LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

Volume 30, No. 4 **Winter 2021**

JUSTICE AMY CONEY BARRETT'S HISTORY WITH EMPLOYMENT CASES

Regan K. Dahle
Butzel Long

In her approximately three years on the bench of the 7th Circuit Court of Appeals, Justice Amy Coney Barrett appears to have authored seven opinions involving questions under Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA) and the Fair Labor Standards Act (FLSA). Four opinions held in favor of the employer, and three opinions held in favor of the employee.

In her first employment case on the bench, Justice Barrett affirmed the trial court's denial of an employer's motion for judgment as a matter of law and for a new trial. In *Smith v. Rosebud Farm, Inc.*, 898 F.3d 747, 752 (7th Cir. 2018), the plaintiff alleged that his co-workers groped and grabbed him and simulated sex acts in front of him, and that one of his co-workers put his hands down the plaintiff's pants. The plaintiff also claimed that his co-workers slashed his tires and threatened him with knives. Although Justice Barrett found that the facts of the case were sufficient to support a jury verdict in the plaintiff's favor, she noted that "unwanted sexual behavior--including the touching of genitals and buttocks--is not necessarily actionable under Title VII," and that "Title VII is an anti-discrimination statute, not an anti-harassment statute."

Shortly after issuing the opinion in *Smith v. Rosebud Farm, Inc.*, Justice Barrett affirmed a district court's decision denying Costco's motion for judgment NOV in a sexual harassment lawsuit filed by the EEOC against Costco on behalf of a former Costco employee. The former employee alleged that a Costco customer unlawfully harassed and stalked her for over one year, leading her to secure a one-year No Contact Order against the customer, and that Costco did not promptly remedy the situation. While Justice Barrett agreed with Costco that the customer's conduct, which ultimately led Costco to ban him from all Costco locations, was not as lewd or amorous as in other cases where an employer received summary judgment, she also noted that actionable harassment does not have to be sexual; it just has to be because of sex. Here, where the customer filmed the employee while she was working; screamed profanities at the employee while she was shopping with her father at a different Costco location; hid in the Costco aisles to watch the employee while she worked; came to Costco just to see the employee; and questioned the employee about conversations she had with other men at Costco, Justice Barrett concluded that it was reasonable for the jury to conclude that this customer created a hostile work environment for the employee. *EEOC v. Costco Wholesale Corp.*, 903 F.3d 618 (7th Cir. 2018).

Earlier this year, in a national origin discrimination claim in which a Hispanic former employee of the Chicago Parks Department sued for wrongful termination, Justice Barrett again affirmed a trial court's denial of an employer's motion for judgment as a matter of law and for a new trial. In *Vega v. Chicago Park District*, 954 F.3d 996 (7th Cir. 2020), the plaintiff alleged that her employer terminated her because of her national origin. While the plaintiff did not have direct evidence of discrimination, she did have extensive circumstantial evidence, including a 20-year positive employment record; the fact that the defendant violated its commitment to the union not to terminate for first offenses; proof that there were multiple factual errors in the investigation that led to the plaintiff's termination; and evidence that the defendant mistreated other Hispanic employees and disciplined Hispanic employees more harshly than non-Hispanic employees. Justice Barrett concluded that the circumstantial evidence was sufficient to support a jury verdict in the plaintiff's favor.

In cases involving what she seemed to believe were less egregious or substantial facts, Justice Barrett found in favor of the employer. For example, in *Weil v. Metal Technologies, Inc.*, 925 F.3d 352 (7th Cir. 2019), Justice Barrett affirmed a district court decision to decertify an FLSA collective action that the same district court had previously certified. The plaintiff argued that the court could not decertify the collective action, because the employer had not offered any new evidence. Justice Barrett disagreed, reasoning that nothing in Fed.R.Civ.P. 23 requires there to be new evidence to justify a decertification decision.

In a case about which she was questioned at her confirmation hearing, Justice Barrett concluded that the plaintiff's supervisor did not create a racially hostile work environment by once calling the plaintiff the "n" word, where the plaintiff also experienced non-race-based harassment. According to Justice Barrett, being called a "n---r" did not alter the plaintiff's conditions of employment and did not cause the plaintiff to suffer any "additional or different distress" than the non-race based harassment he suffered. *Smith v. Illinois Dep't of Transp.*, 936 F.3d 554, 561–62 (7th Cir. 2019).

In *Purtue v. Wisconsin Dep't of Corr.*, 963 F.3d 598, 603 (7th Cir. 2020), *reh'g denied* (July 31, 2020), Justice Barrett affirmed summary judgment in favor of the employer in a gender discrimination claim, discounting the plaintiff's statistical evidence of a disparity between the termination rates of female and male employees. Justice Barrett agreed with the district court that the plaintiff's statistical evidence was immaterial, because the plaintiff had no evidence that the statistical comparators were similarly situated with her in all material respects.

Finally, in *Graham v. Arctic Zone Iceplex, LLC*, 930 F.3d 926 (7th Cir. 2020), Justice Barrett affirmed summary judgment for the employer in an ADA failure-to-accommodate claim, because the plaintiff had not provided his employer with enough notice that his work restrictions prevented him from performing the duties of his new job. Regarding the plaintiff's disability discrimination claim, Justice Barret also affirmed summary judgment for the employer, finding it immaterial that the employer had never written-up the plaintiff for many of the policy violations leading up to plaintiff's discharge. ■

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***

DETERMINING WHEN A COVID-19 ILLNESS IS "WORK-RELATED" AND "RECORDABLE" UNDER OSHA GUIDANCE

Aaron V. Burrell
Dickinson Wright PLLC

With the exception of certain low-risk industries, many employers with more than 10 employees, especially those engaged in manufacturing, are required to keep a record of serious work-related injuries and illnesses. In our current climate, questions arise: Is COVID-19 a "recordable illness?" And under what circumstances should an employer record?

Under its May 19, 2020 Enforcement Memorandum, the United States Department of Labor's Occupational Safety and Health Administration (OSHA) reinforced its position that COVID-19 is a "recordable illness." According to the Memorandum at 1, employers must record cases of COVID-19 if three conditions are met:

1. The case is a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention;
2. The case is work-related as defined by 29 CFR § 1904.5;
3. The case involves one or more of the general recording criteria set forth in 29 CFR § 1903.7.

An employer must consider an injury "work-related" if an "event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated

LOOKING FOR *Lawnotes* Contributors!

Lawnotes is looking for contributions of interest to Labor and Employment Law Section members.

Contributions may address legal developments, trends in the law, practice skills or techniques, professional issues, new books and resources, etc. They can be objective or opinionated, serious or light, humble or (mildly) self-aggrandizing, long or short, original or recycled. They can be articles, outlines, opinions, letters to the editor, cartoons, copyright-free art, or in any other form suitable for publication.

For information and publication guidelines, contact *Lawnotes* editor Stuart M. Israel at Legghio & Israel, P.C., Suite 600, 306 South Washington, Royal Oak, Michigan 48067 or (248) 398-5900 or israel@legghioisrael.com.

a pre-existing injury or illness." *Id.* at n. 3. An employer must consider an injury to meet "general recording criteria," if, among other things, it results in "death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness." *Id.* at n. 4.

The Enforcement Memorandum acknowledges the difficulty in determining "whether a COVID-19 illness is work-related, especially when an employee has experienced potential exposure both in and out of the workplace." *Id.* To aid employers in determining whether a COVID-19 illness is "work-related" and "recordable," OSHA has articulated three factors:

1. *The reasonableness of the employer's investigation into work-relatedness.* Here, OSHA expects employers to "ask the employee how he believes he contracted the COVID-19 illness," "discuss with the employee his work and out-of-work activities that may have led to the COIVD-19 illness," and "review[] the employee's work environment for potential exposure."
2. *The evidence available to the employer.* Here, OSHA notes that employers should look at information "reasonably available to the employer at the time it made its work-relatedness determination."
3. *The evidence that a COVID-19 illness was contracted at work.* Here, OSHA concedes that no "ready formula" exists. Instead, it asks employers to weigh additional factors to determine if the infection was work-related:

a. COVID-19 illnesses are likely work-related when several cases develop among workers with no alternative explanation.

b. COVID-19 illnesses may be work-related if the employee contracts it shortly after lengthy exposure to a customer or client with a confirmed case or in a location in the general public with ongoing community transmission while working, with no alternative explanation.

c. In contrast, a COVID-19 illness may not be work-related if the employee is the only worker to contract the illness in her vicinity and the job duties do not include frequent contact with the general public.

d. A COVID-19 illness may not be work-related if a close family member or associate of an employee (who does not work for the company) is also infected or potentially infectious.

If an employer undergoes the inquiry above and is unable to determine whether it is "more likely than not" that exposure in the workplace played a causal role in a COVID-19 case, the employer does not have to record the illness. On the other hand, if, after its investigation, an employer determines that an employee's COVID-19 illness is "work-related," it has an obligation to report the incident to OSHA.

Takeaways:

There is no bright-line rule to determine if an employee's contraction of COVID-19 is "work-related," and, thus, "recordable." Instead, employers must undergo the analysis above to determine if it is "more likely than not" that exposure occurred in the workplace. As the Enforcement Memorandum concludes, in "all events, it is important as a matter of worker health and safety, as well as public health, for an employer to examine COVID-19 cases among workers and respond appropriately to protect workers, regardless of whether a case is ultimately determined to be work-related." Ultimately, employers must adhere to their continuing responsibility to provide "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to . . . employees." 29 U.S.C. § 654(a)(1). ■

HOW *NOT* TO WRITE A SUPREME COURT RULE

John G. Adam
Legghio & Israel, P.C.

The Supreme Court amended its *certiorari* rule in 2019 to require petitioners to disclose "related proceedings."

Under Rule 14.1(b)(iii), petitioners now must list "all proceedings in state and federal trial and appellate courts, including proceedings in this Court, that are directly related to the case in this Court."

Under the rule, "a proceeding" is "'directly related' if it arises from the same trial court case as the case in this Court (including the proceedings directly on review in this case)." Huh? Repeating the word "case" three times in the same sentence—"trial court case," "the case," "this case"—is not helpful.

So a proceeding is "directly related" if it involves the "proceedings directly on review in this case"? Are a "proceeding" and "proceedings" different from "this case" or "the case"?

The clerk's comment to the new rule only makes it worse: "A complete listing of directly related cases will assist in evaluating whether a Justice's involvement in a case before joining the Court might require recusal." The clerk addresses "related cases" not "related proceedings."

Hmmm?! Supreme Court justices "normally presume that where words differ" within a statute, Congress "intended the differences" to mean something "not only in language but in purpose as well." *Burlington Northern v. White,* 548 U.S. 53, 63 (2006) (citations omitted).

I called the clerk's office. I learned all we had to say was there are "no related proceedings." Despite compliance with the rule, our petition was denied in the "case" of *Pacheco v. Honeywell*, 140 S. Ct. 389 (2019). ■

MICHIGAN ARBITRATION AND MEDIATION CASE LAW UPDATE

Lee Hornberger
Arbitrator and Mediator

I. Introduction

This update reviews Michigan cases issued since January 2019 concerning arbitration and mediation. For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals unpublished decisions. A full review going back to 2008 is at: www.leehornberger.com/files/ADR%20Update%20October%202020.pdf. The YouTube video of the author's 2019-2020 update presentatiion is at: www.youtube.com/watch?v=I0TkP8zs-A8&feature=youtu.be.

II. ARBITRATION

A. Michigan Supreme Court Decisions

Supreme Court grants leave to appeal of Court of Appeals reversal of Circuit Court order granting arbitration

Lichon v Morse, 327 Mich App 375; 933 NW2d 506, 339972 (March 14, 2019), lv gtd, ___ Mich ___; 932 NW2d 785 (September 18, 2019). In a split decision, the Court of Appeals held a sexual harassment claim was not covered by an arbitration provision in an employee handbook. Because the arbitration provision limited the scope of arbitration to only claims that are "related to" plaintiffs' employment, and because sexual assault by an employer or supervisor cannot be related to their employment, this arbitration provision was inapplicable to their claims against Morse and Morse firm. **"[C]entral to our conclusion … is the strong public policy that no individual should be forced to arbitrate his or her claims of sexual assault."** The O'Brien dissent said the parties agreed to arbitrate "any claim against another employee" for "discriminatory conduct" and the plaintiffs' claims arguably fell within the scope of the arbitration agreement.

The Supreme Court granted leave to appeal. The Supreme Court oral argument was October 8, 2020.

B. Michigan Court of Appeals Published Decisions

Pre-dispute arbitration agreement in legal malpractice case.

Tinsley v Yatooma, ___ Mich App ___, 349354 (August 13, 2020). Pre-dispute arbitration provision in legal malpractice case. Under the plain language of MRPC 1.8(h)(1) and EO R-23 the arbitration provision was enforceable because the client consulted with independent counsel. **"We suggest contemplation by the State Bar of Michigan and our Supreme Court of an addition to or amendment of MRPC 1.8 to specifically address arbitration clauses in attorney-client agreements."**

Confirmation of award partially reversed in construction lien case.

TSP Servs, Inc v Nat'l-Std, LLC, 329 Mich App 615, 342530 (September 10, 2019). Michigan law limits a construction lien to the amount of the contract less any payment already made. Although a party suing for breach of contract might recover consequential damages beyond the monetary value of the contract, those consequential damages cannot be subject to a construction lien. The arbitrator concluded otherwise. This was clear legal error that had a substantial impact on the award. The Court of Appeals reversed with respect to confirmation of that portion of award.

Court of Appeals affirms order to arbitrate labor case.

Registered Nurses Union v Hurley Medical Center, 328 Mich App 528, 343473 (April 18, 2019). The grievants were terminated for allegedly striking in violation of the CBA. Although the defendant may present to the arbitrator undisputed evidence that the plaintiffs were engaged in a strike, a question of fact is for the arbitrator to decide. Any doubt regarding whether a question is arbitrable must be resolved in favor of arbitration. The Circuit Court did not err in ruling that the CBA required arbitration.

C. Michigan Court of Appeals Unpublished Decisions

Court of Appeals affirms confirmation of award.

Soulliere v Berger, 349428 (October 29, 2020). The Court of Appeals affirmed the Circuit Court confirmation of an award because the defendants' disagreement with the award implicated the arbitrator's resolution of evidence, and the defendants have not demonstrated an error of law apparent from the face of the award.

Waiver of arbitration.

Wells Fargo Bank, NA, v Walsh, 350960 (October 29, 2020). The Court of Appeals affirmed the Circuit Court finding that the defendant waived the right to compel arbitration. Defending action without seeking to invoke right to compel arbitration, constitutes a waiver of right to arbitration.

Settling case with help of arbitrator.

Estate of O'Connor v O'Connor, 349750 (October 15, 2020). In this dispute over the enforcement of a settlement agreement, the defendant appealed the Circuit Court order granting the plaintiff's motion for entry of judgment. The defendant argued the parties agreed to arbitration and the arbitrator lacked authority to broker a settlement agreement. The Court of Appeals held the defendant contributed to the alleged error by seeking settlement, participating in the settlement negotiations, and signing the settlement agreement. The Court of Appeals affirmed the Circuit Court.

Court of Appeals affirms Circuit Court ordering arbitration in insurance case.

Fisk Ins Agency v Meemic Ins, 350832 (September 10, 2020). The Court of Appeals held the Circuit Court properly concluded, in accordance with the terms of the Agreement, the matter must be returned to the arbitrator and the arbitrator must address the 90-day contractual limitation in Agreement.

Court of Appeals reverses vacatur of DRAA award.

Moore v Glynn, 349505 (August 27, 2020), **app lv pdg.** The Court of Appeals held the Circuit Court erred by determining the arbitrator exceeded its scope of authority by looking beyond the four corners of the parties' settlement agreement. The Circuit Court erroneously determined that the settlement agreement was not ambiguous. The Circuit Court only had the power to determine whether the arbitrator acted within the scope of its authority and did not have power to interpret the parties' contract. Because the arbitrator did not exceed the scope of its authority, the Circuit Court's review should have ended and the court should have confirmed award.

Court of Appeals affirms Circuit Court denying arbitration in condominium case.

Copperfield Villas Ass'n v Tuer, 348518 (May 21, 2020). MCL 559.154(8) and (9) require condominium bylaws to provide for arbitration at "election and written consent of the parties." The plural noun "parties" demonstrates all parties to dispute must elect and consent to arbitration in lieu of litigation. The word "consent" supports this interpretation. It takes two to consent to participate in an arbitration. The Circuit Court correctly determined the Tuers were not permitted to unilaterally demand arbitration.

Court of Appeals affirms Circuit Court order confirming award.

Altobelli v Hartmann, 348953 and 348954 (May 21, 2020), **app lv pdg.** The plaintiff appealed the Circuit Court confirmation of an award. The award held the plaintiff was not entitled to relief because he voluntarily withdrew from membership with the defendant and had not sufficiently proved proximate cause or amount of damages. Because the Circuit Court properly determined the award rested in part on issues of proximate cause and damages, which were beyond the scope of judicial review, the Court of Appeals affirmed. See Altobelli v Hartmann, 499 Mich 284; 884 NW2d 537 (2016).

Court of Appeals affirms Circuit Court denying arbitration.

Andrus v Dunn, 345824, 346897, and 348305 (April 9, 2020). The award, which was adopted in the JOD, required arbitration of disputes that arose regarding **St. Martin property.** The August 2015 order provided Andrus waived any claims she had relating to St. Martin, including pursuant to any prior awards and the JOD, and the Circuit Court had jurisdiction to enforce the terms and conditions of the settlement agreement regarding the St. Martin property issue. Because the JOD and the August 2015 order covered the same subject matter but contain inconsistent provisions regarding the forum for resolving disputes on St. Martin property, the August 2015 order reflects later agreement and supersedes the JOD on that issue. The Circuit Court properly denied Andrus's request to compel arbitration of the St. Martin dispute.

Court of Appeals affirms confirmation of DRAA award.

Shannon v Ralston, 350094, 350110 (March 12, 2020), lv den ___ Mich ___ (2020). The Court of Appeals affirmed confirmation of a DRAA award that granted motion to change primary physical custody of minor child in this contentious domestic relations action. Because plaintiff's refusal to provide required financial information and proposed FOF and COL led to delay, the plaintiff was barred from claiming she was entitled to relief on the basis of this delay.

Court of Appeals affirms granting of motion to compel arbitration.

Century Plastics, LLC v Frimo, Inc, 347535 (January 30, 2020). In this contract case, the Court of Appeals affirmed the Circuit Court holding that the parties validly incorporated General Terms and its arbitration agreement by reference. The Terms applied to the parties' agreement even though the defendant was not a listed entity.

Court of Appeals affirms confirmation of DRAA award.

Daoud v Daoud, 347176 (December 19, 2019). The Court of Appeals affirmed the Circuit Court confirmation of a DRAA award. **Past domestic violence and PPO**. Where the arbitrator provided the parties equal opportunity to present evidence and testimony on all marital issues, recognized and applied current and controlling Michigan law, and explained its uneven distribution of property, there was no basis for concluding the arbitrator exceeded its authority in issuing award.

Court of Appeals reverses Circuit Court denial of motion to compel arbitration.

Lesniak v Archon Builders, Inc, 345228 (December 19, 2019). The Court of Appeals reversed the Circuit Court denying the defendants' motion for arbitration because the arbitration terms in the construction agreements were sufficiently related to the plaintiffs' claims to require arbitration, and the defendants had not waived their right to arbitration. The purpose of arbitration is to preserve the time and resources of courts in the interests of judicial economy.

Refusal to adjourn arbitration hearing approved.

Domestic Uniform Rental v Riversbend Rehab, 344669 (November 19, 2019). After overruling R's motion to adjourn the arbitration hearing, the arbitrator entered an award against R. The Court of Appeals affirmed the Circuit Court's confirmation of the award. MCL 691.1703(1)(c).

Incorporation of AAA rules.

MBK Constructors, Inc v Lipcaman, 344079 (October 29, 2019), lv den ___ Mich ___ (2020). Incorporation of AAA's rules in arbitration agreement clear and unmistakable evidence of parties' intent to have arbitrator decide arbitrability.

Court of Appeals affirms confirmation of award.

2727 Russell Street, LLC v Dearing, 344175 (September 26, 2019), lv den ___ Mich ___ (2020). Court of Appeals affirmed confirmation of award. Arbitrator's factual findings are not reviewable. **The Court of Appeals referenced "facilitation" and "statutory arbitration."** Med-arb.

COURT OF APPEALS affirms denial of sanctions.

Clark v Garratt & Bachand, PC, 344676 (August 20, 2019). The Court of Appeals affirmed the Circuit Court denying G's motion for sanctions. The arbitration award foreclosed G's ability to request sanctions because the issue of sanctions was either not raised during the arbitration or, having been raised, resulted in the arbitrator declining to award sanctions. The judgment confirming the award also foreclosed G's ability to request sanctions. G had failed to prove that the plaintiff's complaint was frivolous.

Circuit Court order to arbitrate confirmed.

Roseman v Weiger, 344677 (June 27, 2019), lv den ___ Mich ___ (2019). To the extent the plaintiff argues the arbitration agreement is unenforceable on the ground that the purchase agreement was invalid, these are matters for the arbitrator. MCL 691.1686(3). The Circuit Court did not err by concluding the plaintiff's claims against the sellers were required to be resolved in arbitration.

DRAA award confirmation confirmed.

Zelasko v Zelasko, 342854 (June 13, 2019), lv den ___ Mich ___ (2020), concerned whether the husband's winning of $80 million Mega Millions jackpot was part of the marital estate. The arbitrator ruled the jackpot was marital property. The Circuit

(Continued on page 6)

MICHIGAN ARBITRATION AND MEDIATION CASE LAW UPDATE

(Continued from page 2)

Court confirmed the award. The Court of Appeals affirmed the confirmation. The Court of Appeals stated, "we may not review the arbitrator's findings of fact and are extremely limited in reviewing alleged errors of law." Delay, death, and alleged bias of arbitrator issues. See Zelasko v Zelasko, 324514 (2015), lv den ___ Mich ___ (2016).

DRAA custody dispute award confirmed.

Shannon v Ralston, 339944 (May 23, 2019), lv den ___ Mich ___ (2019). Agreement to arbitrate "all issues in the pending matter." The Court of Appeals affirmed confirmation of a DRAA award that decided change in domicile issue. The arbitrator acted as both mediator and arbitrator. At time of the ex parte communication, the arbitrator was acting as a mediator, not as an arbitrator and the prohibition against ex parte communications did not apply. The belated raising of the alleged disparaging remarks by neutral. The arbitrator's alleged financial interest in the arbitration process. The plaintiff was ordered to pay fees associated with the investigative guardian ad litem. The issue of the arbitrator's alleged financial bias was one of the plaintiff's own making by stopping payment in violation of the parties' agreement to split the cost of the arbitration and in violation of the arbitrator's instructions.

DRAA award confirmed.

Hyman v Hyman, 346222 (April 18, 2019). The Court of Appeals held that the Circuit Court's modification of a DRAA award because the Circuit Court lacked authority to review the arbitrator's factual findings and alter parenting-time schedule without finding award adverse to the children's best interests.

Court of Appeals affirms order to arbitrate labor case.

Senior Accountants, Analysts and Appraisers Ass'n v City of Detroit Water and Sewerage Dep't, 343498 (April 18, 2019). The issue of whether the union complied with the CBA procedural requirements to arbitrate is a procedural issue for arbitrator.

Selection of replacement arbitrator foreclosed in DRAA case.

Sicher v Sicher, 341411 (March 21, 2019). The arbitration clause in the JOD named only A as the arbitrator and did not provide for alternate, substitute, or successor arbitrators. A became disqualified due to a conflict of interest. MCL 600.5075(1). Because the Circuit Court was presented with no evidence that the parties had agreed upon a new arbitrator to be appointed, the Circuit Court was permitted to void the arbitration agreement and proceed as if arbitration had not been ordered. MCL 600.5075(2). Because the parties had agreed only for A to arbitrate property division disputes, the Circuit Court's refusal to appoint a different arbitrator permitted by DRAA.

Court of Appeals reverses confirmation of employment arbitration award.

Checkpoint Consulting, LLC v Hamm, 342441 (February 26, 2019). The court of Appeals held there was no valid arbitration agreement because the independent contractor agreement voided all prior agreements, including the arbitration clause within the employment agreement.

Court of Appeals affirms confirmation of employment arbitration award.

Wolf Creek Productions, Inc v Gruber, 342146 (January 24, 2019). The Court of Appeals affirmed the confirmation of an employment arbitration award. The Court of Appeals stated nothing on the face of the award demonstrated that the arbitrators were precluded from deciding the issue of whether just cause existed to terminate the defendant's employment. Courts are precluded from engaging in contract interpretation, which is a question for arbitrator.

Court of Appeals affirms confirmation of exemplary damages award.

Grewal v Grewal, 341079 (January 22, 2019). The Court of Appeals affirmed a judgment confirming the arbitrator's award of $4,969,463.94 exemplary damages and correcting the arbitrator's award by striking portion that ordered the plaintiffs to provide accounting of assets in India.

Court of Appeals affirms confirmation of award.

Hunter v DTE Services, LLC, 339138 (January 3, 2019). In employment discrimination case, the Court of Appeals affirmed the confirmation of an award. The arbitrator did not exceed its authority by failing to provide citations to case law.

III. MEDIATION

A. Michigan Supreme Court Decisions

There were apparently no Michigan Supreme Court decisions concerning mediation during this review period.

B. Michigan Court of Appeals Published Decisions

There were apparently no Michigan Court of Appeals published decisions concerning mediation during this review period.

C. Michigan Court of Appeals Unpublished Decisions

Apparent oral agreement to mediate not enforced.

Kuiper Orlebeke, PC v Crehan, 348315 (November 12, 2020). The defendant argued that an agreement to mediate precluded the Circuit Court from granting summary disposition in favor of the plaintiff. The defendant provided no case law in support of argument that the option of mediation precluded summary disposition. An appellant may not merely announce its position and leave it to the Court of Appeals to discover and rationalize the basis for its claims, nor may it give issues cursory treatment with no citation of authority. **LESSON: Agreements to mediate should be in writing.**

Attorney fee issue where party failed to mediate.

Daniels v Daniels, 348950 (Sep 17, 2020). The Circuit Court said the defendant walked out of the mediation causing "lost expense." This may implicate MCR 3.206(D)(2)(b) because suggests the defendant failed to comply with an order to participate in mediation. The Circuit Court did not determine what "lost expense" was and said the Circuit Court was awarding attorney fees because of disparity of income. It did not appear the Circuit Court awarded fees under MCR 3.206(D)(2)(b). The Court of Appeals affirmed the JOD but vacated the attorney fee award. If parties choose to further litigate the attorney fee issue, the Circuit Court must make findings as required by statute. **LESSON: Comply with orders to mediate.**

Court of Appeals affirms Circuit Court holding party in contempt.

Teachout v Teachout, 349692 (August 20, 2020), **app lv pdg.** The Court of Appeals affirmed the Circuit Court finding defendant in contempt for violating three orders: (1) order requiring defendant to pay temporary spousal support to the plaintiff during the pendency of the divorce action; (2) order regarding appraisals of property and required the defendant to allow access to the marital home for appraisal; and (3) scheduling order that required mediation. The Circuit Court did not order MCR 3.216(I) evaluative mediation. **LESSON: Circuit Court can sua sponte order mediation. MCR 3.216.**

MCR 2.612 not applicable to outside of court case MSA.

Smith v Forrest, 349810 (July 30, 2020). In this law firm partnership case, the Court of Appeals held that because MCR 2.612 regarding relief from judgment has no application to the plaintiff's effort to challenge the validity of the MSA that was executed by the parties outside of a judicial or court proceeding, and because the Circuit Court relied on MCR 2.612 in summarily dismissing the plaintiff's lawsuit, the Court of Appeals reversed and remanded.

Mediation confidentiality.

Tyler v Findling, 348231, 350126 (June 11, 2020), **app lv pdg.** In this defamation case, the Court of Appeals held the Circuit Court abused its discretion in granting the defendants' motion to strike Wright's affidavit and motion to preclude Wright's testimony based on a finding that Findling's statements were inadmissible mediation communications. Findling was a nonparty mediation participant, not a mediation party. Findling's statements were made outside the mediation process. Sitting in the room designated for the plaintiff neither made him a party nor did his presence in the room start the mediation. MCR 2.411 and 2.412. See generally ***Hanley v Seymour,*** 334400 (October 26, 2017). **LESSON: Sometimes mediation confidentiality can be fuzzy.**

Violation of orders to mediate.

Lang v Lang, 347110 (May 14, 2020). The Court of Appeals affirmed the granting of attorney fees. The Circuit Court did not award the plaintiff attorney fees because the defendant exercised the right to go to trial after failing, in good faith, to reach a settlement agreement. The Circuit Court awarded the plaintiff attorney fees because, in regard to both the mediation and the sale of the marital home, the defendant attempted to find loopholes in the Circuit Court's order, rather than participating in good faith.

Court of Appeals reverses enforcement of MSA.

Estate of Brown, 342485 and 342486 (April 9, 2020). Barbara argued the MSA should be set aside because Barbara did not receive notice of the mediation. The Court of Appeals agreed and reversed the Circuit Court's enforcement of the MSA. See ***Dolan v Cuppori,*** 345310 (September 12, 2019), and ***Peterson v Kolinske,*** 338327 (April 17, 2018). **LESSON: Make sure all required persons are at the mediation.**

Court of Appeals affirms enforcement of recorded DR MSA.

Brooks v Brooks, 345168 (February 11, 2020). The Court of Appeals affirmed the Circuit Court's enforcement of a recorded MSA. The mediator recited the MSA in open court. The parties agreed it was their agreement. The parties were sitting in the judge's jury room and outlined the agreement. The MSA was silent on the pension issue. The Court of Appeals remanded the case to the Circuit Court to determine the distribution, if any, of the wife's pension. **LESSON: Putting the MSA "on the record" can be helpful.**

Court of Appeals affirms enforcement of domestic relations MSA even though no domestic violence protocol done.

Pohlman v Pohlman, 344121 (January 30, 2020), **lv app pdg.** In a split decision, the Court of Appeals affirmed the Circuit Court's enforcement of a domestic relations MSA **even though there was no domestic violence protocol utilization.** Because the plaintiff did not allege or show she was prejudiced by the mediator's failure to screen for domestic violence, any noncompliance with MCR 3.216(H)(2) was harmless.

Judge Gleicher's **dissent** said the Circuit Court was obligated to hold a hearing to determine whether the wife was coerced into the settlement. Only by evaluating proposed evidence in light of MCL 600.1035 and MCR 3.216(H)(2) could the Circuit Court make an informed decision regarding whether relief was warranted. When there is a background of domestic violence, the reasons for presumption against mediation do not go away because the parties used "shuttle diplomacy." That method may help diffuse immediate tensions, but it cannot undo years of manipulation and mistreatment.

Court of Appeals affirms dismissal of case with prejudice.

Pearson v Morley Cos Inc, 345547 (November 26, 2019). The Court of Appeals affirmed the Circuit Court dismissing with prejudice the plaintiff's hostile work environment lawsuit against the defendant as a sanction for the plaintiff's failure to comply with discovery and scheduling orders, including "**counsel's failure to adequately prepare for facilitation** … ."

Court of Appeals holds MSA invalid.

Dolan v Cuppori, 345310 (September 12, 2019). D and N owned property as **tenants by entirety.** N was not a party to the lawsuit. It violated N's due process rights for settlement reached by D alone to effect non-party N's property rights. The Court of Appeals held the Circuit Court violated N's due process rights when it added her to the Agreement without her consent. The settlement agreement was invalid from outset.

Court of Appeals reverses Circuit Court dismissal for failure to appear.

Corrales v Dunn, 343586 (May 30, 2019). After case evaluation, the Circuit Court ordered mediation. Because of a communication glitch, the plaintiff failed to appear at the mediation. The Circuit Court dismissed the case. Issue on appeal was whether the dismissal was a proper sanction under the circumstances. The Court of Appeals reversed the Circuit Court's dismissal. Dismissal after over two years of litigation under the circumstances was manifest injustice. MCR 2.410(D)(3)(b)(i). **LESSON: Counsel should personally prepare client for mediation and tell client of logistics.**

Non-signed or recorded MSA placed on record and agreed to is binding.

Eubanks v Hendrix, 344102 (May 23, 2019). The plaintiff contended the Circuit Court forced her to comply with an unenforceable MSA. The MSA was not written or recorded. MCR 3.216(H)(8). An MSA could not, absent other valid proof of settlement, be a basis for a JOD. At the hearing, held one day after the mediation, the parties placed a partial agreement on the record. MCR 2.507(G). At that hearing, the Circuit Court indicated its understanding as to the "gist" of the MSA was that the parties were to continue with joint physical and legal custody and equal parenting time. The plaintiff agreed on the record with that statement. The Circuit Court found that this arrangement to be in the best interests of the child. The agreement was placed on the record and agreed to by the plaintiff was binding on her. **LESSON: Make sure MSA is signed.** ■

HOW TO MAXIMIZE YOUR ARTICLE'S IMPACT

Otto Stockmeyer
WMU-Cooley Law School (Emeritus)

Why Stop Now?

Congratulations! Your article has been researched, written, edited, and (hurray!) published. After all that work, why stop with one article? With some imagination, you may be able to develop one or more spin-off pieces for other publications. Sometimes it may be a reprinting of your article in full. More often it will take the form of an excerpt or abridgment.

Examples

An example of a full reprinting might be an article that first appeared in a traditional law review that is then reprinted (with appropriate permission and attribution, of course) in a more specialized journal. On the other hand, your article may be too long and footnote-laden for reprinting in full, and will need to be distilled before it would be appropriate for a more practice-oriented readership.

Here is an extreme example of article spinning: The author published an article on the history behind a famous Contracts case in the *Cooley Law Review.* The article was later reprinted in full in the *Green Bag Almanac and Reader* and in *Stereoscope*, a publication of the Historical Society of the U.S. District Court for the Western District of Michigan. Excerpts from the article were published in the Michigan Supreme Court Historical Society's newsletter *Society Update,* the Historical Society of Michigan's magazine *Chronicle,* and the Scribes newsletter, *The Scrivener.* One manuscript became six articles.

Where to Look

In addition to general-purpose bar publications such as state bar journals, do not overlook the many, more specialized section periodicals published by the American Bar Association and many state bars. Their editors are hungry for good manuscripts in their fields and are more likely to consider publishing full or partial reprints.

The American Bar Association alone publishes almost 60 journals, magazines, and newsletters. The New York State Bar Association has 24 section publications. This publication is an example of the State Bar of Michigan's array of section periodicals. (The *ABA Journal*, read by half of the nation's 1 million lawyers, would be a prime placement, but forget about it. In recent years their articles have been written exclusively by staff reporters and freelance journalists.)

Then there are local and special-purpose bar magazines and newsletters, generally monthlies or quarterlies. Their editors too are copy-hungry. Finally, consider the weekly legal newspapers found in many metropolitan areas. Typically they publish one or more bylined articles wrapped around the legal notices. You might be surprised at the extent of their readership.

How to Proceed

For such second- and third-tier periodicals, get a hold of some back issues. Sometimes they are available through the organization's website. (For example, you can access back issues of this publication here: https://connect.michbar.org/laborlaw/lawnotes).

Skim the issues to see what kinds of articles they carry, at what length, with or without footnotes, their citation style, etc. It is also wise to obtain manuscript submission instructions. They might be printed in the periodical itself or be available on a website; otherwise, email the editor.

After you have massaged your article into shape, feel free to change the title (just cite the original title in your attribution footnote). Then give it one more spell- and grammar-check.

In the absence of instructions otherwise, transmit your submission to the editor as a Word document, using 12-point Times New Roman, along with a transmittal email explaining the article's significance and derivation. Also supply reprint permission (if necessary), a short author bio, and a high-resolution photo. The easier you make the editor's task, the more likely you will see your work in print.

You did the work, now reap the reward. Use these strategies to maximize your article's readership and impact.

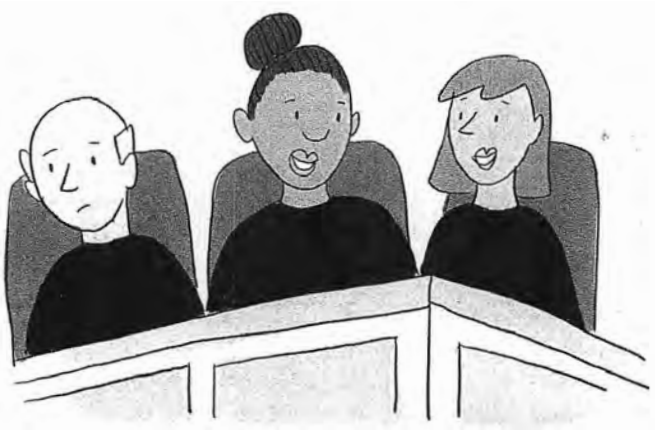
This article is derived from an article in the Scribes newsletter, The Scrivener, *available at https://issuu.com/home/published/how_to_maximize_articles_impact.* ■

DAVID PORTER WINS *LAWNOTES* CAPTION CONTEST

Below is artist Mallory Hee's cartoon with the winning caption by David Porter of Kienbaum Hardy Viviano Pelton Forrest.

Those who do not recognize David's allusion to current events might google "Giuliani" and "scrutiny."

Anyway, David wins fame, the satisfaction of a job well done, and a resume entry under "wit and erudition." Nice.



"Did ... did he ... did he just say 'normal scrutiny'?"

FAD WORDS—*LES PAROLES N'ENGAGENT À RIEN*

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

Author, editor, and teacher William Zinsser wrote that "every profession has its growing arsenal of jargon to throw dust in the eyes of the populace."

Zinsser warned: "Beware of all the slippery new fad words." He provided examples: "paradigm and parameter, prioritize and potentialize," all "weeds that will smother what you write." He advised: "Don't dialogue with someone you can talk to. Don't interface with anybody."[1]

This is sound advice, of course, for good writing and good communication in general.

We all have our *bête noires* when it comes to "fad" words and phrases. One of mine is *national conversation*, used by politicians, pundits, and personalities to display their enlightenment to the benighted rest of us. Calling for a *national conversation* is a succinct way to declare one's depth, seriousness, and concern—without bothering about content.

So, we are incessantly told, it is time for a *national conversation* about—you fill in the blank: climate change, fossil fuels, education, race, law enforcement, "common sense" gun control, substance abuse, criminal justice reform, healthcare, obesity, food safety, foreign policy, Enlightenment values, etc.

The word *conversation* to my ear—trained by Detroit public schools and well-regarded public universities—and confirmed by the Merriam-Webster dictionary (an arbiter of word meaning "since 1828")—means (emphasis added): "*oral exchange* of sentiments, observations, opinions, or ideas"—i.e., *"talk."*

Calls for *national conversations* about serious issues are mostly virtue-signaling. The phrase is meant to tell—not show—that its users are enlightened—in contrast to those of us who must be instructed to turn off Netflix and start conversing about serious stuff—*if* we want to be like them: good, caring, responsible, and right-thinking.

The French phrase *qui s'accuse, s'excuse* means to accuse oneself is to excuse oneself. When politicians, pundits, and personalities call for *national conversations*, they are mildly accusing themselves of complicity in the subject problem—maybe because their private-jet use contributes to climate change, *c'est dommage*—while excusing their complicity by calling on the rest of us—who maybe don't have private jets—to start conversing.

When politicians, pundits, and personalities importune the rest of us to get on the *national conversation* bandwagon, I have two thoughts: (1) *qui s'accuse, s'excuse* and (2) *les paroles n'engagent à rien*, which means, idiomatically: talk is cheap.

I hope that when you next hear a call for a national conversation, you too will recognize *qui s'accuse, s'excuse* applied and think *les paroles n'engagent à rien*, if not worse.[2]

—END NOTES—

[1]William Zinsser, *On Writing Well* (30th Anniversary ed., 2006) at 15.

[2]No French people were injured in the preparation of this essay. All translations were assisted by Francophone legal assistant Tara Smith, but any errors are the author's. If there are errors, *excusez-moi, s'il vous plaît.* ■

HOW CANDOR MAY GET CLIENTS

John G. Adam
Legghio & Israel, P.C.

Alan Dershowitz, on meeting Mike Tyson after his soon-to-be client Tyson's 1992 rape conviction—from Dershowitz's *Taking the Stand: My Life in the Law* (2013) at 326:

The first time I met Mike Tyson was the night before he was to be sentenced and sent to prison. Mike was deciding whether to accept Don King's recommendation that he hire me as his appellate lawyer. He was in a hotel room in Indianapolis, Indiana, with his entourage. After briefly discussing the case and the appeal, he turned to me and asked point-blank, "So, Professor, I have two questions. Do you believe I'm innocent and what do you think of me as a person?"

I replied that I had no basis at that time to form a judgment about his guilt or innocence since I had not yet read the transcripts.

He said, "OK, that's lawyers' talk. Now, man-to-man, what do you think of me?" I looked him straight in the eye and said: "If you're innocent, you're a schmuck."

He looked back at me and said, "You calling me a schmuck?" I said, "Yes, if you're innocent, then you're a schmuck for going up to a hotel room at two o'clock in the morning with a woman who you didn't know, without any witnesses, thereby putting yourself in a position where she could accuse you of rape."

He turned to his entourage and said, "This man's calling me a schmuck. He's right. I want to know why you guys didn't call me a schmuck. He's hired."

"I need somebody who's willing to call me a schmuck when I am a schmuck." ■

INFLUENCING EXPERT OPINIONS

Kevin P. Kales
Legghio & Israel, P.C.

The law works best when research and experience meet.

Ohio State University Moritz College of Law Professor Arthur F. Greenbaum supplies the research in his detailed article "Expert Witness Reports in Federal Civil Litigation: The Role of the Attorney in the Expert Witness Report's Preparation," 48 Hofstra L. Rev. 131 (2019).

Professor Greenbaum carefully chronicles, with 224 footnotes, how the federal courts and the federal rules have tried to manage what some think is "excessive lawyer involvement" in preparing expert reports.

Professor Greenbaum addresses the gamut of views on what is required and proper—from "ghost writing" expert reports on the, shall we say, "highly involved" side of the spectrum—to the "light touch" side of the spectrum, by gingerly suggesting a "choice of words that might be employed to make the witness's meaning clear." *Id.* at 146. Professor Greenbaum's research is exhaustive and objective. I want to say something less objective and simpler: Thank God lawyers are *overinvolved* with experts.

I have 35 years of experience in presenting medical expert reports and testimony to administrative law judges in workers' compensation and social security disability proceedings. I have reviewed hundreds of evidentiary files, prepared hundreds of witnesses to testify, addressed hundreds of expert reports and opinions, taken hundreds of expert medical depositions, and represented individuals in thousands of administrative proceedings in which expert opinions were essential.

Medical experts may be busy, confused, scared to take testimonial stands, poor communicators, unfamiliar with legal standards and evidence rules, arrogant, tunnel-visioned, narcissistic, self-aggrandizing, self-important, not used to communicating with people outside the medical profession, not adept at communicating with people in general, or all of the above. *Experienced lawyers know that medical experts need a lawyer's help and judges need lawyers to help experts.*

Without thorough preparation by diligent lawyers, medical expert reports and testimony may be rambling, unfocused, misguided, incomplete, or mistaken. Often expert reports and testimony are useless to judges. Judges want clear, efficient, concise, pertinent, and well-detailed expert evidence. The lawyer's *duty*—to the client *and* to the court—is to ensure that experts *effectively* communicate their expertise. *Experts need a lawyer's help.*

I will tell an illustrative story. I represented a social security disability claimant. He suffered from severe multiple sclerosis. He required a four-pronged cane. He walked with a severe limp. He was disabled. Our objective was to *prove* disability within the standard set by the Act.

The claimant's family doctor's chart included the M.S. diagnosis, but lacked clinical findings. Worse, the doctor's chart opined that the patient was doing "fantastic." No doubt this word choice was informed by the doctor's sunny worldview, his excessive optimism, and his recognition that the patient was bravely coping with a devastating and debilitating medical condition. A judge, on the other hand, who is focused on *legal disability,* might view the charted word "fantastic" as expert evidence that my client is exaggerating about how M.S. seriously limits his daily life.

The chart of the treating neurologist was even worse. It confirmed the M.S. diagnosis and contained many supportive clinical findings. But it also stated that the patient had a "normal" pattern of walking and standing!? Yeah "normal" for a patient severely disabled by M.S.

As good fortune would have it, this case was heard by an experienced social security judge. He knew these two doctors were too busy or too casual or too divorced from context to be accurate in their own charts. How did the judge know? The judge listened to my client, and observed him—and *then* granted disability benefits. But for the judge's experience, the "evidence" from the two physicians—Doctor *Fantastic* and Doctor *Normal*—could have produced an absurd result. Judicial experience intervened to produce a just result. *Experienced judges know that medical experts need a lawyer's help.*

Many experts dislike lawyers. Many are afraid of the legal process. Many have no idea what language to use and misunderstand legal standards. Without deep lawyer-assisted help, many experts give rambling and bumbling testimony or offer out-of-context views which fail to address the pertinent legal standards or worse, distort the facts. Thank God lawyers influence medical reports.

Professor Greenbaum cites the *Restatement (Third) of The Law Governing Lawyers,* at 144-145. The *Restatement* provides apt guidance. A lawyer should:

- Help the expert present evidence favorable to the client's case.
- Educate the expert about the role of an expert witness, effective courtroom communication, and proper demeanor.
- Discuss other expected expert testimony and its impact and have the expert present testimony in that light.
- Explain the law and the standards to be applied by the judge.
- Coordinate the expert testimony with the other evidence to be introduced.
- Review possible cross-examination and prepare the expert how to answer.
- Suggest words and emphasis, to make meaning clear.

Allowing lawyers broad abilities to accomplish what the *Restatement* suggests will facilitate expert opinions that are clear, efficient, concise, and well detailed, to serve the client, the judge, *and* the integrity of the process. In those few cases where a lawyer goes too far in influencing an expert, a concern raised by Professor Greenbaum, the remedy is the adversary system's greatest engine for eliciting truth: cross examination. ■

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.

Garden City Education Association, MEA/NEA -and- Garden City Public Schools, Case No. CU18 F-020 (October 22, 2020)

Charging Party, Garden City Public Schools (District), initiated an Unfair Labor Practice Charge against the teachers' union for the District, the Garden City Education Association (Union), on June 18, 2018. The Charge claimed the Union violated Section 10(2)(d) of PERA by advancing a grievance to arbitration over an alleged prohibited subject of bargaining. The matter was assigned to Administrative Law Judge (ALJ) David M. Peltz.

The District and the Union are parties to a collective bargaining agreement (CBA) that was in place from September 1, 2015 through August 31, 2018. The Union represents all certified teachers, counselors, psychologists, social workers, coordinators, driver education instructors, librarians, consultants and "all positions listed in Schedule B" of the parties' CBA. Schedule B positions are extracurricular or "co-curricular" in nature. Schedule B positions were extra-duty assignments and included such positions as head coaches and assistant coaches for student sports teams, among others. There was no requirement in the CBA or otherwise which mandated these positions be filled by a certificated teacher. The Union's bargaining unit members had priority to Schedule B positions, for which they would receive additional pay, but Schedule B positions could be held by individuals outside the Union's bargaining unit.

In early 2018, the District hired an outside individual as the boys' varsity soccer coach, a Schedule B position, instead of an applicant who was a member of the Union's bargaining unit and a certificated teacher. On March 12, 2018, the Union filed a grievance over the District's hiring of an outside candidate, alleging *inter alia* that the position was no longer open to a candidate outside the District and that hiring an external candidate violated the parties' CBA. The District continued to deny the grievance and the Union ultimately filed a demand for arbitration on May 31, 2018. Shortly thereafter, the District filed its Charge, alleging the Union had violated Section 15(3)(j) of PERA by advancing a grievance over "teacher placement" to arbitration.

The matter was then heard by Arbitrator Michael J. Falvo on January 22, 2019. For purposes of the arbitration hearing, the parties stipulated that they were not waiving their rights to challenge the application of the arbitration award—pursuant to Section 15(3)(j) of PERA—to the members of the Union's bargaining unit covered by the Teachers' Tenure Act. The parties agreed that, should the Arbitrator find in favor of the Union, the Arbitrator's award would only apply to the non-teacher members of the bargaining unit, pending the outcome of the instant Charge. On March 18, 2019, Arbitrator Falvo granted the Union's grievance; but, subject to the parties' stipulation, did not award any individual relief.

Section 15(3)(j) of PERA renders teacher placement a prohibited subject of bargaining. ALJ Peltz characterized the District's position as claiming Section 15(3)(j) applied to any placement decision involving a certificated teacher, even if the position in question is a non-instructional, extracurricular position. In his analysis, ALJ Peltz examined the text of Section 15(3)(j), as well as the relevant portions of the tie-barred legislation, most appropriately 2011 PA 103, which amended PERA and the related laws. ALJ Peltz determined the phrase "teacher placement" was ambiguous as it was used in Section 15(3)(j) and held the prohibition was only intended to prohibit a labor organization from insisting on bargaining over the placement of individuals in classroom positions. Therefore, ALJ Peltz issued a *Decision and Recommended Order* dismissing the Charge.

The District filed timely exceptions, alleging *inter alia*, that the *Decision and Recommended Order* misinterpreted Section 15(3)(j) of PERA. However, MERC agreed with ALJ Peltz and affirmed the *Decision and Recommended Order* by a 2-1 vote, dismissing the District's Charge against the Union. Commission Members Bagenstos and Pappas concurred with the conclusion of ALJ Peltz, but the majority wrote the plain meaning of the term "teacher placement" was sufficient to establish that the facts did not implicate the prohibited subject of bargaining found in Section 15(3)(j). Commission Member LaBrant filed a dissenting opinion indicating he would have voted to sustain the District's Charge.

Hurley Medical Center -and- Registered Nurses & Registered Pharmacists Association, Case No. 19-H-1753-CE (September 8, 2020)

Charging Party, Registered Nurses & Registered Pharmacists Association (RNRPA) initiated an Unfair Labor Practice Charge against the Hurley Medical Center (Employer), on August 26, 2019. The RNRPA alleged the Employer violated Section 10(1)(e) of PERA by discontinuing privileges that had previously been granted to the RNRPA. Specifically, the RNRPA alleged the Employer had stopped furnishing it with office space and other related amenities which the Union had used for representational purposes. The RNRPA alleged the Employer had moved to evict it from office space used in a facility the Employer owned, and the Employer's action constituted an illegal midterm modification of the parties' collective bargaining agreement or, alternatively, a repudiation of an established past practice. The Charge was submitted to Administrative Law Judge (ALJ) David M. Peltz.

The Employer, Hurley Medical Center, is a 443-bed public teaching hospital located in Flint, Michigan. Ten bargaining units represent Hurley Medical Center employees. The RNRPA is one of two bargaining units with collective bargaining agreements (CBAs) providing union representatives with full-time paid

(Continued on page 12)

MERC UPDATE

(Continued from page 11)

release time. The CBA between the RNRPA and the Employer contained a maintenance of conditions clause. RNRPA representatives were also limited in their access to the Employer's hospital space for employee representation purposes. Accordingly, the Employer had provided the RNRPA with office space and other related amenities for more than thirty years without requiring compensation from the RNRPA. Most recently, the Employer had provided the RNRPA with office space in the Dutcher Center, along with space for the Employer's other employee labor unions. The Dutcher Center was located on the Employer's campus, and witnesses from both parties testified having the RNRPA office within a short distance of the Employer was a benefit to both parties.

In mid-2018, the Employer began negotiating with another outside entity about establishing a behavioral health facility at the Dutcher Center location. The RNRPA and the other labor unions were not officially notified of the Employer's plan until they received eviction letters from the Employer on July 1, 2019, stating their permitted use of the Dutcher Center office space would cease as of December 31, 2019. A subsequent meeting with the Employer's labor relations officer clarified the Employer did not intend to provide the RNRPA with substitute office space.

ALJ Peltz recognized that while the Commission had never specifically addressed whether an employer is required to bargain over providing a union with office space and related amenities, it was well-established that privileges and benefits extended to labor organizations or their representatives constitute mandatory subjects of bargaining when they relate to the union's representation of bargaining unit members. ALJ Peltz concluded the evidence overwhelmingly established that the RNRPA had utilized the office space at the Dutcher Center for representational activities. ALJ Peltz rejected the RNRPA's contention that the actions taken by the Employer constituted an illegal midterm modification of the parties' CBA because the topic was not covered by the contract. However, ALJ Peltz determined that the parties had a binding past practice with respect to the Employer providing free office space and related amenities to the RNRPA.

ALJ Peltz also dismissed allegations from the Employer that requiring them to provide the RNRPA with office space would have placed the Employer in violation of Section 10(1)(b) of PERA. ALJ Peltz determined Section 10(1)(b) was intended to address situations of employer dominance or interference with a labor union. While looking to NLRB precedent covering Section 8(a)(2) of the NLRA, a similar provision to Section 10(1)(b) of PERA, ALJ Peltz determined that providing office space and basic office services did not run afoul of these concerns. Accordingly, ALJ Peltz issued a *Decision and Recommended Order* requiring the Employer to reinstitute its former practice of providing the RNRPA with office space and other related amenities in the Dutcher Center or a comparable location. No exceptions were filed. ■

TACKETT, REESE, AND THE MERCURIALITY OF *STARE DECISIS*—THE SUPREME COURT'S SELECTIVE DISREGARD FOR ITS OWN PRECEDENT

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

In *Guys and Dolls*, gangster Big Jule—displaying a revolver in his shoulder holster—*insists* that crapgame-organizer Nathan Detroit shoot craps—Nathan's cash against Big Jule's marker. Big Jule *insists* on using his own dice, "made especially" for him. He "had the spots removed for luck." But he remembers "where the spots formerly were." Big Jule's memory put him "on a lucky streak," sending Nathan's "whole bankroll" down "memory lane."[1]

I have written about similarly-suspect memories—displayed in judicial decisions which *seem* reasoned, informed, and comprehensive, but are not. I lamented not what these decisions include, but what they *omit*—about their incomplete facts and selective application of *stare decisis*, disregarding where precedential spots "formerly were."[2]

Roger J. McClow provides scholarly support for my lament. He does this in two law review articles analyzing *Tackett* and *Reese*, Supreme Court decisions addressing collectively-bargained retirement healthcare. In the process, Roger offers insights about American labor law, the Supreme Court's selective regard for *stare decisis* principles, and judicial responsibility in constitutional theory and case-specific practice.[3]

1.

Roger shows that in *Tackett* in 2015 and *Reese* in 2018 the Supreme Court "relegated" seven decades of labor-law precedents to the "judicial dust heap"—not by rejecting those precedents on principle, but by ignoring them.[4]

For decades before *Tackett*, the Supreme Court recognized that a collective bargaining agreement "is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common law concepts which control such private contracts."[5] For decades the Supreme Court recognized the "special nature of a collective bargaining contract, and the consequent 'law of the shop' which it creates."[6]

That was then. *Tackett* held in 2015: "We interpret collective bargaining agreements, including those establishing ERISA plans, according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy."

In 2018, the Court cited *Tackett*, but dropped its "at least" qualifier. *Reese* said—simply and inaccurately: "This Court has

long held that collective-bargaining agreements must be interpreted 'according to ordinary principles of contract law.'"

As a result of *Tackett* and *Reese,* Roger shows, employers unilaterally ended or diminished employer-paid retirement healthcare promised in collective-bargaining agreements, many expired, but treated for decades as promising healthcare that was, like pension, "for life," "lifetime," and "vested." For decades these promises had been kept, or were enforced by federal courts. No longer.

2.

Before *Tackett* and *Reese,* Roger shows, many federal courts applied contract principles consistent with Supreme Court precedent and "federal labor policy" to collectively-bargained retirement healthcare promises—and enforced those promises.

Federal courts recognized that retirees *earned* pensions and healthcare with decades of work, and *paid for* those benefits, agreeing to divide their compensation into wages and fringe benefits, foregoing bigger paychecks to fund lifetime pensions and retirement healthcare, exercising patience, prudence, and foresight, fulfilling the American dream, ensuring post-retirement security and dignity for themselves and their surviving spouses.

At retirement, each retiree "vested," having fully performed the *quid* of the *quid pro quo* bargain, expecting the employer's performance of the *quo*. But after *Tackett* and *Reese,* Roger shows, there will be no *quo* for thousands of retirees. After *Tackett* and *Reese,* many employers—like the pharaoh in *Exodus*—"knew not" their retirees.[7]

3.

Roger shows that the Supreme Court ignored its own precedent. As if there were no history—and no *stare decisis et non quieta movere—Tackett* and *Reese* newly declared that collective bargaining agreements are not "special"—merely "ordinary."

Roger shows that a unanimous Supreme Court—mirroring some Sixth Circuit judges—selectively-applied, misapplied, or disregarded precedent, ignored or distorted record evidence, conformed without acknowledgment to an unfortunately-changed *zeitgeist,* and failed to apply the rule of law—to the detriment of thousands of retirees and surviving spouses denied the "benefit of their bargain." Roger shows that "the 'rule of law' is nowhere to be found in *Tackett* and *Reese,*" resulting in "miscarriage of justice" in particular, and in general showing the need for "additional critical scrutiny of every Supreme Court decision." Part 2, at 213.

Roger observes that every Supreme Court nominee promises "fidelity to precedent rather than personal ideology," solemnly recognizing that *stare decisis* principles at least provide "a modicum of impartiality." Part 1, at 188. These promises, Roger demonstrates, were broken in *Tackett* and *Reese*.[8]

4.

Roger makes his case with clarity, precision, detail, citations, history, and insightful analysis. His articles will be of practical, philosophical, and intellectual interest to all who care about labor law in particular or about the rule of law in general.[9]

At the least, Roger's articles put into revealing perspective the clay-footed work product of some Supreme Court justices, their highly-credentialed law clerks, and their counterparts in less-exalted forums. *Tackett* and *Reese* confirm Ambrose Bierce's definition of *lawful*: "compatible with the will of a judge having jurisdiction."[10]

Study Roger's articles or skim them. They will make you a better lawyer or judge.

—END NOTES—

[1]See the script-o-rama.com transcript of *Guys and Dolls*, the 1955 movie, based on the 1950 Broadway musical, based on what Wikipedia calls Damon Runyon's "humorous and sentimental tales of gamblers, hustlers, actors, and gangsters" in New York. The stories "grew out of the Prohibition era" and gave birth to the description *Runyonesque* and to the "vernacular" called *Runyonese. Jule,* you will remember or want to know, is pronounced "ju-lee."

[2]Stuart M. Israel, "*Stare Decisis* and a Litigator's Lament," Vol. 30, No. 2 *Labor and Employment Lawnotes* 9 (Summer 2020).

[3]See **(1)** Roger J. McClow, "Where the Law Ends—Part 1: *M&G Polymers v. Tackett* and *CNH Industrial v. Reese*—Federal Labor Policy, the Interpretation of Collective Bargaining Agreements, and the Failure of *Stare Decisis*," Vol. 20, No. 2 *Marquette Benefits & Social Welfare Law Review* 141-189 (Spring 2019) and **(2)** Roger J. McClow, "Where the Law Ends— Part 2: A Ceremonial Approach to the Interpretation of Collective Bargaining Agreements in *Tackett* and *Reese*," Vol. 37, No. 1 *Hofstra Labor & Employment Law Journal* 129-216 (Fall 2019).

[4]*Tackett* is *M&G Polymers USA, LLC v. Tackett,* 574 U.S. 427 (2015). *Reese* is *CNH Industrial, N.V. v. Reese,* 138 S.Ct. 761 (2018). Disclosure: Roger and I co-authored "Retiree Healthcare and *Reese v. CNH America*—The Beginning of the End of Contract Law as We Know It?" Vol. 59, No. 2 *Wayne Law Review* 417-459 (Fall 2013). We share similar negative views on the failures of some federal courts to enforce collectively-bargained promises of lifetime family healthcare earned by retirees, each with decades of industrial labor.

[5]*Transportation-Communication Employees v. Union Pacific R.R. Co.,* 385 U.S. 157, 160-161 (1966), citing *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 550 (1964).

[6]*NLRB v. Bildisco,* 465 U.S. 513, 524 (1984) (citations omitted), citing *John Wiley & Sons* at 550 and *Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 578-579 (1960).

[7]*Exodus* 1:8: "Now there arose a new king over Egypt, who knew not Joseph." For the Israelites, afflictions followed. *All* is not lost for *all* retirees. Courts still enforce collectively-bargained lifetime healthcare promises—for retirees able to traverse the post-*Reese* legal landscape. Victories are few, however, and no comfort to the thousands of retirees beyond the boundaries of the new legal landscape, where the map now warns *hic sunt dracones*. Also, there still are honorable employers, represented by honorable lawyers, who keep healthcare promises, or who at least negotiate VEBAs, HRAs, or other accommodations providing some support for retirees in their 70s, 80s, and 90s while the law of mortality works its immutable will.

[8]All the justices joined in the *Tackett* result. *Reese* was a *per curiam* decision, issued without briefing and argument. In other words, *all* the justices were on board to deprive retirees of their hard-earned healthcare—all the "good" justices *and* all the rest. This is so regardless of which justices are on your personal "good" list.

[9]The "where the law ends" titles of Roger's two articles allude to John Locke's 1689 principle— later embraced by the Founders and even later carved in stone on the Department of Justice building in D.C.—that judicial legitimacy depends on adherence to the rule of law: "Where-ever law ends, tyranny begins."

[10]Ambrose Bierce, *The Devil's Dictionary* (1911). Bierce defines *precedent* as "a previous decision, rule or practice which ... has whatever force and authority a judge may choose to give it, thereby simplifying [the judge's] task of doing as [the judge] pleases." Bierce was a bit more cynical than Justice Scalia, who wrote that *stare decisis* "protects the legitimate expectations of those who live under the law," requiring principled reasons to disregard precedent, or the *stare decisis* doctrine "would be no doctrine at all." *Hubbard v. U.S.,* 541 U.S. 695, 716 (Scalia concur.) (1995). *Tackett* and *Reese* support Bierce, not Scalia. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

***Bullshit Jobs,* David Graeber, Simon & Schuster, 2018 New York**

We just lost David Graeber at the age of 59. Too bad. He was one of the most original and provocative thinkers of his time and a lively and engaging writer.

Graeber was trained as an anthropologist. He did his field work in Madagascar and quickly got a job teaching at Yale, but he was fired for his politics. Graeber was not your garden variety liberal/Marxist academic. He was an activist anti-capitalist anarchist. He was one of the founders of Occupy Wall Street and is credited with coining the phrase, "We are the 99%." At the time of his death he was a professor at the London School of Economics.

Bullshit Jobs was Graeber's last book. It started as an essay *On the Phenomena of Bullshit Jobs* in a small magazine called *Strike!* To the surprise of everyone concerned, the piece went viral. It quickly got over a million hits, was translated into 21 languages and widely reprinted. He had hit a nerve.

Thousands of people wrote to say their jobs were a pointless, useless waste of time. To a capitalist, of course, this is impossible. Competition in an efficient marketplace must eliminate useless jobs. They simply cannot exist. But here were all these people loudly demonstrating that not only did bullshit jobs exist, they were everywhere, and they were metastasizing.

Graeber began corresponding with people all over the world. Like a good anthropologist, he compiled an ethnographic study. The group he studied consisted of people who held:

> a form of paid employment that is so completely pointless, unnecessary, or pernicious that even the employee cannot justify its existence even though, as part of the conditions of employment, the employee feels obliged to pretend that this is not the case.

Evidently, this is an enormous group. By one measure it accounts for 37 percent of the jobs in America.

In Graeber's taxonomy the group consists of Flunkies, Goons, Duct Tapers, Box Tickers, and Taskmasters. Here is a sample correspondence from a Duct Taper:

> Any given week, there will be a few situations where [our partner company] is supposed to reach out to my team for advisory. So for up to 20 minutes a week, we have actual work to do. Ordinarily, though, I send five or eight fifteen-word emails a day, and every few days, there's a ten-minute team meeting. The rest of the work week is functionally mine, though not in any way I can flaunt. So I flit through social media, RSS aggregation, and coursework in a wide but short browser window I keep discreetly on the second of my two monitors. And every few hours, I'll remember I'm at a workplace and respond to my one waiting email with something like: "We agree with the thing you said. Please proceed with the thing." Then I only have to pretend to be visibly overworked for seven more hours each day.

Graeber suggests that many forms of popular entertainment, Twitter and Facebook for instance, are popular precisely because they can be engaged in while one is pretending to do something else.

How is this possible? How can it be that a competitive, capitalist society can employ so many people – many of them quite well compensated - who contribute nothing? The focus of the book is not Graeber's attempt to answer that question. Nor is it his prescription for what can be done about it. The book mostly raises the question, provides evidence for the existence and scope of the problem, and defeats the simple and obviously false responses to it. It is hard to imagine, for instance, how anyone who thinks he has a bullshit job could be mistaken.

If Graeber is right, what does it mean? What is the effect of so many bullshit jobs on the economic health of a society? And what is the psychological effect on the people who have those jobs and on the mental health of the society that generates them?

We were lucky to have a scholar among us with the independence of thought to be able to raise these questions, and we were fortunate to have an author who could treat them with both a depth of knowledge and a deftness of touch.

Graeber was a marvelous writer. He could drop a phrase *en passant* that the rest of us might labor forever and still fail to produce. Here's an example:

> Men will always take for themselves the kind of jobs one can tell stories about afterward, and try to assign women the kind you tell stories during.

His other books are *Debt: The First 5,000 Years* and *The Utopia of Rules: On Technology, Stupidity, and the Secret Joys of Bureaucracy.* All are highly recommended. ■

THE CASE FOR EMBRACING DIVERSITY AND INCLUSION IN OUR PROFESSION

Sheldon J. Stark
Mediator and Arbitrator

We are living in a time of anxiety and uncertainty: A deadly pandemic. Global warming. White nationalism and domestic terrorism. The decline of democratic values around the world. And a national discussion about race and race relations, diversity and inclusion, from rethinking how we police to the role of Black Lives Matter.

As a profession, we need to be part of the discussion. Coming as I do from a position of white privilege, I want to weigh in. How are we doing? How is the Bar doing? How is our Section doing? Are we doing enough to strengthen opportunities for all? Do we model tolerance and understanding of differences? Are we actively removing barriers for advancement and growth for members of minority and culturally diverse communities? I am confident we can do better.

I am equally confident there is more we can do to promote a vibrant, rich, diverse, welcoming and inclusive profession for all. Despite our progress to date, there remains a long way to go. This is a topic of critical importance to the future of the Bar in general. The demographics of the country are changing. So are the demographics of the Bar. The time to make progress is now. I write to present the case for why you, friends and colleagues, should use this time to commit yourself and embrace the process.

1. It's the right thing to do: We are more alike than different. Our genes are 99% the same. We're all earthlings, inhabitants of the same planet, third rock from the Sun. Our planet is in danger like never before. We face these dangers together. To overcome these threats, many of which are existential, we must all pull together. It takes every one of us. We can't afford to ignore the contributions and strengths of any person or group regardless of race, religion, gender, age, sexual orientation, condition of disability or other protected characteristic. Accordingly, we have a duty to every person who shares our world to see to it they have every opportunity to contribute to the limits of their potential. We must all be part of the effort to establish a more just and equitable society within a more promising and inclusive future. Black, brown, yellow, red, white. Martin Luther King, Jr., taught us these are skin colors not measures of our character. We need one another if we are to prevail over climate change, ensure clean air to breath, clean water to drink, bring peace to a world in tumult, and produce enough food that no one goes hungry. We need everyone's efforts in the search for a cure for the COVID-19 pandemic, cancer, Alzheimer's, HIV/AIDS, heart disease, etc.

2. Living up to the American Ideal: In this country everyone is entitled to equality before the law. Each and every one of us is entitled to an equal opportunity and equal chance to enjoy the benefits of the American Dream. Every person should be able to live up to their true and full potential. That's the American ideal. Since the post-Civil War Amendments to the United States Constitution, the laws of the United States guarantee due process and equal protection to everyone. These principles are central to our democracy and the democratic values on which our system of government rests. As lawyers, our *job* is to enforce the rule of law in society. We speak for the voiceless. We even the playing field. We champion everyone deserving of equal treatment. Nothing can tear the fabric of our cohesion or corrode the body politic more insidiously than perceptions that things are unfair, unequal and discriminatory. Think about all the societies torn apart by their differences, where force is used to gain objectives. Not so much in the United States, where the courts have been a venue to ensure that the majority rules but the minority has rights. As lawyers it is our job to guard this American ideal. In a sense we are the first line keeping the peace. The rule of law prevents the social fabric from ripping to shreds. In order to appreciate the true meaning of equal rights, equal justice, and equal opportunity for all, we must get to know, become familiar with and connected to members of diverse communities. That can't happen in our segregated world unless we actively do something about it. It's on us. You and me.

3. Living Up to Our Ideals as Lawyers: The SBM is committed to diversity and inclusion. The Bar has adopted a Diversity Pledge that it promotes among lawyers. When we pay our dues to the State Bar, we adopt the goal of improving diversity and inclusion. If you're a member of the ADR Section, the Section has itself committed to the Pledge as have most other Sections. Many of our members have done so individually, as well. We are a self-governing organization. As such, it is our responsibility to live up to our own ideals. https://www.michbar.org/diversity/pledge

4. Adhering to the Code of Professional Responsibility: Rule 6.5 of the Michigan Rules of Professional Conduct require that we lawyers treat everyone with courtesy and respect. The rule prohibits treating anyone discourteously or disrespectfully because of race, gender, or other protected personal characteristic. We are required equally to enforce these rules with our subordinates and staff. This is not theoretical. This is *our* Code. Self-imposed. We are expected to live up to it and we should.

5. Growth and Development as Individuals: As I grew up, I was taught and came to believe this nation was built by immigrants, a great melting pot. I still believe in that ideal. Today we are a richly diverse, multicultural nation with many cultures, languages, sub-cultures and colors. There is strength in that diversity. E Pluribus Unum. If we do not reach out to others in the diverse communities that surround us, we do not learn from the lives of others, or develop and expand our awareness from diverse experiences. We are ignorant of the challenges they've had to overcome, the discrimination they've faced. Diversity and inclusion contribute to our own personal growth and development. It enhances the quality of our lives, makes us stronger as individuals and enriches the world in which we live.

6. Enlightened Self-Interest #1: Diversity and inclusion are good for business. Many corporations, especially in the top 500, require that the law firms which do their legal work are themselves committed to diversity and inclusion, with minority partners treated fairly and equally. If you aspire to represent some of the largest and best corporate clients in America, you must yourself be committed to diversity and inclusion and show it in your law practice.

(Continued on page 16)

THE CASE FOR EMBRACING DIVERSITY AND INCLUSION IN OUR PROFESSION

(Continued from page 15)

7. Enlightened Self-Interest #2: Lawyers are professionals. For a substantial majority, that has a business aspect. Lawyers and mediators must earn fees to cover the expense of running their offices. Their practices must thrive if they are to feed themselves and their families. To thrive, law practices require new and repeat clients in need of legal work and advice. Much of that work comes from referrals, generally from other lawyers. In urban areas like Detroit, Flint, Benton Harbor, Southfield, there are majority minority communities. Isolation in a white world insulates white lawyers from the needs and interests of these communities. If lawyers commit to diversity and inclusion, to make friends, build connections, reach out, they are likely to expand their referral sources, gain new business, extend their market and develop new business opportunities.

8. Enlightened Self-Interest #3: Many lawyers work for corporations, government agencies or non-profits. There are strong anti-discrimination laws applicable to each. Lawyers who work in these settings are prohibited from discriminating. Treating minorities differently, failing to treat minorities with respect, and making insensitive racially tinged remarks can get the entity sued for discrimination, harassment or retaliation. It can also get the individual sued *and* fired or both. Accordingly, committing to a diverse and inclusive world increases justice for all, improves morale, increases productivity, protects our employers from liability and ourselves from discipline or discharge.

I urge you to seize this opportunity to reflect on the big questions. I invite you to consider how you, too, can make this profession of which we are all so proud more diverse, more welcoming, more inclusive. ■

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.

SHIRLEY SIEGEL, CIVIL RIGHTS LAWYER: "HARD WORK"

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

This summer the *New York Times* published the obituary, written by Sam Roberts, of Shirley A. Siegel, "leading civil rights lawyer." Born Shirley Adelson in 1918 "in the South Bronx to Jewish immigrants from Lithuania," Siegel died in June 2020 at 101.

Siegel was "a top law school graduate" who "overcame rejections by 40 male-dominated law firms before forging a career as a leading civil rights lawyer, arguing cases before the Supreme Court and becoming New York State's first female solicitor general."

Siegel graduated fourth in her class from Yale Law School in 1941. Her classmates included Gerald R. Ford, Potter Stewart, and R. Sargent Shriver.

Siegel's 40 law firm rejections came "despite an unsolicited endorsement from" Professor Arthur L. Corbin, author of *Corbin on Contracts.* Corbin wrote that "she needs help to get a starting job, first because she is a girl, and second because she is Jewish." He wrote that there was "no reason for the slightest hesitation on either ground" and that anyone "who employs her in legal work will have reason to be thankful to us" at Yale.

Those "40 cold shoulders" were "nothing new" to Siegel, who said: "I came to my first class" at Yale in 1938 "and nobody would sit next to me."

Siegel "was finally hired by Proskauer, Rose & Paskus, a largely Jewish firm, becoming its first female lawyer." She "organized New York State's newly created Civil Rights Bureau in 1959," and served in other legal positions with the state and New York City, addressing employment discrimination and other issues.

Siegel continued to practice into her 90s. She talked about "the importance of understanding the facts, getting skeptical if what you're being told doesn't hang together." "It just applies to everything. And, of course, hard work. Everything is hard work." ■

THE LAWSUIT MARKET

Barry Goldman
Arbitrator and Mediator

I. The Spinner in the Pie

Draw a circle to represent your lawsuit. Divide the circle up into a pie chart to represent different potential outcomes. If you think there is a 25% chance your case will be dismissed, mark off 25% of the circle and write zero in it. If you think there is a 35% chance of a recovery of $100,000, mark off 35% of the circle and write $100,000 in it. Keep doing this until you've marked off the whole circle and you've represented what you think are all the likely outcomes. Adjust the outcomes and the percentages until you're comfortable you've accurately captured the situation.

There is no point in cheating. The purpose of this exercise is to help you rationally determine a fair settlement value for your case. You can only hurt yourself if you exaggerate or fudge.

When you're done, do the math. Multiply the percentages times the outcomes you've identified and add the results together: (.25 x 0 = 0) + (.35 x 100,000 = 35,000) + etc.

This is a valuable exercise in itself, especially if a client and a lawyer go through it together. There is evidence that unless you are clinically depressed the number you arrive at through this process is likely to be significantly over-optimistic, but let's go on.

Once you've honestly evaluated the likely outcomes and their probabilities, the sum of those probabilities is an "expected value." Let's say you came up with $75,000. That means $75,000 is your best estimate of the average recovery if you tried this case a large number of times. A classical economist would argue that after adjusting for costs and fees, you should accept any settlement offer that is better than the expected value and reject any offer that's not as good.

But it is important to understand two things about expected value:

1. Even if you did try the case 1,000 times, you might never achieve the expected outcome. This is because expected value is an average - a mathematical construct. The average American family has 2.5 children and 1.5 cars or some such; that doesn't mean any such family actually exists.

2. You aren't going to try this case 1,000 times. You are going to try it at most once.

So, while the expected value calculation tells us something about your situation, it doesn't capture the whole picture. It only tells the whole story for decision makers who are risk neutral. An insurance company that tries thousands of similar cases might be risk neutral. An individual party is not. The pie chart was effective in reducing a number of possible outcomes and probabilities down to just one number, but now we need a way to get risk back into the model.

Let's go back to the pie chart. This time imagine you have one of those spinners that came with the board games you had when you were a kid. You flick the little arrow and it spins around and tells you how many squares to move. Put that spinner in the center of your pie chart and now you've got an accurate model of your situation. If you are the plaintiff, you have the right to flick the spinner one time. If you're the defendant, you have the obligation to pay the plaintiff whatever he lands on.

The settlement value of this lawsuit, from the plaintiff's point of view, is the amount he would have to be paid to agree to give up his right to flick the spinner. And the settlement value from the defendant's point of view is the amount he would be willing to pay the plaintiff to get him to give up his right to spin. Note that is not the same as expected value. Classical economists, people who study the way people *should* make economic decisions, say the value of a spin is exactly the sum of the possible outcomes multiplied by their likelihoods. But classical economics doesn't take into account people's actual feelings about risk.

Behavioral economists, the ones who study how people actually *do* make economic decisions, know that people are risk averse. If you show people the wheel and spinner you just made and ask, "Which would you rather have, $75,000 or a chance to spin this wheel?" they will often look at the wheel, see that one quarter of the wheel shows a recovery of zero and take the cash. People are risk averse. They are willing to take less than expected value in order to avoid risk.

This is less true for defendants than it is for plaintiffs - people are in general willing to take greater risk to avoid loss than they are to achieve gain - but it is still true. A defendant looking at a pie chart with a spinner in it is likely to focus on the area where he stands to lose the most and will often agree to pay more than expected value to avoid the risk that he may have to pay even more than that.

II. The Lawsuit Market

As all dispute resolution practitioners know, a great deal depends on whose ox is gored. Parties to a dispute have little inclination or ability to "look at the case from the other person's point of view" or to "look at the case objectively." The other side, after all, is Evil and looking at the matter from their point of view would be wrong. And besides, as we all know, my point of view *is* objective. I was there.

So I want to offer another approach. This one doesn't require asking parties to step into anyone else's shoes. They get to stay in their own shoes. They just have to imagine the existence of a lawsuit market.

To a plaintiff, a lawsuit is the right, under certain conditions, to take money from a defendant. To a defendant, a lawsuit is the obligation, under certain conditions, to pay money to a plaintiff. The conditions can get quite complicated. They involve whose witnesses are believed and which jurisdiction's law applies and what the judge had for breakfast and so on. And each has a range and a probability distribution which may also be quite complicated. But if we strip all that away and look just at basic economic structure, a lawsuit involves an obligation to pay and a right to be paid.

Once we realize that, it is only a short step to imagine that there could be a market for lawsuits in which the right to sue and the obligation to be sued could be bought and sold. The reframing

(Continued on page 18)

THE LAWSUIT MARKET

(Continued from page 17)

I propose comes about when we ask the parties to a dispute to think of themselves as investors in this market. We say to the Plaintiff:

> Suppose you didn't have this lawsuit, how much would you be willing to pay to get it?

In other words, we ask the plaintiff to put a value on the economic opportunity represented by his right to sue. But instead of thinking of it as a gain, we ask him to think of it as a loss – a cost.

And we say to the defendant:

> Suppose you weren't involved in this lawsuit, how much would someone have to pay you to endure it?

We ask the defendant to put a value on the economic cost represented by his obligation to be sued. But instead of thinking of it as a loss, we ask him to reframe it as a gain.

If the theorists are right about gain frames and loss frames and loss aversion and the rest, these reframed questions will generate a lower plaintiff's number and a higher defendant's number than we get when we ask the question in the customary way.

The next step is to persuade the parties that the answers they give to these questions are the valuations they themselves put on their role in their lawsuit. If you say, Mr. Plaintiff, that you would pay only x dollars to acquire your lawsuit if you didn't already have it, you are saying, are you not, that you think your lawsuit is *worth* x dollars.

If you say, Mr. Defendant, you would have to be paid y dollars in order to allow yourself to be sued in this case if you weren't already in it, aren't you saying you think this case is worth y dollars?

III. The Lawsuit Market Meets the Spinner in the Pie

Once these two ideas are in place we are ready to combine them for what I anticipate will be maximum effect. First, we use the pie chart to establish what the party believes to be the objective probabilities and their distribution. Then we stick the spinner in the pie to establish the party's subjective valuation of that package of probabilities. We say to the Plaintiff:

> Given that pie, marked with those outcomes, you have the right to spin one time and to get paid what you land on. How much would someone have to pay you to buy that right? How much would you be willing to sell it for?

And we say to the Defendant:

> Given that pie, marked out as you have marked it to show the probable outcomes and their likelihoods and given the fact that the Plaintiff has the right to spin and you have the duty to pay what he lands on, how much would you be willing to pay to buy his right to spin?

That gives us the familiar settlement decision - Plaintiff in a gain frame, Defendant in a loss frame.

Now we apply the reframing provided by the Lawsuit Market. We say to the Plaintiff:

> Suppose you didn't have this lawsuit. Instead, imagine that you are an investor in the Lawsuit Market. And suppose you see an opportunity to invest in a lawsuit that has the probabilities marked on this pie. In other words, you have an opportunity to buy the right to spin this spinner one time and to get paid the amount you land on. How much would you pay for that right?

And we say to the Defendant:

> Suppose you didn't have this lawsuit. Instead, you are an investor in the Lawsuit Market. Suppose there is a lawsuit with the probable outcomes marked as you have marked them here. The Plaintiff is about to spin the spinner and someone is willing to pay you a sum of money if you agree to pay the Plaintiff the amount he lands on. How much would you have to be paid in order to agree to do that?

IV. The Lawsuit Market and the Spinner in the Pie Meet the Status Quo Bias

There is one more step. This is designed to take advantage of regret aversion and the status quo bias. In this version we ask the parties not to think of themselves as just any investor in the Lawsuit Market but to imagine themselves as their post-settlement selves. We ask them to imagine that the case has settled. The money has been paid by the Defendant and received by the Plaintiff. The payment has been posted and booked. And we ask the parties to imagine un-winding the deal. Suppose the offer under consideration is $100,000. We say to the Plaintiff:

> Imagine that the lawsuit is over. Suppose it settled for $100,000 with $75,000 net to you and the money is sitting in the bank. Now, suppose this investment opportunity came up. You have the opportunity to take your $75,000 out of your bank account, put it down on the table and spin this spinner. You have to give up your $75,000 for the privilege, but you get to keep whatever you land on. Would you do it? If not the whole $75,000, how much would you be willing to take out of the bank and bet?

And we say to the Defendant:

> Imagine the lawsuit is over. Suppose it settled for $100,000 with $75,000 net to the Plaintiff. The deal is closed, the money is paid and booked. Now this investment opportunity has come up. There is a lawsuit out there with the probabilities distributed just as you have them on this pie. Someone is willing to pay you $100,000 if you will agree to pay the plaintiff in that lawsuit what he lands on. Will you do it? If you won't do it for $100,000, how much would you have to be paid?

At this point I think we have a tool that will settle cases.

Editor's Note. This article is excerpted from Barry Goldman's book, *The Science of Settlement—Ideas for Negotiators* (2008), available at amazon.com., reviewed in *Lawnotes*, Vol. 18, No. 2 (Summer 2008). ■

WHAT CAN APPELLATE ATTORNEYS DO FOR YOU?

Thomas J. Davis
David Porter
Kienbaum Hardy Viviano Pelton Forrest

Law & Order. The Practice. Perry Mason. There's a reason why most of the best legal dramas are about jury trials: they showcase passionate legal advocacy by lawyers who demand the facts and the truth, whether by discovering crucial evidence at the last minute or cross-examining mendacious witnesses until they break down and confess.

But very few people would watch a show focused on the reality of appellate law, no matter how exaggerated—and that's why you probably can't even name one (excluding, of course, that classic Joe Mantegna vehicle *First Monday*). Reviewing a cold trial court record, researching case law, and writing briefs doesn't make for good viewing. And oral arguments—even in the most high-profile cases—would put the average viewer to sleep. It is perhaps for this reason that the average person, indeed, even the average lawyer, might overlook what a good appellate lawyer can bring to the table, even when the trial-level proceedings are ongoing.

So, what can a good appellate lawyer do for you?

***First,* prevent you from losing the appeal before the trial even ends.** Courts of appeals decide cases based on a defined factual record and legal issues properly raised in the trial court. The appeal is not the time to raise new legal arguments (or, heaven forbid, new facts). Appeals courts generally refuse to even consider legal arguments that were not adequately "fleshed out" factually in the trial court or that were not raised at the proper time. For example, did the trial judge refuse to grant your client summary judgment on a killer legal argument, but then you forgot to make the same argument in your motion for judgment notwithstanding the verdict after the jury unjustly found against your client? If you're on appeal in the U.S. Court of Appeals for the Sixth Circuit, you're out of luck, because the argument has been almost certainly waived. There are also complex rules governing how to preserve arguments regarding jury instructions or challenges to an ambiguous or inconsistent jury verdict form. Having an appellate attorney—even one who won't yet be involved in writing—at least review key dispositive pleadings, jury instructions, and post-trial motions to ensure the proper presentation and preservation of key legal issues can be worth every penny, for both you and your client.

***Second,* bring a fresh perspective and package arguments for appellate success.** Trial lawyers who work a case, often for years, can come to view it as a parent would their child: quick to tout its strengths and loath to admit its shortcomings. But biased assessments, even well-intentioned ones, are a poor foundation for future success. Although appellate specialists have little to offer by way of parenting advice, your client's case is a different matter. An appellate specialist can approach the record from a distance. After you have worked diligently in the trial court (perhaps with the help of an appellate specialist) to ensure that all of the possibly relevant legal arguments are preserved, a good appellate attorney can give a fresh-eyed evaluation of each issue and focus on the two or three that are most likely to resonate on appeal.

Moreover, while trial is about the facts of what happened to your client, an appeal is about much more. As former Michigan Supreme Court Chief Justice Robert Young, Jr. was fond of reminding advocates, an appeals court is there to decide what the rule will be, not only for your client's case but for the next hundred cases like it. Appellate attorneys know this and are attuned to emerging trends in the law. They will focus on the jurisprudentially significant issues and tailor the argument with an eye toward setting legal precedent favorable to you and your clients down the road.

***Third,* understand the audience and advocate accordingly.** Appellate advocacy requires a different approach from trial advocacy. All judges, trial and appellate alike, have busy dockets and, thus, short attention spans. But unlike trial judges, appellate judges make most of their decisions before the lawyers ever step foot in court. That means that the appellate brief is the most important—and, in many cases, the *only*—chance to convince the judges to rule in your client's favor. Good appellate attorneys are excellent writers and skilled researchers who know how to distill the key legal points into a focused, effective message that is easy to understand. And in close cases where oral argument matters, an appellate attorney is fluent in the kind of rhetoric that appellate judges find persuasive. They know that the same words that will stir a jury of laypeople will likely fall flat with three black-robed lawyers. A skilled appellate advocate can also navigate the intricacies of addressing a multi-member panel of judges, many of whom have conflicting ideologies. With a firm grasp of the reputation and judicial philosophies of the appellate bench, an appellate specialist will know when a judge is throwing a softball or trying to extract a concession that will doom your client's case. Whatever the medium, an experienced appellate attorney can help you effectively communicate and defend your client's position to a specialized audience of appellate judges.

* * *

Whether you won or lost at trial, having an attorney on your side who specializes in appellate practice will increase your odds of success on appeal. If they are not already involved in your case at the trial level helping preserve key legal arguments, an appellate specialist will bring a fresh set of eyes to your case, identify the most appealing arguments in light of current legal trends, and present them in a way that will capture your new appellate audience. An appellate decision will likely be the last word on whether your client wins or loses. Bringing in an appellate specialist to assist you can be the difference between failure and success. ■

ABRAHAM LINCOLN AND MICHIGANDERS DAISY ELLIOTT, MELVIN LARSEN, AND LEWIS CASS

John G. Adam
Legghio & Israel, P.C.

Governor Whitmer's June 30, 2020 order renames the Lewis Cass Building in Lansing as the Elliott-Larsen Building. "Cass owned a slave; defended a system to permit the expansion of slavery; and implemented a policy that forcibly removed Native Americans from their tribal lands." Executive Order, 2020-139.

The Governor states:

> In 1976 the people of Michigan, led by Daisy Elliott, a former Democratic member of the Michigan House of Representatives, and Melvin Larsen, a former Republican member of the Michigan House of Representatives, made a down payment on this promise with passage of Public Act 453. This Act, known as the Elliott-Larsen Civil Rights Act, declared that the right to be free from discrimination is a civil right and expanded the above constitutional protections to a broader class of individuals.

Governor Whitmer says that no one can deny the important role that Lewis Cass (1782-1866) played in Michigan's and the nation's early history, but she does not say what Cass did.

Cass, trained as a lawyer, has an impressive resume. He was a member of the Ohio legislature (1806), marshal of Ohio (1807–1812), colonel during the War of 1812, Governor of the Michigan Territory and, concurrently, superintendent of Indian Affairs (1813-1831), secretary of war (1831-1836) under President Andrew Jackson, Minister to France (1836-1842), Michigan senator (1845-1847), 1848 Democratic presidential candidate, losing to Zachary Taylor, again Michigan senator (1849-1857), and Secretary of State (1858-1860) under President Buchanan. He resigned as Secretary of State in 1860 in protest over Buchanan's refusal to reinforce Fort Sumter and the Charleston defenses. See, *e.g.*, Frank B. Woodford, *Lewis Cass: The Last Jeffersonian* (1950).

During the 1848 presidential campaign, Wikipedia recounts, then-Illinois Congressman Lincoln campaigned for Zachary Taylor and against Michigander Cass:

> Michigander is considered pejorative by some due to the circumstances under which the term was coined, but others perceive no such negative connotation. The term is attributed to Abraham Lincoln, coining it when he was a Whig representative in Congress.
>
> On July 27, 1848, Lincoln made a speech against Lewis Cass, who had been a long-time governor of the Michigan Territory. Cass was then running for president on a "popular sovereignty" platform that would have let states that were conquered in the Mexican–American War decide whether to legalize slavery.
>
> Lincoln accused the Democrats of campaigning on the former President Andrew Jackson's coattails by exaggerating their military accomplishments.
>
> * * *
>
> Lincoln thus combined Michigan with gander to form a nickname that made Cass sound foolish like a goose. Despite that, Michigan voters would go on to favor Lincoln for President twice, in 1860 and 1864.

Lincoln also ridiculed Cass for his weight, quipping that Cass "had been governor of the Michigan Territory as well as superintendent of Indian Affairs" eating "ten rations a day in Michigan, ten in Washington, and five dollars' worth a day on the road between them." Lincoln ended: "By all means, make him President, gentlemen. He will feed you bounteously if there is any left after he shall have helped himself." C. DeRose, *Congressman Lincoln* (2013).

Cass wrote the Michigan motto—"If you seek a pleasant peninsula, look around you"—and designed the state seal. Cass is the namesake of counties in Indiana, Iowa, Minnesota, Missouri, Nebraska, Illinois, Michigan, and Texas. Throughout the country, more than 50 cities, villages, schools, streets, *etc.* are named for Lewis Cass.

The Lewis Cass Building is now the Elliott-Larsen Building. What does the future hold for Cass County, Cass Tech High School, Cass Avenue, and the Cass Corridor? ■

SEDENTARY ATTORNEYS: BEWARE THE DANGERS OF SITTING

Dr. Joel K. Kahn

This article addresses what I call sedereicide (killing oneself by excessive sitting).

I am a cardiologist addicted to standing. I use a standing desk when I see patients at my office. I use a standing desk at home. When we used to go to conferences I was always the guy in the back of the room pacing back and forth rather than sitting. When we use to fly I was the guy by the exit row standing and squatting. Are you that attorney with the same issue?

We can all blame James Levine, M.D., Ph.D., of the Mayo Clinic. He has shown the health risks of prolonged inactivity and sitting. His research showed that even small movements contributed to health and prolonged sitting contributed to disease and even early death. He explained in 2014:

> Excessive sitting has been linked to more than 2 dozen chronic diseases and conditions including cardiovascular disease, diabetes mellitus, obesity, hypertension, hyperlipidemia, back pain, ankle swelling, and deep vein thrombosis. Of concern, going to the gymnasium after work does not offset the harm of sitting, and excess sitting harms lean and obese people alike. Studies, thousands of them, drill down to the same point: sitting is lethal.

Or to quote the title of Dr. Levine's 2014 book, *Get Up! Why Your Chair is Killing You and What You Can Do About It.*

How did Dr. Levine identify the health risks of prolonged inactivity? About 15 years ago he had research subjects wear underwear with multiple sensors in them to track their activity. He observed that obese individuals moved less compared with thin people during an average day. It was not gym time but small motions like standing, shaking legs and walking to the water cooler. He called these motions NEAT or non-exercise activity thermogenesis. It helps to burn calories when you are active, even if it is just standing and fidgeting.

Subsequently, researchers have found that each hour of sitting per day is associated with an increased hardening of heart arteries, a sign of aging. These small, daily and consistent movements, NEAT, were more preventive of heart aging than even prolonged time in the gym! The lead author of the study summarized the findings as "how much you sit every day may represent a novel, companion strategy (in addition to exercise) to help reduce your cardiovascular risk."

Heart disease joins other diseases linked to excessive sitting including diabetes mellitus, high blood pressure, obesity, cancer, and dementia. Even 30 minutes of sitting has been found to raise the "bad" LDL cholesterol, blood pressure, blood sugar and inflammation levels along with lower levels of mental alertness.

So what are we to do? The amount of activity needed to improve the response to prolonged sitting is small; even light walking two out of every 20 minutes can improve blood sugar metabolism. Standing 5-10 minutes and hour, combined with some squats or walking in place, can overcome most of the detriment of prolonged sitting.

What is an attorney to do? How about start reading depositions standing or even on a slow-moving treadmill. Take phone calls standing or moving around.

And, please, read *Labor and Employment Lawnotes* while pacing like a trapped tiger.

Sedentary Emptor.

Editor's Note: Joel Kahn, MD, FACC, is a practicing cardiologist and a clinical professor of medicine at Wayne State University School of Medicine. His books include *Lipoprotein(a): The Heart's Silent Killer; Your Whole Heart Solution; Dead Execs Don't Get Bonuses;* and *The Plant Based Solution.* See www.drjoelkahn.com.

"NEVER STAND UP WHEN YOU CAN SIT DOWN, AND NEVER SIT DOWN WHEN YOU CAN LIE DOWN."

Winston S. Churchill (1874-1965)

This quote comes from historian and writer Paul Johnson, who met Churchill in October 1946 when Johnson was about to go to Oxford. In his great book, *Churchill* (2009), Johnson writes (at 5):

> Churchill was capable of tremendous physical and intellectual efforts, of high intensity over long periods, often with little sleep. But he had corresponding powers of relaxation, filled with a variety of pleasurable occupations, and he also had the gift of taking short naps when time permitted. Again, when possible, he spent his mornings in bed, telephoning, dictating, and receiving visitors.
>
> In 1946, when I was seventeen, I had the good fortune to ask him a question: "Mr. Churchill, sir, to what do you attribute your success in life?" Without pause or hesitation, he replied: "Conservation of energy. Never stand up when you can sit down, and never sit down when you can lie down." He then got into his limo.

Most of us are not Churchill-like—hardworking, courageous, brilliant and able to conduct business in bed, aided by short naps. We ought to follow Doctors Kahn's and Levine's advice.

— John G. Adam

THE 2020 TITLE IX REGULATIONS

Elizabeth Rae
Associate General Counsel
Oakland Community College

To understand Title IX's most recent evolution, a brief history of its past is in order. Title IX, first enacted in 1972, is a federal civil rights law that prohibits sex discrimination in all schools, colleges and universities. Schools that fail to follow Title IX risk losing federal funds. All colleges must address sexual misconduct under Title IX and the Clery Act, 206 U.S. Code §1092 et. seq. The Clery Act mandates that colleges and universities participating in federal financial aid programs must report statistics on crimes that occur on campus.

Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C §1681-1688. Remedies for violations of Title IX also include private causes of action against a school by or on behalf of students subjected to sexual misconduct (See *Franklin v Gwinnet County Public School*, 503 U.S. 60 (1992)), and enforcement actions by federal agencies such as the Office of Civil Rights (OCR) after the completion of extensive investigations. Title IX applies to all educational institutions, both public and private, that receive federal funds. Public elementary and secondary schools are also subject to Title IX.

The word "harassment" is missing from the text of Title IX's general prohibition. In 1986, the Supreme Court in *Meritor Savings Bank v Vinson*, 477 U.S. 57 (1986), first recognized that "sexual harassment" constitutes discrimination in violation of Title VII and the court began to establish liability rules for employers, including standards for evaluating if conduct creates a "hostile environment." In the 1990's, courts began to apply similar rules to schools under Title IX.

Two important Title IX Supreme Court decisions from the 1990's frame the context for the most recently enacted Title IX regulations. In *Gebser v Lago Vista Independent School District*, 524 U.S. 274 (1998), and *Davis v Monroe County Board of Education*, 526 U.S. 629 (1999), the court held that any school receiving federal funds can be found responsible for the sexual harassment of students if the school had: (1) "actual knowledge of the misconduct", or (2) responded with "deliberate indifference." *Davis* at 633. Importantly, the court also held that the alleged misconduct must be "so severe, pervasive *and* objectively offensive that it effectively bars the victims' access to educational opportunity." *Id.* In Title VII rulings, however, the Supreme Court's standard for evaluating whether an environment is hostile requires an analysis determining that the harassment is "sufficient, severe or pervasive" to alter the conditions of [the victims'] employment and create an abusive working environment. *Vinson*, 477 U.S. at 67 (quoting *Henson v City of Dundee* 682 F.2d 897, 904 (11th Cir. 1982).

Title IX's case interpretations that harassment must be "severe, pervasive *and* objectively offensive" are arguably narrower and perhaps more difficult to prove than Title VII's severe *or* pervasive standard. Analyzed together, the Title IX cases of *Gebser* and *Davis* set forth a slightly higher bar for plaintiffs seeking damages against a school for failing to adequately address sexual harassment. This can be somewhat confusing, given the trend in federal court cases where Title IX holdings borrow heavily from Title VII jurisprudence when analyzing institutional liability. See *Johnson Baptist Med Ctr.*, 97 F.3d 1070 (8th Cir. 1996); *Lipsett v Univ. of P.R.*, 864 F2d 881, 896 (1st Cir. 1988); *Nelson v Christian Bros Univ.*, 226 Ed. Appx. 448, 454 (6th Cir. 2007). Additionally, employees of schools can sue their employers under both Title VII and Title IX, leaving courts to employ two different but similar standards when assessing if sexual harassment liability has been established.

Obama Administration Response to Title IX

Added to the mix of interpretations regarding Title IX, standards of liability change depending upon which presidential administration is in office. The Obama administration aggressively moved to address the problems of sexual assaults and harassment on college campuses through guidance and recommendations. In 2011 and in 2014, the U.S. Department of Education issued "Dear Colleague Letters" (DCL) delineating recommended steps for schools to end harassment. The DCLs did not add requirements to existing law, but provided information and examples to inform schools how the Department of Education would evaluate if they were in compliance with their legal obligations under Title IX. The OCR also opened up many publicized investigations against colleges and universities across the country and entered into several legally binding resolution agreements designed to have the broad effect of eliminating the negative effects of sexual assault. The OCR often required wholesale changes in policies at schools along with mandating education, training and "climate checks" to evaluate attitudes on campus and to find out if the preventive measures actually worked. Melnick, R. Shep. "Analyzing the Department of Education's Final Title IX Rules on Sexual Misconduct." *Brookings*, 11 June 2020, www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/.

The OCR and Obama Administration's stance on Title IX was not without controversy. The OCR supported a wide-ranging definition of sexual harassment including sexual comments and jokes and spreading sexual rumors. The Obama guidance also stated that schools should utilize a "preponderance of the evidence standard" (more likely than not) to determine guilt for sexual misconduct complaints with a single party investigator where live hearings and cross examination were discouraged. See Anderson, Greta. "U.S. Publishes New Regulations on Campus Sexual Assault." Inside Higher Ed, 7 May 2020, https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations.

A 2018 article from the American Bar Association reported that opponents of the 2011 and 2014 DCLs complained the guidelines sacrificed procedural fairness for accused students and skewed protocols in favor of alleged victims, resulting in the removal of students based on false accusations, a lack of notice and missing due process protections. See Gordon, Erin. "Campus Rape – A Complex Legal Landscape." American Bar Association, 31 Aug. 2018, www.americanbar.org/groups/diversity/women/publications/perspectives/2018/summer/campus-rapea-complex-legal-landscape/.

In the wake of 2011 DCL, legal challenges proliferated in federal courts with actions filed by alleged victims and accused perpetrators of sexual misconduct where both sides alleged they were not treated fairly during Title IX hearing processes. See Anderson, Greta. "More Title IX Lawsuits by Accusers and Accused." Inside Higher Ed, 3 Oct. 2019, www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings.

Emblematic of this growing trend, the Sixth Circuit has a developing body of case law addressing faulty due process procedures. For example, in *Doe v University of Cincinnati*, 872 F.3d 393, 401-02 (6th Cir. 2017), the Court upheld the district court's grant of a preliminary injunction against the university halting student John Doe's expulsion after a female student filed an internal Title IX complaint alleging that she was sexually assaulted. The university's adjudication procedures allowed for limited cross-examination of witnesses at the disciplinary hearing through the submission of questions to a hearing panel, but did

not require witnesses to appear at the hearing. Because John Doe's accuser did not appear at the hearing, he was unable to ask questions of her through the hearing panel. Doe was still found responsible and was suspended.

Doe sued the university in federal district court seeking a preliminary injunction to prevent his suspension. The district court granted his request for an injunction. The Court of Appeals affirmed the district court's holdings. The court held that while cross-examination may not be vital in all due process cases, it was in this case due to the fact the university made a "credibility determination" without giving Doe a chance to confront his accuser, which was fundamentally unfair. See also *Doe v Baum*, No. 17-2213 (6th Cir. 2018).

Trump Administration Response to Title IX

The Trump Administration hailed the winds of change and formulated a different strategy for Title IX investigation and enforcement matters. In 2017, the Department of Education and Secretary DeVos rescinded the Obama administration and OCR's 2011 and 2014 DCLs. In 2018, the Department of Education issued a notice of proposed rulemaking under the Administrative Procedure Act (APA) to establish rules addressing sexual harassment under Title IX. The Department of Education received over 124,000 comments on its proposal. On May 6, 2020, almost three years after withdrawing the Obama administration's guidance on Title IX, the Department of Education released Title IX rules on sexual harassment. 34 C.F.R. Part 106. The detailed preamble and analysis of the final rules totaled more than 2,000 pages. These regulations became effective August 14, 2020 for all schools receiving federal funding. Eighteen states and the District of Columbia filed complaints against the Department of Education requesting injunctive relief to prevent the rules from going into effect on August 14, 2020. Injunctive relief was denied and the deadline date for compliance was not modified by any court.

The 2020 Title IX Regulations – Significant Changes

In the summer of 2020, colleges and universities across the country scrambled to craft new Title IX policies and guidelines to meet the August 14, 2020 deadline. Central to the current regulations are the requirements that all schools must have a Title IX coordinator, along with policies and practices ensuring that the accused is presumed innocent unless and until the evidence shows otherwise. Additionally, all Title IX coordinators and investigators must receive training and must not be biased either for or against a complainant or respondent. Whereas previously, schools were required to use a "preponderance of the evidence" standard, schools can now choose between a "preponderance of the evidence" or a "clear and convincing evidence" standard. The new rules do not have a set time frame to resolve complaints. While the former guidance indicated that schools must resolve complaints within 60 days, schools must now respond to misconduct in a way that is not "deliberately indifferent" and conclude investigations within a "reasonable" time frame.

Unlike the old Title IX guidance where schools were required to investigate all complaints of "unwelcome conduct of a sexual nature," schools are now only required to investigate reports that meet one of the three definitions of sexual harassment: (1) unwelcome "quid pro quo" sexual harassment by a school employee; (2) harassment that meets the definitions for sexual assault (20 U.S.C. 1092(f)(6)(A)(V)), dating violence (34 U.S.C. 12291(a)(10)) and domestic violence or stalking (34 U.S.C. 12291(a)(8) and 34 U.S.C. 12291(a)(30); and (3) unwelcome conduct on the basis of sex that interferes with education (severe, pervasive and objectively offensive (34 C.F.R. 106.30(2)). Regardless of whether a report of sexual harassment meets the new Title IX standards, all victims should be offered "supportive measures" which may include counseling, extensions of deadlines, modifications of class or work schedules, or course-related adjustments.

Although the former guidance provided that schools had the responsibility to investigate if a responsible employee "knew or should have known" of employee on student or student on student sexual harassment, the new Title IX regulations mandate investigation only when formal complaints are filed with the Title IX coordinator or with a school official who has "authority to institute corrective measures", or to any employee of an elementary or secondary school. 34 C.F.R. 106.30(a).

Other important measures for the new Title IX regulations include the requirements that investigations can only proceed if the complainant and respondent are both still affiliated with the school and the alleged incident took place in the United States or in an area where the school has "substantial control", which would include off-campus buildings owned or controlled by officially recognized student organizations. 34 C.F.R. 106.44(a).

The Grievance Process, Quasi-Judicial Hearings and Live Cross Examination

If a report of sexual harassment proceeds to a formal complaint, each party must have the right to review and inspect any evidence the school collects in the ensuing investigation, along with the opportunity to respond in writing to the evidence.

Post-secondary schools, not elementary and secondary schools, must hold all hearings before a trained hearing officer, where the parties' advisors (not the parties themselves), must be allowed to cross examine all witnesses, including the opposing parties. Schools are required to appoint advisors for students who do not have them for the hearing for the purpose of allowing the advisor to question witnesses. Advisors can be a lawyer, a parent, or a disinterested individual. In a move that seems contrary to the formal rules of evidence, the hearing officer cannot consider the statements of anyone who does not submit to questioning at the live hearing. This is a troubling aspect of the new regulations. For example, the hearing officer would be required to ignore an alibi for an accused student if it was not presented at the live hearing. All schools are required to record the live hearings and allow the parties access to the recordings. Following the live hearings, the hearing officer must issue a written decision containing findings of fact and drawing conclusions that apply school policies to the facts, while also giving a rationale for each charge. If there is a determination of responsibility, sanctions may be levied. Appeals may be filed by either party to an appointed appellate officer. Appellate challenges are limited to assertions that new evidence exists that was not previously known; actual bias and procedural error.

The Fate of the 2020 Title IX Regulations

President-elect Joe Biden has publically stated that he would rescind the Title IX regulations. See Bauer-Wolf, Jeremy. "Biden Said He Wants to Undo DeVos' Title IX Rule. How Would He Replace It?" Education Dive, 28 Oct. 2020, www.educationdive.com/news/biden-said-he-wants-to-undo-devos-title-ix-rule-how-would-he-replace-it/587853/. The time frame for a possible dismantling of the new regulations is unknown and would also lead to confusion for schools, colleges and universities who worked so diligently to meet the August 14, 2020. The possibilities for undoing the regulations is also somewhat complex. Parts of the new Title IX regulations actually reflect a growing body of federal case law, particularly in the Sixth Circuit, that accused students have a right to a hearing before a significant penalty, such as expulsion, is sanctioned. The Biden administration could rescind the regulations and issue a new DCL or a series of DCLs for guidance. More than likely, however, the new regulations will be modified, following a lengthy policymaking process under the Administrative Procedure Act (APA). In the meantime, navigating the complicated matters of sexual harassment and sexual assaults on campus will continue to challenge all schools. ■

Labor and Employment Law Section
State Bar of Michigan
The Michael Franck Building
306 Townsend Street
Lansing, Michigan 48933

Presorted Standard
U.S. Postage
PAID
DETROIT, MI
Permit No. 1328

INSIDE *LAWNOTES*

- Regan Dahle looks at Justice ACB's Seventh Circuit employment cases.
- Doctor Joel Kahn writes about standing—not to sue, but as opposed to sitting.
- Aaron Burrell addresses employer reporting on COVID-19 cases.
- Stuart Israel writes in French and Latin, but mostly English and Legalese. Does that make him a dilettante or a pedant? *Quién sabe?*
- John Adam writes about Elliott, Larsen, Lincoln, Cass, Whitmer, Churchill, Tyson, and Dershowitz!
- Lee Hornberger addresses ADR developments, and Barry Goldman reviews *Bullshit Jobs*, the book.
- Thomas Davis and David Porter on what appellate attorneys do, and David wins the *Lawnotes* cartoon caption contest, too.
- Kevin Kales is the voice of experience on expert witness preparation.
- 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.
- Authors John G. Adam, Aaron V. Burrell, Regan K. Dahle, Thomas J. Davis, Barry Goldman, Andrew J. Gordon, Lee Hornberger, Mallory Hee, Stuart M. Israel, Kevin P. Kales, Joel K. Kahn, David Porter, Elizabeth A. Rae, Otto Stockmeyer, and Sheldon J. Stark.