and ability.

Legally-imposing enhanced licensing burdens based solely on a "senior" driver's birthdate would be arbitrary and unfair. Age alone is an unreliable measure of ability.

The Mayo Clinic notes the "important difference between how old someone is, known as chronological age, and the overall state of someone's body, known as biological age." The Mayo Clinic observes: "there is no universal experience of aging," that some people "remain active and sharp both mentally and physically well into their 80s or even 90s, while other people begin to experience a decline in their health or quality of life decades earlier."

I discussed the bill with an almost-80 lawyer. His last ticket was in 1995, for going 5 MPH over the posted limit. He said that the government would have to pry his car keys out of his arthritic hands. He was hyperbolically making a point about the legislative process, of course. He honors the rule of law, even dumb laws.

Some younger readers are thinking: "Old people problems, ho-hum." But make no mistake: time and tide wait for no one. Someday, if this bill survives, *you* will be summoned to the SOS to take "written knowledge" tests—and artificial intelligence won't be there to tell you the answers. Now is the time for all good citizens to resist ageism.

3. Ageism and action.

Disclosure: I am in the bill's first-level target age-group. I passed the driving-skills test decades ago when I was 16. It was administered by a certified police officer. I don't remember exactly, but the testing was probably during rush hour on Woodward Avenue, during a freak March blizzard, requiring all-uphill driving. I have been driving ever since.

Over time I have been licensed in three states and at one time had a military driver's license that permitted me to drive five-ton trucks (but no explosives). Anyway, I have an admirable driving record and I don't want to be forced to take another "driving skills test" just because the *calendar* reveals that I am a highly-experienced driver. That's ageism.

So I wrote to Senator Bayer. I identified myself as a citizen and a voter. I expressed my opposition to the bill. I copied my communication to Senator Erika Geiss, the transportation committee chair, and to Secretary of State Jocelyn Benson. The essence of what I wrote follows. I hope you, too, will express opposition to the bill to your state senator and other "leaders." *Carpe diem*. Elections are coming, and you are not getting any younger.

4. "For examples."

The media report that Senator Bayer was "inspired" to sponsor the bill by the death of a constituent, hit by a 94-year-old driver. That was a tragic incident, but that incident does not warrant burdening all "senior" drivers based solely on age, and burdening all taxpayers with the costs of added bureaucracy. There is an aphorism: "For example is not proof."

Here is a different "for example." The April 8, 2026 *Farmington Press* reports on a "traffic fatality," the result of an "early morning" two-vehicle "head-on" collision on I-696. The drivers were ages 26 and 81. Police first believed the older driver "was driving the wrong way and caused the accident that killed him." But based on "digital forensic evidence," police later concluded "the opposite of what they initially reported from their preliminary investigation." Police "now believe" the surviving younger driver was driving eastbound on westbound I-696, "causing the accident." He has been charged with "reckless driving causing death." The paper reports that the "investigation remains active."

Had Senate Bill 847 been "inspired" by this example, rather than by the example of Senator Bayer's constituent who died when hit by an age-94 driver, the bill might have focused on drivers in the demographic of the accused wrong-way I-696 driver. It might have called for regular road-sign re-testing of, and a driving-curfew for, drivers under age 27, barring them from freeways during dark "early morning hours." That bill would burden younger drivers, of course, but would keep 81-year-olds and everyone else safer—statistically.

The point: bills "inspired" by "for examples," tunnel-visioned situational-sympathy, and facile stereotypes can lead to misreading "problems," imposing ineffective or harmful "solutions," and, as here, ageism.

Lawyers have an adage: "hard cases make bad law." The death of Senator Bayer's constituent caused by the 94-year-old driver and the death of the 81-year-old charged to the 26-year-old wrong-way driver are indeed "hard cases," but a bill imposing

broad age-governed licensing burdens, based only on either "for example," would call for bad law.

5. "Lies, damned lies, and statistics."

The media report that in 2024 the 26% of Michigan drivers age 65 or older were "involved" in about 20% of vehicle "crashes." It seems these "senior" drivers were statistically underrepresented in "crashes," and the remaining 74% of drivers, those ages 16 through 64, involved in at least 80% of "crashes," were statistically overrepresented.

The reported statistics don't give details. They don't reveal the age-distribution of the drivers who *caused* those "crashes" or much else about other pertinent circumstances.

The statistics don't report what percentage of the "crashes" involved alcohol; legal or illegal drugs; drivers distracted by in-car romance or domestic friction; texting, Internet searching, or other device-related in-car distractions; speeding, tailgating, or road rage; hot-coffee-in-the-driver's-lap spills; falling asleep; illegal dark-window-tints; road hazards, street disrepair, or badly-marked construction; car disrepair or malfunction; unlicensed or suspended drivers; snow, ice, or other weather hazards; broken headlights or burned-out street lights in what the USPS calls the "gloom of night"; scolding raucous kids in the back seat; left-at-home prescription glasses; combinations of these causes; or other factors having nothing at all to do with a driver's chronological age.

Statistics have their limitations. As attributed to Mark Twain, there are "lies, damned lies, and statistics." Danny Devito (reportedly 4'10") and Shaquille O'Neal (reportedly 7'1"), for example, are, on average, just over 5'11" tall. This is a mathematically-derived but utterly useless fact.

The point is that the reported *age-only* statistics do not warrant Senate Bill 847. The media report that the highest-risk drivers are those under age 26, not those over age 74. Youthful careless drivers may be "crashing" into older drivers—maybe in the high-risk "roundabouts" in Senator Bayer's district—and "involving" innocent older-driver-victims in "crashes" and giving all older-drivers an undeserved bad name.

6. "Stories."

The media quote Senator Bayer as being also motivated by "stories" that show it can be "really hard" for some adult-children to get their aging parents to "stop driving."

These conversations can be "really hard" because "senior" drivers are reluctant to give up their independence just because their adult-children are overprotective, or are know-it-alls who insufficiently respect their parents. Some adult-children scolds need to consider their parents' safe-driving history and sound judgment, and maybe that parent-related Commandment. In any event, the SOS already offers help to *anyone* concerned about an aging driver, even if the concerned party is the driver.

The SOS provides form DA-88 for any concerned person to request individual driver-evaluations, because of a driver's age-related issues or otherwise. The form is available to the public—including to law-enforcement personnel and agencies, medical professionals, adult protective services, SOS staff, concerned citizens, and of course, concerned neighbors, friends, and family members. The SOS keeps private-citizen driver-evaluation requests "confidential to the extent permitted by law."

The SOS has the authority under the Michigan Vehicle Code to reexamine licensed drivers and to restrict, suspend, or revoke their driving privileges when there is reason to do so in individual cases. Individual driving-disabilities, medical or otherwise, and bad driving-records, warrant SOS attention to problematic drivers of all ages.

The SOS provides a 50-plus page booklet (online and on paper, in English, Spanish, and Arabic versions) called *Michigan's Guide for Aging Drivers and Their Families*. The no-charge booklet provides information and offers assistance and resources for aging drivers, for others concerned about aging drivers, and for all drivers and those concerned about them. To borrow from *Death of a Salesman*, attention will be paid by the SOS—when attention is individually warranted.

I expect that the SOS promptly addresses each driver-evaluation request, and decides if it merits individualized investigation. When warranted, the SOS says, it will "assess a driver's abilities, behaviors, and habits, regardless of their age" and "determine what actions may be required" to "ensure" the driver's safety and "the safety of others."

7. Everyone has opinions.

The media coverage included or prompted many person-on-the-street and letter-to-the-media opinions about the bill—pro, con, mixed, and incoherent.

Some opinions proclaim whole-hearted support for the bill. Many of these complain about the supposed deficiencies of older drivers (and older people in general, like those who clog up supermarket aisles with their unlicensed electric shopping carts). Some say the bill should apply starting at age 65, or even at age 60. Some display little empathy for drivers in the "old fogey" demographic, wherever they draw the age-line.

Some say the bill should be focused on drivers ages 16 through 25, who are the Michigan drivers most "prone" to be involved in "crashes." These opinions display little empathy for drivers in the "whippersnapper" demographic.

Some complain about the negative economic consequences and unfairness of automatic re-testing based *solely* on age. Others anticipate negative social consequences, predicting problems due to inadequate and expensive public transportation for "seniors" and short-sighted planning in past decades which favored cars over pedestrians and caused suburban sprawl and urban decay. Some predict that passage of the bill would result in profligately-delicensed drivers who would become lawbreakers—unlicensed drivers—a reverse "broken windows theory" effect which would erode the rule of law. Some predict social isolation, dependence, depression, and other adverse effects on the "wellness" of law-abiding older drivers who are delicensed or just burdened with age-based over-testing.

Some say the bill doesn't go far enough, that it should apply to *every* driver, with re-testing every three—or two, or you-choose—years.

Some opine that the state's driver-training system—long gone from the public schools, now in the for-profit sector—is deficient and, some say, economically discriminatory. Some say that the age-governed bill abdicates evidence-based decision-making, and serves only as a symbol, a "band-aid," to prompt emotional, cosmetic, and "mindless," "knee-jerk," and "feel-good" reactions from voters, politically-pandering to those against traffic tragedies (*i.e.,* everyone), that the bill *appears* to call for salutary legislative

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action while in fact *failing* to meaningfully address the many direct causes of driving-related problems that have nothing to do with a driver's chronological age.

Some opine that "feelings," "stories," skewed "statistics," and tragic "for examples," are not reliable foundations for setting legislative policies. Demographic self-interest is a distorting factor, too. Some younger drivers are totally unconcerned about the bill's imposition on drivers over 74. Some older drivers wouldn't care about raising the driving age to 18 or 21, or about keeping all younger drivers off the streets after dark. Some drivers *feel* that more restrictions on *other* drivers would enhance traffic safety.

Some don't follow the bill's supposed logic, not seeing that a traffic death caused by one 94-year-old driver warrants imposing licensing burdens on all drivers over age 74.

Some call for "common sense." They say that if the legislature wants to deal with a driver who—in the words of the SOS—is "incompetent" or "inflicted with a mental or physical infirmity or disability rendering it unsafe for that person to drive a motor vehicle," the legislature should address individuals' driving-records, not their birth certificates.

8. "Trade-offs."

There are many effective ways to improve traffic safety. Among them: lowering speed limits; more rigorously enforcing all traffic laws; enhancing penalties for traffic violations; automatically-suspending and re-testing drivers who *cause* "crashes," or even all drivers "involved" in "crashes"; mandating more safety equipment for vehicles; publicizing safety statistics by vehicle model, and maybe outlawing the least statistically-safe vehicles, like convertibles and motorcycles; and more. But every safety measure has trade-off costs.

Economist Thomas Sowell writes: "There are no solutions. There are only trade-offs." The "trade-off" costs of improving traffic safety may be in increased taxes, added inconvenience and freedom-restrictions for drivers, more regulation resulting in safer—and higher-priced—cars, etc.

Cars built like Abrams tanks would be safer, for example, but would be expensive, slow, get horrible gas mileage, require more driver-training, be too big for existing garages, driveways, and parking-spaces, destroy bridges, and ruin what the governor calls "the damn roads." Mandating tank-like cars *would* improve traffic safety—but at substantial cost.

All proposed "solutions" and "improvements" should satisfy cost-benefit analysis. About Senate Bill 847, AARP Michigan has it right.

9. AARP has it right—this is a civil rights issue.

AARP Michigan opposes the bill because the bill "unfairly targets older drivers based solely on age, not driving ability or safety." AARP opines: "Michigan should focus on individualized, evidence-based approaches—such as reviewing driving-records or addressing specific medical concerns—rather than policies that restrict independence, limit access to essential services, and discriminate against older residents."

This is a civil rights issue. Individuals may be held accountable for their conduct, but Michigan law generally holds that accountability must be based on evidence, not on assumptions or bias against an individual's age, race, color, religion, national origin, ethnicity, sex, marital or familial status, disability, height, weight, or other protected group-membership or personal characteristics unrelated to things like employment, education, housing, and public accommodations, services, and privileges, like driving privileges.

Bias, stereotype-assumptions, "stories," and "for examples" do not justify, as AARP puts it, discrimination against individual "older residents." This is so even if by some statistical measure "older residents" as a group are overrepresented—though less so than those under age 26—among drivers who have "involvement" in traffic "crashes." Try this bias-test at home. Imagine your reaction to a letter-to-the-media that says:

> "Everyone knows that **[insert an ethnicity]** people don't know how to drive. You take your life in your hands driving in **[insert an ethnic neighborhood]**. The legislature should do something about those people! Those people are different than us. Make them show up to test every year. Most of those **[insert the ethnicity]** people don't know the traffic laws, or don't care about them. The old **[insert the ethnicity]** people are the worst. Get more of those **[insert the ethnicity]** people off our streets, and we'll all be safer."

Michigan law bars employment discrimination based on height, for example. If "everyone knows," or if statistics in any given year show, that "tall" people are more likely than average-height or "short" people to be "involved" in car "crashes," should the legislature add "tall" people to Senate Bill 847? If Mustang-drivers, or bald people, or left-handers, or people who don't like dogs are statistically-overrepresented in crash-"involvement," should the legislature add to their licensing burdens?

These are *reductio ad absurdum* questions. They highlight the bias in Senate Bill 847—which ignores the Mayo Clinic and doesn't even bother to differentiate between drivers who cause "crashes" and those "involved" in "crashes" as victims. The bill calls for bad law. It is grounded on "ageism"—which the dictionary defines as "prejudice or discrimination based on age," particularly against "older adults." A 2023 article published by the American Psychological Association called ageism "one of the last socially acceptable prejudices." Ageism should not be become enshrined in the law.

Judge drivers *not* by their birthdates, but by the content of their driving-records.

Epilogue

I asked that Senator Bayer consider my views, and consider withdrawing her bill. That was on March 31. At this writing, she has not replied. In contrast, Secretary Benson replied the same day. She thanked me, assured that my "message is important" to her, and that she appreciates my "patience" as she and her staff prepare to "respond" to my "message." ■

THE CASE FOR DENTIST-PHYSICIAN COLLABORATION

Dr. Doug Thompson & Dr. Chelsea Watkins

We are entering a transformative phase in both dentistry and medicine. As research continues to unravel the intricate relationships between oral biofilm, formerly known as plaque, and overall systemic health, it has become clear that the opportunities for improving patient wellness are greater than ever before. See, for example, Peng X, Cheng L, You Y, *et al*.,"Oral microbiota in human systemic diseases." *International Journal of Oral Scienc*e, 2022; (https://perma.cc/9VCU-ESLQ).

To fully capitalize on this emerging science, however, an efficient and collaborative relationship between dentists and physicians is essential.

It would have been hard to imagine years ago that microorganisms living in the mouth could influence as many as 57 different systemic disease processes. Yet that is precisely what current research suggests. This knowledge places dentists in a remarkable position to help their patients achieve better health in ways that extend far beyond the teeth and gums. Every day, dental professionals observe early signs of metabolic dysfunction, sleep apnea, lifestyle-related inflammation, and numerous other concerns that often go unnoticed in traditional medical settings. It turns out your dentist is paying closer attention than you think — not just to your flossing habits. Most patients visit their dentist at least twice a year, giving dental teams a unique advantage for identifying early indicators of disease.

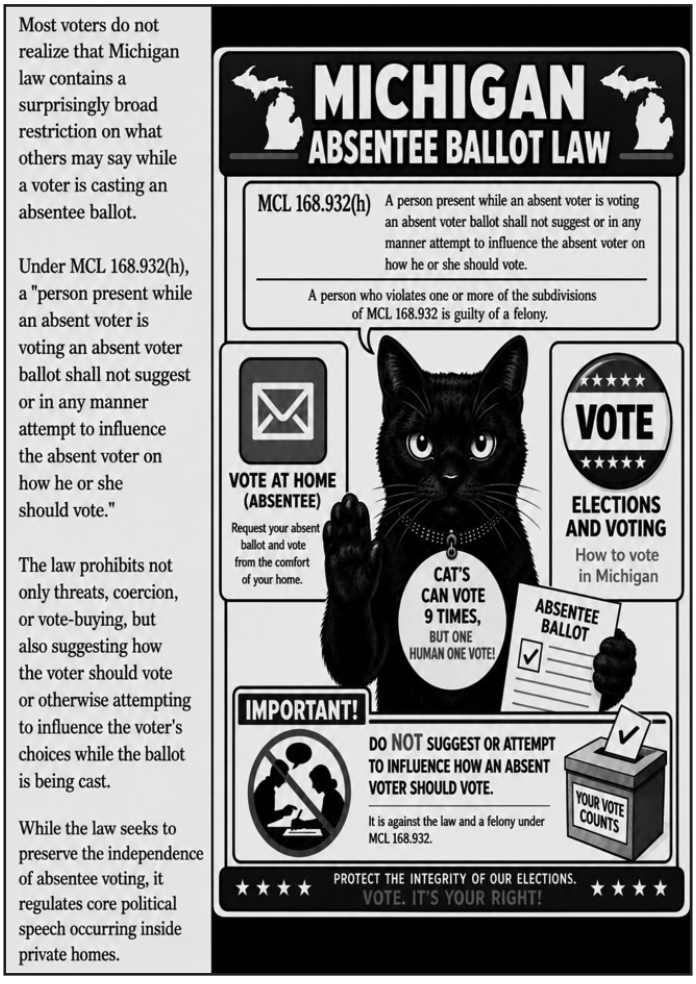
A dentist who understands how oral conditions influence systemic health can be extraordinarily helpful to patients. Still, no dentist can manage a patient's overall health — and no physician should be expected to count your molars. This is where partnerships with physicians become indispensable.

Many physicians today are learning more about the early signs and risks associated with heart attacks and strokes. One of the most significant drivers of sudden cardiovascular events is chronic inflammation. Physicians, however, cannot thoroughly assess a patient's oral health with visual inspection alone. A complete oral wellness evaluation requires a dentist who can identify early periodontal disease, periapical infections, signs of gastrointestinal reflux affecting the teeth, airway and sleep-related issues, and imbalances in the oral microbiome that may contribute to systemic illness.

Because physicians cannot perform this level of oral assessment, they must rely on trusted dental partners. In fact, many oral infections can be viewed as systemic medical problems that require dental solutions. Anyone concerned about early heart attack or stroke risk, cognitive decline, cancer, or other chronic diseases should have strong relationships with both a dentist and a physician to achieve optimal health.

In our local community, we are working to build these ideal collaborative relationships. Our goal is to help people live longer, healthier lives — ideally with all their original teeth. By bringing dentistry and medicine together, we can detect disease earlier, reduce inflammation more effectively, and create a more comprehensive model of preventive care.

Recently, we identified a suspicious spot on a dental X-ray that appeared to be a calcification inside a major artery. We referred the patient to a local cardiologist for evaluation. It was discovered that this younger patient had vascular disease more advanced than 93% of men his age — a sobering finding that had nothing to do with his bite. This is a prime example of how your dentist can help prevent unnecessary hospitalizations, and potentially save lives, simply by recognizing how oral conditions affect systemic health. ■



MERC NEWS

Sidney McBride
Director, Bureau of Employment Relations

MERC e-Filing Updates

In late 2025, the agency implemented mandatory e-filing and e-service requirements for several categories of filings. Various MERC Webforms have been launched and now available on the agency's website home page. These MERC Webforms are simple to use and replace all previous versions of those filing documents. Notably, when filings are correctly submitted using a MERC Webform or MERC eFile, the filing is automatically emailed to all party representatives listed on the case thereby satisfying any service requirement. The new MERC Webforms also meet the WCAG 2.1 Level AA standards regarding digitally accessible website content and address several findings identified during a recent internal audit conducted by the Office of the Auditor General (OAG). Below is a summary chart of several frequently used Webforms, all available on the agency's website at www.michigan.gov/merc.

Additional Service Options—MSV and MSR Certifications

The agency now offers 2 optional services— Majority Status Verifications (MSV) and Majority Status Recognition (MSR) Certifications. The MSV is similar to the card check process. The labor organization would complete and submit the MSV Webform. Designated agency staff would confirm the existence of majority status based on the valid interest documents submitted separately from the webform. The MSV service is offered through the agency's Mediation Division and available to labor organizations in public and private sectors. NOTE: this MSV process only confirms the existence of majority status and DOES NOT confirm or seek to obtain voluntary recognition between the union and that employer.

The Majority Status Recognition Certification is an option under the routine RC process where subject to certain conditions the parties may mutually consent to forgo the election process and grant exclusive recognition to the petitioning labor organization based on the agency's verification of majority status using the MSV process. This MSR option only applies to RC petitions that fall under MERC's jurisdiction. Several restrictions apply as it is not applicable if an incumbent or other interested labor organization exists or with decertification petitions. Specifics would be discussed during the preliminary conference with the MERC Election Officer.

DISCONTINUED FORM	NEW WEBFORM	COMMENTS
Status of Negotiations/ Collective Bargaining Notice	**CB Webform***	* Private sector can email the completed FMCS Form F7 to merc-mediation@ michigan.gov
Grievance Mediation Request	**GM Webform**	Don't Include Grievance specifics
Grievance Arbitration Petition	**GA Webform**	No attachments needed; Indicate panel size if listed in CBA
Act 312 Petition (Public Sector Only)	**312 Petition Webform**	Required uploads: Current CBA List of Disputed Issues/Proposals
Fact Finding Petition (Public Sector Only)	**FF Petition Webform**	Required uploads: Current CBA List of Disputed Issues/Proposals
Union Audit (UA) Form	**Union Audit Webform**	Public Sector Unions Only
ULP Charge Form	**ULP Webform**	May include uploads
Election Petition	**R/UC Petition Webform**	Send Show of Interest Separately

Bureau Staff Changes

Staff Retirements:

Sidney McBride-- Bureau Director

Shortly following the release of this Lawnotes edition, I will retire effective July 1, 2026. Reflecting on nearly 17 years with the Bureau, I'm filled with gratitude. This work has been one of the great joys of my extensive public service career. I've had the privilege of serving in several roles and collaborating with Commissioners, Staff, Colleagues, and Agency Partners who care deeply about MERC's mission and goals. Together, we've successfully moved the agency forward in many meaningful ways. To the incredible MERC staff, LEO Executive Team, and the current MERC Commission—Chair Pappas, Member Young, and Member Chiaravalli—thank you all for your support, dedication, and partnership.

Carl Wexel— MERC Staff Attorney

Retired effective April 1, 2026 after nearly 11 years with the agency as Staff Attorney. Prior to MERC and while living in the Jacksonville, Florida area, he served in related positions as Labor Relations Director for a major corporation and as Field Examiner with the National Labor Relations Board in that state. Throughout his Bureau years, Carl maintained the respect and confidence of leadership, coworkers and the labor relations community for his knowledge and professionalism.

Staff Additions:

Bureau Director: Andrew Niedzinski

Brings extensive experience in public administration, labor policy, and organizational leadership that includes both local and state government leadership roles. Throughout his career, Andrew has focused on improving service delivery, strengthening stakeholder relationships, and driving process innovation. Prior to this new role, he served as Director of the Wage and Hour Division and as City Manager for the City of Vassar. Andrew holds a Master of Public Administration from Central Michigan University. He remains committed to overseeing the impartial administration of the laws that govern the services under the Bureau.

Staff Attorney: George Surowy

Comes to the agency with over 14 years of experience in public sector labor law as a private practice attorney representing clients in various areas of collective bargaining including actions before this Commission, MOAHR, and in both State and Federal Courts. He is an active member of the State Bar of Michigan and received his Juris Doctorate from Ave Maria School of Law.

Labor Mediator: Wanda Dukes

Comes with an impressive collective bargaining background with Unite Here Local 24 where her skills included contract negotiations, diversity training, relationship building, and more.

Labor Mediator: Y'londa Kellum

Joins with extensive public sector collective bargaining experience in K-12 public and charter school organizations including complex collective bargaining issues and sensitive workplace disputes. ■

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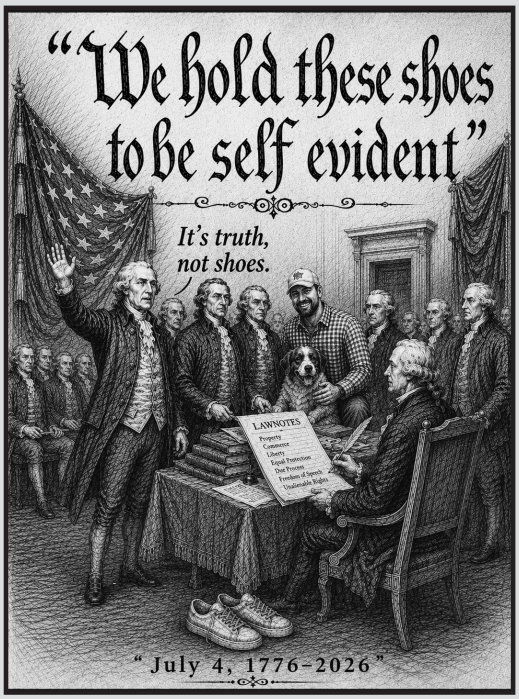

- John Adam examines the Sixth Circuit's decision in *Kerwin v. Trinity Health Grand Haven Hospital* and the future of labor injunctions after *Starbucks*.
- Stuart Israel presents a collection of workplace and labor-themed haiku.
- Ben King reviews the Michigan Supreme Court's new ICE arrest rule and courthouse procedures, accompanied by photographs of Ben King and his dog.
- Important recent Sixth Circuit labor, employment, ERISA, and federal practice decisions.
- Lisa Timmons discusses bifurcation of hearings in arbitration and administrative proceedings, including liability, damages, arbitrability, and procedural defenses.
- Stuart Israel writes about ageism and "senior" drivers and the perils of "for example" decision-making and uncritical legal "solutions."
- Dr. Doug Thompson discusses cooperation between dentists and physicians in improving patient health, accompanied by a humorous medical sketch.

Authors: John G. Adam, Ahmad Chehab, Bayan M. Jaber, Stuart M. Israel, Benjamin L. King, Andrew Niedzinski, Sara Ojala, Dr. Doug Thompson, Lisa W. Timmons, and Chelsea Watkins