LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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TITLE VII PROTECTS HOMOSEXUAL AND TRANSGENDER EMPLOYEES

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Butzel Long

In a single decision issued in three cases argued together last October 8th, the U.S. Supreme Court held on June 15 that Title VII of the Civil Rights Act of 1964 protects individual employees from intentional employer discrimination because of the individual's homosexuality or transgender status.[1] *Bostock v. Clayton County, Georgia,* 2020 WL 314668.[2] Justice Neil Gorsuch wrote for the six-person majority that also included Chief Justice John Roberts.

The employers in all three cases did not dispute that they had fired the employees simply for being gay or transgender. Title VII, the employers argued, did not prevent employers from intentionally discriminating against employees on the basis of homosexuality or transgender status.

The Individual Employees: Mr. Bostock, a long-term county employee and child welfare advocate, had led his office to several national awards. Clayton County discharged him for "conduct unbecoming a county employee" after "influential members of the community made disparaging comments about [his] sexual orientation and participation in [a gay recreational baseball] league."[3]

R. G. & G. R. Funeral Homes in Garden City, Michigan, fired the late Ms. Stephens, a funeral director employed for six years (who passed away on May 11th), when she informed the funeral home owner by letter that, after four years of therapy and treatment for gender dysphoria and consistent with her clinicians' recommendations, she would return from vacation living and presenting as a woman. The funeral home fired her before she left on vacation, saying that "this is not going to work out."[4]

Altitude Express fired Mr. Zarda, a skydiving instructor for several seasons (who died in a skydiving accident before trial some five years ago), after a female client complained to the employer that Mr. Zarda told her that he was gay, allegedly to "preempt any discomfort the client may have felt in being strapped to the body of an unfamiliar man."[5]

The Employers' Arguments: The Court rejected each of the employers' arguments in turn and echoed in the opinion the concerns expressed by Justices Ginsberg, Breyer, Sotomayor, Kagan and Gorsuch during oral argument last October.

Although the dissenting opinions and several amici addressed the potential for religious liberty claims if Title VII were interpreted to protect homosexual and transgender employees, the Court noted that Harris Funeral Homes had unsuccessfully pursued a Religious Freedom Restoration Act (RFRA) claim below, but had declined to seek review of that issue in its petition for certiorari, and that no other religious liberty claim was before the Court.

The employers did argue that, when Title VII was passed, dictionaries defined "sex" in binary (i.e., a man and a woman) biological terms. The employers also argued that it would surprise the drafters of Title VII and the Congress that passed the act to find that the act included protection for homosexual or transgender employees.

Even assuming that dictionary definition in 1964, the Court focused on the specific language used in Title VII, which prohibits employers from discriminating against an "individual" on the basis of sex. Rejecting the employers' position, the Court announced:

> Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

The Court cautioned that "the limits of the drafters' imagination supply no reason to ignore the law's demands" or the "written words" of the statute. Recognizing that transgender and homosexual statuses are distinct concepts from "sex," the Court pointed to "sexual harassment" as a distinct concept from "sex" but a concept accepted well after 1964 as falling within the scope of Title VII liability.

Reviewing its Title VII cases from 1971 forward, the Court noted its long history of remaining "unswayed" by employer arguments that their decisions had turned on generalized factors other than sex. In *Phillips v. Martin Marietta Corp.,* 400 U.S. 542 (1971) *(per curiam),* the Court rejected an employer's defense that it could presume the primary caretaker status of women with small children to justify not hiring such women. In *Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702 (1978), the Court rejected the employer's contention that mortality statistics in the aggregate showing that women lived longer than men justified demanding higher pension contributions from women than men, and that its policy was even-handed as to all members in each group based on that factor. Instead, in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) (plurality opinion), and again in *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75 (1998), the Court concluded that an employer who discriminates against an employee on the basis of sexual stereotypes violates Title VII. The *Bostock* Court cautioned that employers who discriminate against a transgender or gay employee simply because the employer is transgender or gay violates Title VII in the same manner.

Nor did having "multiple intentions" save the employers who had conceded their motivation in these cases. For the Court, if changing an employee's sex would have yielded a different choice

(Continued on page 2)

CONTENTS

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.

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

TITLE VII PROTECTS HOMOSEXUAL AND TRANSGENDER EMPLOYEES

(Continued from page 1)

by the employer, a Title VII violation occurs. In an inimitable example in an opinion replete with examples, the Court reasoned that "[j]ust as sex is necessarily a but-for cause when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decision-making":

> Reframing the additional causes in today's cases as additional intentions can do no more to insulate the employers from liability. Intentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view.

Unanswered questions: Aside from the issues waived by the employers, the reach of the *Bostock* decision under Title VII will only become clear as federal courts (and perhaps some state courts) attempt to apply its conclusions. Both the majority opinion and the dissenting opinions provide example after example and roadmaps for arguments in future cases.

—END NOTE—

[1]This article adopts the terminology used in the Supreme Court opinions.

[2](SCOTUS No. 17-1658), reversing and remanding 723 Fed. App'x. 946, (11th Cir., May 10, 2018) *(per curiam), en banc* petition denied with dissenting opinion, 894 F.3d 1335 (11th Cir., July 18, 2018); affirming *Altitude Express, Inc., et al. v. Zarda et al.* (SCOTUS No. 17-1623), 883 F.3d 100 (2d Cir. 2018) *(en banc)*; and affirming *R. G. & G. R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission* (SCOTUS No. 18-107), 884 F3d 560 (6th Cir. 2018).

[3]2020 WL 314668 at *3.

[4]*Id.*

[5]883 F.3d at 108. ■

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DEMOTED FOR DISLOYALTY: FIRST AMENDMENT RETALIATION AGAINST PUBLIC EMPLOYEES

John B. Spitzer

If a county coroner's office employee accidentally dons a surgical mask that bears the logo of a political candidate, and is demoted for appearing to support that candidate, can she challenge her termination by filing suit under 42 U.S.C. §1983? If her employer demotes her based on its mistaken perception that she was engaged in political activity, and there is no valid statute or neutral employer policy banning political masks, she may have a viable civil rights claim that she was punished for engaging in protected First Amendment conduct.

Political Horse Race

One Sixth Circuit case, arising out of the treatment of Michigan horse racing stewards, provides an example of an apparent misperception of political loyalty. *Dye v. Office of the Racing Comm'n*[1] makes an important point: Individuals claiming to have been retaliated against because of their political affiliation need not show that they were actually affiliated with the political party or candidate at issue. In *Dye,* the Court stated that plaintiffs need not allege an actual affiliation to survive a motion to dismiss; plaintiffs need only allege they were *perceived* to have been politically affiliated and retaliated against because of their perceived affiliation.

The State of Michigan employs horse racing stewards. At one time, the state also had an Office of Racing Commissioner. According to the Michigan Gaming website, Michigan Governor Jennifer Granholm abolished that office in 2009.

In discussing the political context that gave rise to the racing stewards' claims, the court in *Dye* said that the ORC, according to the stewards, was apparently divided based on political affiliation. The stewards claimed that the Racing Commissioner, who at that time was appointed by a Democratic Michigan governor, hired a contract management consultant who made personnel decisions based on the political affiliation of the stewards. The stewards, who ultimately sued the ORC, claimed that the Commissioner, a Democrat, retaliated against those stewards who did not support her or the then-Governor and treated them poorly based on their political affiliation.

In particular, the court said that affidavits and deposition testimony showed that ORC officials perceived that some of the stewards were affiliated with the Republican party because of their support for a Republican challenger to the governor. But one particular steward never affirmatively stated that he was a member of the Republican Party, according to the court.

The Sixth Circuit rejected the district court's denial of the two steward's claims. The court held that even though those stewards never affirmatively stated that they were members of the Republican Party, the defendants' alleged perception that they were affiliated with the Republican Party was enough to satisfy their burden of establishing that they engaged in protected activity. The court said that an ORC manager could easily have inferred that those stewards were affiliated with the Republican Party based on their support for the Republican candidate for governor.

In reversing the district court's dismissal of those stewards' claims, the court set forth the elements a plaintiff must allege to bring a prima facie case of first amendment retaliation under 42 U.S.C. §1983: (1) she engaged in constitutionally protected speech or conduct; (2) an adverse action was taken against her that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by her protected conduct.

If the employee establishes a prima facie case, the burden then shifts to the employer to demonstrate by a preponderance of the evidence that the employment decision would have been the same absent the protected conduct. Once this shift has occurred, summary judgment is warranted if, in light of the evidence viewed in the light most favorable to the plaintiff, no reasonable juror could fail to return a verdict for the defendant.

Supreme Court Resolves Circuit Split

In deciding a split between the Third Circuit and the Sixth Circuit, the United States Supreme Court, in *Heffernan v. City of Paterson, N.J.,*[2] adopted the Sixth Circuit's position. In adopting *Dye's* holding regarding perceived political affiliation, the Supreme Court held that an employer's mistaken belief that an employee was engaged in political activity, when he actually was not, did not bar that employee from stating a civil rights claim for First Amendment retaliation.

Heffernan was a police officer in Paterson, New Jersey. The police chief and Heffernan's supervisor had been appointed by Paterson's mayor, who was running for re-election against, Spagnola, a friend of Heffernan.

Although Heffernan was not involved in Spagnola's campaign, Heffernan agreed to pick up and deliver a Spagnola campaign yard sign to his mother. Other police officers saw Heffernan with the yard sign.

The day after other members of the police force heard about the yard sign incident, Heffernan's supervisors demoted him from detective to patrol officer. The demotion was described as punishment for Heffernan's involvement in Spagnola's campaign.

Heffernan then filed suit under 42 U.S.C. §1983, alleging that he was improperly punished for engaging in protected First Amendment conduct. The District Court found that Heffernan had not been deprived of any constitutionally protected right because he had not actually engaged in any protected First Amendment conduct.

The Third Circuit affirmed on the basis that Heffernan's §1983 claim was viable only if his employer's adverse action was prompted by Heffernan's actual exercise of his free-speech rights. In contrast to the Sixth Circuit in *Dye,* the Third Circuit held that Heffernan could not maintain a civil rights action because he had not in fact engaged in conduct that constituted protected speech

Adopting *Dye's* reasoning and rejecting the Third Circuit's reasoning, the Supreme Court reversed the Third Circuit's decision. Focusing on the employer's motive as the key factor, the Supreme Court held that a First Amendment retaliation claim can be based on a mistaken factual belief that an employee engaged in protected conduct.

Remanding for further proceedings, the Court did not address the issue of whether Heffernan violated a neutral policy banning police officers from engaging in political activity. The Court said that whether there was a neutral policy prohibiting police officers from overt involvement in any political campaign, whether Heffernan's supervisors were following it, and whether any such policy complies with constitutional standards, are matters for the lower courts to decide.

(Continued on page 4)

DEMOTED FOR DISLOYALTY: FIRST AMENDMENT RETALIATION AGAINST PUBLIC EMPLOYEES

(Continued from page 3)

Bottom line: If an employer demotes an employee to punish the employee for engaging in protected First Amendment political activity, the employee is entitled to challenge that action under 42 U.S.C. § 1983—even if, as in *Heffernan*—the employer's decision is based on a factual misperception.

Apolitical and Unemployed

Just as an employer's mistaken perception of an employee's political loyalties does not bar an employee from bringing a First Amendment retaliation claim, an official's mistaken hunch that an employee will engage in political activity helpful to that official can set the stage for a political retaliation claim.

In a case involving a judge's alleged attempt to recruit an employee to dig up dirt on another judge, the Second Circuit held that even an employee who is exempt from civil service protection, but who is not a policy maker, may bring a claim that certain individuals retaliated against her for refusing to engage in political activity.[3] *Morin* stands for the proposition that, in First Amendment retaliation cases, public employees who are not policy makers can no more be discriminated against for being apolitical than for being a member of the wrong political party.

The *Morin* court found that Morin expressed no political opinion. According to her Complaint, Morin simply refused to be pressed into political service.

Rejecting the defendant's interlocutory appeal from the denial of a motion to dismiss, the court held that Morin's alleged status as a policymaker was not established as a matter of law. Applying a multi-factor test, the court found that Morin was not a policy maker because, among other things, political activity or ideology was not necessary to the effective performance of her position as Chief Clerk of the Family Court.

The court also rejected the defendant's contention that a qualified immunity defense was established as a matter of law. The court found that the defendants failed to show that Morin's job required that she have a particular political affiliation. For that reason, the court held that it was not objectively reasonable for the defendants to believe that Morin was a policymaker. Therefore, the court affirmed the District Judge's holding that the qualified immunity defense did not apply.

Conclusions

Perhaps some public officials will permit their personal feelings regarding a subordinate's political loyalties to influence their personnel decisions. But public officials who take adverse action against non-policy-making subordinates to punish perceived political disloyalty may face viable First Amendment retaliation claims even when their perceptions are mistaken.

COVID-19 may cause infected persons to lose their sense of smell. But even uninfected politicians may make mistakes when they sniff the air for political disloyalty.

—END NOTES—

[1]*Dye v. Office of the Racing Comm'n,* 702 F.3d286 (6th Cir. 2012).
[2]*Heffernan v. City of Paterson, N.J.,* 136 S. Ct. 1412, 194 L. Ed. 2d 508 (2016).
[3]*Morin v. Tormey,* 626 F.3d 40 (2d Cir. 2010). ■

CONSIDERATIONS FOR USING WORKPLACE ARTIFICIAL INTELLIGENCE RECRUITMENT AND HIRING TOOLS IN THE POST-COVID-19 WORKPLACE

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The novel coronavirus ("COVID-19") has not only changed the way business will operate for the foreseeable future, it may also lead employers to turn to the proliferation of workplace artificial intelligence ("AI") tools to help streamline recruiting and hiring so that they can continue maintaining social distancing best practices. Employers, however, should be aware that using such AI tools brings with it various regulatory challenges regardless of its utility in these trying times.

AI has been exerting an ever-growing influence on companies' employment decision making for some time. AI tools that have long been used to market services and products to customers (e.g., algorithms for personalized pop-up ads) are making increasing inroads into the employment arena, including those that mine data from an applicant's social media and internet presence to determine personal attributes and those that evaluate an applicant's responses during a video interview in making employment decisions.

Employers considering using AI recruitment and selection tools during the COVID-19 crisis, which some experts expect to last for months after the curve has "flattened," should be mindful of the concerns about the potential for misuse and of discriminatory impact raised by these technologies. While federal and state laws exist prohibiting discrimination in the recruiting and selection process, as well as throughout employment, until recently there has been minimal legal guidance on or regulation of employers' use of AI. This regulatory landscape is changing, as states and municipalities have started to take steps to regulate AI's use, particularly with respect to recruitment and hiring.

In 2019, for example, Illinois became the first state to enact protections with respect to the use of AI in hiring. The Illinois Artificial Intelligence Video Interview Act ("Illinois Act"), requires an employer that asks a job applicant to record video interviews and that uses AI to analyze the recorded video to notify the applicant of its use and of the characteristics the AI uses to evaluate applicants. The Illinois Act also requires employers to destroy applicant data within thirty days of receiving a request from the applicant.

Maryland, following the lead of Illinois, enacted a law (HR 1202) prohibiting the use of facial recognition technologies during pre-employment interviews without the applicant's consent. Enacted in May 2020, the Maryland law applies only to AI tools

that employ facial recognition services, i.e., "technology that analyzes facial features and is used for recognition or persistent tracking of individuals or video images." The law prohibits employers from using facial recognition services in interviewing without an applicant's written consent and waiver that states the applicant's name, the date of the interview, that the applicant consents to the use of facial recognition during the interview and that the applicant has read the waiver. Maryland's law will take effect on October 1, 2020. Further, California and New York City have each proposed legislation restricting the sale and use of employment-related AI under consideration.

California's proposed law, the Talent Equity for Competitive Hiring ("TECH") Act (SB 1241), is more extensive and if enacted would apply to all AI technology used in selection procedures. The bill, which is aimed at addressing discrimination concerns, would create a presumption that an employer's decision relating to hiring or promotion based on, among other things, use of "assessment technology," is not discriminatory, if it meets specified criteria. Specifically, AI would be considered compliant with anti-discrimination rules if: (1) prior to deployment, it is tested and found not likely to have an adverse impact on the basis of gender, race, or ethnicity; (2) the outcomes are reviewed annually and show no adverse impact or an increase in diversity at the workplace; and (3) the use is discontinued if a post-deployment review indicates an adverse impact. The bill is currently in committee process.

On February 27, 2020, New York City, for its part, introduced a bill (Intro No. 1894-2020) that would govern the sale and use of any automated employment decision tool. Under the bill, companies that *sell* AI tools that automate employment decision-making must first audit them for bias and provide an annual bias audit to the purchaser. The bill would require employers who use such AI to notify candidates of the use of AI technology to assess their candidacy for employment within 30 days of use, and to disclose the specific job qualifications and characteristics assessed by the AI technology. Violators of the law would be subject to a $500 penalty for the first violation, and up to $1500 for any subsequent violation.

These laws and proposals are clearly the beginning of a trend, which may be expected to accelerate. The COVID-19 pandemic seems likely to increase employers' use of video interview tools and other online candidate assessments, and with them AI assisted decision-making. Accordingly, companies should monitor these developments in the jurisdictions in which they do business and ensure they comply with those that apply to them. Even if the current proposals are not enacted, or are not applicable where a company currently operates, best practices dictate that companies using AI should regularly audit the technology they employ use to ensure that it does not create adverse impact on any protected classes and, absent legitimate business reasons for not doing so, to provide notice to candidates about the company's use of AI. In addition, companies selling or using employment-related AI should confer with counsel who can help navigate the various nuances of each law, as well as advise on the gaps in the law that still remain. ■

IS THERE A ZOOM MEDIATION IN YOUR FUTURE?

Sheldon J. Stark
Mediator and Arbitrator

Michigan's State Court Administrative Office reports: "During the state of emergency, courts have been working at less than full capacity. While no two courts are the same, none have conducted business as usual since mid-March, and there will likely be backlogs as a result. Some cases are backlogged because of hearings being adjourned and new matters not being set. Still more cases will come into the trial courts as legal and public health conditions continue to relax."

Many labor and employment lawyers are working from home, their offices closed with limited access. Normal routines are at a standstill. While most court matters are postponed, lawyers must decide whether to adjourn or pursue discovery and alternative dispute resolution (ADR) processes. I write to suggest that the factors favoring ADR outweigh the factors favoring adjournment.

Issue 1 – Security: You may have read that Zoom is *not* secure. Whatever problems there were appear resolved. I believe Zoom is both secure and confidential. First, no one gains access to a Zoom meeting without a passcode and meeting number. Second, individuals must be admitted to the mediation through a "waiting room" feature controlled by the mediator. No one unrecognized can gain access. Third, once the mediation begins, the mediator host can "lock" the meeting and prevent anyone else from joining. Fourth, no one in a break out room can hear, access or see what is happening in another. Fifth, the mediator host can disable the ability of a party or lawyer to record the session using Zoom itself.

Issue 2 – Mediator Selection: The same principals apply here as in the days before COVID-19 turned our world upside down: Is the mediator trustworthy, competent, prepared, committed? Will he or she be acceptable to the other side? Does the mediator prepare? Is the mediator a "closer" who sticks with it and doesn't give up too soon? Is the mediator creative? Does he or she have subject matter expertise?[1] Today, you should also ask whether the mediator is trained to mediate using a video platform. Mediations are difficult enough without technical glitches interrupting, hi-jacking, or distracting the participants. Trained mediators ensure that each mediation is secure and confidential, won't be recorded, and provides a smooth professional process through all the stages litigators are familiar with: joint sessions, private caucuses, shuttle diplomacy, lawyer only conferences, etc.

Issue 3 – Preparation: Despite the popularity and growth of Zoom, some advocates and clients are unfamiliar with the

(Continued on page 6)

IS THERE A ZOOM MEDIATION IN YOUR FUTURE?

(Continued from page 5)

technology and experience anxiety even thinking about it. If you find yourself in that category, you can easily discover whether your favorite mediators offer to help prepare you and your clients to use the process and make the most of it.[2] See, for example: https://www.starkmediator.com/wp-content/uploads/sites/4/2020/04/GUIDE-TO-ONLINE-DISPUTE-RESOLUTION.pdf

To assist parties and lawyers in getting comfortable with the program, I offer a complementary practice session. Practice sessions extend from 15 to 45 minutes. Practice sessions insure participant audio and video features are working, the parties are able to navigate from one room to another, and all understand Zoom features such as "Chat" (to send one another messages), "Share Screen" (to view documents and images), and "Security" (to lock out intruders).

Issue 4 – Does It Work: My experience with Zoom has been uniformly good. There have been few technical difficulties, mostly related to unreliable internet connectivity. The solution to virtually all glitches is simple: the person who drops out of the mediatoin is directed to log out and rejoin. That resolves almost all problems. If all else fails, I have a conference call line to complete the process via telephone.

Here's the process in a nutshell: On the date set for mediation, everyone receives a link with a password and meeting number. The parties and lawyers log in and wait for admission in the "waiting room." At the scheduled time for mediation, the mediator admits everyone into "the main room." Once sound and video are checked, the mediator collects cell phone numbers to text or call in the event of technical difficulties. I also provide my cell to everyone in case someone has a problem and wants to reach out to me. Participants are then moved to their break out rooms. For a two party mediation, I typically create four: a caucus room for the plaintiff team, a caucus room for the defense team, a joint session room for the mediator's opening remarks, and a lawyers only room in the event the lawyers want to confer with each other or meet privately with me. If agreement is reached, the lawyer only room is typically where we hammer out language issues. For signatures, most people – including parties – own a printer/scanner. They sign the last page of the agreement, initial the others, scan them into their computers and email to their attorneys who, in turn, exchange the documents. Where someone does not own a scanner, they take a cell phone picture of the signature page and text it to their lawyers. Technology has not been a barrier to signing documents.

In my judgment, the advantages of mediating with Zoom outweigh the disadvantages:

Advantages:

- No risk of face-to-face contact.
- If resolution is important to your clients, they need not wait until the pandemic subsides.
- Zoom is secure, private and confidential.
- Meetings are not recorded.
- No embarrassing chance encounters with the other side.
- Cases settle. Each of the matters I've mediated using Zoom so far has resolved during the process.
- No need to bring your client to your office to participate.
- Mediate from home, your office or anywhere you have wi-fi service.
- No travel time.
- No mediator travel fees

Disadvantages:

- You're staring at a screen the entire day.
- Video interaction is not as satisfying as face-to-face.
- An unauthorized person could be listening in on the other side without you knowing.
- A party could be recording with a cell phone.[3]
- Sometimes there are technical difficulties that interfere with an orderly process.
- Uncertainty regarding whether your client will survive the economic downturn.
- Limited ability to observe body language.
- Reduced persuasion and influence by the mediator when not face-to-face with decision makers.
- Video mediations can take longer.
- Document exchange and signing can be clunky.

Conclusion: The Zoom platform is free. The process works much like the face-to-face mediation process to which you are accustomed. Zoom offers you options. They are worth exploring.

—END NOTES—

[1]See, for example, https://www.starkmediator.com/wp-content/uploads/sites/4/2013/10/2013 Article Making the Most of Mediation.pdf

[2]The National Academy of Distinguished Neutrals (NADN), for example, denotes which mediators are familiar with which video platforms. https://www.nadn.org

[3]As mediator, I address these questions at the start of the process. ■

GUIDE TO ONLINE DISPUTE RESOLUTION WITH ZOOM

Sheldon J. Stark
Mediator and Arbitrator

PREPARING FOR ZOOM

1. **Download the App:** Before the date scheduled for mediation, download the free Zoom meeting client. It can be found at https://support.zoom.us/hc/en-us/articles/201362033-Getting-Started-on-Windows-and-Mac. To participate in the video mediation process your computer will need a camera and external audio capability. If your computer is not so equipped, consult with your counsel about how to proceed. Once at the Zoom website, download the desktop client. It's free. https://zoom.us/support/download (PC/Apple/Android).

2. **Install the App:** Follow the instructions to install and troubleshoot Zoom on your computer.

3. **Getting help:** If you are still having trouble, visit the Zoom Help Center for assistance. https://support.zoom.us/hc/en-us

4. **Maintain confidentiality:** All participants in the mediation are committed to the confidentiality of the process. Accordingly, your mediation location must be private, free of interruption or interference and the discussion cannot be overheard by third parties. Do not use public wi-fi for the mediation at libraries or coffee shops, for example.

5. **No recording:** Mediation is a confidential process. Recording the mediation is therefore strictly prohibited. Taking notes is allowed. No one has permission to make an audio or video recording, however. The Agreement to Mediate you will sign or have signed already does not allow recording.

6. **Authorized persons only:** No one can be present during any portion of the mediation unless their presence is known by all other mediation participants and that person has also signed the Agreement to Mediate. Do not permit your spouse, friend or significant other to "listen in" without permission. If you use a relative or friend's wi-fi, explain to them that they cannot listen in because the rules of confidentiality prohibit them from doing so.

7. **Confirmation:** At the start of the mediation, you will be asked to confirm that you're alone.

8. **Lighting:** Check out your video image before the mediation begins to consider the lighting in the room where you will be sitting. Avoid sitting with a window behind you, if possible. Otherwise, participants may not be able to see your face clearly.

9. **Signing the Agreement to Mediate:** Be sure you sign the two-page Agreement to Mediate and return it to your counsel. Among other things, this Agreement provides for confidentiality of the process, prohibits recording, and sets forth the rules governing the process. Everyone who participates in the mediation must sign. If you have questions, ask your counsel.

GETTING STARTED

10. **The invitation:** You will receive an email inviting you to a Zoom meeting. It will probably come from your attorney or someone in your attorney's office. Open the invitation. Do so at least 10 minutes before the scheduled start of the meeting. Joining 10 minutes early will avoid delays, ensure your connection is working, and give you time to deal with any issues or glitches with the software.

11. **Open Zoom:** You will be asked, "Open Zoom?" Click Open Zoom!

12. **Join the Meeting:** Choose "Join with Video" and "Join with Computer Audio." If you are asked to "Allow" Zoom, choose Allow. You will be given the option of testing your microphone. You should run the test.

13. **IF YOU ARE UNABLE TO CONNECT:** Close your browser. Re-open it and start over by returning to the email with the invitation. If that doesn't work, use your telephone to call 734-417-0287 for assistance.

THE MEDIATION PROCESS

14. **Your private "waiting" room:** When you first join the meeting, you and other participants will be admitted to a virtual private "waiting" room for up to 5 minutes – longer if another participant is late. The "waiting room" provides a "Zone of Silence." You will not be able to hear or see anyone else temporarily. Please be patient. Once everyone "arrives," you will be admitted one by one into a joint meeting room also temporarily. The purpose is to make certain you can see and be heard, make certain you can see and hear me as well as each other, and otherwise get things kicked off. Once the technology is in order you will be transferred to your own private virtual conference room.

15. **The "caucus" room:** A private and secure conference room has been set up and reserved for you, your attorney, and anyone permitted to attend along with you. This is called a "caucus" room. The mediator will place you in your caucus room. No one from the other side can see or hear what happens in your caucus room. It is completely secure and confidential. If a lawsuit has been started, there will be a private caucus room for the "Plaintiff" and a private caucus room for each "Defendant" or "Defense" group. If your matter is in arbitration, the rooms will be designated "Claimant" and "Respondent." You and your counsel will be able to see and converse with one another privately in the caucus room. When anyone "enters" your room including me, you will be able to see them.

(Continued on page 8)

GUIDE TO ONLINE DISPUTE RESOLUTION WITH ZOOM

(Continued from page 7)

16. **Introductory private meetings:** Once everyone has been transferred to their own Plaintiff or Defendant caucus room, I will join you privately for a formal "get acquainted" session. I generally start with the plaintiff side as they brought the claim; followed by a parallel meeting with the defense team or teams. These introductory sessions typically take from 20-30 minutes. I cannot promise to spend the same amount of time in each room. Every dispute is different. What I can promise is that if I meet with one side, I will meet with the other.

PARTICIPATING IN THE MEDIATION

17. **Place cell phones and pagers on Silent Mode:** During the mediation, please set all cell phones, pagers, unused iPads or other electronic devices to silent mode or vibrate. The point is to minimize the number of distractions to insure a smooth-running mediation process.

18. **Respectful online communication:** Due to the nature of the online forum, it is especially important to allow each participant to finish their comments or statements before responding. Significantly, audio technology allows only one person at a time to be heard. The microphones cannot pick up two or more voices simultaneously. As a result, the person to whom you are speaking may not hear all or part of your comments if you don't wait until they have finished speaking. Common courtesy also dictates that every person be allowed to finish speaking without interruption. Treating everyone with respect and hearing them out contributes importantly to building a productive atmosphere which increases the likelihood the mediation will result in resolution.

19. **Dress code:** There is no specific dress code for mediation. Keep in mind, however, that mediation is a process for getting to know, learning about and gaining a better understanding of one other. It's important, therefore, to make the best impression possible on the mediator and the other side. You should want to appear as your best self, a credible and realistic reflection of who you are. First impressions are as important in mediation as any other significant interaction. If you normally dress up for business meetings and are comfortable doing so, by all means do so for the Zoom mediation. If you choose to dress casually, consider business casual – at least above the waist where the camera will show it.

20. **Hand gestures:** The camera does not always transmit your hand gestures or other non-verbal cues especially if you hold your hands below the camera level. It is important, therefore, to verbalize all communication as much as possible during an online session.

21. **Use a regular speaking voice:** The online format can amplify and exaggerate sound so maintaining a regular speaking voice is also important.

MANAGING THE ZOOM CONTROLS

22. **Zoom window:** To enlarge the Zoom window, move your cursor toward the upper right corner. Click on the box to create a full screen experience. Any time you wish to exit full screen you can press escape or click on the "exit full screen" box in the upper right corner. Other icons in the upper right corner are "speaker view" and "gallery view". Gallery view provides small windows so you can see everyone participating in the session at once. Speaker view places the speaker's image in the center of the screen in large format with everyone else in thumbnail views. Which view you choose is a matter of personal preference.

23. **Bottom Bar:** On the bottom left is a microphone icon and an arrow which will allow you to mute or unmute your microphone. The little up arrow opens a submenu to select a headset, speakers or your computer's internal speaker. Test your speaker and microphone to be sure they are working. To the right of the microphone icon is the camera icon which has its own submenu. You may select which camera to use, but usually the integrated web cam that's part of your computer is best.

24. **Action Bar:** In the center of the bottom bar are some additional tools:

    a. **Invite:** This allows inviting additional people to the meeting. You will not be using this button.

    b. **Share screen:** This button will allow you to share any documents on your screen with the mediator or other participants.

    c. **Chat:** This is an internal email system that allows all participants to send email notes to one another individually or to the entire group. The option of sending a message is available only for individuals in your same room. Once you are in your caucus room, you will be able to chat only with other individuals sharing your room.

    d. **Reactions:** This allows you to post a few basic emojis to the screen.

25. **In case of a technical glitch or failure:** In the event of any technical problems, do not panic. Panic is not your friend. Shut down your browser and restart the meeting from your email invitation. That should solve any problem. If it does not, you can text me at 734-417-0287.

26. **Worst Case Scenario:** In the event you are not able to reconnect, we can try completing the mediation via telephone conference call. If that becomes necessary, the call-in number and passcode are 712-432-3447 and 752649# ■

STARE DECISIS AND A LITIGATOR'S LAMENT

Stuart M. Israel
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1.

Early on in law school I learned about *stare decisis et non quieta movere.*

Black's Law Dictionary explained that the *stare decisis* doctrine calls on judges "to adhere to precedents and not unsettle things which are established."[1]

Comforting. People attracted to law school, more than most, value consistency, predictability, and—as Tevye put it—tradition, at least when it comes to things legal.

People who think that consistency is the hobgoblin of little minds,[2] or who revel in contradicting themselves,[3] generally write poetry, or go into sales, or become politicians.

Law school *seemed* the way to consistency. Law and order go together like a horse and carriage. But *non semper ea sunt quae videntur*—things are not always what they seem.

And *Black's* is not the only dictionary on the shelf.

2.

Ambrose Bierce, in *The Devil's Dictionary,* defines "precedent," the *sine qua non* of *stare decisis*. "Precedent," "In Law," is:

> a previous decision, rule or practice which, in the absence of a definite statute, has whatever force and authority a judge may choose to give it, thereby simplifying [the judge's] task of doing as [the judge] pleases.

As "there are precedents for everything," Bierce explains, the judge "has only to ignore those" precedents "against" the judge's "interest" and "accentuate those in the line of" the judge's "desire."

"Invention of the precedent elevates the trial-at-law from the low estate of a fortuitous ordeal to the noble attitude of a dirigible arbitrament"—*dirigible* meaning principled and rational, *arbitrament* meaning an authoritative resolution of a legal dispute.[4]

3.

Bierce didn't say so, but judicial accentuation also can make an appellate opinion *seem* more "dirigible arbitrament" than "fortuitous ordeal"—*fortuitous* meaning happening by accident or chance, *ordeal* meaning a painful or horrific experience.

That brings me to my lament—*lament* meaning an expression of disappointment over something unsatisfactory, unreasonable, or unfair.

My lament is over that species of appellate opinion that *seems* reasoned, informed, and comprehensive, but is not.

In the interest of professional self-preservation, I will provide an abstract explanation rather than citations.

4.

My lament is directed at the sort of opinion written by an appellate panel, or a panel majority, that details facts A, B, and C, quotes contract terms D and E, and cites decisions F and G for legal proposition H, all culminating in the *seemingly* reasoned and precedent-supported decision that my clients lose.

I say *seemingly*—and this is my lament—because the panel—or the panel majority—did not mention facts I and J, or contract term K, or decisions L, M, and N, all of which were precisely identified in my brief as supporting my faultless conclusion that—under the pertinent facts, the salient contract terms, the governing law presented in reasoned precedent, Truth, Justice, and the American Way—my clients should win.

My lament is not about what this sort of opinion *includes,* but about what it *omits.* Here is a literary reference to illustrate my point.

Dashiell Hammett, author of *The Maltese Falcon* (1930), wrote about his experience as a Pinkerton detective. He recounted: "The chief of police of a Southern city once gave me a description of a man, complete to the mole on his neck, but neglected to mention that he had only one arm."[5]

5.

Don't get me wrong. I don't expect to win every case. Law is more art than science. Sometimes judges have legitimate reasons for ruling against my clients. I can't think of any examples right now.

Nevertheless, I understand that you win some, you lose some. *C'est la vie.* Or, maybe more aptly, *c'est la guerre. Was mich nicht umbringt, macht mich stärker*—what doesn't kill me, makes me stronger. I'm sure these sentiments are quite comforting to clients.

It is disappointing to lose. My lament is that it is disappointing to the nth degree to lose when the panel or the panel majority misses—or ignores—the key points exactingly-made in my hard-wrought brief.

6.

Socrates—who never wrote an appellate brief—reportedly said:

> Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.

I'm with Socrates: courtesy, wisdom, sobriety, and impartiality. But I'd add humility.

Even Supreme Court justices, the late Vincent Bugliosi wrote, are "simply lawyers who wear black robes...nine ordinary human beings who are subject to all the infirmities that affect" humankind.[6]

Humility dictates judicial consideration of all the points made by the person upon whom the weight of an adverse decision will fall. Humility dictates, to borrow from Willie Loman, that "attention must finally be paid to such a person."[7]

—END NOTES—

[1] *Black's Law Dictionary* (4th ed. 1951)

[2] Ralph Waldo Emerson, "Self-Reliance" (1841): "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines....Speak what you think now in hard words, and tomorrow speak what tomorrow thinks in hard words again, though it contradict everything you said today."

[3] Walt Whitman, "Song of Myself," Section 51 (1892): "Do I contradict myself? Very well then I contradict myself, (I am large, I contain multitudes.)"

[4] Ambrose Bierce, *The Devil's Dictionary* (1911). Bierce also defined "Lawful" as "compatible with the will of a judge having jurisdiction."

[5] Dashiell Hammett, "From the Memoirs of a Private Detective," in *The Smart Set* magazine (March 1923)

[6] Vincent Bugliosi, *The Betrayal of America—How the Supreme Court Undermined the Constitution and Chose Our President* (2001) at 28. Chief Justice John Roberts said in 2005 that "a certain humility should characterize the judicial role," that "judges and justices are servants of the law, not the other way around." Admittedly, achieving the proper level of humility is made more difficult when everybody stands when you walk in to the room and calls you "Your Honor" and when year after year your academically-accomplished law clerks from top schools, and the bar-event crowds of potential consumers of your judicial services, raptly attend to your imparted wisdom and "seldom is heard a discouraging word, and the sky is not cloudy all day."

[7] Arthur Miller, *Death of a Salesman* (1949) ■

NAVIGATING UNCHARTERED WATERS — AN INVESTIGATOR'S PERSPECTIVE

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As this article is being written in April 2020, many peoples' lives have been upended by the COVID-19 pandemic and related restrictions on various activities. Many companies are struggling to sustain some semblance of what they once were. Companies are more likely short staffed, staffed with individuals who have been shuffled to a new position and/or staffed with individuals who lack institutional knowledge. Some companies have even shifted their focus to a different product or service and have completely different priorities than they had months ago.

These changes can seriously challenge a company's ability to effectively handle employee concerns. For example, if an employee complains about events that occurred prior to the pandemic, witnesses may be in a different position, in a different department, on leave, no longer with the company or perhaps no longer living.

Rules are changing by the day and sometimes by the hour. Regardless of how fast they are changing and how uncertain things will be, the one thing certain is that there will be rules and there will be people trying to make sense of them.

Different concerns, unique to the pandemic situation, may be raised. For example:

- Failure to accommodate;
- Discrimination involving the jobs or duties required of some but not all employees;
- Discrimination by laying off or furloughing some but not all employees;
- Discrimination by bringing some but not all employees back to work, or by allowing some but not all employees to continue teleworking;
- Issues involving out-of-classification work in organized workplaces;
- Harassment based on national origin ("Chinese Virus");
- Invasion of privacy concerns based on COVID -19; and
- Issues involving compliance with the many rules and regulations promulgated to address COVID-19 and related whistleblower claims.

Companies will need to respond quickly to questions or requests that they haven't faced before. Changes in personnel, operating procedures, telecommuting rules, customer interactions and other areas impacted by the COVID-19 pandemic and the political and business responses to it, all make responding to employee claims a more challenging endeavor. Fair, reasonable and effective responses require level-headedness, discipline and creativity on the part of HR directors and others in management. When a complaint is presented, the important thing is to keep one's eye on the ball – the objective to provide a prompt, thorough and impartial investigation – rather than get stuck on processes laid out in a written company policy that may not be feasible under the current circumstances.

Although preceding the COVID-19 pandemic, a recent Seventh Circuit case offers useful guidance on this point. The plaintiff in *Gamble v. Fiat Chrysler Automobiles,* No. 18 C 4520, 2020 WL 1445611 at *1 (N.D. Ill Mar. 25, 2020) an African American production supervisor, was terminated for violating Fiat Chrysler Automobiles' ("FCA's") Discrimination and Harassment Prevention Policy. Gamble challenged his termination, claiming that FCA's reasoning was a pretext for race discrimination and that FCA's human resources representative, Kelly Pollard, performed her investigation in a biased fashion, thus supporting the pretext. Gamble's claim that the HR investigator was biased was based upon her failure to get witness statements in violation of the company's policy and her failure to interview some individuals that Gamble requested be interviewed.

The court granted FCA's motion for summary judgment because it found that the investigator had conducted a reasonable investigation of the allegations brought against Gamble and honestly concluded that Gamble's conduct warranted his termination. The court found that because the investigator reached this honest belief after interviewing multiple individuals with relevant information, no reasonable jury could conclude that her decision to recommend Gamble's termination was pretextual. Even if the two individuals (identified by Gamble, but not interviewed) had some ulterior motive for making allegations against Gamble, because the investigator honestly believed the allegations, FCA's decision to terminate Gamble cannot be considered pretextual.

The *Gamble* case is in alignment with the Sixth Circuit on this issue. In *McLaughlin v. Fifth Third Bank, Inc.,* 772 F. App'x 300, 301 (6th Cir, 2019), the Sixth Circuit upheld summary judgment based on the strength of a bank's investigation where it found the bank had an honest belief supporting its decision even if the decision was not correct. Consistent with *Gamble,* the *McLaughlin* case teaches that an investigation need not be perfect and, indeed, its findings need not even be correct, so long as the investigation is reasonable under the circumstances and is conducted in good faith,

Take-aways:

1. Under the current COVID-19 conditions, there may be certain actions that an investigator might ordinarily undertake, or that are called for in an employer's investigation procedure guidelines, that are not feasible or even possible. The Gamble case supports the proposition that an investigation need not be perfect and need not adhere to the letter of every guideline to be fair and effective. Anything the investigator can do to show he or she protected the integrity of the process and did in fact complete a prompt impartial and thorough investigation under the existing circumstances will prove helpful. Such as:
   - Document the reason for the method of interview if different from normal, *e.g.,* video or audio rather than in person;
   - Document any admonitions given;

- Document any distractions that may have occurred during the interview;
- Document why certain individuals weren't interviewed;
- Document reasons for delays if any;
- Document abnormalities if any;
- Make credibility decisions; and
- Document support for the credibility decisions.

2. Because your HR or investigation department may be staffed differently, your handbook and complaint policies may not reflect the current reality of the organization. Even if it is not possible to change the written policies, it would be wise to identify a temporary contact person or number for people to contact if they have a concern. Perhaps this could be the individual who is the entity's COVID-19 Coordinator.

3. Individuals (including your investigators) may continue to get sick or be furloughed. Having a mechanism (or person) in place who can quickly re-assign the investigation to another person within the company or who can at least contact the complaining party and witnesses to inform them of the delay will also be helpful. Also, putting a mechanism in place to make sure that investigations are proceeding on track and are completed could prove important.

4. Document production may take longer as people working from home may not have the same technology or bandwidth. Some employees or other witnesses may be less responsive or harder to locate – especially if they have been furloughed. In-person interviews likely will need to be replaced by interviews using telephones, Zoom or similar technology, and investigators will need to become proficient with new tools.

Conclusion

Channels of communication will be disrupted. There will likely to be an increase in the volume of calls and requests for information. The current disruptions to workplaces have the potential to generate even more than the usual number of complaints under circumstances that make them more challenging to deal with. Making it a first priority to let people know who they can reach out to and how they can reach out to them will help both employees and management. Having a solid and well communicated process to ensure those in charge of receiving calls for assistance are actually receiving those calls, will never be more important.

The customary process of an investigation may change; the order in which various steps are taken may change; the manner in which they are done and who is available to do them all may need to change in light of changed circumstances. But case law suggests that the courts will not second guess an employer's reasonable decisions made on the ground – even if they depart at times from "the book" – so long as the investigator is acting in good faith to conduct a prompt, impartial and thorough investigation and has an honest belief supporting its decision and document its process. With the objective kept in focus, successful investigations are certainly possible. ■

"SIMPLE AND MOMENTOUS" – *BOSTOCK V. CLAYTON COUNTY* IS A LANDMARK VICTORY FOR LGBTQ+ EQUALITY

Sue Ellen Eisenberg
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"An individual's homosexuality or transgender status is not relevant to employment decisions."
– Opinion of the Court

On June 15, 2020, Justice Neil M. Gorsuch wrote in a 6-3 ruling (joined by Chief Justice John G. Roberts Jr. and Justices Ruth Bader Ginsburg, Sonia Sotomayor, Elena Kagan, and Stephen G. Breyer) that the prohibition against sex-based discrimination in Title VII of the 1964 Civil Rights Act protects employees from discrimination based on sexual orientation and gender identity. Two important takeaways emerge from this decision—as well as a call to further action.

In drafting the majority opinion, Gorsuch honored his textualist approach to statutory interpretation. He stated emphatically: "only the words on the page constitute the law adopted by Congress and approved by the President."[1] The opinion focused on the "ordinary public meaning" of Title VII's mandate that it is unlawful for an employer to discriminate against any individual "because of … sex."[2] With a focus on the text alone, the Court's opinion made clear that the expectations, or intentions, of lawmakers in 1964 were simply irrelevant to the analysis.

Analyzing the plain meaning of Title VII's text, the Court concluded that an employer violates the law when it intentionally fires an employee based in part on sex—and homosexuality and transgender status are inextricably bound up within the plain meaning of sex. Because sexual orientation and gender identity are included within Title VII's definition of sex, it unlawful for an employer to discriminate on these bases. Gorsuch used several examples to illustrate this point:

> Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.[3]

The discharge decision by the employer in this example necessarily hinges on the sex of the employee. Had the fired employee been female, the outcome would have been different. The sex of the employee, therefore, plays an unmistakable—and inextricable—role in the discharge decision. In short, Title VII's message is "simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions."[4] This is because discrimination predicated on sexual orientation or gender identity inherently entails discrimination because of sex.

Another important takeaway from the *Bostock* decision is that fact that it is a narrow one. Gorsuch stated, in no uncertain terms: "we do not purport to address bathrooms, locker rooms, or

(Continued on page 12)

"SIMPLE AND MOMENTOUS" – *BOSTOCK V. CLAYTON COUNTY* IS A LANDMARK VICTORY FOR LGBTQ+ EQUALITY

(Continued from page 11)

anything else of the kind."[5] He also stated that the manner in which the doctrines protecting religious liberty "interact with Title VII are questions for future cases too."[6] Although a religious liberty claim is not now before the Supreme Court, this dicta is significant because, in a concurring opinion in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), Gorsuch suggested that religious conservatives should enjoy broad exemptions from laws prohibiting discrimination on the basis of sexual orientation or gender identity. So for employees with bosses who object to LGBTQ+ individuals on religious grounds, their fate remains unclear.

Finally, the *Bostock* decision reflects the work of brave individuals and LGBTQ+ leaders who fought to make this possible. It also provides the necessary catalyst for additional action to ensure *consistent* protections for LGBTQ+ individuals at the state level as well as across all key areas of life. The *Bostock* decision does not amend the protections afforded by Michigan's Elliott-Larsen Civil Rights Act ("ELCRA"). This has profound practical consequences because Title VII applies to employers with 15 or more employees, while the ELCRA applies to employers with one or more employee. Consider the situation of a gay married couple in Michigan, one of whom works at Google while the other works for a small three-person law firm. They are both fired in part due to their homosexuality. The Google employee has legal recourse against his employer, while his husband does not. The ELCRA must be amended to protect members of the LGBTQ+ community and ensure uniformity across the employment landscape. Although not relevant to the theory of textualism underlying the *Bostock* opinion, amending the ELCRA in this manner is supported by Mel Larsen—one of its co-sponsors (and a former Republican member of the Michigan House of Representatives). In a recent article published in the *Lansing State Journal*, Mr. Larsen stated: "As one of the original authors of this law, I can state unequivocally the intent was to offer the broadest possible protections against discrimination of any kind."[7]

Similarly, the U.S. Congress must pass the Equality Act in order to provide consistent non-discrimination protections for LGBTQ+ people across all key areas of life, not just employment. This would include housing, credit, education, public spaces and services, federally funded programs, and jury service. Passed in the House by a bipartisan vote of 236-173 last May, the Equality Act seeks to amend existing civil rights laws—including the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, the Jury Selection and Services Act—to explicitly include sexual orientation and gender identity as protected characteristics.

—END NOTES—

[1] *Bostock v. Clayton County,* 590 U.S. ___, slip op. at 4 (2020).
[2] *Id.*
[3] *Bostock*, slip op. at 9-10
[4] *Bostock*, slip op. at 9
[5] *Bostock*, slip op. at 31
[6] *Bostock*, slip op. at 32
[7] Larsen, "Mich. Civil Rights Act was Meant to Include LGBTQ, I Know Because I Wrote It," *Lansing State Journal*, May 20, 2020 as updated on June 15, 2020. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

If I see a discipline report that says, "Porn discovered on office computer" I know what to expect.

Somebody walked by Jones's work computer while he was away from his desk, or he accidentally sent an attachment, or his computer got sent in for servicing. Dirty pictures were observed. Somebody dropped a dime. HR brought Jones in for a chat. He denied everything. Can't imagine how that stuff got there. Must be some kind of conspiracy cooked up by unknown people for unknown reasons.

Jones gets fired. His union claims there was no just cause for discharge. His employer says there was. I get the case because that's what I do.

In making my decision I ask myself which is more likely: the porn got on Jones's computer because he put it there, or it got there by itself?

I think I know the answer to that question. Finding porn on a computer is like finding a turtle on a fencepost. It didn't get there by itself. The burden of persuasion shifts to Jones and his union. If Jones didn't put it there, who did? And why? If no one comes up with an explanation that's more likely than the obvious one, Jones and his union lose the case. The penalty may or may not be appropriate, but the facts speak for themselves. *Res ipsa loquitur.*

So imagine my surprise when a tidal wave of really lurid porn starts turning up on my computer.

I subscribe to a mail list called Motor City Freecycle. People who have stuff they don't want post it on the list, and people who want it come and get it. It's about reducing waste and reusing things and sharing. It's a nice idea. There are similar sites all over the country. I gave away an old desk once and we got some bamboo for the garden another time.

Well, somebody hacked the list and started posting ads for porn movies. With big pictures. We're not talking suggestive, soft core here. We are talking serious, nasty business. Gross, really. And there it is on my desk.

I tried to get rid of it by setting up a filter that would send it to trash. Didn't work. All my email went to trash. My computer guy came and restored my email, but the porn came back with it. In full color.

This raises several questions. Like who is doing this, and why? They aren't making any money. I doubt anyone is buying their movies or even clicking on the links. It must take time and effort to post these things. What possible benefit can these people expect to gain from it? And if they're not getting anything out of it, why are they doing it? To hurt the people on the Freecycle list? Why? And why in this particular way? For what possible reason?

And that takes us back to Jones and the porn at work cases. If this stuff can turn up on my desk from my Freecycle list, maybe Jones is telling the truth. Maybe he doesn't know where the stuff on his computer came from. Maybe I'm not as worldly and wise as I thought. Maybe, as the British scientist J. B. S. Haldane wrote nearly one hundred years ago, "The universe is not only queerer than we suppose, but queerer than we can suppose." ■

SUPREME COURT UPDATE

Regan Dahle
Butzel Long

Supreme Court Tackles Causation Standards

The issue before the Supreme Court in *Comcast Corporation v. National Association of African American-Owned Media,* was whether a plaintiff must demonstrate "but-for" or "motivating factor" causation in order to prevail on a claim of race discrimination under 42 U.S.C. § 1981. Plaintiffs were an African American-owned operation of television networks that, for years, had unsuccessfully sought to contract with Defendant Comcast to carry their networks on its platform. They sued Comcast claiming that its decision not to carry their networks was discriminatory and violated 42 U.S.C. § 1981. The trial court dismissed Plaintiffs' claims on the pleadings for the reason that they pled no facts that race was a but-for factor in Comcast's decision. The Ninth Circuit Court of Appeals reversed the decision of the trial court, finding that it improperly applied a but-for standard to its analysis of Comcast's motion for summary judgment, instead of a motivating factor standard.

The Supreme Court heard oral argument in the case on November 13, 2019 and issued its opinion on March 23, 2020. In reversing the Court of Appeals, the Supreme Court noted first that the "ancient and simple but for common law causation test supplies the default or background rule against which Congress is normally presumed to have legislated when creating its own new causes of action. . . . That includes when it comes to federal antidiscrimination laws like §1981." *Comcast Corp v. Natl Assn of African Am-Owned Media,* 140 S. Ct. 1009 (2020) *(citations omitted).* The Court rejected Plaintiffs' argument that they only had the burden of proving that race was a motivating factor in Comcast's decision; it also rejected Plaintiffs' alternate argument that, while at trial they may have the burden of proving that race was a but-for factor, at the pleading stage, their burden was to prove that race was merely a motivating factor. The Court also refused to find that because Congress included a motivating factor causation standard in Title VII of the Civil Rights Act of 1991, that same standard should be read into 42 U.S.C. § 1981. Instead, the Court succinctly instructed that, "[t]o prevail [under 42 U.S.C. § 1981], a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right. *Comcast Corp v Natl Assn of African Am-Owned Media,* 140 S Ct 1009, 1019 (2020).

On April 6, 2020, the Supreme Court issued its Opinion in *Babb v. Wilkie,* where the issue was whether a federal employee suing under the federal-sector provision of the Age Discrimination in Employment Act must prove that her age was a "but-for" cause of an adverse employment action. Noris Babb worked for the Department of Veterans Affairs as a pharmacist. She sued the VA for age discrimination after she failed to receive several transfers and promotions. The trial court applied the *McDonnell-Douglas* burden shifting analysis and concluded that Babb's claims could not survive summary judgment. Babb appealed to the Eleventh Circuit Court of Appeals, claiming that the trial court erred in applying the *McDonnell-Douglas* analysis. She argued that because the federal-sector portion of the Age Discrimination in Employment Act provides that "all personnel actions affecting employees or applicants for employment who are at least 40 years of age *shall be made free from any discrimination based on age,*" the trial court should have applied a motivating factor standard. 29 U.S.C. § 633a(a); *Babb v. Department of Veterans Affairs,* 743 Fed. Appx. 280 (11th Cir. 2018) (*emphasis in original).* While the Court of Appeals saw merit in Babb's argument, it held that precedent precluded reaching that conclusion and denied Babb's appeal.

The Supreme Court agreed with Babb. The Court held that the Federal Government must make personnel decisions that are untainted by discrimination and that a public-sector employee can establish a violation of § 633a(a) without proving that discrimination was a but-for factor in a personnel decision. *Babb v. Wilkie,* 140 S. Ct. 1168, 1172 (2020). The Court went on to explain, however, that simply proving they were subjected to unequal consideration would not afford a public-sector employee a remedy like reinstatement, back pay or compensatory damages. Instead, to be entitled to those remedies, a public-sector employee must prove that their age was the but-for cause of the employment decision. *Id.* at 1177–78. The Court based its opinion on the traditional principle of tort and remedies law that a remedy should place the victim of a legal wrong "in the position they would have been in had the wrong not occurred," not in a better position. And the Court cited precedent "in which" it held that "where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting damages relief." *Id. (citations omitted).* The Court remanded the case to the district court to apply the proper causation standard to Babb's proofs. ■

JUDICIAL DEFERENCE AND ENFORCEMENT OF LABOR ARBITRATION AWARDS

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CBA interpretation and application are the province—and the special expertise—of labor arbitrators—not courts—under federal law, including the *Steelworkers Trilogy* and its progeny.

"The seminal Supreme Court instruction" that national policy favors labor arbitration is "found in the *Steelworkers Trilogy,* three cases simultaneously decided in 1960." The "key lesson" from the *Steelworkers Trilogy* is that the "judiciary shall defer to the method selected by the parties to settle their differences"—"final and binding arbitration." *Titan Tire v. USW,* 656 F.3d 368, 371-372, 374-375 (6th Cir. 2011). See *Knollwood Cemetery Ass'n v. USW,* 789 F.2d 367, 369 (6th Cir. 1986) ("It is well-settled that federal labor laws embody a policy favoring arbitration, and courts are generally required to refrain from reviewing the merits of an arbitrator's award.").

Labor arbitrators, "more so than the courts, possess the proper experience and expertise to resolve labor disputes." *USW v. Cooper Tire & Rubber Co.,* 474 F.3d 271, 278 (6th Cir. 2007) (citations omitted).

See *USW v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582 (1960) (recognizing that the "ablest judge cannot be expected to bring the same experience and competence" in CBA application and interpretation as labor arbitrators) and *United Paperworkers v. Misco, Inc.,* 484 U.S. 29, 37-38 (1987) ("Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning" of the CBA that the parties' "agreed to accept.").

Ahead, I summarize the key Supreme Court and Sixth Circuit decisions enforcing labor arbitration awards.

A. Supreme Court limits judicial review

Steelworkers Trilogy: **(1)** *USW v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 596-97 (1960) (federal courts are not to "review the merits of an arbitration award," but only determine whether the award "draws its essence from the collective bargaining agreement"); **(2)** *Warrior & Gulf,* 363 U.S. at 582–83 (an "order to arbitrate [a] particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute"); and **(3)** *USW v. Am. Mfg. Co.,* 363 U.S. 564, 568 (1960) (the underlying "question of contract interpretation is for the arbitrator" and courts "have no business weighing the merits of the grievance").

United Paperworkers v. Misco, Inc., 484 U.S. 29, 37-38 (1987) ("Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning" of the CBA that the parties' "agreed to accept.").

Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001) (internal quotations marks omitted; "[I]f an arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision.").

B. Vacating awards is "rare" in the Sixth Circuit

The law governing federal courts asked to vacate labor arbitration awards is succinctly addressed in *Teamsters Local 436 v. J.M. Smucker Co.,* 541 Fed. Appx. 529 (6th Cir. 2013).

Teamsters draws on the more elaborate discussion in *Michigan Family Resources, Inc. v. SEIU Local 517M,* 475 F.3d 746 (6th Cir. 2007) *(en banc)* which, in turn, draws on the *Steelworkers Trilogy, Misco,* and *Garvey.*

Michigan Family Resources, 475 F.3d at 753-754 ("In determining when a court may vacate an arbitration award, we apply a 'procedural aberration' test, which includes" the question whether "in resolving any legal or factual disputes in the case, was the arbitrator 'arguably construing or applying the contract?'"; the "arguably construing" inquiry permits courts to vacate only the "most egregious awards," and "respects the parties' decision" to hire an arbitrator "to resolve their disputes" and the "finality clause" in CBAs).

Teamsters declined to vacate an award even though the arbitrator committed "serious," "improvident," and "silly" errors and the arbitrator's "reasoning" was "cursory, meandering, and generally unclear." The court did not have "the authority" to "correct" these deficiencies because—*Teamsters* explained—the arbitrator "did not neglect" the facts, quoted the CBA terms, and "arguably" was "construing or applying the CBA." 541 Fed. Appx. at 533-536.

Teamsters followed Sixth Circuit standards, derived from Supreme Court precedent. These standards are "so sweepingly deferential" to labor arbitration awards as to permit "barely any review at all" in federal courts. 541 Fed. Appx. at 536.

C. Sixth Circuit enforcement

Sheet Metal Workers v. Port Authority, 2020 WL 3045724 at *3 (6th Cir. 2020) (enforcing award, noting that the employer's argument "is a plausible—if not persuasive—construction of the CBA," but "it is not the only one" and the arbitrator's "analysis clearly constitutes an interpretation of the CBA" and "that alone is enough to foreclose us from disturbing the award").

Zeon Chemicals v. UFCW, 949 F.3d 980, 982-983 (6th Cir. 2020) (citation omitted) ("Our review of arbitration awards is deferential, especially so when it comes to challenges to the merits of an arbitrator's interpretation" of the CBA; "What violates this arguable-construction standard? An interpretation 'so untethered' from the terms of the contract that it conveys a lack of 'good-faith interpretation.'").

Johns Manville v. Teamsters, 784 F. App'x. 425, 426-427, 429 (6th Cir. 2019) ("Because the arbitrator acted within the scope of his authority in resolving the dispute and arguably construed and applied" the CBA, "we reverse the district court and remand with instructions to enter an order enforcing the arbitration award"; "the parties committed the dispute—whether Johns Manville acted without just cause—to arbitration.").

Royal Ice Cream Co. v. Teamsters, 506 F. App'x. 455, 456-457 (6th Cir. 2012) ("In challenging the district court's decision, the companies face a steep climb. Review of an arbitration award is 'one of the narrowest standards of judicial review in all of American jurisprudence'"; the "arbitrator's 43-page opinion satisfies this modest standard. To start, the arbitrator construed the key section of the CBA").

GM Grand Detroit v. UAW, 495 Fed. App'x. 646, 649-650, (6th Cir. 2012) ("The arbitrator arguably interpreted the collective

bargaining agreement when he held that the term 'just cause' as used in the agreement encompassed both substantive and procedural components.").

Titan Tire v. USW, 656 F.3d 368, 373, 374 (6th Cir. 2011) (citation omitted) ("The only issue is whether, in making the just-cause determination, the arbitrator arguably construed or applied the contract"; "There is no indication in the arbitrator's twenty-four-page opinion reaching this conslusion that he 'was doing anything other than trying to reach a good-faith interpretation of the contract.'").

Equitable Resources v. USW, 621 F.3d 538, 549 (6th Cir. 2010) (quoting *IAM v. TVA,* 155 F.3d 767, 772 (6th Cir. 1998) (The "'extraordinary deference given to an arbitrator's ultimate decision on the merits applies equally to an arbitrator's threshold decision that the parties have indeed submitted a particular issue for arbitration.'").

Lattimer-Stevens Co. v. USW, 913 F.2d 1166, 1169 (6th Cir. 1990) ("When courts are called on to review an arbitrator's decision, the review is very narrow; one of the narrowest standards of judicial review in all of American jurisprudence.").

Tenn. Valley Auth. v. Tenn. Valley Trades & Labor Council, 184 F.3d 510, 515 (6th Cir. 1999) (quotation marks and citation omitted) (A court may not reject an arbitrator's findings of fact "simply because it disagrees with them.").

D. Awarding fees

Knollwood Cemetery v. USW, 789 F.2d 367, 369–70 (6th Cir. 1986), citing *Summit Valley Industries v. United Brotherhood of Carpenters,* 456 U.S. 717 (1982) (applying *Summit Valley*—which "holds that the American rule would still allow a fee award if a party pursues or defends a lawsuit in bad faith or without justification"—to employer action to vacate arbitration award).

Chippewa County War Memorial Hospital v. MNA, 2017 WL 3456297 at *4 (W.D. Mich.) (awarding fees because "no reasonable attorney could have thought that the challenge to the arbitration award in this case had any merit" and there was no "legitimate basis to challenge the arbitrator's award"). ■

WRITER'S BLOCK?

You know you've been feeling a need to write a feature article for *Lawnotes*. But the muse is elusive. And you just can't find the perfect topic. You make the excuse that it's the press of other business but in your heart you know it's just writer's block. We can help. On request, we will help you with ideas for article topics, no strings attached, free consultation. Also, we will give you our expert assessment of your ideas, at no charge. No idea is too ridiculous to get assessed. This is how Larry Flynt got started. You have been unpublished too long. Contact *Lawnotes* editor Stuart M. Israel at Legghio & Israel, P.C., 306 South Washington, Suite 600, Royal Oak, Michigan 48067 or (248) 398-5900 or israel@legghioisrael.com.

MERC UPDATE

Andrew J. Gordon
White Schneider PC

A summary of two recent decisions issued by the Michigan Employment Relations Commission (the "Commission") follows. Decisions of the Commission may be reviewed on the Bureau of Employment Relations' website at www.michigan.gov/merc.

Schoolcraft Community College -and- Schoolcraft College Faculty Forum -and- Nicholas Marcelletti, an Individual Charging Party, Case Nos. C18 E-037, C18 I-090, CU18 F-017, and CU18 I-028 (March 13, 2020)

Charging Party, Nicholas Marcelletti, initiated four (4) unfair labor practice Charges against his former employer, Schoolcraft Community College (Employer), and his labor union, the Schoolcraft College Faculty Forum (Union), between May 8, 2018, and October 1, 2018. The Employer and the Union were parties to a collective bargaining agreement (CBA) in effect from August 2015 through August 2018. The various Charges were consolidated and assigned to Administrative Law Judge (ALJ) Travis Calderwood.

Marcelletti was employed by the Employer as a part-time probationary professor. On May 2, 2018, Marcelletti was notified by the Employer that it was discontinuing his services for poor performance. According to Marcelletti's account of events, on or about May 7, 2018, he spoke with Dean Cheryl Hawkins (Dean Hawkins) "regarding filing a grievance pertaining to his termination." Dean Hawkins allegedly told him the "decision was final" as to his termination. Thereafter, Marcelletti approached representatives from the Union to discuss filing a grievance over his termination. Marcelletti alleged he was told the Union did not grieve the termination of part-time probationary faculty members. On May 8, 2018, Marcelletti filed his first Charge (Case No. C18 E-037) against the Employer, alleging it had *inter alia* "unlawfully broke[n] the terms and conditions of [his] contract." On June 12, 2018, Marcelletti filed a Charge (Case No. CU18 F-017) against the Union, alleging *inter alia* that the Union's failure to grieve his termination constituted a "breach of contract" and "taking fees under false pretenses."

On August 14, 2018, the Union grieved Marcelletti's termination. On August 20, 2018, the Employer denied the grievance on the basis that it was untimely since it was filed after the 15-day contractual grievance window had lapsed. The Employer further denied the Union's grievance on the basis the CBA prohibited grievances over the discontinuation of the employment of a probationary part-time faculty member based on the member's poor work performance.

On September 7, 2018, Marcelletti filed another Charge (Case No. C18 I-090) against the Employer alleging it had "failed in its contractual responsibility to inform [him] of his right to file a

(Continued on page 16)

MERC UPDATE

(Continued from page 15)

grievance." Marcelletti based the Charge on his conversation with Dean Hawkins, in which she told Marcelletti the Employer's "decision was final." On or about September 10, 2018, Marcelletti filed another Charge (Case No. CU18 I-028) against the Union. The final Charge alleged the Union had admitted its prior position with respect to filing a grievance was based on a misinterpretation of the CBA. ALJ Calderwood issued Marcelletti an order to show cause as to why Case Nos. C18 E-037 and CU18 F-017 should not be dismissed. The Employer and the Union filed separate motions to dismiss Marcelletti's remaining Charges.

ALJ Calderwood reviewed Marcelletti's Charges against the Employer under Sections 10(1)(a) and (c) of PERA. He noted that a public employer does not necessarily violate PERA every time it treats an employee unfairly, or even unlawfully. Accordingly, ALJ Calderwood recommended dismissal of the two Charges against the Employer for failure to allege a PERA violation.

ALJ Calderwood reviewed Marcelletti's Charges against the Union for breach of its duty of fair representation. ALJ Calderwood noted that to succeed on a claim that a union breached its duty of fair representation in its handling of a grievance, the charging party must establish not only that the union breached its duty but also the employer breached the collective bargaining agreement. ALJ Calderwood found there was no articulated rationale in the record for how the Employer breached the CBA, and there was support for the position that the CBA precluded grievances challenging the termination of a probationary part-time professor based on poor performance. Accordingly, ALJ Calderwood also recommended dismissal of the two Charges against the Union.

Marcelletti filed exceptions to ALJ Calderwood's *Recommended Order* dismissing all four Charges. Marcelletti alleged that ALJ Calderwood's ruling had been biased in favor of the respondents. The Commission noted that Marcelletti identified nothing in the record to establish any bias on the part of ALJ Calderwood. The Commission looked to the Michigan Court of Appeals ruling in *Armstrong v Ypsilanti Charter Twp,* 248 Mich App 573, 597; 640 NW2d 321 (2001), and held that to establish judicial bias, the party must establish that the trial court was actually biased against the party. Judicial rulings, in and of themselves, almost never constitute a valid basis for alleging bias. Since Marcelletti had not sufficiently established any judicial bias, the Commission found no merit to his exceptions and issued an *Order* dismissing the Charges.

University of Michigan Health System -and- AFSCME Council 25, Local 1583 -and- Ronney M. Harrell, an Individual Charging Party, Case Nos. 19-H 1754-CE and 19-H-1762-CU (February 28, 2020)

Charging Party, Ronney M. Harrell, initiated unfair labor practice Charges against his employer, the University of Michigan Health System (Employer), and his labor union, AFSCME Council 25, Local 1583 (AFSCME), on August 29, 2019. The Charges were assigned to Administrative Law Judge (ALJ) David M. Peltz.

Harrell had been employed by the Employer since February 2013. In his Charge against the Employer (Case No. 19-H-1754-CE), Harrell initially alleged that beginning in October 2015 the Employer had committed "various unfair labor practices and contractual violations" which consisted of: discipline and intimidation for exercising the grievance process; harassment through job assignments; unfair overtime distribution; creating a hostile work environment; hazardous work assignments; and verbal abuse from management. While Harrell's Charge did not provide further detail, it indicated that "[s]tatements with dates along with witness statements shall follow very shortly." At the same time, Harrell filed a Charge against AFSCME (Case No. 19-H-1762-CU), in which he alleged that he had requested AFSCME file grievances on his behalf in 2015, but AFSCME had not allegedly responded to his requests nor provided Harrell with information on the status of those disputes.

On September 30, 2019, the Employer filed a motion for a more definite statement. The Employer's motion alleged Harrell's Charge did not comply with Rule 151(2), R 423.151(2) of the General Rules and Regulations of the Employment Relations Commission, which requires a charge to include a clear and complete statement of the facts which allege a violation of PERA. On October 2, 2019, ALJ Peltz directed Harrell to file a more definite statement as to both Charges. Harrell responded on October 16, 2019, by filing separate numbered lists, but not providing much, if any, additional facts or detail. ALJ Peltz reviewed Harrell's responses and determined he had failed to comply with the order for a more definite statement.

Thereafter, on October 18, 2019, ALJ Peltz issued Harrell an order to show cause why his Charges should not be dismissed for failure to state a claim. Harrell responsed on November 13, 2019, with four numbered paragraphs stating alleged additional facts against the Employer and AFSCME.

After reviewing Harrell's response to the order to show cause, ALJ Peltz first recognized the power of an ALJ to order the dismissal of a charge upon the ALJ's own motion, including on grounds that the charge fails to state a claim upon which relief can be granted. ALJ Petlz then recognized Sections 10(1)(a) and (c) of PERA prohibit a public employer from interfering with an employee's Section 9 rights, but PERA does not prohibit all types of discrimination or unfair treatment by a public employer nor provide a remedy for a breach of contract claim asserted by an individual employee. The Commission's jurisdiction as to an individual is limited to determining whether his rights have been violated under PERA. ALJ Peltz determined Harrell's Charge against the Employer lacked the factual specificity required by the Commission's General Rules and Regulations. Likewise, ALJ Petlz determined Harrell's Charge against AFSCME did not specifically identify any conduct which violated PERA. Accordingly, ALJ Petlz issued a *Recommended Order* dismissing both Charges. No exceptions were filed. ■

THE TRUTH IS RARELY PURE AND NEVER SIMPLE

Stuart M. Israel
Legghio & Israel, P.C.

The above title is from Oscar Wilde's play, *The Importance of Being Earnest* (1895).

Wilde's immutable proposition is of great importance to we who engage in the adversary system. We are concerned about ethical advocacy, witness "coaching," cross-examination, the limits of human memory and perception, and, as the oath puts it, "the truth, the whole truth, and nothing but the truth."

I ruminated on lawyers and truth during my pandemic-induced home confinement.

When stuck in one's basement—spared commuting, meetings and court appearances, and other time-consuming inefficiencies of the way things used to be—one has time for—and to write about—ruminations.

1.

The lawyer's obligation to the truth is addressed in the American Bar Association *Model Rules of Professional Conduct* (the "MRPC"), the similar Michigan RPC, and other "ethics" codes and rules for lawyers.

Truth is an important consideration in meeting the obligations addressed by MRPC 1.6, 3.3, 3.4, 4.1, and 8.4 and the comments accompanying those rules and by disclosure and discovery rules. I expect you will reread the rules and comments soon, but for now I summarize: a lawyer is obligated to the truth—*within limits.*

2.

The rules provide guidance, but things aren't always pure and simple. The rules meaningfully distinguish between what the lawyer knows about the truth and what the lawyer *believes or suspects* about the truth.

Sometimes the ethical lawyer is obligated to present as *true* evidence that the lawyer suspects is *not true,* or at least is *not the whole truth.* Sometimes client interests obligate the ethical lawyer to withhold, or distort, pertinent truths.

Of course, the ethical lawyer cannot properly "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." MRPC 8.4(c). Nor can the ethical lawyer "knowingly assist or induce another to do so, or do so through the acts of another." MRPC 8.4(a).

But sometimes, *to be ethical*—to provide responsible, confidential, and zealous representation—the lawyer must misdirect, or mislead, or put a thumb on one side of the scale, or put the em*pha*sis on the wrong syl*la*ble, or otherwise deviate from what is—or what the lawyer suspects, or even knows is—the truth, the whole truth, and nothing but the truth.

Take cross-examination, for example, discussed next.

3.

Professor Stephen L. Carter clinically assesses cross-examination, the centerpiece of the art and science of trial advocacy.

> In cross-examination, a lawyer will try to make even a witness he knows to be telling the truth appear to be at best confused and at worst a liar. In a system that relies on the adversity of the parties to discover the truth, a lawyer can do nothing else. Still, this conveying of a false impression— trying, in effect, to fool the jury into disbelieving a truthful witness—is nothing but an expedient lie.[1]

Professor Alan Dershowitz writes that "when you become a lawyer, you have to define good differently than you did before." As a lawyer, Dershowitz writes, "you're someone else's representative," "acting on their behalf," as "their spokesperson." As a lawyer, "doing good" often means "doing good specifically for your client, not for the world at large, and certainly not for yourself."[2]

That is why, Dershowitz writes, the ethical lawyer can defend a client accused of a crime when the lawyer suspects that the innocence-professing client is not telling the truth, and even when the client tells the lawyer—in confidence—that the client is guilty.

The lawyer serves the client, and simultaneously the adversary system, even while withholding or distorting the truth by, as Carter describes, making a truthful witness appear to be confused or lying. This obligation to the client is, Dershowitz writes, the ethical lawyer's "role responsibility."[3]

4.

Barrister and creator of Rumpole of the Bailey, the late Sir John Mortimer, wrote that the defense advocate's responsibility in a criminal case "is to put the case for the defence as effectively and clearly" as would the client if the client "had an advocate's skills."

The advocate's "belief or disbelief in the truth" of the client's story is "irrelevant." A barrister can't ethically call the client "to tell a story" the barrister *knows* to be untrue, but if the client "says he didn't do it," the barrister must present the client's story. The barrister is "a spokesman in an argument which is directed not at uncovering the truth, but at deciding whether or not the prosecution has proved guilt."

The barrister's ethical responsibility, Mortimer observes, sometimes requires "the suspension of disbelief."[4]

This ethical responsibility also governs labor and employment lawyers called on, say, to defend the accused at discharge arbitrations, to represent managers denying discriminatory

(Continued on page 18

THE TRUTH IS RARELY PURE AND NEVER SIMPLE

(Continued from page 17)

motives, or to disclaim collectively-bargained lifetime retiree healthcare promises.

So, it seems, ethical advocates may be *obligated* to conceal or distort the truth and to employ the "expedient lie." This is ethical because it serves the adversary system which, ultimately, we believe, serves the truth, as discussed next.

5.

A foundational premise of our adversary system is that the truth is most likely to emerge from the ordered clash of partisan interests, zealously represented.

The lawyer-client privilege allows candid communications, cloaked in confidentiality, shielded from adversaries, judges, jurors, and everyone else. This confidentiality, we believe, serves the adversary system which, we trust, will lead to truth and justice—or at least to fair adjudication and final resolution.

Cross-examination has the same salutary end. Bentham called cross-examination "a security for the correctness and completeness of testimony." The epigraph to Wellman's *The Art of Cross-Examination,* first published in 1903, calls cross-examination "the surest test of truth and a better security than the oath." Wigmore famously called cross-examination "the greatest engine ever invented for the discovery of truth." You can look it up.

So, our system trusts—or hopes—as Shakespeare put it, that "in the end truth will out."

Is this so? Is the best road to truth paved with concealment, distortion, false impressions, expedient lies, and adversary self-interest? To quote Tevye from *Fiddler on the Roof:* "I'll tell you...I don't know."

As they say in law school, discuss and decide. While doing so, consider—borrowing from Churchill on democracy—that our adversary system might be the "the worst" ever— "except for all" the others.[5]

6.

Dershowitz offers more perspective:

> Despite the bad rap that lawyers get for being amoral, even immoral, the reality is that no profession obsesses more about morality and ethics than the legal profession. We draft codes, we teach classes, we require examination, we have ethics committees and we actually discipline and disbar—though not enough—for failure to comply with these generally high standards.

Ethical lawyers must "resolve all ethical doubts" in their clients' favor. Lawyers do not have a "license to lie," Dershowitz affirms, but "do have a license to keep deep dark secrets" and "advocate outcomes" which the lawyers know are "objectively unjust but subjectively beneficial" to their clients.[6]

An ethical lawyer must sometimes struggle to resolve tensions between the lawyer's responsibilities as the client's advocate and, as the MRPC Preamble puts it, as "an officer of the legal system and a public citizen having special responsibility for the quality of justice."

It ain't always easy. Professors Carter and Dershowitz show that the truth is rarely pure and never simple. Mortimer—who kept his "disbelief" hanging in the Old Bailey robing room for years—observed that "life as a mouthpiece for more or less convincing stories can, in the end, prove unsatisfactory."[7]

Dershowitz writes that if you are "a decent and thinking person, you will never grow entirely comfortable with some of the tactics you will be required to employ as an effective and ethical lawyer."[8]

7.

This year marks my first pandemic, but over the decades I have ruminated, written, talked to lawyers, and taught and tested law students, about the lawyer's obligation to the truth.[9] Here are my conclusions, to date: **(1)** the truth is rarely pure and never simple; **(2)** ethical lawyers must ruminate, and bring care, thought, zeal, and humility to their advocacy work; and **(3)** ethical lawyers inevitably will suffer periodic decision-making difficulties, doubts, and disappointments.

Caveat litigator. If you want distance from difficult decisions, doubts, and disappointments, you can maybe switch to estate planning.

—END NOTES—

[1]Stephen L. Carter, *Integrity* (1996) at 112. As the Yiddish proverb teaches, "a half truth is a whole lie."

[2]Alan Dershowitz, *Letters to a Young Lawyer* (2001) at 41.

[3]Dershowitz at 44-45.

[4]Sir John Mortimer, *Where There's a Will* (2003), chapter 11, "Lying," at 85.

[5]*Cf*., the European civil law system which, to my admittedly casual eye, is marred by rigidity, technicality, bureaucracy, and abstraction. To again borrow from Churchill, "in this world of sin and woe," *no one* "pretends that" the American adversary system and its elected and appointed judicial officers are "perfect or all-wise," but for all their flaws, they may be better than the alternatives.

[6]Dershowitz at 151-152, 158.

[7]Mortimer at 85.

[8]Dershowitz at 160. Discomfort may derive in part from popular disapproval, or misunderstanding, of the lawyer's role in the adversary system. Carter writes that while lawyers "may share a vision of integrity," the "lies we are forced to tell, and the convoluted arguments we must offer to justify them, virtually ensure that lawyers will be not only disliked but distrusted." At 120. Some dislike lawyers for their perceived "quiddities," "quillities," and "tricks"—arguments, fine distinctions, and, well, tricks. W. Shakespeare, *Hamlet* (1603), Act V, Scene 1.

[9]See—or maybe buy—my book *Taking and Defending Depositions—Second Edition* (ALI-CLE 2017). Chapter 7, on which this article draws, is titled "Truth, Memory, and the Ethical Boundaries of 'Coaching.'" See also my essay titled "The Lawyer's Obligation to the Truth in Litigation, Negotiation, and Mediation," collected in Israel and Goldman, *Opinions—Essays on Lawyering, Litigation and Arbitration, the Placebo Effect,* Chutzpah, *and Related Matters* (Amazon Createspace 2016) at 125. My views on lawyers, truth, and advocacy ethics have appeared in various manifestations in *Lawnotes,* ICLE and law school materials, and elsewhere, dating back decades. I became interested in these topics early on, when I worked as a public defender and taught criminal appellate practice. Like Dershowitz and Mortimer, I was frequently asked how I could represent people—*i.e.,* "crooks"—who I knew were guilty. When you do criminal appeals, *all* your clients are convicted criminals. My answer, of course, as Dershowitz later put it, is that it was my "role responsibility" to serve my clients and, simultaneously, the integrity of the adversary system. ■

MERC NEWS

Sidney McBride
Interim Bureau Director
Bureau of Employment Relations

The Age of COVID-19

One certainty exists today, the unexpected events since February 2020 have forced most Americans (and others) to embrace a "new normal" when handling the routine business operations of our personal and work lives. This same "unpredicted" shift has occurred in the business life at MERC. In the midst of various State issued executive orders designed to protect lives and promote efficiency during this COVID-19 crisis, the Commission and MERC staff quickly pushed to develop and implement various changes to allow the agency to continue to provide superior public service while under less convenient conditions. Additionally, parties, constituents and public citizens who rely on MERC processes for dispute resolution purposes or to obtain general agency information needed a remote means to do so with few impediments or complexities. Within one week into Michigan's initial Stay at Home order (issued on March 23, 2020), much of this agency's operations were successfully retooled for staff to telecommute when working with minimal need to access a physical MERC office. Fortunately, the 2018 launch of the agency's online case filing system—MERC e-File, has helped to attain these goals for staff and non-staff users. Now, several months later, in retrospect the COVID-19 pandemic has caused several advancements planned for the future to be acted on sooner than later. Below are highlights on a few examples of the temporary and long-term impact of COVID-19 on MERC practices.

a. Electronic Filing & Online Case Access

Submit MERC case filings via MERC e-File, or by using the four distinct e-mail filing addresses for mediation, grievance arbitration, elections and ULP's. With MERC e-File, new cases can be filed without a login. Case filings on existing cases require a user to log into the system using their MILogin for Citizen account, searching for the specific case and submitting the desired new event filing (e.g., brief filed) plus any associated uploads. Of course, mail, in person and fax filing methods continue, but are the less preferred filing methods. Details on using MERC e-File and the e-mail filing addresses is available on the agency website at www.michigan.gov/merc.

b. Remote Mediation & Remote Hearings

The several state issued executive orders helped to jumpstart this agency's reliance on video and audio-conferencing technology to conduct prehearing conferences, mediation sessions and case hearings. Existing programs such as Microsoft Teams and Zoom, coupled with information available from the State Court Administrators Office (SCAO) and various state courts were used to fast track the overall process used at MERC. Agency staff became more skillful by viewing various webinars and other training materials focused on remote video conferencing business processes. Soon, agency labor mediators assisted parties to successfully reach settlement agreements in several collective bargaining negotiations using remote mediation (rather than the traditional "in-person" method). Likewise, remote hearings were conducted on MERC cases by agency panel members and the ALJs from our sister State agency, the Michigan Office of Administrative Hearings and Rules (MOAHR). The ability to conduct mediation sessions and case hearings via remote means permitted parties to continue toward the resolution of their outstanding MERC cases, notwithstanding other interruptions caused by the COVID-19 crisis.

Post COVID-19

Exactly when the post COVID-19 period will begin is uncertain. Predictions span from a couple months to over one year. Either way, many temporary changes implemented to circumvent the COVID-19 disruptions are here to stay, even if only in a limited form. Recently, the Commission unanimously affirmed this agency's direction toward mandatory e-filing of MERC cases. Getting to that point will involve several steps including minor changes to a few existing MERC rules. Similarly, on the horizon are operational and rule changes which support the discretionary use of remote processes including mediation and hearings when circumstances are most favorable to do so. Stay tuned to the MERC website as well as future releases of *Lawnotes* as more details develop. ■

GIVING AN EFFECTIVE OPENING STATEMENT IN A LABOR ARBITRATION

Lee Hornberger
Arbitrator and Mediator

This article provides a toolkit for giving an effective opening statement in a labor arbitration case.

In a labor arbitration case, the opening statement is given in what may be a unique adjudicative environment. It differs from court litigation or employment arbitration where the parties will have provided information, including pleadings and briefing, to the adjudicator well prior to the evidentiary hearing. That is not usually the case in a labor arbitration. Usually the labor arbitrator will know little, if anything, about the case before the opening statement is given. At best, the arbitrator will know whether the case is a discipline or a contractual interpretation case. Only moments before the opening statement will the arbitrator learn the wording of the issue. This highlights the opening statement's extreme importance in a labor arbitration case.

The opening statement should be thoroughly prepared and practiced ahead of time.

In a discipline case, the employer will give its opening statement first. In a contractual interpretation case, the union will give its opening statement first. This reflects both tradition and which party has the burden of proof. If the advocate is going to ask for a burden of proof other than the preponderance of the evidence in the post-hearing argument, the advocate should seriously consider giving the arbitrator warning of that in the opening statement.

To overcome the hurdle of no advance knowledge on the part of the arbitrator, the advocate must effectively promote the interests of the advocate's client, whether the employer or the union. Furthermore, the advocate should not overpromise.

The opening statement must clarify the issues for the arbitrator. This will include both the substantive and procedural issues. In addition, the opening statement must clearly inform the arbitrator of the applicable sections of the pertinent documents, including the collective bargaining agreement (CBA), employment manual, established policies, and other operative documents and the page numbers in the documents where those sections can be found. It is of extreme importance that the arbitrator know exactly where in these documents, including page numbers, the arbitrator can go in order to better understand the case and the parties' viewpoints.

The advocate should observe whether the arbitrator is writing notes during the opening statement. The speed with which the opening statement is delivered should be adjusted by paying careful attention to the note taking speed and depth of the arbitrator. The goal of the advocate should be to help make the arbitrator's job easier. Sometimes the pace at which the advocate delivers the opening statement, including pauses, can be helpful. The arbitrator's hearing notes are ultimately the record upon which the arbitrator's memory of the hearing will largely be made.

The opening statement should, in a concise clear fashion, outline the "who, what, where, how, and when" of the case. Once the opening statement is completed, the arbitrator should have a clear understanding of the main actors, what happened to give rise to the grievance, where the situation occurred, how the situation unfolded, and the time line of the situation.

Elkouri & Elkouri, How Arbitration Works (8th ed. 2016), p. 7-30, states that:

> An opening statement is a brief and general outline of what the dispute is about and what the advocate intends to prove. Even if the advocate prepares a written opening statement, it should be presented orally.

The opening statement should also address unfavorable aspects of the case. The arbitrator should not hear these unfavorable aspects for the first time during the other side's opening statement. This gives the advocate the opportunity to present adverse facts in the best light.

The advocate in the second opening statement (for example, the union's opening statement in a discipline case) should typically respond to issues raised in the first opening statement rather than waiting for the evidentiary portion of the hearing in which to respond. For example, if the employer argues for the first time ever in its opening statement, that the grievance or demand for arbitration is untimely, the union should tell the arbitrator, if true, during its opening statement that this issue was never previously raised by the employer. The arbitrator should know about these contested procedural issues before the end of the opening statements.

The opening statement should be a precise nonargumentative presentation of the case in a professional and courteous fashion. It will summarize in a convincing manner the advocate's main arguments, including what happened and precisely what the advocate intends to prove. The statement should also tell the arbitrator the relief that the party is seeking. If the arbitrator knows what remedy the party is seeking, it is easier for the arbitrator to understand the evidence as it comes in.

In discipline cases, the union will occasionally refrain from making its opening statement until after the employer presents its evidence and rests. There are those who think that this prevents the arbitrator from having a balanced or full understanding of the case at the start. On the other hand, there are others who believe that the union advocate can better serve the interests of the grievant by not playing the advocate's hand until after hearing all of the employer's evidence. Deciding to delay giving the one's opening is an important decision that should not be made lightly.

In a virtual arbitration hearing via Zoom or other platform, the advocate must give consideration to the different methods and characteristics of communication during a virtual arbitration. Depending on the settings of the observer's monitor, the screen might display the advocate's face on the entire screen. In addition, there might be a short delay between the advocate's speaking and when the speaking is actually heard by the arbitrator. In that event, it is important that the advocate speak more slowly.

The advocate should also consider using Share Screen during the opening statement and other parts of the arbitration hearing in order to help emphasize the relevant CBA provisions and the more important documents. Share Screen is a tool that is available on the Zoom platform which allows the user to share the user's documents on the monitor to be seen by other participants.

Pre-sharing of exhibits will occur much more frequently in virtual arbitration than in in-person arbitration. By using Share Screen, the arbitrator can see the relevant exhibit and the advocates at the same time. Power points and exhibits can be displayed via Share Screen to the arbitrator during the opening statement.

In all arbitrations, there should be cooperation, professionalism, and mutual respect.

In conclusion, the opening statement should tell the arbitrator in a concise, courteous fashion exactly how the advocate wants the arbitrator to rule on the issues and exactly what relief is being requested. The advocate's use of Share Screen during a Zoom arbitration can help make for a powerful opening statement. ■

DIALOGUE ON THE LABOR AND EMPLOYMENT LAW SECTION'S STATEMENT AGAINST RACISM

The LELS Statement is set out first, followed by LELS member Thomas G. Kienbaum's views and proposed edited version, followed by the LELS Council's response to Tom, for your consideration.

LELS Statement Against Racism

In response to recent protests following the killings of Breonna Taylor, Ahmaud Arbery and George Floyd, the Labor and Employment Law Section of the State Bar of Michigan renews and reaffirms its opposition to systemic racism. We recognize the reality that racism and discrimination, too often, preclude African Americans and other people of color from obtaining access and equal opportunity in employment. Civil rights statutes serve as important vehicles to eradicate racial injustice, and as labor and employment lawyers, we commit to continue utilizing these statutes to vigorously advocate for equal justice in the representation of our clients. We further acknowledge that our words cannot replace our deeds; that listening will be important for all on this journey; and that for divisions to heal, we must focus on self-reflection, education, understanding, and most of all, unity, as we work collectively to identify sustainable solutions. In this vein, the Section will continue to provide quality programming centered around race equity and implicit bias via our diversity luncheon series and then join with our members to do the very difficult work of putting what we learn into practice.

Please Note: The Labor & Employment Law Section of the State Bar of Michigan does not speak for all 2,221 of its members, but through your actions we will always speak for the rule of law and equal justice for all.

Tom Kienbaum's views

I found an aspect of the State Bar Labor Section's June 13, 2020 message 'Our Statement Against Racism' troubling. My problem is of course not with the core message that we stand against racism, systemic or otherwise, a message our Section should emphasize. After all, who among us could disagree!

Instead it was the righteous assumption that the message should be submitted on behalf of the plaintiffs' bar, and not necessarily its defense colleagues, that concerns me. That intent was apparent from the reference to continuous advocacy of statutory rights "in the representation of our clients". To make sure the point was not missed, the writer footnoted that the section "does not speak for all 2221 of its members". A message about racial justice does not require that reservation.

The notion that a defense lawyer in our business is presumptively not engaged in the search for justice is as wrongheaded as arguing that the lawyer representing a criminal defendant does not care about the truth or eschews law and order. Virtually all employment cases involve a search for truth: what happened and what was the actor's intent. Every plaintiff's lawyer has seen a well-intended case collapse when the facts were examined closely, and every defense lawyer has had the opposite experience, calling for a resolution involving just compensation.

Our Section should emphasize that a search for justice is the obligation of every lawyer. The Section's racial justice message, while otherwise well intended and appropriate, unfortunately conveyed a contrary subtext about its defense bar members.

Tom Kienbaum's proposed version

In response to recent protests following the killings of Breonna Taylor, Ahmaud Arbery and George Floyd, the Labor and Employment Law Section of the State Bar of Michigan renews and reaffirms its opposition to systemic racism. We recognize the reality that racism and discrimination, too often, preclude African Americans and other people of color from obtaining access and equal opportunity in employment. As labor and employment lawyers, we commit to continue advocating for equal justice. We further acknowledge that our words cannot replace our deeds; that listening will be important for all on this journey; and that for divisions to heal, we must focus on self-reflection, education, understanding, and most of all, unity, as we work collectively to identify sustainable solutions. In this vein, the section will continue to provide quality programming centered around race equity and implicit bias via our diversity luncheon series and then join with our members to do the very difficult work of putting what we learn into practice.

As a section of the State Bar of Michigan we are required to state that we cannot speak for all our members.

The LELS Council response

The Council of the Labor and Employment Law Section seeks to balance, and to fairly represent, several diverse constituencies—management, labor, employee and neutral, including government agencies. The Council's statement on the deplorable events of the past few months attempted to broadly reflect these views without exclusion or subtext. We recognize however, that words are imperfect vehicles and interpretations may vary, even if the ends are noble and the cause worthy. Against this backdrop, and understanding that leadership often requires humility, the Council wants to again emphasize the importance of what we all do and not what we say, and how important it is, and will be, that we listen to each other carefully, whether it be on this issue or others. In this spirit, and with a goal of finding unity of purpose despite imperfections or differences, we welcome Mr. Kienbaum's viewpoint and are grateful to him having shared it.

CHECKLIST OF FACTORS TO CONSIDER WHEN CHOOSING BETWEEN VIDEO AND IN-PERSON MEDIATION

Paul F. Monicatti
Mediator/Arbitrator/Adjunct Law Professor

I. INTRODUCTION

By the time this article is published, many of you will have participated in remote court or ADR proceedings by video conferencing using the internet ("video") instead of the customary in-person format. It's too soon to forecast with any certainty whether the video method that temporarily replaced in-person legal proceedings during the recent COVID-19 pandemic and its aftermath will continue to grow into pervasive use and become a permanent fixture on the legal and ADR landscape. Nonetheless, in anticipation that it probably is here to stay, this article will briefly discuss various factors favoring use of remote mediation by video and other factors favoring use of in-person mediation. Keep in mind that this is an evolving practice area subject to further development as more practical knowledge and experience is gained from ongoing use.

Video is one form of online dispute resolution (ODR), a term that also includes negotiation by email and by telephone. For purposes of this discussion, the focus is on the use of video to deliver ADR services. Although already popular among businesses and younger generations to conduct meetings, the use of video by the older, general population unexpectedly exploded almost overnight due to the onset and rapid spread of the COVID-19 pandemic in early 2020 across the United States and the world. Attempting to control and mitigate the effects of the virus, Michigan's governor issued executive orders banning social gatherings and travel except for essential services, which did not include legal services. The Michigan Supreme Court and local Michigan courts followed suit by limiting in-court activity to only essential functions and exigent matters, while tolling time periods applicable to various legal activities.

With jury trials and most court hearings at a standstill and the backlog of cases steadily building, lawyers looked for alternative ways to move files, resolve disputes, provide compensation for their clients, and generate income in light of social distancing, travel bans, and overburdened courts. Consequently, their attention turned gradually to consideration of video for mediations and arbitrations.

II. ATTORNEY RELUCTANCE AND CONCERNS ABOUT REMOTE MEDIATION

Attorney reluctance to use the video technology that was relatively foreign to many of them often revolves around concerns about confidentiality, privacy, and trust in mediation. Confidentiality encompasses protection of mediation communications from other participants during private caucuses internally or with the mediator, and prevention of any recording of the mediation. It also pertains to maintenance of data security against intruders and hackers. Privacy means that a participant's remote location is private and not in public, that public Wi-Fi hotspots or other unsecure internet access means are not used, and that no one who is not under direct observation is present within hearing or viewing distance.

Trust is an essential ingredient in the recipe for mediation success. Trust applies not only to the integrity and trustworthiness of the mediator but also to trust among other mediation participants. In addition to their reputation, skill, and track record for success prior to a mediation, mediators earn trust during mediation by: establishing rapport; making personal connections; showing interest, sensitivity, and understanding; eye contact; chemistry and other inter-personal dynamics with the participants.

According to Professors Susan Nauss Exon and Soomi Lee in "Building Trust Online: The Realities of Telepresence for Mediators Engaged in Online Dispute Resolution", 49 *Stetson Law Review* 109 (2019), current research focuses on limitations of trust corresponding to video limitations, including: poor reception may distort or limit facial expressions, body language may be lacking if an entire body image is not accurately projected, webcam refocuses eye contact toward cameras on a computer rather than direct eye contact with a counterpart, and sensory perception of touch and smell are missing. p 128. Obviously, these same limitations would affect other mediation participants besides mediators.

III. RELEVANT FACTORS TO CONSIDER

Like everything else, remote mediation by video has its advantages and disadvantages. Presently there is a divergence of opinion among attorneys and judges regarding whether in-person mediation is always better than remote mediation and whether a party can insist on one particular format over another. So far, in the absence of any persuasive authority on point under current COVID-19 circumstances, judges are generally deferring to counsel resolve the issues themselves.

The positive aspects favoring remote mediation are mainly procedural, pragmatic, tangible, and objective – the practical side of mediation - whereas the negative aspects (i.e., those favoring in-person mediation) tend to be substantive, artful, intangible, and subjective - the personal side of mediation. The following are various factors tending to favor remote mediation by video.

A. Factors Favoring Remote Mediation

- Useful when neutrals, counsel, clients or participating consultants are distant
- Effective when the number of participants makes finding a suitable venue difficult
- Convenient (saves travel time and expense)
- Provides more time for discussion and negotiation when travel time is eliminated
- Accommodates participants who find travel difficult due to fear or physical challenges
- More timely scheduling on shorter notice because the time lapse between file intake and the mediation hearing is quicker when arranging travel and clearing schedules for travel aren't factors
- Facilitates prompt scheduling and convening further hearings before focus and momentum are lost
- No time constraints caused by travel across different time zones
- Levels the playing field by diminishing the appearance of power imbalance between parties
- Affords client safety in high conflict disputes and bitter personal or business relationships, and also allows client comfort when remotely located in familiar surroundings

- Efficient when the amount or issues at stake don't justify travel time and expense
- Increases productivity by eliminating time and geographical barriers, thus allowing negotiations to take place anytime, anywhere, with anyone
- Enables participation by ultimate decision makers who might not otherwise participate because of productivity loss due to travel time and time away from the office
- If counsel or clients already know and trust each other prior to a remote mediation, then its advantages correlate with those of ADR generally in terms of speed, cost savings, efficiency, flexibility, and client satisfaction.

If any of the above considerations apply in a particular dispute to favor remote over in-person mediation, then a number of video platforms are relatively easy to learn and simple to use, especially for participants joining a mediation as guests instead of serving as the host. On the other hand, if none of the above factors are determinative, then the automatic default position should be in-person mediation. Additionally, the following factors would further support use of in-person mediation.

B. Factors Favoring In-Person Mediation

- Unrestricted observation (unimpaired by video's limited on-camera visibility and frequent audio/visual distortions) of visual, audible, verbal, non-verbal, and sensory clues from participants such as details of facial expressions, tone and pitch of voice, nervousness, feelings and their intensity, hand gestures, subtle body language, and other negotiation nuances like sensing someone's fear, anguish, discomfort, and pain that are necessary in order to read the room and people. What the late great musician, singer, and songwriter Prince said in 2004 about musicians performing in live concerts readily applies to mediators and mediation participants, "You have to be able to vibe off the audience . . . ."
- Mediations are more personal when meeting face-to-face because they foster mediators' personal touch, figuratively and literally, in establishing rapport, making personal connections, and earning trust. Also, they provide an opportunity for the face-to-face inter-personal communication, socialization, brainstorming, and direct interaction between attorney and client physically working together as a team that happens when they're in the same location instead of separate, remote locations. One attorney remarked to Jeff Kichaven, who is one of California's leading mediators, that there's value in lawyers and clients being physically present with each other, telling stories about themselves, talking privately and candidly about personal things and resolving the case, and connecting with each other that's hard to duplicate remotely.
- Better suited for complex matters and those requiring prolonged discussion, attention, and negotiation and for disputes involving personal, emotional or relational matters.
- Avoids the common technical difficulties with video that can interrupt the natural flow of conversation and exchange of ideas, and test the patience necessary for productive negotiations.
- Better control over confidentiality and privacy when participants are together in-person at same location.
- Without the distraction of serving as video meeting hosts with responsibility for using new or unfamiliar technology, and without technical glitches adding more stress to their already stressful work, mediators can give their full attention to mediating the dispute using all their skills and techniques and working their magic.
- Mediators report that they feel much more engaged and energized in face-to-face mediations. Experts and colleagues alike indicate that video conferences are exhausting and drain energy. According to workplace experts interviewed for the BBC, video meetings require more focus than a face-to-face discussion because participants need to work harder to process non-verbal cues like facial expressions and other body language; paying more attention to these consumes a lot of energy. bbc.com/worklife/article "The Reason Zoom Calls Drain Your Energy" (April 22, 2020).
- It's easier for parties to hide behind technology in video mediation than when they are present together in the same location, and research shows that online negotiators have more hostility and willingness to lie, and less credibility and emotional engagement.
- When all necessary parties and decision makers are present together in the same location at the same time, there are higher levels of: focus without outside distractions; personal interaction among attorneys, clients, and mediators; and commitment since participants invest extra time, expense, and physical effort to travel to and remain at a mediation site.

IV. FUTURE OUTLOOK

In the final analysis, the decision in the future post-pandemic world on whether to use remote instead of in-person mediation likely will fluctuate on a case-by-case basis depending on if in a particular situation the factors favoring video outweigh those favoring in-person. Even so, if you don't trust someone on the other side, you probably shouldn't choose remote over in-person mediation for reasons discussed above in section III, B. Moreover, as California mediator Kichaven speculates, "who knows whether reluctance to use video for mediations will melt away as the technological sophistication of lawyers continues, out of necessity, to accelerate", thus fulfilling the prophecy authors Orna Rabinovich-Einy and Ethan Katsh made in their 17 *Harvard Negotiation Law Review* 151 (Spring 2012) article "Technology and the Future of Dispute Systems Design", p 178 n 98:

> We are in the midst of a period of dramatic change in terms of what ODR [online dispute resolution] processes can offer disputants as well as what disputants feel comfortable with when communicating online. What we can say is that the trend is towards increasingly richer technologies (at lower costs) and a higher degree of comfort among young users with the online medium. It is our contention, that over time we can expect increasingly complex disputes to be addressed online with higher degrees of comfort and satisfaction among users. Whatever the future holds, we believe there will always be a need for face-to-face dispute resolution in some cases, for some disputants . . . .

—END NOTE—

[1]Portions of this article are adapted from the author's chapter 16 in *Michigan Civil Procedure* (2020 Update). ■

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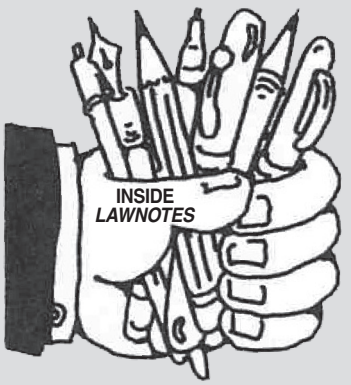

- Reports on *Bostock v. Clayton County* from Diane Soubly, Sue Ellen Eisenberg, and Kerry Cahill.
- Zoom mediation advice from Shel Stark and Paul Monicatti.
- Post-COVID-19 issues addressed by Adam Forman, Linda Burwell, and Sidney McBride.
- John Spitzer addresses retaliation against public employees for First Amendment activity. Lee Hornberger offers advice on opening statements in labor arbitrations.
- Labor and employment decisions and developments from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC, MDCR and EEOC news, websites to visit, and more.

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