LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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USELESS LAWYER-DECLARATIONS

Stuart M. Israel

This is another meditation about odd things lawyers do.

I have decried various odd lawyer-practices—for example, **(1)** writing numbers in both words and numerals (*e.g.,* the other side's argument "has seven (7) fatal defects"); **(2)** providing superfluous labels (*e.g.,* labelling a phone number, email address, and the date as "telephone number," "email address," and "date"—as if otherwise there may be confusion about a seven-digit number following a three-digit area code, and what is meant by an "@" address ending in ".com," and that August 15, 2022 is a date); and **(3)** giving needless explanations (*e.g.,* that "Defendant Smith Corporation is hereinafter referred to as 'Defendant,' or 'Smith,' or 'the Corporation'").

Unfortunately, these odd practices continue. Oh, well. Winston Churchill said that success consists of going from failure to failure without loss of enthusiasm.

Here, I enthusiastically decry lawyer-declarations which uselessly attest to what is indisputable and documented and undisputed, or which present not facts, but inadmissible hearsay, conclusions, and argument. Here is a case in point.

It was an ERISA/LMRA retirement healthcare class action. Defendants were dissatisfied with our responses to document requests. We—plaintiffs—provided some documents and not others. We objected on various grounds—among them the Rule 23 precedent which bars most discovery directed to, as the defense lawyers called them, "non-named" class members, *i.e.,* all those who are not certified class representatives.

Defendants moved to compel documents from "non-named" class members. Two defense lawyers filed declarations "in support," "pursuant to 28 U.S.C. 1746" and "under penalty of perjury." Both attested their contents were "true and correct."

Each attested that the declarant-lawyer is a member of "the law firm" Doe & Roe LLP (also named in each lawyer's signature block), is "counsel of record for defendants in the above-captioned matter" (as shown in every paper the lawyers filed in the "above-captioned matter" in the district court, the Seventh Circuit, and the Supreme Court during the preceding five years of litigation), and is "a licensed member in good standing of the bar of the State of Illinois."

But for the assurances, it would not have occurred to anyone that these lawyers *might not* be "licensed" and "in good standing." They doth protest too much, like the restaurant sign from *The Simpsons:* "Our dining room is now rat free."

One declaration recounted *indisputable* history: the defense served document requests in March, plaintiffs responded with documents and objections in April, and the parties discussed their divergent views in "correspondences" and "meet and confer" discussions in May and June but "were unable to reach agreement."

Attached as "true and correct" was the "best evidence"—the document requests, the responses and objections, and the "correspondences."

That declaration was sprinkled with partisan characterizations about what was "suggested," "clarified," and discussed in the "correspondences" and the "meet and confer" exchanges. Partisan characterizations are expected in arguments, but are not "facts" and do not belong in declarations.

The other defense lawyer declared (in 2022) that *his client* "sent numerous letters to putative class members" in 2019 and 2020 with "notice" of the 2017 lawsuit and that in 2020 *his client* "was contacted by individuals who stated that attorneys held a telephone conference regarding this lawsuit where attendees were asked for records of healthcare costs" for the "time" the promised retirement "coverage was terminated," beginning in 2016.

You are thinking that this under-oath information is second- and third-hand. The lawyer says *his client* sent letters and "was contacted by individuals" who "stated" things *to the client.* The lawyer *heard* about these things.

You are thinking, too, that this declaration is murky: some unidentified "individuals" said to some unidentified person(s) affiliated with the declarant-lawyer's client that some unidentified "attorneys" sponsored a call during which some unidentified "attendees were asked" for some "records."

Objection: inadmissible hearsay, double hearsay, no foundation, no personal knowledge, vague, passive voice, irrelevant, useless, etc.

Lawyer-advocates should avoid becoming witnesses. Combining these roles can create "a conflict of interest." It "can prejudice the tribunal and the opposing party." It "may not be clear whether a statement by an advocate-witness"—in a lawyer-declaration, say—"should be taken as proof or as an analysis of the proof." These things are addressed in—and the quoted phrases come from—ABA Model Rule of Professional Conduct 3.7 and the accompanying comments.

But we don't need to get all ethical-angels-dancing-on-heads-of-pins analytical. Lawyer-declarations attesting to indisputable, documented, and undisputed things—or presenting inadmissible second- and third-hand accounts, conclusions, and argument—are, at best, useless docket-clutter.

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STATEMENT OF EDITORIAL POLICY

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

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

USELESS LAWYER-DECLARATIONS

(Continued from page 1)

They waste PACER electrons. They ignore the Lorax's concern for the trees. They distract. They violate the maxim *lex est ratio summa, quae jubet quae sunt utilia et necessaria et contraria prohibet*—law is the highest form of reason, which commands what is useful and necessary and forbids the contrary.

Worse, and too often, lawyer-declarations confuse, complicate, mislead, and conflate "proof" with "analysis of the proof."

Why do lawyers present useless, unnecessary, and forbidden declarations?

Do some lawyers have a collective-memory addiction to formalisms, even though the federal rules did away with code pleading rigidities in 1938? Did a senior partner (or formidable secretary) once instruct that lawyer-declarations *must* be filed with *every* motion and response—that is how things are, always have been, and always will be done at the Doe & Roe law firm? Are the declarant-lawyers unable to find witnesses with pertinent *personal* knowledge? Are the lawyers unable to resist an opportunity to instruct the court on what—the lawyers say—is "true and correct"? Is it because lawyer-declarations are billable? Do some declarant-lawyers intend to confuse, complicate, mislead, and conflate "proof" with their *ipse dixits*?

Whatever their "root causes," lawyer-declarations attesting to indisputable, documented, and undisputed things, or to inadmissible things, or to both, are neither *utilia* nor *necessaria.* Indeed, they are *improprium* and *contra legem.* Lawyers should not file them. ■

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 John Adam at jgabrieladam@gmail.com.

COURT OF CLAIMS UPHOLDS STATE PREVAILING-WAGE POLICY

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Michigan Court of Claims Judge Douglass B. Shapiro upheld the State of Michigan's ability to establish a prevailing-wage policy for contractors working on state projects. Judge Shapiro explained that state law grants the state "broad discretionary powers when awarding a contract to the responsive and responsible best-value bidder. [The State's] prevailing-wage policy follows from its permissive statutory authority to make all discretionary decisions about the solicitation and award of state contracts." *Associated Builders and Contractors of Michigan v Dept of Technology, Management, & Budget,* Mich. Ct. Cl., Oct. 10, 2022 (Docket No. 22-000111-MZ), p.18.

Corky wonders if the Democrats in Lansing will restore the PWA in 2023

Ahead, I describe the events that led to this decision and explain why the court upheld the State's right to implement a prevailing wage policy.

1.

In 2018, following a voter-initiated petition, the Michigan legislature repealed the Prevailing Wage Act, MCL 408.551 *et seq.* Prior to its repeal the Prevailing Wage Act required contractors who worked on state funded construction and maintenance projects to include prevailing wage and benefits provisions in their contracts with the State. MCL 408.552, repealed by 2018 PA 171.

The Michigan Court of Claims hears all civil actions filed against Michigan and is a specialized court with exclusive jurisdiction over state-related litigation involving contract, tax, and constitutional actions.

Governor Gretchen Whitmer in October 2021 announced that the State would require contractors who work on State construction projects greater than $50,000 to pay their workers prevailing wages. In March 2022 the Department of Technology, Management and Budget modified its procurement policy to require contractors to pay prevailing wages on construction-based contracts. Unlike the Prevailing Wage Act, the department's policy does not impose any penalties for non-compliance.

The Associated Builders and Contractors of Michigan (ABC) sued the department, seeking declaratory and injunctive relief against the department's prevailing wage policy. ABC alleged that the new policy: (1) violated the separation of powers under Article III, Section 2 of the Michigan Constitution; (2) did not comply with the Administrative Procedures Act of 1969 ("APA"), MCL 24.201 *et seq.;* and (3) is an *ultra vires* act which is not mandated or authorized by constitution, statute, or other law.

The State, joined by the Michigan Building and Construction Trades Council as an intervening defendant (represented by our law firm), argued that ABC's lawsuit should be dismissed because ABC did not have a justiciable claim or standing, and that the State's policy was lawful under the Michigan Constitution and the Management and Budget Act, MCL 18.1101 *et seq.*

2.

The Court of Claims rejected all three of ABCs arguments.

Judge Shapiro found that the State's policy did not violate the Michigan Constitution's separation of powers clause because the Legislature "delegated certain powers to defendant in the Management and Budget Act ("MBA"), MCL 18.1101, *et seq.* Among other powers, MCL 18.1261(2) grants defendant broad discretionary authority over award, solicitation, and amendment of state contracts.The statute provides, [t]he department shall *make all discretionary decisions* concerning the solicitation, award, amendment, cancellation, and appeal of state contracts." (internal quotations and citations omitted). Judge Shapiro further explained that the Legislature provided the State with "ample guidance to support its discretionary decisions making" by establishing certain criteria and sufficient standards for the State to follow. Judge Shapiro noted that the "Legislature does not regulate defendant's discretionary power at the granular level…[and that] defendant has the discretion to determine what metrics it uses" to measure a bidder's business integrity. *Id.* at p.11.

ABC argued that the State's policy was unlawful because the department failed to follow the APA's rulemaking procedures. Judge Shapiro found that the APA did not apply to the policy. In reaching this conclusion he noted under the APA an exception to rulemaking applies where the agency decision is an exercise of a permissive statutory power. *Id.* at p.17. "If an agency policy follows from its statutory authority, the policy is an exercise of permissive statutory power and not a rule requiring formal adoption." *Pyke v Dep't of Social Servs,* 182 Mich App 619, 630 (1990). Judge Shapiro explained that the MBA grants the State "broad discretionary powers" and therefore the department's policy follows from "its permissive statutory authority to make all discretionary decisions about the solicitation and award of state contracts. *Associated Builders and Contractors of Michigan, supra* at p. 18.

ABC also challenged the policy as an *ultra vires* act because it was "not expressly or impliedly mandated or authorized by law." Judge Shapiro also noted that because the department's "decision to implement a prevailing-wage policy was within its discretionary powers outlined in the Management and Budget Act," it would not be an *ultra vires* exercise of governmental power.

The Prevailing Wage Act has been off the law books since 2018. However, as indicated in Judge Shapiro's decision, nothing prohibits the State from implementing basic quality control to ensure that State projects are performed by skilled, qualified, and ethical contractors. ABC's lawsuit represents an attempt to incorporate the Prevailing Wage Act repeal into the State's ability to make discretionary decisions regarding the quality and integrity of the contractors it decides to work with on state projects. However, as explained by Judge Shapiro the "voter-initiated law simply repealed the Prevailing Wage Act, without otherwise limiting defendant's authority under the Management and Budget Act." *Id.* at p. 16.

While the law on this issue appears clear, ABC appealed the Court of Claims' decision, so the Michigan Court of Appeals will weigh in on the legality of State's prevailing wage policy, and perhaps, the Michigan Supreme Court. ■

SIXTH CIRCUIT ON FAILURE TO HIRE CLAIMS WHEN JOB IS NOT FILLED AND REHABILTATION ACT REQUIRES "BUT FOR" CAUSATION

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Miller, Canfield, Paddock and Stone, P.L.C.

Charlton-Perkins v. University of Cincinnati, 35 F.4th 1053 (6th Cir. 2022) (Siler, Bush and Murphy) confirmed an expanded view of an applicant's right to sue an employer for discriminatory failure to hire under Title VII of the Civil Rights Act of 1964 to include a failure to hire where the job search is cancelled such that no individual is hired at all.

• In *Charlton-Perkins* the plaintiff applied for a position as a professor. Over 60 candidates applied and a search committee interviewed the top four candidates (including plaintiff). The plaintiff was ranked first after this set of interviews and recommended for hire by the committee.

• The chair of the department pushed back on the committee's recommendation, seeking to focus on a female candidates. Thereafter, the dean informed faculty that the search was cancelled in its entirety.

• The district court initially dismissed the case due to plaintiff's failure to show that an individual not in plaintiff's protected class actually received the position. The Sixth Circuit reversed, holding that the prima facie case requirement is not an "inflexible rule" and instead can vary based on the circumstances.

• The impacts of the Court's decision include:

- "When an employer discriminatorily cancels a position to avoid hiring an applicant of a disfavored class, the applicant need not establish that somebody else filled the position."

- Employers must be able to show that any cancellation of a job search was for non-discriminatory, business reasons.

Bledsoe v. Tennessee Valley Authority Board of Directors 42 F.4th 568 (6th Cir. 2022) (Moore, Cole and Nalbandian) established that a federal employee asserting a disability discrimination claim must show discrimination is the "but-for" cause of the adverse employment action alleged.

In *Bledsoe,* a nuclear plant operator alleged he was discriminated against on the basis of age and disability and retaliated against through a demotion. The plaintiff took a medical leave for a liver transplant and upon his return to work alleged that his supervisor began to make comments about his age and disability, including that he was slowing down and too old.

The plaintiff's son was then accepted to a training program that the plaintiff was responsible for teaching and the employer (through a committee) demoted plaintiff from his position as an instructor, citing to ethical concerns. The district court initially granted the employer's motion for summary judgment as to all claims, but the Sixth Circuit reversed, reinstating the claims of age and disability discrimination as well as retaliation. In its opinion, the Sixth Circuit stated that there were a variety of alternatives to a demotion which rendered it possible that the supervisor's animus – rather than an ethical conflict in plaintiff teaching a course for his son – caused the demotion. The Sixth Circuit further held that plaintiff had identified temporal proximity between his complaints about his supervisor and the demotion sufficient to state a claim of retaliation. The matter was remanded to the district court for further proceedings.

Potter Stewart U.S. Courthouse
Home of the Sixth Circuit

The impacts of this decision include:

• In reaching its holding, the Sixth Circuit held that under the ADA and Section 501 of the Rehabilitation Act, a plaintiff must show that discrimination was the "but-for" cause of the adverse employment action. Similar, claims under the ADEA require a showing of "but for" causation.

• The Court held that discriminatory remarks, such as the supervisor stating the plaintiff was "too old" could only be considered direct evidence of discrimination if the supervisor had a meaningful role in the decision making process that led to the adverse action. Thus, where such statements were made by an individual that was not the decisionmaker, an indirect evidence standard need to be applied.

• The Sixth Circuit re-emphasized that under a cat's paw theory, a supervisor's discriminatory animus can be found to motivate a decision which leads to an adverse action against an employee. Here, even though the supervisor was not on the committee which made the demotion determination, the Sixth Circuit held that the biased supervisor's level of influence on this determination was a question of fact that required a jury determination. ■

SIXTH CIRCUIT INVOKES "DISCOVERY RULE" IN OSU SEXUAL ABUSE CASE TO DENY TIME-BAR DISMISSAL

John G. Adam

In *UM's Statute of Limitations Defense and $490 Million Sex Abuse Settlement (Lawnotes,* Spring 2022), I raised questions about UM's large settlement because it appeared that UM had a solid statute of limitations defense. The allegedly serial-sex-abusing Dr. Robert Anderson worked for UM from 1968 to 2003. He directed the University Health Service and was later team doctor for the wrestling, football, hockey and track teams. The abuse dated from the 1970s to 2003. Anderson died in 2008. The first lawsuit was filed in 2020.

1.

UM's Anderson is eerily similar to Ohio State University's Dr. Richard Strauss (1938–2005). Dr. Strauss allegedly abused hundreds of "young men under the guise of performing medical examinations" "between 1978 and 1998." Like UM's Anderson, Strauss served as a team physician for several sports. Straus committed suicide in 2005. Plaintiffs in a series of cases sued OSU starting in 2018.

OSU won their Rule 12(b)(6) SOL defense in the Southern District of Ohio before Judge Michael H. Watson. See *Garrett v. OSU,* 561 F.Supp.3d 747, 759 (S.D. Ohio 2021).

But, in a 2 to 1 ruling, the Sixth Circuit ruled against OSU. *Snyder-Hill v. OSU,* 48 F.4th 686 (6th Cir. 2022) (Guy, Moore, Clay, J.).

The facts alleged are shocking. Judge Moore wrote the majority opinion, joined by Judge Clay (*id*. at 690–91 (record citations and footnotes omitted):

> In his roles at Ohio State, Strauss regularly abused male students during medical examinations, committing at least 1,429 sexual assaults, and 47 rapes. He "groped and fondled students' genitalia"; "performed unnecessary rectal examinations and digitally penetrated students' anuses"; "pressed his erect penis against students' bodies"; "drugged and anally raped students"; "masturbated during or after the exams"; and engaged in other sexually abusive behavior. Each plaintiff alleges that Strauss abused him between 1979 and 2000; all but four were Ohio State students during this time.

Judge Moore explained that in a "Title IX case, a plaintiff's cause of action is against the school based on the school's actions or inactions, not the actions of the person who abused the plaintiff." The majority "expressly hold that, pursuant to the discovery rule, a claim accrues when a plaintiff knows or has reason to know that they were injured and that the defendant caused their injury. In the Title IX context, this means that the claim does not accrue until the plaintiff knows or has reason to know that the defendant institution injured them." 48 F.4th at 704.

I wrote of the UM case, "Any claim would accrue, it seem obvious, when the abuse took place." That was *not* correct, based on reading of the majority opinion. The abuse at issue would be OSU's knowledge of and deliberate indifference to the doctor's conduct. Under that analysis, the claim accrues when the plaintiffs knew or should have known that OSU knew of and was deliberately indifferent to the doctor's conduct. That date would not correlate with the doctor's conduct itself and may not arise in at least the first couple instances of the doctor's abuse.

Still, the abuse here took place between 1978 and 1998, the SOL is two-years, and the lawsuit was filed in 2018. It is hard to explain a *20-to-40-year* delay from the abuse to accrual.

2.

In dissent, Judge Guy says the majority's "decision effectively nullifies any statute of limitations for Title IX claims based on sexual harassment" and highlights that much of the abuse was not confined to medical examinations. Judge Guy lets the "facts speak for themselves" (48 F.4th at 709-721; footnotes and record citations omitted; ellipsis not used):

> In the Snyder-Hill plaintiffs' 371-page complaint and the Moxley plaintiffs' 159-page complaint, each plaintiff describes the obscene details of how Dr. Richard Strauss sexually abused them in the school's locker room or showers, at Strauss's home, or during physical examinations. All agree that the alleged sexual abuse occurred between 1978 and 1998.
>
> Nor is the alleged sexual abuse confined to the context of a medical exam (as the majority opinion suggests). The abuse also occurred in the university's locker room, in the showers, or at Strauss's home. For example, the complaints allege: Strauss came into the locker room wearing only a towel and masturbated John Doe 9; Strauss showered with John Doe 17, John Doe 42, and John Doe 98, and masturbated while staring at each plaintiff; Strauss masturbated while he watched John Doe 8 shower; Strauss entered the sauna nude and masturbated, sometimes while sitting behind John Doe 98 ; Strauss gave John Doe 19 a ride home and attempted to kiss him and repeatedly tried to fondle his genitals, took nude photographs of plaintiff at Strauss's home, followed plaintiff into the locker room, began massaging him, and then "kissing John Doe 19's neck and back"; at Strauss's home, Strauss gave John Doe 70 a massage, penetrated plaintiff's anus with his finger, and then straddled plaintiff's lower back, masturbated, and ejaculated onto plaintiff's back. This is just a sampling.
>
> Lest there is any doubt, plaintiffs allege they were subjected to obscene sexual abuse in the school's locker room or showers, at Strauss's home, or during physical exams. At least 28 plaintiffs fled from the situation and/or later refused to be examined by Strauss or be anywhere near Strauss. At least 25 plaintiffs allege that they complained to university administration, coaches, trainers, health center staff, and/or other physicians about Strauss's conduct. Of the 2 plaintiffs who complained to physicians, one physician replied, "That seems really odd ... It's not normal." The other physician responded, "Dr. Strauss' actions were inappropriate and not

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SIXTH CIRCUIT INVOKES "DISCOVERY RULE" IN OSU SEXUAL ABUSE CASE TO DENY TIME-BAR DISMISSAL

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> medically necessary," and the physician wrote a note "to excuse John Doe 9 from further physicals by Dr. Strauss."
>
> It is beyond debate that plaintiffs knew of their "injury" between 1978 and 1998. Because the facts on the face of the complaint show that plaintiffs' claims are untimely, "dismissing the claim[s] under Rule 12(b)(6) is appropriate.'"

3.

So, did the majority "fuzz" up the SOL by invoking the "discovery rule" based on deliberate indifference standard as a way to allow the case to survive 12(b)(6)?

As Judge Richard Posner wrote in his 2008 book, "Statutes of limitations fix definite deadlines but the judges then *fuzz them up* with doctrines such as the discovery rule, equitable estoppel, and equitable tolling, which in many cases allow a suit to be brought after the deadline has passed." *How Judges Think* 177 (italics added).

OSU is seeking *en banc* rehearing. So, perhaps we have not heard the last word on this.

Regardless of the legal outcome, how did OSU and UM officials, coaches, doctors, and others allow these doctor evils to inflict this reign of abuse on student-athletes for 20 plus years? ■

NOEL D. MASSIE
(1949-2022)

Noel will be missed by his colleagues in the LEL Section.

A PRIMER ON PUBLIC EMPLOYEE SPEECH

Mark H. Cousens

The widespread use of social media has invited a great many public employees to comment on matters that concern them, sometimes making remarks critical of their employer, sometimes presenting personal complaints about their workplace. Social media appears to provide millions with an opportunity to share the minutiae of their lives ("I just had a doughnut!") or to communicate with friends and family. But it can create serious problems for the employee whose comments are viewed with displeasure by a public employer. In the recent past two fine educators left their jobs because of comments they made which their employer would not tolerate. While each would likely have prevailed in litigation neither person wanted to expend energy and resources suing anyone and went on to other jobs. But in both cases neither the employer nor the employee understood the extent of First Amendment protection of speech.

Individuals who work for a public employer are protected by the First Amendment. See *Rankin v. McPherson,* 483 U.S. 378 (1987). Unlike the private sector, persons working for public schools, counties, cities and other public authorities can expect that their rights as citizens will be respected. But there is considerable misunderstanding as to just what those rights are. Too often employees incorrectly conclude that there are no limits on what they can say and where they can say it. Public debate is healthy. And public employees should be free to be critical of their employer and to expose misconduct or incompetence. But it is important that these employees be aware that there are some basic rules that apply to their comments as citizens. These precepts both *protect* employees from retaliation for their speech and *impose* some restrictions on their speech under certain circumstances.

This article is not going to be a substitute for a law review analysis. Space limits the scope of the presentation. But it will try to express the parameters of existing law and invite further review when faced with complicated situations.

1.

First, there is a fundamental distinction between speech as a citizen and speech in the course of employment. A public employer may expect that a person's speech in the course of their official duties will stick to the script. See *DeCrane v. Eckart,* 12 F.4th 586 (6th Cir. 2021) (When employees undertake the programs they are assigned to perform, the government may require them to stick to its message rather than express their own without offending the First Amendment). When public employees speak as agents of their employer the employer may expect that the person will avoid making statements which are inconsistent with the person's tasks or which adversely impact the employer's goals.

Second, employees whose speech consists largely of the airing of personal gripes should not expect Constitutional protection. *Connick v. Myers,* 461 U.S. 138 (1983) held that a public employee's circulation of a questionnaire to other employees was not protected speech but a matter of purely personal concern and not protected.

Third, educator's speech in the classroom is subject to the same First Amendment analysis as applied to non-classroom speech. "Because the essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of "public concern" *Hardy v. Jefferson Community College,* 260 F.3d 671 (6th Cir. 2001). See also *Bonnell v. Lorenzo,* 241 F.3d 800, 823 (6th Cir. 2001) ("a professor's rights to academic freedom and freedom of expression are paramount in the academic setting").

Speech outside the classroom or the workplace may also be protected. The seminal case is *Pickering v Board of Education* 391 US 563 (1968) where the Court concluded that a public employee could not be disciplined for writing a letter to a newspaper that was critical of the distribution of public funds. *Pickering* established a two-part inquiry to determine whether particular speech is subject to First Amendment protection. The primary question is whether the employee is speaking as an individual on a matter of public concern or whether the person is speaking as part of their official duties. If the person is speaking as part of their job the First Amendment is not likely to apply But speech as an individual on matters of public concern may be protected. However, the second part of the *Pickering* test is whether the employer's interest in "promoting the efficiency of public services" outweighs the employee's interest in speaking on the matter.

2.

Whether a comment is made as a citizen or as an employee is usually a question of context. "This "inquiry is a practical one." And several non-exhaustive factors are relevant, including "the speech's impetus; its setting; its audience; and its general subject matter." *Woodard v. Etue,* 2022 WL 107580 at *5 (E.D.Mich.).

Whether an employee's speech addresses a matter of public concern requires a review of the "content, form and context of a given statement." *Connick,* 461 US at 147. In short, the analysis is never simple. But in *Bonnell* the Sixth Circuit quoted Justice Holmes in *Schenck v. United States,* 249 U.S. 47 (1919) where Justice Holmes wrote that "the character of every act depends upon the circumstances in which it was done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that have all the effect of force."

A comment addresses a matter of public concern if it is directed at matters of political, social or similar concerns to the community. A coach's use of racist terms purportedly to motivate a team were not comments on a matter of public concern because a "coach's distress about the degree of aggressiveness shown by his players on the basketball court is a reasonable matter of concern, certainly, to the coach, but not the kind of question that is fairly cast as a "public" issue." *Dambrot v. CMU,* 55 F.3d 1177, 1188–89 (6th Cir.1995). However, in *Bonnell* a community college teacher who repeatedly used crude words in the classroom and who distributed a caustic criticism of a complaint made against him was commenting on a matter of public concern as his statements addressed the importance of free speech in the classroom. Despite the manner in which his comments were made, it was "Speech which can be "fairly considered as relating to any matter of political, social, or other concern to the community." *Bonnell* at 812.

3.

If an employee is disciplined for speech made as a citizen and which is directed toward a matter of public concern the employee may have a legitimate claim that her rights under the First Amendment have been abridged. But the analysis does not stop there. *Pickering* and the myriad cases which have followed established a balancing test which is substantially less than clear and not easy to apply. The query is whether "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Dambrot, supra.* Stated in brief, the test decides who wins in the contest between employee and employer. It is difficult to draw any kind of bright line which provides any guidance as each case seems to be decided on its facts.

In *Meriwether v Hartop,* 992 F.3d 492 (6th Cir. 2021) an educator refused to comply with an employer's policy requiring that teachers address students by their preferred pronouns. Judge Thapar wrote that the plaintiff's interest prevailed over that of the employer in part because there was no evidence that the teacher's actions interfered with the educational process. The balance of interests, in this instance, favored the teacher. While there is room for criticism of the decision, the ruling points to the manner in which this balancing test is to be applied.

In *Bonnell* at 823, the Court held that "in the matter before us, we believe that Defendants' purported interests, including maintaining the confidentiality of student sexual harassment complaints, disciplining teachers who retaliate against students who file sexual harassment claims, and creating an atmosphere free of faculty disruption, outweigh Plaintiff's purported interests." The employer had a greater interest in maintaining a harassment free classroom than did the teacher who wished to comment on the validity of a sexual harassment complaint against him.

Speech on social media is subject to the same protection as speech elsewhere. But it is also subject to the same restrictions as speech elsewhere. The public employee who wants to air their gripes over social media is not likely to give lengthy consideration to the *Pickering* test or the legal implications of what they want to say. In reality we should not want individuals to have to worry about the impact of their comments; freedom of speech is far too important to require that individuals refrain from comment out of fear. But those who work with public employees or who represent them may want to help employees understand the parameters of their speech rights. ■

A READER'S GUIDE TO OLIVER WENDELL HOLMES JR. (1841-1935)

Thomas Healy, *The Great Dissent: How Oliver Wendell Holmes Changed His Mind and Changed the History of Free Speech in America* (2013).

Adam Cohen, *Imbecile: the Supreme Court, American Eugenics, and the Sterilization of Carrie Buck* (2017).

Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law, and Ideas* (2019).

BLURRING THE LINES BETWEEN EMPLOYEES AND INDEPENDENT CONTRACTORS

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The workplace has dramatically changed in the law few years. Technology, the pandemic, and the great resignation have changed the landscape of employment. Together with that change, lawmakers and courts have been trying to catchup with the times, because many workers no longer have the protections of the law because they are either part-time or independent contractors under existing tests for "employee". Gig worker is now a common household phrase; it's not only fun to say, it also defines close to half the workers in the US today. One source has forecasted that over 50% of the workers in the US will be gig workers by 2023. We are now living in what is often referred to as a gig economy. According to an article in US Chamber of Commerce editorial website Co in March of 2021, gig worker is defined as, "independent contractors or freelancers who typically do short-term work for multiple clients. The work may be project-based, hourly or part-time, and can either be an ongoing contract or temporary position." For example, workers for Uber, Lyft, DoorDash, GrubHub, web design, and various other companies we have come to rely on for our everyday needs are gig workers.

Based on the definition of gig worker, if more than half of the workforce falls under that definition, then workers will be left without the benefits and protections under the law. If you are not an employee, you do not have the protections of workers' compensation laws, FLSA, NLRA, FMLA, Title VII, and various other laws, which protect employees in the US. Without changes to existing laws, or the way we define which workers are protected, many workers will go without important legal protections.

Test For Employee v Independent Contractor Under Michigan Law

In Michigan, and other states, the test to determine whether an individual is an employee or an independent contract is the economic reality test. In a recent opinion out of the Michigan Court of Appeals written by Judge Elizabeth L. Gleicher, she discusses the economic reality test and its application to an adult son working on a farm for food, clothing, and shelter rather than typical wages. *Mich. OSHA v. Yoder Family Farm,* No. 355262, 2022 Mich. App. LEXIS 5108 (Ct. App. Aug. 25, 2022). The farm claimed the son was not an "employee" and, therefore, MIOSHA did not have jurisdiction to investigate safety violations. After the son (worker) was electrocuted and died, while removing a metal pole from a grain bin, MIOSHA cited the farm for safety violations. The farm argued under *Hottmann v. Hottmann,* 226 Mich. App. 171; 572 N.W.2d 259 (1997) in order to be an "employee" for purposes of MIOSHA regulations, there must be payment of compensation. In *Yoder, supra,* the COA adopted the economic reality test holding it is, "the most common tool for discerning whether an employer-employee relationship exists." *citing Buckley v Prof Plaza Clinic Corp,* 281 Mich. App. 224, 234; 761 NW2d 284 (2008).

The Michigan Court of Appeals applied the economic reality test: "(1) the control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal." *MIOSHA v. Yoder Family Farm,* 2022 Mich. App. LEXIS 5108, at *14 . The Court of Appeals held the payment of wages under the second factor is not limited to the exchange of money. *Id.* The Court remanded the case to the administrative agency board to apply the economic reality test under the guidelines of the decision. The decision may likely result in the broader interpretation of who falls under the definition of "employee," in Michigan.

Test For Employee v Independent Contractor Under Federal Law

On the federal level, the Department of Labor recently proposed a new rule to address the misclassification of workers as independent contractors under the FLSA. The proposed rule returns to the six-factor Economic Reality Test. The factors include: (1) Opportunity for Profit or Loss Depending on Managerial Skill (Proposed § 795.110(b)(1)); (2) Investments by the Worker and the Employer (Proposed § 795.110(b)(2)); (3) Degree of Permanence of the Work Relationship (§ 795.110(b)(3)); (4) Nature and Degree of Control (Proposed § 795.110(b)(4)); (5) Extent to Which the Work Performed is an Integral Part of the Employer's Business (Proposed § 795.110(b)(5)); and (6) Skill and Initiative (Proposed § 795.110(b)(6)). 87 FR 62218. The proposed rule will repeal the Trump administration's 2021 IC rule, which relied on some factors of the test more than others, or "core factors". The factors weighed more included degree of control workers have over their work and the opportunity for profit and loss. Arguably, under the proposed rule, which looks at the totality of circumstances, more delivery drivers, and other independent contractors will be considered employees, which would grant those workers protections under the law.

What an "employee" looks like has changed significantly from the days where 9-5, five days a week was the norm. Gone are the days that a written contract stating a worker is an independent contractor makes that true. Practitioners need to look at all the factors under the economic reality test to determine whether someone is an employee or independent contractor. A worker who is misclassified may lose valuable benefits and protections under the law, he or she would or should be entitled to as an employee. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

THE ILLUSION OF EXPLANATORY DEPTH

Here's a question: On a scale of 1 to 7, how well do you understand how a zipper works?

Most people say they know how a zipper works. You pull the tab up, the little teeth fit together and the zipper closes. You pull the tab down, the little teeth separate and the zipper opens.

Right. But that describes what a zipper *is*. Everybody knows what a zipper is. The question is whether you know how it works. Please describe in as much detail as you can all the steps involved in a zipper's operation.

Finished?

Okay, now try the first question again. On a scale of 1 to 7, how well do you understand how a zipper works?

What you have just demonstrated is called the illusion of explanatory depth. It isn't just you, and it isn't just zippers. It appears we all believe we understand much more than we do. There are books on the subject. One of the most accessible is *The Knowledge Illusion* by Steven Sloman and Philip Fernbach.

According to Sloman and Fernbach, in addition to our vast overestimation of how well we understand mechanical objects like toilets and ballpoint pens, we are terrible judges of how well we understand what we might call political objects. Single-payer healthcare is a good example.

If you ask people how they feel about single-payer healthcare, they will have an answer. Some people strongly support it, others strongly oppose it. Ask them to put a number on their position from 1 to 7.

If you ask them to give reasons for their position, they will easily supply them. We are very good at providing reasons for our beliefs.

But if you ask people to explain exactly how single-payer healthcare works and what will follow if it is implemented, you will not get much beyond vague generalities and arm-waving.

Then, if you ask the first question again, the number moves. When you ask people how they feel about single-payer healthcare after they've been through the exercise of trying and failing to explain how it works, their number softens. Their position moderates.

Now here's a story:

In California in 2008 there was a proposition on the ballot to amend the state constitution to define marriage as between one man and one woman. Proposition 8 would ban same sex marriage in California. And it passed.

Folks from the Los Angeles LGBT Center were stunned and devastated. They said:

> Let's go try and talk to the people who are voting against us. Let's go into the neighborhoods where we lost heavily and knock-on people's doors and find out (a) if we can have a conversation with the people who voted against us; (b) if we can talk to each other honestly; and (c) if that's possible, if there's anything we can do to change those minds.

The quote is from *The Persuaders: At the Front Lines of the Fight for Hearts, Minds, and Democracy* by Anand Giridharadas.

The technique that emerged from tens of thousands of those conversations is known as deep canvassing. The director of the LGBT Center and the inventor of deep canvassing is Dave Fleischer. He says this about his invention:

> Well, it's funny, in a way it's not new at all. We did not invent the concept that one human being can talk with another human being. So in a way, there's nothing original here at all, and yet it is very original, because it is so much against the grain of the dominant political culture.

Deep canvassing has proven its effectiveness on the ground in real campaigns and in repeated and rigorous review by social scientists. A 2018 study by Kalla and Broockman published in American Political Science Review, for example, showed deep canvassing to be 102 times more effective than the average presidential persuasion program.

The conclusion is clear. Facts and arguments, data, evidence, and expert opinions just cause people to dig into their previous positions. Talking to them one human being to another, non-judgmentally, asking them open-ended questions, and listening to what they say changes minds.

Who knew? ■

DENTAL HEALTH IS HEART HEALTH: THE SIMPLEST HABIT

Dr. Joel K. Kahn

Did you know that there is a strong connection between a healthy mouth and a healthy heart? The link is so strong that when you brush and floss your teeth to keep them clean you are helping to keep your heart clean too. And while it may be a challenge to eat well, exercise, and avoid stress, the toothbrush is right there along with the floss and water massage and are so simple to use regularly.

Scientific data linking heart and oral health has been coming from researchers in around the globe and might motivate you to upgrade your oral health.

1) In a study of 247,696 healthy adults followed for nearly ten years for the development of heart disease like heart attacks, better oral health behaviors were associated with fewer heart events. The number of missing teeth and dental caries were associated with increased heart events.

2) Poor oral hygiene can release bacteria into the blood stream and trigger inflammation throughout the body including the heart. In a study of 161,286 subjects frequent tooth brushing (≥3 times/day) was associated with a lower risk of a serious heart rhythm called atrial fibrillation and also reduced cases of congestive heart failure, another serious heart condition.

3) Worried about your memory and brain power? A group of researchers published research in linking oral health to the risk of Alzheimer's Disease. PG is a common bacteria in chronic gum disease and it was found in the brain of Alzheimer's disease patients. The presence of these bacteria raised the risk for developing the disease substantially and were implicated in a more rapid disease progression. The researchers recommend regular oral hygiene practices and regular cleanings.

Attorneys need to focus on healthy lifestyle habits. A nice smile may help win your case!

Don't smoke, schedule regular exercise, avoid processed food from fast food restaurants and vending machines and gas stations. Eat a whole food plant-based diet full of natural colors. According to a new book, Justice Frankfurter would read while brushing his teeth.

As dentist Steven Lin writes in *The Dental Diet* at 4, 6 (2018):

> But the more I got to know my patients, the more I discovered how little people understood dental disease and how it affects their lives. I saw plenty of patients who had fine educations and impressive careers but whose mouths were disaster zones. It was common for them to have broken, missing, or crooked teeth; swollen gums; and infected wisdom teeth.
>
> Oral disease is both a warning and a cause of chronic diseases that harm the entire body.

So you have gotten your "Miranda"-Dental warnings. Treat your mouth as an extension of your heart. Keep a toothbrush and floss in your briefcase. Every time you remember to brush, floss, and water cleanse your teeth you have practiced a science-based way to prevent heart disease, and perhaps, brain disease. The discipline of excellent oral health can be considered an act of brushing and flossing your heart and brain. ■

SOME "HEALTHY" BOOKS

Joel K. Kahn, *The Plant-Based Solution* (2019).

Steven Lin, *The Dental Diet* (2018).

Katrina Ubell, *How to Lose Weight for the Last Time* (2022).

Daniel Lieberman, *Exercised* (2020).

Martin Gibala, *The One-Minute Workout* (2017).

Mary Otto, *Teeth* (2017).

E. Fuller Torrey, *American Psychosis* (2014).

DUES CHECKOFF CANNOT BE UNILATERALLY ENDED AT CBA EXPIRATION

Valley Hospital Medical Center, 371 NLRB No. 160 at 1 (9/30/22) (paragraph breaks added):

> "This case…raises again a question that has divided the Board and troubled the court for two decades: whether, consistent with the duty to bargain established by Section 8(a)(5) of the National Labor Relations Act (the Act), an employer may unilaterally cease dues checkoff after the expiration of the collective-bargaining agreement that provides for it.
>
> That is, where a collective-bargaining agreement requires the employer, when authorized by an employee, to deduct union dues from the employee's wages and remit the dues to the union, is such dues checkoff, like most terms and conditions of employment, part of the status quo that the Act requires the employer to maintain--or bargain over changing--after the collective-bargaining agreement expires?
>
> Or, rather, is there reason for the Board to include dues checkoff among the relatively few terms that an employer may change unilaterally after contract expiration?
>
> . . . We find that dues checkoff should be treated as part of the status quo that cannot be changed unilaterally after contract expiration."

WHAT IS A TEACHER UNDER PERA?

John A. Maise
White Schneider PC

Kalamazoo Education Association, Case No. 21-G-1465-CU (Oct. 11, 2022) discusses the fundamental definition of what a teacher is when examined through the lens of the teacher placement, a prohibited bargaining subject. This decision sheds light on how prior MERC decisions should be interpreted and provides clarification on the fundamental definition and clarifies the fundamental question of what is a "teacher".

Kalamazoo Public Schools (the District), after returning a guidance counselor, who had always and only worked at the District as a guidance counselor but possessed a valid teaching certificate, into a classroom teaching position. When the Kalamazoo Education Association objected to this placement and attempted to elevate their grievance to arbitration, the District filed an unfair labor practice alleging that the Union was forbidden from arbitrating this issue because "teacher placement" is a prohibited subject of bargaining under PERA. The question centers on whether or not the guidance counselor was a teacher for teacher placement. If the guidance counselor met the definition of a teacher, then subsequent placement into a teaching position would be a prohibited subject of bargaining.

Administrative Law Judge Travis Calderwood found that the guidance counselor fell under the definition of teacher based on MERC precedent.

The Commission disagreed, focusing on whether the word "teacher" in the phrase "teacher placement" includes an individual who holds a teaching certificate but is not employed as a teacher. The Commission rejected both the definition of teacher contained within the Teacher Tenure Act (as advocated by the District) and the definition contained within the Revised School Code (as advocated by the Union). The Commission found that the legislature intended that the provision making teacher placement a prohibited subject of bargaining would be encompassed under the plain and ordinary meaning of "teacher" and "teacher placement." In applying a dictionary definition, the Commission rejected the District's assertion that a teacher was any individual holding a teaching certificate. Instead, it noted that a person who was and always had been a guidance counselor did not meet any standard definition of teacher, *i.e.,* "a person who teaches, especially in a school". Moreover, extending teacher placement to such individuals does nothing to further the legislature's goal to reward well-performing classroom teachers.

Notably, the Commission distinguished this decision from several prior decisions and provides useful clarification as to how the definition of the teacher should be interpreted going forwards. *Garden City Education Association,* 34 MPER 19 (2020) defined a teacher: The legislature has defined the term "teacher" only one way: "a certified individual employed for a full school year by a board of education or controlling board." The plain meaning of "teacher placement" is clear: placement of a teacher in a teaching position.

The Commission notes that the question in *Garden City* was the placement of teachers in non-teaching co-curricular positions, and further distinguished *Garden City* as defining "teacher placement" as opposed to defining "teacher." Indeed, such a difference was unnecessary because *Garden City* centered its analysis on the status of the position to which someone who unquestionably was a teacher was assigned. As such, the finding in *Garden City* that a teacher assigned to a non-curricular coaching position was not consistent with the ordinary meaning of teacher placement.

The second case the Commission distinguished is *Pontiac School District,* 28 MPER 34 (2014). It involved the placement of a speech pathologist into an elementary school teaching position. The Commission noted that the union had waived its right to assert the speech pathologist was not a teacher, because the union at no point contested the district's assertion that the position was a teaching one. As such, the parties effectively agreed that the speech pathologist was a teacher for that decision, limiting the scope of the decision.

Overall, this is a decision which explores the meaning behind a fundamental term in PERA-- what is a "teacher" The main takeaway is that when interpreting the PERA it is often important to use the plain English definition of the word where another definition is not explicitly provided by the legislature. This decision shows that context matters and emphasizes the importance of interpreting Commission decisions narrowly and to avoid overly extrapolating from prior decisions that are not directly relevant to the case before it. ■

WORKPLACE NEWSPEAK—IT IS WHAT IT IS, OR IS IT?

Stuart M. Israel

Dilbert's pointy-haired boss addressed the workforce: "At the end of the day, it is what it is and that means we need to unpack everyone's input and use best practices to generate the highest R.O.I. while being customer focused as we disrupt the market with a deep dive."

You might admire his expression of robust commitment to a solutions-driven action plan, but Dilbert said: "I have no idea what any of that meant." The boss responded: "My takeaway is you're not a team player."

Dilbert may have to answer for his negativity to Catbert, the company's "evil human resources director."

Life imitates art when it comes to workplace newspeak. *Dilbert* is the art. Life is represented by an email invitation I got to "join" an upcoming "live seminar" called "What's New In Onboarding."

The seminar would be presented by an "industrial/ organizational psychologist," the "founder and CEO" of "a global technology enabled talent management consulting firm specializing in bringing the science of talent management to the bottom line." Not often, in my experience, does the phrase "talent management" appear twice in a sentence. Or even once.

If I "joined" the seminar, I would "learn about trends, current best practices and how to organize the new hire experience in order to build commitment, confidence and competence." I would learn how to "design a 90-day onboarding process that reduces the time it takes to get new employees up to speed."

I passed up the invitation (and the proffered 10% discount), but gave the author credit for using the term "employees," and not, as is increasingly common, calling people who work "team members," "associates," "colleagues," or anything-but-employees.

Workers were once universally called employees, like in the National Labor Relations Act (1935), the Civil Rights Act (1964), and ERISA (1974). Sometimes they were even called workers and employees, like in the WARN Act (1988). Employees once dealt with personnel directors. Now, more often they deal with human resources directors, talent managers, and human capital vice presidents.

I have attributed the new-title-trend—the new-new-thing—to corporate affinity for building "career" (f/k/a/ "job") satisfaction, "passion," self-esteem, and loyalty among "onboarded talent"—if the effort doesn't hurt the "bottom line." I thought the trend was benign—until I read writer David Mamet's view suggesting that something insidious is afoot.

Mamet wrote: "Employees are now referred to as human resources. The folks described are the same, but the difference is semantic, which is to say, in the way that they are considered, and, so, treated. What does one do with employees? One pays them. What does one do with resources? One exploits them."

Mark Twain wrote that the "right word" is a "powerful agent" which "lights the reader's way and makes it plain." But the right word also can be a powerful agent which darkens the reader's way. George Orwell demonstrated that "plain" is not always a writer's or speaker's desired outcome. What the "right word" is depends on the author's or speaker's purpose. There are important lessons here.

First, those offering advice on "best practices" for designing "onboarding processes" to affect the "new hire experience," and those concerned about "the science of talent management," and people who deal with actual employees, should all watch their language.

Euphemisms can soften, or deceive, and they can backfire on the euphemizer.

To paraphrase Shakespeare, if an employer calls a rose (an employee) by another name (say, colleague), the employer may adversely affect its credibility with employees who know the difference between a rose and fertilizer when they see—or smell—it. As the pointy-haired boss says, it is what it is.

Second, Confucius said that humility is the solid foundation of all virtues. For labor and employment professionals, the path to humility begins with a daily reading of *Dilbert.* ■

THREE "PLAIN" PRINCIPLES TO INFORM "BEST PRACTICES"

"All labor that uplifts humanity has dignity and importance and should be undertaken with painstaking excellence." –Martin Luther King Jr.

A "just demand" and an "everlasting right": "A fair day's wage for a fair day's work." –Thomas Carlyle

"I don't want a stupid title. I want a raise!"—Dilbert

STATE JUDICIAL DEFERENCE —OR NOT—TO LABOR ARBITRATION AWARDS

Lee Hornberger
Arbitrator and Mediator

Michigan AFSCME Council 25 v Wayne County, 2022 WL 1196802 (Mich App), lv app pdg, affirmed the Circuit Court vacatur of a labor arbitration award, and in doing so, the majority opinion applied the wrong legal standard.

Michigan AFSCME involved an employee who, on the verge of discharge, took a cash-in retirement. The employee applied for retirement while awaiting the outcome of a disciplinary action initiated by the employer arising from a work accident that resulted in an injury to another employee. The retirement application required the employee to agree to a "separation waiver." The "waiver" stated that he was terminating his employment and not seeking reemployment. The employer terminated the employee's employment the following day. The employee allowed his retirement application to proceed, but he also filed a grievance with the employer pursuant to the CBA, seeking reinstatement of his employment. In the meantime, the Wayne County Employees' Retirement System approved the employee's retirement. The employee then transferred his defined contribution retirement account funds to a private IRA. The grievance proceeded to arbitration. The arbitrator found there was no just cause for the discharge and reinstated the employee with a suspension in spite of the retirement and waiver language issues.

The Circuit Court vacated the award. The COA, in a split decision, affirmed, applying the arbitration award review standard enunciated in a non-labor case, *Detroit Auto Inter-Ins Exch v Gavin,* 416 Mich 407 (1982). Judge Jansen in dissent applied the correct standard and stated that the arbitrator did not exceed its authority and that the applicability of defenses to arbitration, including waiver, was for the arbitrator to decide.

The Michigan Supreme Court directed the Clerk to schedule oral argument and directed the parties to address (979 N.W.2d 665):

> whether the standard set forth in *Detroit Auto Inter-Ins Exch v Gavin,* 416 Mich 407 (1982), applies to labor arbitration cases, see *Bay City Sch Dist v Bay City Ed Ass'n, Inc,* 425 Mich 426, 440 n 20, (1986), and *Port Huron Area Sch Dist v Port Huron Ed Ass'n,* 426 Mich 143, 150 (1986); and (2) whether the trial court erred in vacating the arbitrator's awards in this case. 979 NW2d 665 (2022).

In my opinion, *Gavin* conflicts with *Port Huron* and many other cases where the Michigan Supreme Court and Courts of Appeal have applied the same policy of judicial deference applied by federal courts. *Port Huron* relied on the *Steelworkers Trilogy* decisions concerning labor arbitration awards. *United Steelworkers v American Manufacturing Co,* 363 US 564 (1960), held that if the CBA provided that a dispute should be submitted to arbitration the underlying "question of contract interpretation [is] for the arbitrator," even though the claim in the court's eyes appears to be a "frivolous" one. "The courts have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." *Id.*

In *Michigan AFSCME,* the Court of Appeals held that *Gavin,* 416 Mich 407 (1982), applies to labor arbitration awards. But Gavin involved an arbitration conducted under an insurance policy. The issue was whether the arbitrator erred by finding that four automobile no-fault insurance policies could be stacked to allow the insured party to receive the maximum benefit under all four policies, contrary to anti-stacking provisions in the policies. The Supreme Court framed the issue as whether an arbitrator's plainly erroneous contractual interpretation was subject to correction by the courts.

In *Michigan AFSCME,* the Union argues that *Gavin* applies only to statutory arbitration and has no relevance to public-sector labor arbitration. It can be argued that, if *Gavin* had involved a CBA rather than a commercial insurance contract, the *Gavin* award would not have been vacated. *Gavin* discusses the overriding importance of the anti-stacking provisions in the insurance industry. *Gavin* does not discuss labor-management arbitration or the Supreme Court decisions that have reviewed labor-management arbitration.

Commercial arbitration such as *Gavi*n is a substitute for court litigation. Labor arbitration such as *Wayne County AFSCME* is a substitute for industrial strife, strikes, and work stoppages. Labor arbitration is the result of collective bargaining. In labor arbitration, there is an ongoing relationship between the parties. In labor arbitration, the arbitrator looks at the CBA and the common law of the shop. Commercial arbitration and labor arbitration serve completely different purposes.

Bay City Sch Dist v Bay City Ed Ass'n, Inc, 425 Mich 426 (1986), held that the pendency of unfair labor practice charges before the MERC does not preclude arbitration of breach of contract claims where the statutory claims submitted to the MERC and the contractual claims submitted to arbitration arise out of the same controversy. *Bay City Sch Dist* is a pro-labor arbitration case.

Port Huron Area Sch Dist v Port Huron Ed Ass'n, 426 Mich 143, 150 (1986), while reversing a decision upholding an arbitrator's award, restated the narrow grounds for setting aside an award: "The United States Supreme Court expressed the federal policy of judicial deference in the context of labor arbitration in the celebrated *Steelworkers' Trilogy.* This Court expressed its general acceptance of such a policy."

The Supreme Court should apply the *Trilogy* and its progeny and correct the mistake made by the Court of Appeals in *Michigan AFSCME.* ■

INDIVIDUALIZED DISCOVERY DIRECTED TO CLASS MEMBERS IS IMPROPER

John G. Adam

I recently dealt with a company, in a retiree healthcare case, that sought individual "damages" discovery from about 100 class members. The district court denied class discovery as "unnecessary, burdensome, duplicative of the claims process, and would require each retiree to potentially obtain counsel now as to the amount of their claim." *Stone v. Signode and ITW,* 2022 WL 3355246 (N.D. Ill.).

Individual class member discovery in a FLSA "collective" case was denied in *Stephenson v. Family Solutions of Ohio, Inc.,* 2022 WL 597261 (N.D. Ohio) (Defendants "failed to make a strong showing that the discovery (1) is not sought to harass or alter class membership; (2) is directly relevant to common questions and unavailable from the representative parties; and (3) is necessary at trial of issues common to the class.").

1.

The Illinois and Ohio district courts got it right.

Discovery directed to absent class members is generally barred. See *e.g., In re Local TV Advertising Antitrust Litigation,* 2022 WL 2439989 at *2, 3 (N.D. Ill.) (quashing subpoenas; discovery from "absent" class members is "not the norm") and *Rogers v. Baxter Intern. Inc.*, 2007 WL 2908829 at *1 (N.D. Ill.) (denying leave to serve individualized interrogatories; discovery directed to "nonnamed class members is not warranted 'as a matter of course'").

Indeed, "courts have found that the party seeking discovery of absent class members must first obtain leave of court." *Stephenson* at *7. See also *In re Skelaxin Antitrust Litig.,* 292 F.R.D. 544, 550 (E.D. Tenn. 2013) (finding that "in a class action, even a putative class action, the party seeking discovery from an unnamed class member must...first seek permission from the court").

The Ohio district court surveys the law, noting that "courts in the Sixth Circuit have yet to arrive at a consensus as to what showing [the party seeking discovery] must make." Some courts have held that "discovery is only permitted where a strong showing is made that the information" is (1) not sought with the purpose or effect of "harassment or altering" class membership; (2) "directly relevant to common questions and unavailable from the representative parties;" and (3) "necessary at trial of issues common to the class." Other courts have allowed class discovery "upon a showing of 'particularized need,' which generally requires a demonstration that the discovery is addressed to common issues (as opposed to individual issues), that it is not designed to force class members to opt out, and that it would not impose an undue burden or require the deponent to seek legal or technical assistance to respond." *Id.* at *7.

Whatever the test, individual class member discovery is the *rare* exception, *not* the rule.

2.

Individualized discovery unfairly burdens class members and undermines Rule 23 economies, efficiencies, and effectiveness. Further, individualized discovery is "generally only permitted to the extent necessary at the liability stage of a class action." *Bell v. Woodward Governor Co.,* 2005 WL 8179364 at *1 (N.D. Ill.).

In particular, individualized claims discovery is barred. It "is improper to subject absent class members to discovery meant 'solely to determine the identity and amount of the class members' claims.'" *Zollicoffer v. Gold Standard Baking,* 2020 WL 6825688 at *2 (N.D. Ill) (emphasis added), citing *Brennan v. Midwestern United Life,* 450 F.2d 999, 1005 (7th Cir. 1971).

Indeed, individualized claims discovery is unnecessary, wasteful, and duplicative. When damages are awarded in class actions, individual amounts are ascertained in court-approved claims procedures, often directed by court-appointed administrators or special masters. To "carry out the claims procedure," generally a court will require "(1) a proposed [Rule 23(c)] notice and claims schedule; (2) a claims administrator; (3) the notice procedures, including the notice of verdict and proof of claim form; (4) the process by which Defendants can challenge claims; and (5) the formula for calculating the total damages suffered by each claimant." See *HsingChing Hsu v. Puma Biotechnology,* 2019 WL 4295285 at *3 (C.D. Cal.).

Stone v. Signode and Stephenson v. Family Solutions show that Rule 23 principles and common sense prevail, class members should not be burdened with discovery. ■

WRITER'S BLOCK?

You know you've been feeling a need to write a feature article for . 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. You have been unpublished too long. Contact editor John Adam at jgabrieladam@gmail.com.

TIPS TO SIMPLIFY WRITING: SHORTENING PARTY NAMES THE RIGHT WAY

William Cook and Matthew High
Wilson Elser Moskowitz Edelman & Dicker LLP

One of the best ways to communicate, in our opinion, is to simplify. It makes a brief easier to grasp if we can explain complex legal issues in an easily understandable way, such as talking about negligence in terms of what someone did or did not do wrong rather than using legal jargon.

There are many ways to simplify writing, but the one we'll focus on is shortening party names. We've all seen examples of this in briefs and other pleadings. Some examples include:

- Defendant ABC Corporation ("ABC") moves for summary disposition by arguing . . . .

- Plaintiff John Doe ("Plaintiff" or "Doe") was badly injured in a motor vehicle accident and is suing defendants for negligence.

- Plaintiff served non-party General Motors Company ("GM") with a subpoena.

The worst offender of the bunch, however, is:

- XYZ Corporation (hereinafter, "XYZ" or "Defendant") seeks dismissal of plaintiff's complaint because . . . .

So much of this shortening of names is unnecessary and pointlessly complicates writing. There really is no need for any or most of this—the parentheses, the quotation marks, and certainly not the hereinafter. For us, we'd take out all the parts of each sentence shortening the party names. Does anyone really think that adding ("ABC") right after saying ABC Corporation makes a meaningful difference? Will the reader really be confused if, later in the brief, the writer refers to ABC? Does a reader, especially one in Michigan, really need to be told that a later reference to GM means General Motors (or that Ford is a shortened version of Ford Motor Company)? In our opinion, the answer is no. *The reader will get it.*

Sure, adding a parentheses can serve some function in the right context. Sometimes it may be appropriate to shorten a party's name with an acronym or phrase. For example, if you're writing about the Equal Employment Opportunity Commission, it probably makes sense to write something like "The Equal Employment Opportunity Commission (EEOC) is currently investigating . . . ." Or shortening the United States Department of Agriculture to USDA makes sense. But these situations, we think, are rare.

Also, why have parentheses *and* quotation marks? As far as we can tell, the quotation marks add no value and are unnecessary. Take them out. If you want to identify how you're going to shorten a party name, just use the parentheses.

How should we write? In our view, the first sentence—Defendant ABC Corporation ("ABC") moves for summary disposition by arguing—is better written in one of way two ways:

Better: Defendant ABC Corporation (ABC) moves for summary disposition by arguing . . . .

Best: Defendant ABC Corporation moves for summary disposition by arguing . . . .

So why do lawyers do this if it's unnecessary? Our best guess is we saw lawyers do it before us, that's what we learned, and we've continued to do what we were taught. But we hope that, upon reflection, you come to the conclusion that we have that all of this is unnecessary, doesn't improve your brief, and may, in fact, make it more complicated.

Is this a big deal? Will this turn a bad brief into an award-winning brief? Probably not, but change often comes in small steps. And we think this is a change lawyers should make as one of many ways to simplify and improve their writing. We hope you, hereinafter, will. ■

INCREASES IN MINIMUM WAGE AND SICK LEAVE (LIKELY) COMING SOON

David Porter
Kienbaum Hardy Viviano Pelton & Forrest, PLC

Those with longer memories may recall that several elections ago, voters were poised to decide two ballot initiatives that promised significant changes to Michigan workplaces. One, the Michigan Minimum Wage Increase Initiative, would have raised the minimum wage. The other, the Michigan Paid Sick Leave Initiative, would have guaranteed paid sick leave. Shortly before the November 2018 election, the Legislature adopted the initiatives as law (as authorized by the state constitution) and, before the year's end, amended the laws to ease the most burdensome aspects for Michigan employers.

The Legislature's "adopt-and-amend" strategy upset proponents of the ballot initiatives, who filed legal challenges seeking to strike down the amended laws and reinstitute the initiatives as they were originally adopted by the Legislature. That spawned years of legal wrangling and uncertainty for businesses across the state.

For better or worse, much of that uncertainty recently ended, maybe. Agreeing with proponents that the Legislature's "adopt and amend" tactic was unlawful, a Michigan Court of Claims judge ruled that the laws as originally adopted should go into effect—though not right away. Concerned about employers having to immediately accommodate the changes brought by the laws, the court held that its decision would not go into effect until February 20, 2023.

But the legal challenge will continue to wend its way through the Michigan appellate courts (a Michigan Court of Appeals decision is expected in early 2023), but employers and their counsel should start planning for the new laws now. Here is a brief rundown of the legal requirements that employers will face early next year.

The Improved Workforce Opportunity Wage Act. Under the new minimum wage law, the minimum wage will increase to $12 an hour, with annual increases based on changes in the consumer price index. The law will also phase out the different compensation system for tipped employees, requiring that they be paid the normal minimum wage (over a 250% increase from the present system). Finally, the new law guarantees time-and-a-half overtime pay for most wage earners who work over 40 hours in a work week. Excluded from the overtime requirements are executive, administrative, and professional employees, including teachers and academic administrators; elected public officials or their appointees; seasonal recreational workers; and agricultural workers.

One major question that remains unanswered is how quickly the increases in minimum wage will go into effect. As originally enacted in 2018, the law gradually increased the minimum wage rate over four years (to 2022) and the tipped employee minimum wage over six years (to 2024). Although the timeline may change, either because of a judicial ruling or political compromise between the Legislature and the Governor, employers should prepare as though the minimum wage rate for 2022 will apply as soon as the ruling goes into effect.

The Earned Sick Time Act. Under the new paid sick leave law, employees accrue a minimum of 1 hour of paid sick time for every 30 hours worked. Employees of small businesses (fewer than 10 employees) will be allowed to accrue and use 40 hours of paid sick time per year. All other employees will be allowed to accrue and use 72 hours of paid sick time per year. Employees are allowed to carry over paid sick leave from year to year, but employers are not required to provide more than the total annual paid sick leave required by law.

Given the difference in minimum annual sick leave benefits, the first question employers (and their attorneys) will confront is whether they are a "small business." The Act defines "small business" as a business with fewer than 10 individuals working for compensation in a given week. Employers must count all individuals performing work for compensation on a full-time, part-time, or temporary basis. And if an employer maintained 10 or more employees on its payroll for 20 or more weeks during the current or preceding calendar year, it cannot qualify as a small business.

The law also requires employers to allow employees to use their paid sick leave for a variety of reasons that employers may not immediately associate with sick leave. Employees are permitted to use the paid leave for their or their family member's mental or physical illness, injury, or health condition, including treatment and preventative care. Family member is broadly defined to include not only an employee's child, parent, spouse, domestic partner, grandparent, grandchild and sibling, but also "any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship." Also covered are absences because the employee or covered family member is a victim of domestic violence or sexual assault or because of certain public health emergencies.

Employees may use their sick time in hourly increments or the smallest increment in the employer's payroll system for absences or use of other time, whichever is smaller. If the absence exceeds three consecutive days, employers may require reasonable documentation showing that the sick leave has been used for an authorized purpose.

The new Act includes an anti-retaliation provision, prohibiting employers from taking any retaliatory personnel action or discriminating against an employee because the employee has exercised a right protected under this act. The Act also prohibits employers or any person from interfering with, restraining, or denying the exercise of any right under the Act. Employees aggrieved under the Act may file a complaint with the Department of Licensing and Regulatory Affairs or pursue a civil action for damages, including an equal additional amount as liquidated damages together with costs and reasonable attorney fees.

Employers must inform their employees (and any new hires) about their rights under the new Act, including the amount of earned sick time the employer is required to provide, the terms under which the leave may be used, retaliation protections, and the availability of redress for violations of the Act. In addition, employers must display a poster in a conspicuous place that is accessible to employees that contains information about what is required by the Act. Employers are required to retain for the previous three years records documenting the hours worked and earned sick time taken by employees.

In sum, these new laws will bring significant financial and record-keeping changes to Michigan businesses. It is important that employers and their attorneys familiarize themselves with the changes now, so they will be ready to meet the new requirements beginning February 20, 2023. ■

MICHIGAN'S WAGE AND HOUR DIVISION

Sidney McBride, Bureau Director
Bureau of Employment Relations

Wage and Hour Division of BER

As many are aware, the Bureau of Employment Relations (BER or Bureau) serves as the administrative arm of the Michigan Employment Relations Commission (MERC or Commission). For years—the terms "Bureau", "MERC" and "the Commission" were shortcut references often used interchangeably without much cause for concern as they all related to a single state agency. The Department of Licensing and Regulatory Affairs (LARA) in 2016 placed a second agency under the Bureau--namely Michigan's Wage and Hour Division (WHD). The two agencies—MERC and WHD operate independently with separate budgets, distinct staffs and protocols, and the MERC Commissioners have absolutely no authority or involvement with any of the WHD operations or decisions.

This submission jumpstarts the addition of articles in future editions of *Lawnotes* that will pertain to happenings at the state's Wage and Hour Division.

Here is a brief summary of the various areas of the WHD's responsibilities:

1. Regulate wages and other fringe benefits such as vacation pay, sick pay, holiday pay, bonuses, and authorized expenses owed to workers under the **Payment of Wages and Fringe Benefits [1978 PA 390]**

2. Reinforce payment minimum and premium wage rates under the state's **Workforce Opportunity Wage Act [2018 PA 337]** *(Impact of recent court decision stayed until February 19, 2023)*

3. Regulate certain safeguards affecting youth workers under the age of 18 pursuant to the **Youth Employment Standards Act (YESA) [1978 PA 90]**.

4. Reinforce eligible workers' access to paid sick leave under the state's **Earned Sick Time Act [2018 PA 338]** *(Impact of recent court decision stayed until February 19, 2023).*

5. Monitor the posting of required notices at certain entities and business establishments under the **Michigan Human Trafficking Notification Act [2016 PA 62]**.

6. Compile rates and enforce claims of non-compliance with the state's requirement that approved contractors and subcontractors pay prevailing wage rates on certain state construction contracts issued by the Michigan Department of Technology, Management & Budget.

More information on the Wage and Hour Division is at www.michigan.gov/wagehour. ■

IMPROVED "REHEARING OR RECONSIDERATION" RULE

John G. Adam

Local Rule 7.1(h) motion for rehearing or reconsideration, Eastern District of Michigan, was amended in 2021 to clarify the differences between final and non-final orders and to better identify the grounds for reconsideration.

The new Rule 7.1(h) states that reconsideration of *non-final* orders must be filed "within 14 days" after entry of the order. This is like the old rule, but the grounds are rewritten and spelled out in (h)(2):

(A) The court made a mistake, correcting the mistake changes the outcome of the prior decision, and the mistake was based on the record and law before the court at the time of its prior decision;

(B) An intervening change in controlling law warrants a different outcome; or

(C) New facts warrant a different outcome and the new facts could not have been discovered with reasonable diligence before the prior decision

The old language was deleted with good reason. It was vague and limited to "palpable defect"—whatever that means.

The amended rule adds (h)(4)—a motion to reconsider an order denying a motion "may not be filed." This rejects Churchills advice to "never give in, never give in—never, never, never, never—in nothing, great or small, large or petty—never give in." *Gollomp v. Spitzer,* 568 F.3d 355, 367 n. 10 (2d Cir. 2009) (1941 Address at Harrow School).

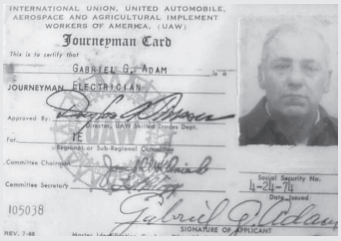
Of course, Churchill did not practice law in the Eastern District. And even Churchill qualified "never give in" by adding "except to convictions of honor and good sense."

I think this new rule allows a second motion to reconsider if you are reconsidering an order *granting* a motion to reconsider. This happened to me in Ohio. I got the court to reconsider an order denying my motion to compel arbitration. Then the company sought reconsideration of the reconsideration order compelling arbitration. Finally, the company's reconsideration of reconsideration order was denied. *Verso Corp. v. USW,* 2020 WL 1482368 (denying USW motion to compel arbitration), *recon. granted,* 2021 WL 1746303, *recon. denied,* 2022 WL 909320 (S.D. Ohio).

As to *final* orders or judgments, the rule states that a party seeking reconsideration must file such a motion under Fed. R. Civ. P. 59(e) or 60(b), *not* the local rule. The time under the 60(b) is 28-days and 59(e) states it "must be made within a reasonable time" but "no more than a year after the entry of the judgment or order." ■

READ, READ, READ!

John G. Adam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My father always told me, my sisters, and his grandchildren that it was very important to "read, read, read." He was an electrician who was always reading and learning a new skill.

A new book discuss the importance of reading.

Benjamin Netanyahu, *My Story* at 52, 231 (2022):

"I read voraciously, devouring Machiavelli, Hemingway and the American historian Will Durant, whose voluminous Story of Civilization I discovered through my father. I made a point to add new words to my vocabulary each day. I thoroughly enjoyed my classes. My teachers were exceptional. I owe them a great deal.

"Though addicted to history books and political biographies, I have now read so many books about Churchill, whom I much admire, that I immediately discard any that are not written in a novel and gripping way. I also often explored other subjects according to whatever work I was doing at the time. Thus when I was at BCG and RIM Industries, and then again later when I became finance minister, I read books on economics and technology; when I sought to turn Israel into a cyber power, I read books on cybernetics, and so on. Books have to say something substantive and say it well. Good books are my escape from drudgery; good works on history illuminate the present as much as the past."

Winston Churchill, *My Early Life: 1874-1904* at 116 (1930) was also a great reader:

"It is a good thing for an uneducated man to read books of quotations. *Bartlett's Familiar Quotations* is an admirable work, and I studied it intently. The quotations when engraved upon the memory give you good thoughts. They also make you anxious to read the authors and look for more."

Robert Bray in *Reading With Lincoln* at 1 (2010) writes:

"From boyhood on, Lincoln's habit of reading concentrated a naturally powerful mind; and reading provided models of voice and diction to one who had inborn talent as a storyteller and a near-flawless memory and therefore needed only the stimulus of literary greatness, and emulative practice, to emerge as a great writer himself."

MICHIGAN COURT RULINGS ON MEDIATION

Lee Hornberger
Arbitrator and Mediator

I review 20 plus appellate decisions addressing mediation since January 2021.

Supreme Court Protects Mediation Confidentiality

Tyler v Findling, 508 Mich 364 (2021) is a defamation case arising from statements made by one attorney acting as receiver to another attorney before meeting in--person with mediator. The Supreme Court held the statements were MCR 2.412(B)(2) "mediation communications" and confidential under MCR 2.412(C). The phrase "mediation communications" is defined broadly to include statements that "occur during the mediation process" and statements that "are made for purposes of … preparing for … a mediation." MCR 2.412(B)(2). The conversation between the two attorneys took place within "plaintiff's room" while parties to mediation were waiting for mediation session to start and were part of "mediation process."

What if this were pre-suit mediation and arguably MCR 2.412 did not apply? "The mediator should include a statement concerning the obligations of confidentiality in a written agreement to mediate." Standard V(A)(2), SCAO, Michigan Standards of Conduct for Mediators (effective February 1, 2013). *Tyler* is discussed in detail by me in "Michigan Supreme Court Enforces Mediation Confidentiality," *Oakland County Legal News* (12/28/2021).

Published Court of Appeals

COA affirms Circuit Court that no settlement agreement. *Citizens Ins Co of Am v Livingston Co Rd Comm'n,* 356294 (September 15, 2022), app lv pdg. This is an insurance coverage dispute case. COA held that local government can be bound by settlement agreement entered into by its lawyer if (1) government later ratifies agreement or (2) lawyer had prior special authority to settle claim. Lawyer may bind client to agreement if lawyer had "some precedent special authority" to enter into such settlement on behalf of client, even if client is governmental unit. Lawyer must have specific authority to bind client to agreement. If ongoing discovery related to whether Road Commission's lawyer had authority from Road Commission to settle case on its behalf, then, notwithstanding there was no public meeting ratifying agreement, Road Commission would be bound by settlement agreement. Mediation. Subsequent email negotiations. Attorney-client privilege issue. COA affirmed, ruling that defendant waived attorney-client privilege when defendant argued that its attorney did not have authority to settle.

COA reverses Circuit Court that there was a settlement agreement. *Dabash v Gayar,* 358727 (September 15, 2022). Defendants filed motion to enforce purported settlement agreement. Circuit Court granted motion. enforcing purported

agreement. COA reversed. COA held parties had not reached enforceable agreement. "… bitter impasse … inevitable … lost their appetite … fraught with peril … sue for peace … ." When case involves agreement to settle pending litigation, it must comply with MCR 2.507(G). Because no version of "Settlement Agreement and Release" or "Membership Interest Purchase Agreement" bears Dabish's signature at bottom, neither document enforceable against Dabish. Nothing in e-mail traffic demonstrating that Dabish ever accepted defendants' offer.

Unpublished Court of Appeals

COA affirms Circuit Court interpretation of consent judgement. *Foster [Seven Lakes] v Charter Twp of Washington,* 355650 (April 28, 2022). Enforcement of consent judgment case. COA affirmed Circuit Court ordering Township to enter into cost-sharing agreement with Seven Lakes containing a payback agreement. This case involves settlement without mediation.

COA reverses Circuit Court rejection of consent judgment. *Stacy v Stacy,* 353757 (March 17, 2022). Action for separate maintenance through proposed consent judgment. Plaintiff submitted proposed consent judgment to Circuit Court that would transfer 100% of defendant's two pensions to plaintiff. Referee recommended case be dismissed because division of assets reflected in proposed consent judgment was not fair or equitable to defendant. Referee stated that it did not appear parties wanted to be separated but instead only wanted to qualify defendant for Medicaid benefits. Circuit Court effectuated Referee's recommended order. COA reversed Circuit Court. Without making a finding that proposed consent judgment was entered into through fraud, mistake, illegality, or some unconscionability, Circuit Court was not permitted to modify, and deny, proposed consent judgment in order to obtain an equitable result. Because parties essentially entered into a property settlement, Circuit Court erred by not effectuating it. This case involves settlement without mediation.

COA reverses Circuit Court rejection of marriage settlement agreement. *Rudzinski v Rudzinski,* 355312 (March 10, 2022). COA reversed Circuit Court's denial of motion to enforce marriage settlement agreement. In October 2015, parties began discussions about ending their marriage. Over the next several months, parties had meetings about dissolving their marriage and dividing their assets. These conversations resulted in marriage settlement agreement, drafted by Dolores, which parties both signed in June 2016. In January 2019, Thomas filed for divorce. Dolores then moved to enforce marital settlement agreement. Following evidentiary hearing, Circuit Court denied Dolores's motion to enforce settlement agreement. Thomas failed to show duress. Thomas conceded that he did not sign under duress. In absence of fraud, duress, mutual mistake, or severe stress, the Circuit Court erred by refusing to enforce settlement agreement. COA stated that agreement was not illusionary or impossible to perform. A party seeking to avoid contract on basis of contract defense such as duress or fraud bears burden of proving that defense. *Morris v Metriyakool,* 418 Mich 423; 344 NW2d 736 (1984). Assuming some ambiguity, the Circuit Court should have tried to ascertain the parties' intent, considering extrinsic evidence if necessary. This case involves settlement without mediation.

COA affirms Circuit Court in legal malpractice case. *Rufo v Rickard, Denney, Garno & Leichliter,* 356213 (March 10, 2022). Legal-malpractice case incidentally involving the "pension provision" in an MSA. COA affirmed summary disposition in favor of defendant law firm in this legal malpractice case. Primary issue was whether defendants' alleged breach of their professional duty of care in failing to explain how the consent judgment of divorce distributed the pension resulted in plaintiff receiving a less favorable result than she would have otherwise. "If a party settles a case, the pertinent question can be answered by determining whether a better settlement, or a better result during a trial, could have been obtained but for the attorney's negligence."

COA affirms entry of JOD signed by attorneys. *Turner v Turner,* 354495 (February 10, 2022). COA stated negotiation and settlement are part of any civil lawsuit, including domestic relations matters. For negotiations to work, parties must be able to take other side - both party and attorney - at their word. Agreements signed by party or party's attorney are binding. MCR 2.507(G). Parties negotiated consent JOD in person and through series of emails. At close of negotiations, Wife's attorney drafted necessary documents and signed them, along with Husband and his attorney. JOD was contract binding on both parties, despite wife's later disagreement, and Circuit Court properly entered consent JOD.

Party's attorney can bind party to settlement or consent even where party does not give attorney actual authority to do so. Where attorney has "apparent authority" to enter agreement on client's behalf, it would be unjust to opposing party to set it aside. When client hires attorney and holds attorney out as counsel representing client in a matter, client clothes attorney with apparent authority to settle claims connected with matter. Opposing party is generally entitled to enforcement of settlement agreement even if attorney was acting contrary to client's express instructions unless opposing party has reason to believe attorney has no authority to negotiate settlement. Attorney can bind client in this manner. Court and parties in divorce action are bound by settlements that are in writing and signed by parties or their representatives. Injured client's remedy is not against opposing party but against attorney in malpractice. This case involves settlement without mediation.

Post final order motion for mediation. *Jones v Peake,* 356436 (January 20, 2022). This was the seventh appeal to COA and arose from litigious and contentious paternity and child support action. Post final order motion for mediation in Paternity Act, MCL 722.711 *et seq.,* case was frivolous. Motion gave no reason for having mediation.

COA affirms MSA interpretation. *Moriah Inc (Eisenhower Center) v Am Automobile Ins Co,* 355837 (January 6, 2022). MSA included plaintiff's claims for penalty interest and attorney fees.

(Continued on page 20

MICHIGAN COURT RULINGS ON MEDIATION

(Continued from page 19)

Stated intent of parties was to release defendant from liability from "any and all claims … or causes of action" for no fault benefits. Plaintiff's claims for penalty interest and attorney fees were premised on payment of no-fault benefits, specifically benefits having been paid untimely, and thus were included in MSA. MSA unambiguously identified that claims "for all services provided to … through September 30, 2019" were intended to be released. This language covered the period up until parties' October 1, 2019, mediation and agreement to settle plaintiff's claim. It would have also covered any allegedly late-paid claims. The only attorney fee that was excluded from release was plaintiff's counsel's attorney charging lien.

COA reverses enforcement of email exchange settlement agreement. *Haqqani v Brandes,* 355308 (October 21, 2021). COA reversed Circuit Court enforcement of email exchange alleged settlement agreement. "Signature: Nothing in this communication is intended to constitute an electronic signature. This email does not establish a contract or engagement."

COA affirms enforcement of MSA. *Shores Home Owners Ass'n v Wizinsky,* 353321, 35620 (October 14, 2021), lv den (2022). Settlement agreement was entered into following mediation. All parties represented by counsel at mediation. MSA reduced to writing and signed. Agreement was unambiguous. COA affirmed Circuit Court enforcing agreement.

COA affirms nonenforcement of settlement agreement. *Jones Lang LaSalle Mi, LLC, v Trident Barrow Mgmt 22, LLC,* 353367 (June 17, 2021). Although parties apparently agreed to some terms of settlement agreement, they did not reach agreement on scope of release clause. Because parties did not reach meeting of minds over essential terms, there was no enforceable settlement agreement. This was no MSA or "mediation term sheet." In MSA, provide for method to resolve post settlement technical issues.

COA reverses Circuit Court refusal to accelerate. *CIGL Properties v CM Renovation Services,* 353595 (May 27, 2021). MSA provided for payment plan with acceleration and attorney fees if payment were missed. Because of "undergoing surgery" party missed one payment. In light of surgery, Circuit Court refused to order acceleration. COA reversed.

Waiver of right to appeal. *Zyble v Michael Fischer Builders,* 352681 (May 27, 2021). Defendant appealed circuit court order denying ex parte motion to stay enforcement of judgment in favor of plaintiffs. Plaintiffs cross-appealed portion of order concerning award of attorney fees. COA concluded repairs considered in inspection company's calculation of damages were within scope of settlement agreement, COA affirmed portion of order that denied defendant's motion to stay enforcement of judgment. COA remanded matter to reconsider plaintiffs' motion for attorney fees. Defendant waived appellate review of settlement agreement and judgment by signing provision in settlement agreement that stated: "In consideration of Dream Maker's agreement to the terms set forth above, Dream Makers [sic] hereby waives its right to appeal after entry of said Confession of Judgment."

COA affirms enforcement of settlement agreement. *Drake v Auto Club Ins Assoc,* 353942 (May 13, 2021). In no fault case, facilitator issued written Recommendation. Plaintiff accepted and then had change of heart. Circuit Court enforced Recommendation. COA affirmed. Plaintiff admitted both parties accepted Recommendation. Plaintiff argued agreement was unenforceable because of illusory promises, mutual mistake, fraudulent misrepresentation by facilitator, and unconscionability.

COA partially affirms JOD entry incorporating MSA. *Kohl v Kohl,* 353686 (May 13, 2021). Defendant argued Circuit Court erred in entering JOD because it did not conform to MSA concerning martial home. COA agreed, in part, and remanded for further proceedings. "The parties have both faithfully and truthfully participated in mediation with their attorneys and have arrived at the following resolution meant to be full and final and binding. It will be incorporated into the [JOD]."

COA reverses default judgment. *Nalcor v Condom Sense, Inc,* 351764 (January 21, 2021). Kahn (guarantor) argued good cause to set aside default judgment because his failure to appear at mediation and status conference inadvertent. Kahn claimed his counsel was retained just before mediation and conference and not provided copy of scheduling order. Kahn and his counsel failed to appear at mediation and conference because they were unaware mediation and conference were scheduled. COA held not abuse of discretion for Circuit Court to conclude Kahn failed to establish good cause to set aside default judgment. Lesser showing of good cause required if moving party can demonstrate strong meritorious defense.

COA affirms dismissal for failure to post bond. *Neff v Chapel Hill Condominium Ass'n,* 349444, 349976 (January 14, 2021), lv den (2021). Plaintiff argued Circuit Court, by ordering mediation, deprived her of right to jury trial and wrongfully reopened discovery. Plaintiff said Circuit Court order, which required her to post security bond and $4,426 in mediator fees deprived her of right to jury trial. COA held plaintiff wrong. Damages was not the only issue to be decided. Circuit Court denied summary disposition on plaintiff's contract claim, leaving open question of liability. Discovery not reopened only for Chapel Hill and Mixer; court made no discovery order and mediator sought inspection of property only for purposes of conducting mediation. Mediation is form of ADR that all civil cases in Michigan subject to, unless otherwise directed by statute or court rule. MCR 2.410(A). If mediation fails, jury trial available. Mediation failed and court entered security bond in lieu of dismissal. When plaintiff did not post bond, her case was dismissed. Court ordered mediation did not deprive her of right to jury trial. Plaintiff's actions led to imposition of bond and plaintiff's failure to post security ultimately led to dismissal. ■

"SHADOW DOCKET" CASTS A SHADOW

Russell S. Linden

The U.S. Supreme Court's use of emergency orders and summary decisions without oral argument has appropriately been labeled the shadow docket. That term was coined by University of Chicago Law professor William Baude, *Foreword: The Supreme Court's Shadow Docket, 9 N.Y.U.J.L. & Liberty* 1, 7–8 (2015).

> The shadow docket is a break from ordinary procedure. Such cases receive very limited briefings and are typically decided a week or less after an application is filed. The process generally results in short, unsigned rulings. On the other hand, merits cases take months, include oral argument, and result in lengthy opinions detailing the reasoning of the majority and concurring and dissenting justices, if any.

The shadow docket has existed for years but until relatively recently, it has usually been used to rule on procedural matters such as scheduling and lifting injunctions.

The Roberts Court has resorted to the shadow docket with increasing frequency to issue orders and summary decisions that in the past were usually the subject of a formal reasoned opinion following complete and full briefing and oral argument. Orders with little, if any explanation, and frequently without disclosing how the Justices voted have been issued in cases involving controversial subjects such as gerrymandering, environmental regulations, abortion, and health and safety rules implemented during the Covid pandemic. These orders were issued despite the fact that historically the granting of such extraordinary relief has been limited to the rare case where there was a showing of an exceptional need for immediate action with evidence that irreversible injury would occur during the appeals process that could not later be remedied.

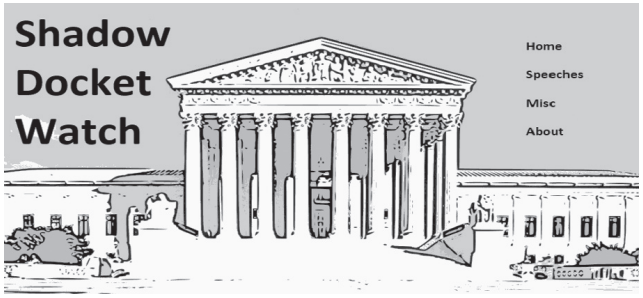
The current Supreme Court's expanded shadow docket practice has ironically cast a shadow on its legitimacy and raised questions about becoming politicalized. That practice has caused great consternation among some Justices, practitioners, and the public and added fuel to the polarized times The Internet's seemingly ubiquitous encyclopedia Wikipedia provides a good summary of the state of affairs stemming from the Supreme Court's burgeoning reliance on the shadow docket:

> It is used when the Court believes an applicant will suffer 'irreparable harm' if its request is not immediately granted. Historically, the shadow docket was rarely used for rulings of serious legal or political significance. However, since 2017, it has been increasingly utilized for consequential rulings, especially for requests by the Department of Justice for emergency stays of lower-court rulings. The practice has been criticized for various reasons, including for bias, lack of transparency, and lack of accountability.

The Sixth Circuit was the first to use the shadow docket term, citing Professor Baude in *Dodds v. U.S. Department of Education,* 845 F.3d 217, 223 (6th Cir. 2016): "The lesson is straightforward: The lower courts should adhere to the Supreme Court's stay decisions when faced with indistinguishable claims."

Some current Justices have vocally criticized the expanded substantive use of the shadow docket. See, e.g., **(1)** *Louisiana v. American Rivers,* 143 S.Ct. 1347 (2022) (Kagan, J., joined by Roberts, Breyer, and Sotomayor, dissenting)(Court had gone "astray" rendering "the Court's emergency docket not for emergencies at all" and shadow docket had become "only another place for meritless determinations except without full briefing and any argument."); **(2)** *Merrill v. Milligan,* 142 S.Ct. 879, 889 (2022) (Kagan, J., joined by Breyer and Sotomayor, dissenting from grant of application for stay) ("Today's decision is one more in a disconcertingly long line of cases in which this Court uses its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument") and **(3)** *Whole Woman's Health v. Jackson,* 141 S.Ct. 2494, 2500 (2021) (Kagan, J., joined by Breyer and Sotomayor, dissenting) ("Today's ruling illustrates just how far the Court's "shadow-docket" decisions may depart from the usual principles of appellate process. That ruling, as everyone must agree, is of great consequence.")

Commentators like Professor Baude and members of Congress have called for reforms in the shadow docket, including requiring greater transparency with more openness on the vote and more detailed reasoning in the orders. For more, see Stephen I. Vladeck, *The Solicitor General and the Shadow Docket,* 133 Harv. L. Rev. 123, 134–44 (2019) (reviewing eighteen requests by the federal government to stay nationwide injunctions or to grant certiorari before judgment where nationwide relief had been ordered). ■



http://shadowdocket.net/index.html

SIMPLICITY BY FDR AND ZINSSER

William Zinsser, *On Writing Well, 30th Anniversary Edition: An Informal Guide to Writing Nonfiction,* prefers the "approach taken by Franklin D. Roosevelt" when FDR tried to "convert into English his own government's memos, such as this blackout order of 1942." The draft 1942 order read:

> "Such preparations shall be made as will completely obscure all Federal buildings and non-Federal buildings occupied by the Federal government during an air raid for any period of time from visibility by reason of internal or external illumination."

FDR shortened it. "Tell them," Roosevelt said, "that in buildings where they have to keep the work going to put something across the windows."

Zinsser explains that "Clutter is the disease of American writing. We are a society strangling in unnecessary words, circular constructions, pompous frills and meaningless jargon." This applies to legal writing:

> Who can understand the clotted language of everyday American commerce: the memo, the corporation report, the business letter, the notice from the bank explaining its latest "simplified" statement? What member of an insurance or medical plan can decipher the brochure explaining his costs and benefits? What father or mother can put together a child's toy from the instructions on the box? Our national tendency is to inflate and thereby sound important. The airline pilot who announces that he is presently anticipating experiencing considerable precipitation wouldn't think of saying it may rain. The sentence is too simple—there must be something wrong with it.
>
> But the secret of good writing is to strip every sentence to its cleanest components.
>
> Every word that serves no function, every long word that could be a short word, every adverb that carries the same meaning that's already in the verb, every passive construction that leaves the reader unsure of who is doing what—these are the thousand and one adulterants that weaken the strength of a sentence. And they usually occur in proportion to education and rank. ■

NLRB UPDATES *ASPIRUS* GUIDE TO MANUAL AND MAIL-BALLOT ELECTIONS

Aspirus Keweenaw, 370 NLRB No. 45 (2020) gives Regional Directors discretion to decide whether to hold manual v. mail-ballot elections. While *Aspirus* provides six factors, the most important was factor 2: 14-day trend in the number of new confirmed cases of Covid-19 in the county where the facility is located is increasing or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher.

Starbucks Corp., 371 NLRB No. 154, slip op. at 1 (2022) made a "technical update" to *Aspirus* factor 2. The Board in a 3 to 2 ruling explained:

> In *Aspirus Keweenaw,* 370 NLRB No. 45 (2020), the Board identified six factors to guide Regional Directors in exercising their discretion to direct mail-ballot elections, rather than manual elections, based on circumstances associated with the ongoing COVID-19 pandemic. The Board held that the presence of any one factor would justify--though not require--the direction of a mail-ballot election. Today, we make a technical update to Aspirus factor 2 based on a metric developed by the Centers for Disease Control and Prevention (CDC). Currently, *Aspirus* factor 2 asks whether, based on data collected by Johns Hopkins University and/or state and local governments, the 14-day trend in the number of new confirmed COVID-19 cases in the county encompassing the employer's facility is increasing, or the 14-day testing positivity rate in that county is 5 percent or higher. For the reasons discussed below, we have decided to realign *Aspirus* factor 2 to track the CDC's county-based Community Level system. Under this system, we hold that a Regional Director will not abuse their discretion by directing a mail-ballot election whenever the relevant Community Level is "high."
>
> The Employer contends generally that *Aspirus* is outdated and should be abandoned, but primarily criticizes the continuing viability of factor 2. Specifically, the Employer argues that testing positivity rates alone (again, the decisive factor in this case) do not accurately indicate community risk of contracting the virus. We reject the Employer's suggestion that the Regional Director abused his discretion in relying on the testing positivity rate established in Aspirus to determine that a mail ballot election was appropriate here. As explained below, we also decline at this time to revisit *Aspirus* altogether. However, we agree that developments following *Aspirus* warrant refinement of factor 2. Thus, as stated, we have decided to update factor 2 in accordance with the CDC's recently established Community Level tracker.

The majority also rejects the dissents assertion that there has been a "surge in voting irregularities" in mail-ballot elections and notes that there is "no evidence of any increase in the frequency of meritorious objections in mail-ballot elections" and that the "raw number of such cases may have increased simply because the Board has held many more mail-ballot elections since the onset of the pandemic." Indeed, there were more mail ballot objections because the number of mail-ballot elections had skyrocketed. About 84% of the elections were by mail-ballot during the pandemic. Slip op. at 4, fn. 20

As a result of *Starbucks,* we are likely to see more manual elections in the future. ■

ADDING "SEX" TO TITLE VII

John G. Adam

How did "sex" become part of Title VII of the Civil Rights Act of 1964? Clay Risen explains in *The Bill of the Century* at 4 (2014) that Democratic Congressman Howard Smith added the "sex" language to try to stop the civil rights bill designed to outlaw racial discrimination. Some called the "sex" language a poison pill:

> And there was Representative Howard Smith, the arch segregationist from Virginia who amended the bill so that it banned sex discrimination—a move that he hoped would turn off congressional male chauvinists but that actually opened the door to equality for millions of American women. It was the varied efforts of these and other men, not the genius of a single historical actor, that made the Civil Rights Act.

Bostock v. Clayton County, 140 S. Ct. 1731, 1752 (2020) refers to Smith's sex amendment as perhaps an "effort to scuttle the whole Civil Rights bill." *Bostoc*k held that Title VII's prohibition on discriminating "because of sex" makes it illegal to fire a person for being homosexual or transgender, something that Smith and other members were not considering in 1964.

The majority seems to blame Congressmen Smith and the law of unintended consequences for its broad reading. Justice Gorsuch states that the difficulty in understanding the scope of "because of sex" is due to Smith's unique role in drafting the civil rights law (*Bostock,* 140 S. Ct. at 1752)(citation and brackets omitted):

> The "difficulty" may owe something to the initial proponent of the sex discrimination rule in Title VII, Representative Howard Smith. On some accounts, the congressman may have wanted (or at least was indifferent to the possibility of) broad language with wide-ranging effect. Not necessarily because he was interested in rooting out sex discrimination in all its forms, but because he may have hoped to scuttle the whole Civil Rights Act and thought that adding language covering sex discrimination would serve as a poison pill. Certainly nothing in the meager legislative history of this provision suggests it was meant to be read narrowly.
>
> Whatever his reasons, thanks to the broad language Representative Smith introduced, many, maybe most, applications of Title VII's sex provision were "unanticipated" at the time of the law's adoption.

But what is the truth? While the legislative history as to the sex amendment may be "meager," per *Bostock,* more information is provided in *The Bill of the Century* at 160 (footnotes omitted):

> On February 8 [1964], Howard Smith submitted the amendment he promised Celler he would add during the Rules Committee hearing: the inclusion of "sex" in the language of the FEPC.
>
> Smith's amendment caught no one by surprise—not only had he announced his plan during the Rules Committee hearing, but he had said as much during a January 26 appearance on *Meet the Press*. When May Craig, a correspondent for the Portland Press Herald, asked him if he was serious about submitting the amendment, he said, "Well, maybe I would. I am always strong for the women, you know."
>
> Smith's amendment was immediately opposed by Edith Green of Washington, one of just eleven women in the House at the time (there were also two in the Senate), who had been enlisted by the White House to offer the most compelling speech against it—she was, after all, a woman, and one with strong anti-sex-discrimination credentials. Green argued that whatever the merits of the amendment, Smith was simply trying to add a poison pill to the bill, one that would drive away support from otherwise liberal male representatives. "At the risk of being called an Aunt Jane, if not an Uncle Tom," she said, "let us not add any amendment that could get in the way of our primary objective." But her efforts were to no avail—despite a few minutes of wolfishly chauvinist joking by Celler, the amendment passed 168 to 133. When the vote was announced, a woman in the gallery shouted, "We've won, we've won!" Another yelled, "We made it, God bless America." Guards moved quickly to remove them.
>
> "Along with Betty Friedan," wrote Smith's biographer, Bruce Dierenfield, "Smith must be credited with giving the modern feminist movement a powerful, if unanticipated, push forward." The question remains, though: Was Smith sincere in his desire to help women—or was he just trying to throw a wrench into the proceedings?
>
> Representative Martha Griffiths of Michigan said that Smith later told her the amendment was "a joke." T. M. Carothers, the counsel for the Rules Committee, said, "The ladies give him credit for helping them, but he had another motive. I wouldn't say he was in favor of civil rights."

Did Congressman Smith want to help women—or was he just trying to throw a wrench into the process? Was Smith a feminist or an segregationist that used woman to try to sabotage Title VII? It does not appear to have mattered to the Supreme Court. ■

DOGS AND THE LAW

Working on a *Lawnotes* article

Exercise, fresh air, just what Dr. Kahn ordered

Learning about the Supreme Court

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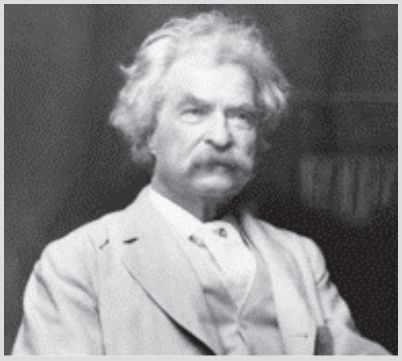

***Lawnotes* makes you laugh and learn.**

- Ben King explains why the challenge to the state's prevailing wage *policy* was upheld even after the state's prevailing wage *law* was repealed.
- Stuart Israel opposes useless lawyer-declarations.
- Increases in minimum wage and sick leave confront Michigan employers, says David Porter.
- Lee Hornberger discusses the *Steelworkers Trilogy* and why the Michigan Supreme Court needs to correct the court of appeals.
- Sidney McBride discusses the Wage and Hour Division.
- Bibi Netanyahu, Winston Churchill, Abraham Lincoln, and Gabriel Adam on the importance of reading.
- Individual class member discovery is rarely allowed, says John Adam.
- Russell Linden discusses the "shadow docket."
- Mark Cousens presents a primer on public workers' free speech rights.
- Zippers and the illusion of explanatory depth explained by Barry Goldman.
- Sixth Circuit rulings are discussed by Ashley Higginson.
- A photo of Calvin (Julie Gafkay's dog) with a book about his and Julie's hero–RBG.

Authors: John G. Adam, Mark H. Cousens, Julie A. Gafkay, Barry Goldman, Ashley Higginson, Mathew High, Lee Hornberger, Stuart M. Israel, Joel K. Kahn, Benjamin L. King, Russell S. Linden, John A. Maise, Sidney McBride, and David Porter.