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WHAT'S INSIDE

Letter from the Chair

by: Fatima M. Bolyea

Happy Summer to the members of the Litigation Section! I would like to take a moment to introduce myself as the current Chair of the Section for 2021-2022. I have previously served as Treasurer, Secretary, and Chair-Elect of the Section, and was elected as Chair in September 2021. It has been my honor to serve with the Governing Council the past few years, and I am very excited to now serve as the Chair.

As we all know, during the last couple years, our Section's in-person events have been limited due to various COVID restrictions. However, we are happy to announce that in-person events are beginning to return!

As one example, the Litigation Section has partnered with ICLE to sponsor the Masters in Litigation Seminar that took place in person on April 5, 2021 at the Inn at St. John's, Plymouth. This event showed attorneys how to master the fundamental concepts of evidence to successfully handle any jury or bench trial, arbitration, administrative proceeding, or other hearing. Find more information on the ICLE website or by emailing me directly.

Additionally, for the last couple years, the Litigation Section has proudly partnered with the Michigan Civic Center for Education ("MCCE") to sponsor and support MCCE's Michigan High School Mock Trial Program. On Saturday, March 19, 2021, the MCCE held its 2022 Michigan High School Mock Trial Series State Competition. I had the honor of serving as a scoring judge (along with Chair-Elect of the Section, Ed Perdue) of the final round of the State Competition. It was an honor to serve as a judge in the final round and to witness high school students bring to life a case they have worked on for months. Importantly, Michigan was also chosen to host the 2022 National High School Mock Trial Championship for the first time, under the guidance of the MCCE! The event was held May 4, 2021, in Kalamazoo and was a resounding success. Please reach out to me or visit https://miciviced.org/ for more information about volunteering to support future mock trial events.

As the year progresses, you will hear about additional events and seminars hosted or sponsored by the Litigation Section, including summer networking and learning opportunities. I look forward to seeing you all in person once again. Please feel free to reach out to me with any questions regarding our Section or comments regarding how our Governing Council and Section can best serve our members.

Fatima M. Bolyea
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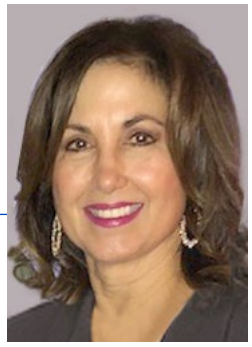
Top Ten Cognitive Biases and Distortions in Mediation



By: Laura A. Athens[1]

"You can't always get what you want, but if you try sometimes, you get what you need."[2]

The success of a mediation lies in the willingness to collaborate. Understanding each other's perspective, needs and interests is key. But how do you alter another person's viewpoint when they appear glued to a particular stance or steadfastly cling to an opening number? How about when your own prior experiences with a party or their legal counsel lead you to distrust them? Sometimes, we need to reexamine long-held beliefs and hit the refresh button.

Preconceived notions and automatic associations are examples of cognitive bias and distortion. To effectively negotiate, we need to be aware of cognitive bias and distortion and how each adversely affects judgment and decision making.

Cognitive biases involve a tendency to be inclined in favor or against something. When they are at play, a person lacks a neutral viewpoint. Cognitive distortions are thinking errors. They can lead to inaccurate perceptions of reality and illogical inferences. Both are automatic and occur in everyone to some degree and both can result in irrational decisions. This article will address the ten most common cognitive biases and distortions that arise during mediation and will help you to understand and deal with them.

Why do Cognitive Biases and Distortions Occur?

Cognitive biases and distortions cause individuals to make erroneous assumptions, instinctively categorize people and things and rely on mental shortcuts when making decisions. When someone speaks in terms of what "should" be said or done, it is a clue that a cognitive bias or distortion is influencing their perspective. They may mistakenly believe their feelings about a situation are a reliable indicator of reality.

In mediation, the deleterious effects of cognitive biases and distortions can be minimized by identifying the specific bias or distortion, explaining how it impacts judgment and encouraging thoughtful and thorough consideration of a range of options.

Anchoring Bias

Anchoring bias occurs when individuals over rely on the first piece of information they receive. This information becomes a reference point, or anchor, which affects subsequent judgments and decisions. A fact or figure becomes anchored in the mind.

When negotiating a monetary settlement, what is considered reasonable can be greatly influenced by the first offer. Whoever makes that first offer generally has an advantage because anchoring bias essentially causes the parties to place excess weight on the initial offer during subsequent negotiations. The first offer acts as an anchor establishing the range of acceptable counteroffers.

Anchoring bias also impacts non-monetary negotiations. For instance, in the case of personal in-

jury, anchoring can influence decisions about the amount of psychological services to which an individual is entitled to address emotional distress. In the criminal law context, an original excessive charge may persuade a defendant to accept a plea bargain to a charge much more serious than a probable jury verdict because of the anchoring effect.

Anchoring bias can be diminished by suggesting consideration of a range of possibilities rather than a fixed number or a specific solution. Mediators also can stimulate critical thinking and challenge the assumptions underlying the anchor. A useful exercise may involve writing down an original offer, followed by three or four potential alternatives.

Confirmation Bias

Confirmation bias is the tendency to value and focus on ideas that affirm preexisting beliefs. This leads individuals to discount facts and reject information that contradicts their preconceptions. Like an echo chamber, confirmation bias reduces objectivity and reinforces preexisting beliefs.

People may become blinded to potential alternatives. For example, if the plaintiff demonizes the defendant and believes the defendant is untrustworthy, the plaintiff will look for and internalize information that confirms that negative view. Confirmation bias shapes not only how information is gathered, but also how it is interpreted and recalled. It can lead to faulty choices based on incomplete information.

In mediation of a guardianship matter, confirmation bias may influence a family member to become disenchanted with and overly critical of a guardian who has done something to upset them. They may search for evidence supporting their belief the guardian is doing a poor job and discount any evidence to the contrary. An isolated, negative experience may become magnified beyond what is warranted by the overall situation.

Confirmation bias can be countered by encouraging consideration of all relevant facts, not just those that confirm preexisting beliefs, and scrutinizing the accuracy of the memory of pivotal events. The mediator may ask a party to consider if any empirical evidence or principled basis exists for the other party's perspective. The bias can be challenged by creating a chart listing the belief, the evidence supporting and refuting the belief and the probable outcome if the case proceeds to trial.

Labeling and Overgeneralization Distortions

Labeling is a cognitive distortion in which people reduce themselves or others to a single, typically negative, characteristic, like a "liar" or "cheat." Rather than viewing the person's behavior objectively, there is a tendency to globally label the person in a derogatory manner. As a result, any information that does not support the label is filtered out. Making a broad assumption about a person based on an isolated behavior or event, is almost always inaccurate.

Overgeneralization is a related cognitive distortion that involves drawing overbroad conclusions based on limited information. People may reach a conclusion based on one or two experiences, then see patterns where they do not exist and incorrectly draw sweeping conclusions about unrelated events.

In a mediation, a party may predict settlement will never occur because of a previous unsuccessful attempt to resolve a matter with the opposing party. They may unreasonably expect the unpleasant experience to occur repeatedly.

This distorted thinking can be addressed by asking a party to define the terms they are using and itemize the evidence that supports, as well as contradicts, their belief or prediction. Mediators can foster logical thinking by inquiring whether conclusions are based on a substantial amount of relevant data or merely one or two pieces of evidence. Mediators may want to gently raise the possibility that feelings, rather than logic, are guiding the party. Distinguishing between opin-

ions and facts also can diminish the ramifications of this cognitive distortion.

When someone engages in labeling, one simple approach is to ask them to objectively describe the behavior. If they view the behavior as the problem, rather than the person, it becomes easier to discuss interests and concerns and reach a meaningful resolution.

Mediators can urge parties to assume good intentions and give the other party the benefit of the doubt. Remind the participants a first impression is merely an initial impression that is incomplete and often inaccurate. If they would like to test this theory, suggest they watch an episode of the "To Tell the Truth" game show and try to guess the correct contestant based on their first impression of the mystery guests.

Negativity Bias

Negativity bias is a tendency to focus on and remember negative rather than positive experiences. The human brain is naturally attuned to negativity and perceives adverse incidents as more influential than positive ones. Negativity bias can influence perception as well as memory. When a person concentrates on the potential downsides of a decision, they also tend to avoid risk.

Negativity bias has an evolutionary genesis. Humans are hardwired with a negativity bias based on our pre-historic ancestors who needed to be keenly aware of potential dangers to protect survival of the species. Neuroimaging research has demonstrated negative stimuli lead to a surge of electrical activity in certain areas of the brain. Negative events and experiences imprint more quickly and linger longer than positive ones according to Washington University professor and researcher Randy J. Larsen, Ph.D. Therefore, people are more likely to remember and dwell on an insult or unpleasant event than a compliment or a joyful event.

Because of the negative feedback instinct, there is a tendency to spot flaws first. In mediation, negativity bias may result in a perfectly reasonable offer being rejected summarily without careful consideration.

Negativity bias can be reduced by reflecting on good things that have occurred, listing approaches that have been successful, and considering the best-case scenario as well as the most realistic scenario. The mediator may encourage participants to focus on the positive features of a proposed settlement. Asking them to put themselves in the shoes of the other party also may promote a different perspective.

Optimism Bias

The reverse of negativity bias is optimism bias, also known as the illusion of invulnerability. Optimism bias causes individuals to overestimate the probability of a positive outcome and underestimate the risks. Unduly positive assumptions can lead to disastrous results. A related concept is the ostrich effect, which is the tendency to ignore apparent weaknesses.

In mediation, optimism bias may lead participants to believe their case is stronger and their chance of success at trial is greater than reality would suggest. Optimism bias can be curtailed by suggesting participants moderate optimism and proceed with caution to consider the strengths and weaknesses of their case, potential risks of proceeding forward and probability of a negative outcome.

In caucus, the mediator may ask the participants to consider the worst-case scenario. Creating a matrix, which sets forth the best, worse and most likely outcomes and the probabilities of each occurring, may be helpful. The mediator can guide them through realistic weighing of the evidence to reach a balanced and sensible decision.

Polarized Thinking Distortion

Polarized thinking, also known as dichotomous thinking, is a cognitive distortion in which people view things in two distinct categories rather than on a continuum. It involves all-or-nothing thinking, viewing things as black or white, good or bad, with no gray zone or middle ground. Thinking in the

extremes does not promote compromise and is unrealistic because the truth generally lies somewhere between the two extremes. A sign of polarized thinking is the use of absolute words, such as "always", "never", "all", and "nothing".

Sometimes a fallacy of fairness is at play. An individual may believe life should be fair and when things do not work out the way they think is fair, they may become resentful. The assumption that life is fair is a fallacy not based on reality.

In mediation of a university dispute, a faculty member with dichotomous thinking, who has been denied tenure, may believe the only viable outcomes would be immediate granting of tenure or leaving academia entirely, not recognizing many alternatives exist between these extremes.

Polarized thinking can be ameliorated by consideration of objective evidence and other information that would support different conclusions. The mediator can stimulate conversation about exceptions and shades of gray. In caucus, the mediator can help individuals to expand their thinking and recognize a continuum by placing potential outcomes on a probability scale of 1 to 10. Alternatively, the mediator may suggest a break to evaluate a multitude of feasible options and reconsider crucial decisions.

Endowment Effect Bias

Endowment effect, also known as divestiture aversion, is the tendency for people to ascribe a higher value to something they own and expect more money to relinquish it than they would be willing to pay to acquire it. The mere fact of possessing an object can heighten perception of its value.

Loss aversion involves people being more interested in avoiding loss than in obtaining gains. The pain of losing is experienced more acutely than the pleasure of winning. People sometimes make flawed decisions based on an aversion toward loss.

In mediation of a partnership dissolution, a party may overestimate the value of their partnership share and discount the benefits of a proposed buyout. They may be more concerned about giving up rights or assets than they are interested in obtaining fair compensation.

The endowment effect may be reduced by asking a party to suppose the right or asset was on the market, to consider the factors an average person would find relevant in ascertaining its value and then determine the amount that average person would be willing to pay for it. Another approach would be to ask the party to imagine they were the other partner, what would they be willing to pay to acquire the partnership interest. Alternative views also may be fostered by asking the party to consider the consequences of adhering to the endowment effect.

Functional Fixedness Bias

The functional fixedness bias involves seeing or using an object or idea in only the way it is typically used. This bias can lead to being stuck and viewing a problem in one specific way. It impedes the ability to think "outside of the box" to find innovative solutions.

In mediation, a participant may become fixated on a precise remedy, rather than recognizing a variety of options may meet their underlying interest or concern. For example, in a special education dispute, the parent may believe individual speech therapy for one hour three times per week, which the school has previously provided to their child, is the only means of improving their child's speech and language. Not recognizing that speech and language consultation to the teacher, a social skills group overseen by a social worker or speech therapist, paraprofessional support, and time in the general education classroom with peers may also contribute to reaching the desired goal.

Functional fixedness can be overcome by inviting participants to brainstorm a plethora of possibilities. Divergent thinking can be enhanced by asking participants to cite as many options as possible, without critique, prior to engaging in more convergent thinking to select acceptable solu-

tions. A reluctant party may be asked to play Devil's Advocate and challenge their adherence to one particular outcome. The mediator also may urge participants to genuinely listen to each other, be curious about other points of views, set aside preconceptions and suspend judgment before making a final decision.

Status Quo Bias

Status quo bias is the tendency to want things to stay relatively the same as they have always been, following the path of least resistance. People tend to prefer the familiar and often fear the unknown. Maintaining the status quo minimizes the risks and costs associated with change, but it also may result in people missing out on potential benefits that may outweigh the risks. Loss aversion is a primary reason underlying status quo bias.

Some people are overwhelmed by too many options and suffer from "choice overload." This phenomenon can amplify the sense that change is complex and costly and should be avoided. In mediation, status quo bias may be at play if a party steadfastly insists on keeping things exactly as they are and resists any proposed change.

Status quo bias can be countered by helping a party to perform a realistic cost/benefit analysis of maintaining the status quo and making a change. A discussion of the pros and cons of staying on the same path or moving in a new direction may also be useful. The mediator could suggest they consider whether they would give the same advice to a good friend in their situation. The experience can also be normalized by acknowledging that everyone has biases that affect their decision making and can benefit from new experiences.

Sunk Cost Bias

Sunk cost bias, also known as escalation of commitment, involves continuing to do what an individual has been doing merely because they have invested time, resources or energy into it. For example, an individual might stay at a concert even when they are not enjoying the music because they paid a substantial amount for the ticket. A sunk cost is a cost that has already been paid for and cannot be recovered.

In mediation of an employment matter, an employee may demonstrate sunk cost by seeking reinstatement to their job, even though they dislike their work, simply because they have spent so much time at the job and with their co-workers they cannot see themselves in a different job.

Another example of sunk costs would be when a party resists settlement because they are upset about the amount of time, money and energy they have spent litigating the dispute and believe they must see it through until the end.

As with several other biases, loss aversion underlies this bias. Having strong emotional connections and a drive to preserve investments can lead to poor decisions not based on current realities.

Sunk cost bias can be diminished by pointing out that although time and money may have already been expended, where time and money is spent in the future is within their control. The mediator can encourage parties to consider the bigger picture, their ultimate goals and vision for the future. A bird's eye view facilitates objective analysis of the case strengths and weaknesses and realistic assessment of the chance of success. It may be helpful to point out the ability to accept mistakes and learn from them is an important part of making better decisions in the future. While calling it quits can be painful, it frees up energy and resources to pursue new opportunities.

Framing Effect

Mediators often employ the framing effect, which is a cognitive bias, to help parties draw more favorable conclusions from essentially the same information. Perception of a situation can be significantly influenced by how information is presented. Judgments and reactions can change depending on whether issues are framed in a positive or negative light.

Prior to mediation, while working with parties individually, the mediator can coach the parties to frame their concerns in a manner the other party is likely to hear. During the perspective sharing portion of mediation, the mediator can reframe caustic statements in more neutral and constructive terms to improve the other party's understanding and receptivity to the underlying message. Reframing is also useful in converting deeply entrenched positions into underlying needs and interests.

When presenting a reasonable settlement offer, the mediator may wish to focus on what each party gains, rather than loses, to increase the participants' receptivity to the offer. Because of loss aversion, a loss often is perceived as more significant, and worthy of avoiding, than an equivalent gain. Mediators can present an offer or proposal in a manner that makes it more attractive. For instance, with permission of the plaintiff, the mediator may take a proposal of $79,500, rather than $80,000, to the defendant to make the figure more palatable.

Word choice also impacts perception. A dispute may be reframed as an opportunity. A crisis may be viewed as a challenge. Even the pronoun selected can influence the listener's experience and the outcome. Kenneth Cloke, a nationally recognized mediator, trainer and author has pointed out the pronoun "we" tends to foster collaboration and build consensus. The word "it" may facilitate problem solving because the participants can attack a thing rather than each other. Conversely, "they" may promote stereotyping and prejudice. "You" is more likely to result in accusations, denials and counterattacks.

Professor Robert Cialdini has pointed out the choice of financial terms can shape how people perceive a situation. For instance, "purchase" or "investment," which are associated with gain, are more likely to be receive a positive reception than "cost" or "price," which are associated with loss.

Parties may also react to the context in which something is embedded, not just to the thing itself. A trial may seem distant and unlikely when the parties are engaged in early-stage mediation. However, it looms large on the eve of trial and frequently involves much more than the parties anticipate. The mediator can help the parties and their legal counsel consider the demands of trial by discussing the realistic time, money and energy that will be required.

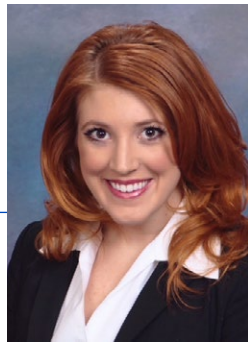
Conclusion

Cognitive biases and distortions are automatic and universal. Mediators can help parties and their legal counsel to effectively and compassionately address cognitive biases and distortions that impede rational decision making. Recognizing the bias or distortion involved, understanding its impact and employing strategies to reduce its negative effects on negotiation can greatly enhance the resolution process and promote mutually satisfactory and enduring outcomes.

ENDNOTES

1. Laura A. Athens is an attorney, mediator, facilitator and arbitrator with over 30 years of combined litigation and alternative dispute resolution experience. Ms. Athens is an associate of Professional Resolution Experts of Michigan, LLC (PREMi), is on the roster of the American Arbitration Association (AAA) Consumer Panel, and is a member of the Michigan Chapter of National Academy of Distinguished Neutrals. She has served on the State Bar of Michigan Alternative Dispute Resolution Council and as a former Chair of the Oakland County Bar Association ADR Committee.
2. THE ROLLING STONES, *You Can't Always Get What You Want*, on LET IT BLEED (London Records 1969).

An Introduction to Trauma-Informed Lawyering



By Alexander S. Rusek[1] and Aylysh B. Gallagher[2]

"Trauma-informed" is not just the newest social science buzzword. Rather, it is an important set of research-based guiding principles that attorneys in most practice areas must recognize to provide the most effective representation that they can to their clients. So, what is trauma? What does it mean to be trauma-informed? What is trauma-informed lawyering? And where can you learn more about these concepts?

The Centers for Disease Control and Prevention has stated that "[a]n event, or series of events, that causes moderate to severe stress reactions, is called a traumatic event. Traumatic events are characterized by a sense of horror, helplessness, serious injury, or the threat of serious injury or death. Traumatic events affect survivors, rescue workers, and friends and relatives of victims who have been directly involved."[3] These effects may not be immediate, can be extremely long lasting, and can impact many, if not all, areas of a survivor's life.

Our justice system and related services also, regrettably, present the possibility of causing further trauma by creating situations where those who have experienced it are re-traumatized. When this happens, clients can experience a lack of control, experience further abrupt changes in their lives, and feel threatened, vulnerable, exposed, and responsible. Recognizing trauma and its potential effects are the first steps to becoming trauma-informed.

It has been said that "'[t]rauma-informed practice' is an increasingly prevalent approach in the delivery of therapeutic services, social and human services, and now legal practice. Put simply, the hallmarks of trauma informed practice are when the practitioner puts the realities of the client's trauma experiences at the forefront in engaging with the client, and adjusts the practice approach informed by the individual client's trauma experience."[4] Vivianne Mbaku of Justice in Aging has also written that "[a] trauma-informed legal practice aims to reduce re-traumatization and recognize the role trauma plays in the lawyer-client relationship. Integrating trauma-informed practices provides lawyers with the opportunity to increase connections to their clients and improve advocacy."[5] More simply, a trauma-informed lawyer "asks clients not 'what is wrong with you?' but instead, 'what happened to you?'"[6] Delivering trauma-informed services is not accomplished by following a single checklist or set of techniques, but rather it requires "constant attention, caring awareness, sensitivity, and possibly a cultural change at an organizational level."[7] A trauma-informed lawyer must also understand that the trauma a client has experienced does not define them as a whole.

Sometimes, it will be obvious that a lawyer needs to incorporate trauma-informed principles into their practice because of the nature of the case, such as when representing survivors of sexual abuse and survivors of tragic accidents in civil litigation, or when prosecutors work with victims of traumatizing crimes. Other times, it may not be as apparent that a lawyer needs to incorporate these principles, such as representing a sur-

vivor of domestic abuse in a divorce or child custody matter or representing a criminal defendant who has suffered trauma that has contributed to issues such as substance abuse.

In addition to the positive effects on a client's wellbeing, trauma-informed lawyering offers numerous other benefits. Clients who are comfortable and trusting of their lawyer are far more likely to share their experience with the lawyer, potentially providing far more useful information than they would otherwise share. For example, the civil lawyer may learn critical information regarding their client's damages that would otherwise remain hidden. For the prosecutor, they may obtain information that transforms perceived weaknesses in their case into strong evidence of the guilt of the accused with the additional context provided by the victim. It is also often true that a client will hold the trauma-informed lawyer in higher regard, thus creating a stronger rapport and ultimately more effective attorney-client relationship.

How can you take steps towards becoming a trauma-informed lawyer? Some have argued that the four key characteristics of trauma-informed lawyering are: identifying trauma, adjusting the attorney-client relationship, adapting litigation strategy, and preventing vicarious trauma.[8] To accomplish these goals, the trauma-informed lawyer will work to ensure that their client feels safe, that the client can trust their lawyer and feel that the relationship has transparency, that the client feels as though they have the ability to make the choices that will impact their lives and that the client is actually empowered to make those decisions, that the client has a collaborative relationship with the lawyer, and that the lawyer has considered cultural, historical, race, gender, and other identity issues that the client may be experiencing.[9,10] In practice, the first step is to recognize the potential impact that trauma has had on a client and provide a safe environment for them to express their concerns and share their experience with a lawyer that will listen to them, will not judge them, that will not minimize their experience, nor disregard them.

To learn more about being a trauma-informed lawyer, there are a number of existing and forthcoming materials available. For example, The National Center on Domestic Violence, Trauma and Mental Health has started the Trauma-Informed Legal Advocacy Project ("TILA") which "offers guidance on applying trauma-informed principles to working with survivors of domestic violence in the context of legal proceedings."[11] It is important to note that the resources available through the TILA, while focused on survivors of domestic violence, are not limited or only applicable to trauma caused by intimate partner violence. The same remains true for other trauma-informed resources not directed at lawyers, such as those for first-responders and health care workers.

There are also a number of other useful resources, including podcasts, webinars, and articles readily available on the internet (such as ***The Trauma Informed Lawyer*** podcast[12] and the ***Trauma-Informed Legal Advocacy: An Introduction*** webinar[13]). In the near future, the American Bar Association Law Practice Management Section will be publishing a book tentatively called "Trauma-Informed Law: A Primer for Lawyers in Practice."[14] The aforementioned list is not comprehensive and the body of research and literature on trauma-informed practice is growing every day. It is also important to remember that we must recognize our own limitations and levels of expertise. This often means learning about available resources and being prepared to offer them to the client when needed, such as the assistance of counselors and community organizations.

It is also important to keep in mind that a lawyer being trauma-informed alone is not enough as the lawyer is not the only person that the client will interact with. Thus, training staff and providing them with the resources to be trauma-informed is also critical.

Finally, the effects of learning about and experiencing another person's trauma (sometimes called secondary trauma, secondary traumatic stress, vicarious trauma, or indirect trauma) include symptoms similar to those of people who have directly experienced trauma.[15] Secondary trauma can result in severe job burnout, compassion fatigue, reliving of the trauma, negative changes in beliefs and feelings, and other ill effects.[16] As such, being a trauma-informed lawyer "also encompasses the practitioner employing modes of self-care to counterbalance the effect the client's trauma experience may have on the practitioner." [17]

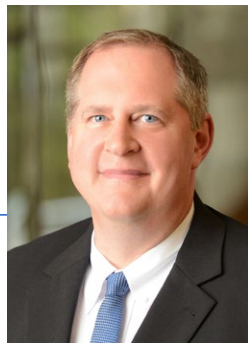
There are a number of books and other resources that address the effects of secondary trauma and how lawyers and others who experience it can manage. For example, *Trauma Stewardship: An Everyday Guide to Caring for Self While Caring for Others* by Laura van Dernoot Lipsky and Connie Burk, *The Age of Overwhelm: Strategies for the Long Haul* by Laura van Dernoot Lipsky, *Reducing Compassion Fatigue, Secondary Traumatic Stress and Burnout* by William Steele, and *Burnout: The Secret to Unlocking the Stress Cycle* by Emily Nagoski, Ph.D. and Amelia Nagoski, DMA are all highly recommended readings, but certainly do not encompass all of the resources currently available.

In conclusion, recognizing trauma and being mindful, compassionate, empathetic, and aware of it is of the utmost importance in the legal profession because lawyers are often working together with clients who have experienced, and are still experiencing, the worst situations that life can expose them to. The trauma-informed attorney will strive to leave the client in a better place than they found them. As Maya Angelou said "I've learned that people will forget what you said, people will forget what you did, but people will never forget how you made them feel." Being trauma-informed will not only enhance the attorney-client relationship, but can lead to significantly better outcomes legally and personally for our clients – outcomes that we should all fully embrace.

ENDNOTES

1. Alexander S. Rusek is the founder of Rusek Law PLLC in Lansing, Michigan
2. Aylysh B. Gallagher is an Assistant Prosecuting Attorney for the Ingham County Prosecutor's Office in Lansing, Michigan. She specializes in prosecuting matters involving intimate partner violence in her role as the Unit Chief overseeing Felony Domestic Violence and Sexual Assault cases. These cases often involve increased lethality factors, severe injury, evidence-based prosecutions, and serial offenders. Ms. Gallagher is the current President of the Ingham County Bar Association - Young Lawyers Section and serves as the Vice President of the Mid-Michigan Region for the Women Lawyers Association of Michigan.
3. *See* Centers for Disease Control and Prevention, *Helping Patients Cope With a Traumatic Event*, https://www.cdc.gov/masstrauma/factsheets/professionals/coping_professional.pdf.
4. Sarah Katz & Deeya Haldard, *The Pedagogy of Trauma-Informed Lawyering*, 22 Clinical L. Rev. 359, 359 (Spring 2016).
5. *See* Vivianne Mbaku, Nat'l Ctr. on Law & Elder Rights, *Trauma-Informed Lawyering*, https://ncler.acl.gov/Files/Trauma-Informed-Lawyering.aspx.
6. Katz & Haldard, *supra* note 3 at 363.
7. *See* Centers for Disease Control and Prevention, *6 Guiding Principles to a Trauma-Informed Approach*, https://www.cdc.gov/cpr/infographics/6_principles_trauma_info.htm.
8. Katz & Haldard, *supra* note 3 at 360.
9. *See generally* Maxine Harris & Roger D. Fallot (eds.), *Using trauma theory to design service systems*. 89 NEW DIRECTIONS IN MENTAL HEALTH SERVICES (Spring 2001).
10. *See* CDC, 6 *Principles, supra* note 6.
11. *See* Nat'l Ctr. on Domestic Violence, Trauma & Mental Health, *Trauma-Informed Legal Advocacy (TILA)* Project, http://www.nationalcenterdvtraumamh.org/trainingta/trauma-informed-legal-advocacy-tila-project/.
12. Available at https://thetraumainformedlawyer.simplecast.com/.
13. Available at http://www.nationalcenterdvtraumamh.org/trainingta/webinars-seminars/.
14. *See* Marjorie Florestal, et al., *Trauma-Informed Law Book*, http://www.traumainformedlaw.org/traumainformed-law-book.
15. Roman Cieslak, et al., *A Meta-analysis of the Relationship Between Job Burnout and Secondary Traumatic Stress Among Workers with Indirect Exposure to Trauma*, PSYCHOLOGICAL SERVICES, Vol 11, No. 1, 75–86 (February 2014).
16. *Id*.
17. Katz & Haldard, *supra* note 3 at 359.

Book Review: A Visual Refresher Course on Expert Testimony by David C. Sarnacki



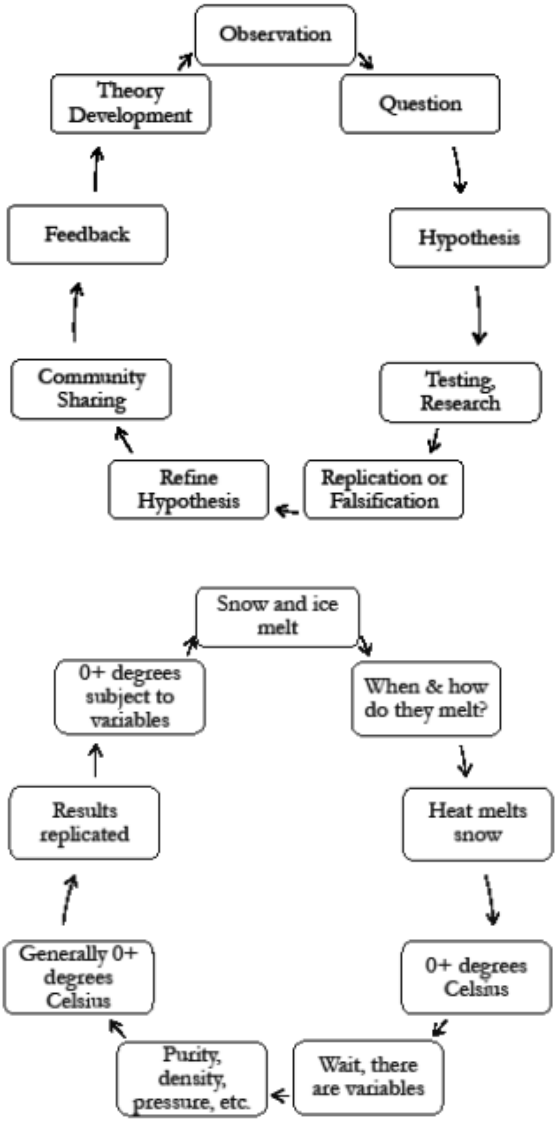
By Robert C. Rutgers Jr. [1]

Imagine the marriage of a picture book with an encyclopedia on the rules of evidence on the topic of testimony of the expert witness. This very unusual merger of delivery concepts can be found in "A Visual Refresher Course on Expert Testimony" by David Sarnacki.

One of the most difficult things for a writer to do is significantly narrow down issues into easily understood parts and subparts. Sarnacki does just that in this delightfully unusual book on what is, in my perhaps jaded opinion, typically a very dry topic. He provides a step-by-step flowchart analysis of the examination of expert witnesses during trial, going through the bases that are necessary for properly addressing the expert, including the subject knowledge of the witness, the facts and data (and assumptions) utilized, the methodology used, and the legal principals applied.

Sarnacki begins by diving into the development of specialized knowledge. In a very visual manner, the reader is shown how experience and observation lead to ideas, which lead to insights, which lead to general rules. How an expert develops experience in and masters a particular subject matter is demonstrated. Using simple flowcharts, we are shown how, over time, the expert learns and develops ideas and "rules" in a subject area. Included here is an example of using a visual chart showing the flow of utilization of the "scientific method" as demonstrated in a simple to understand set of graphs.

1 The Scientific Method Discovers Truths about the Natural World



Note how the first chart tracks the areas of the flow (from observation to hypothesis, testing to theory) and the second gives us an example of how they are used in a given situation (in this case dealing with the melting of ice and snow). This visualization allows for easy understanding of the methods as applied to a subject matter.

The book then leads into how the expert develops their opinion. We are shown examples of charts tracking specific areas of common expert testimony. From medical decisions to business values to lost profits, an easy-to-follow visual chart is provided, educating the reader on how experts develop their positions on a particular topic. We are then provided with graphs demonstrating how to analyze and map the expert opinion to exploit or shore up a weakness.

Sarnacki also shows us how facts and assumptions play a part in this process, and the methodologies involved. The ways experts search for support for the principles upon which they will opine, and the areas for questioning in which we need to delve in terms of relevancy, reliability and verifiability of sources are illustrated. In a very simple format, we are guided through how to develop the testimony of our expert, and to attack the basis of the opposing expert's opinions and conclusions. The reader is reminded of the basic steps needed for adequate preparation for examination of the expert. The outline is set forth in a way that is straightforward to assist in examination preparation.

Finally, Sarnacki provides the same uncomplicated format to offer practical ways for the inquirer to address expert issues and direct or attack the testimony. The certainty of the expert, gaps between methodology and opinion testimony, and fallibility of witnesses in general are covered. He lays the groundwork for what the attorney should do to prepare, and again uses specific examples charting such matters as the *Daubert* case,[2] which involved birth defects as allegedly caused by mother's use of an anti-nausea drug during her pregnancy, to abuse head trauma, and legal malpractice. Through these examples we can easily track how the expert testimony is developed and, therefore, managed.

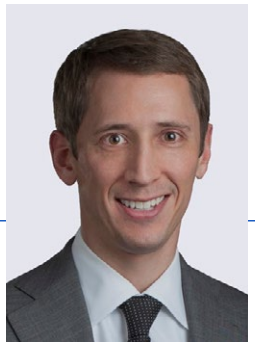
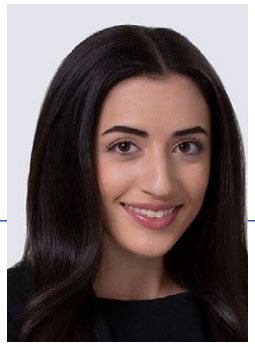
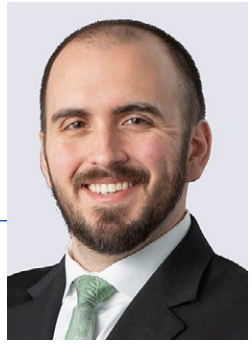
This visually appealing book is a must-have for any practitioner who wants to quickly and easily prepare for examination of an expert. It is a very straightforward reference to use as part of the trial toolkit and should go into the briefcase of any practitioner heading to the courthouse for trial.

ENDNOTES

1. Bob Rutgers has practiced law in Grand Rapids for 30 years. His firm, Rutgers Law, is rooted in people, and his passion for helping clients with their business and family law issues is evident in the service he provides. When not at the office, Bob and his wife of 32 years like to travel and spend time with family.
2. *Daubert v. Merrill-Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993).

ESG Compliance Risks: Mitigate or Litigate?

By: Robert M. Riley, Jewel M. Haji, and Daniel R. Lemon[1]

Environmental, Social, and Governance (ESG) is a concept used to evaluate a company's collective awareness of non-financial factors that present risks and growth opportunities. Businesses often refer to ESG as "factors that are utilized by a growing number of institutional investors and other capital markets participants to evaluate public companies and to inform decisions to invest (or maintain investments) in different companies, industries, and geographies."[2] Environmental factors (E) may include greenhouse gas emissions, climate change, and sustainability.[3] Social factors (S) may include diversity and inclusion, compensation and benefits, and human rights.[4] Governance factors (G) may include executive compensation, disclosure and reporting, and ethics and compliance.[5] More so than ever, companies are carefully managing their ESG initiatives to not only drive positive societal change, but to deliver positive financial results and satisfy investor expectations. As they do so, their ESG efforts are increasingly at the forefront—and in the crosshairs—of the law.

ESG is "a form of self-regulation premised upon the principle that companies have certain obligations and considerations that extend beyond the bottom-line objections of its owners."[6] Alleged ESG-related deficiencies have become the subject of lawsuits against companies, creating an increased pressure on executives, boards, and business owners to establish ESG goals. ESG factors "can affect a company's reputation, and investors and business leaders are increasingly applying these nonfinancial factors in their analysis to identify the material risks and growth opportunities of a company."[7]

ESG initiatives—long considered secondary to the common financial metrics used to evaluate business performance—are top of mind in many industries. Diversity and inclusion factors have specifically become the focus of companies' efforts in recent years. "[T]he increase of social movements in the U.S. forced investors and companies to focus on developing strong and effective diversity and inclusion initiatives."[8] Companies that are more diverse also "tend to perform better financially" and are "tracking their progress and commitment to supporting racial and social justice."[9] There is an "increasing pressure on corporations to take tangible action to address racial injustice in America."[10] While there is a "growing appetite for enhanced company disclosure about ESG performance[,]" it is met with "intensifying scrutiny."[11]

ESG Litigation Regarding Social Factors Is In Its Infancy

Alongside financial reporting, ESG disclosures are now under investors' microscopes. The past decade has seen significant growth in the number of lawsuits filed seeking damages for allegedly false ESG statements.[12] As these types of claims evolve, creative plaintiffs have implemented a wide variety of legal theories on which to base their complaints, including by pleading consumer protection claims, deceptive and unfair business practices claims, and securities fraud claims.[13] These claims have been difficult to

plead and even more difficult to prove, but the mere emergence of ESG-related litigation reveals an increasing willingness to scrutinize companies' public-facing statements and social responsibility policies.

Several of the early ESG cases targeted climate change initiatives. In *Native Village of Kivalina v. ExxonMobil Corp.*, members of a native Alaskan tribe argued that the defendant's massive greenhouse gas emissions had contributed to global warming.[14] The court ultimately dismissed the case, ruling that "federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action."[15] The U.S. Supreme Court denied the tribe's petition for writ of certiorari.[16]

Similarly, in *American Electric Power Co., Inc. v. Connecticut*, eight states, the City of New York, and three land trusts sued an electric power corporation based on a public nuisance theory and contributions to global warming.[17] The case generally concerned federal regulation of emissions of carbon dioxide and other greenhouse gases. The court held that "the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power-plants."[18] Further to this conclusion, the Court found that federal judges may not set limits on greenhouse gas emissions where there is a law empowering the EPA to set those same limits.[19]

Recently, social factors have been at the forefront of litigation and plaintiffs have filed three suits alleging that the defendants failed to live up to their diversity-and-inclusion claims.[20] All three of these cases were brought as derivative actions, and despite all three being dismissed at the pleadings stage, they are likely the tip of the ESG litigation iceberg.

In *Ocegueda*, the plaintiff brought a derivative action challenging Facebook's alleged lack of diversity, alleged discriminatory hiring practices, and its alleged failure to curb hate speech. Specifically, the plaintiff alleged that "[w]hile Facebook states that it is committed to building a diverse workforce . . . there are no Black or other minorities among its senior executives."[21] The plaintiff also cited a newspaper article about Facebook's lack of diversity, which noted that Facebook was hiring "very few black and Hispanic women," which plaintiff alleged contradicted Facebook's public-facing proxy statement that it was "building a workforce that is as diverse as the communities [it] serves" and including individuals from diverse backgrounds at the board level.[22] Facebook moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(6) and 23.1(b)(3)(B). The district court granted the motion, citing the plaintiff's failure to make a pre-suit demand on the board of directors—a common requirement for derivative suits except in exceptional circumstances.[23]

Similarly, *Caldwell* involved allegations that the defendants, members of the board of directors of Advanced Micro Devices, Inc., had "publicly misrepresented AMD as a company that effectively promotes diversity throughout its ranks, including in the boardroom," when in fact no African Americans served on AMD's board or executive team.[24] In addition to the duty to be truthful, the plaintiff alleged that AMD's directors had violated their duty to maximize shareholder value, citing McKinsey & Company reports showing that diverse companies tend to be more profitable than their peers.[25] Like the court in Ocegueda, the Caldwell court granted the defendants' Rule 12(b)(6) motion to dismiss the case due to plaintiff's failure to make a pre-suit demand.[26]

Danaher was likewise dismissed on legal grounds pre-discovery. There, the plaintiffs argued that the defendants "falsely represented Danaher as a diverse corporation even though no African American serves on the Board."[27] Danaher allegedly made statements such as "[w]e're passionate about recruiting, developing and retaining the most talented and diverse team possible"; "[a] diverse and inclusive workforce strengthens

Danaher and ensures the best team continues to win"; and "[w]e seek out a wide range of unique experiences, perspectives and talents, ensuring that diverse voices and viewpoints are heard and celebrated."[28] The court ruled that the plaintiffs had "not properly alleged that any of the cited statements were false," because "most of the statements at issue do not apply to the Board or imply that the Board is diverse."[29] Additionally, the court ruled that, even if the statements did apply to the Board, the lack of African Americans on the Board did not mean that the Board was necessarily not diverse. "The Board could be racially diverse in other ways," and "there are other types of diversity besides racial diversity."[30] And, like in *Oceguada* and *Caldwell*, the *Danaher* court found that the plaintiffs' failure to make a pre-suit demand justified dismissal of their derivative suit.[31]

Although the plaintiffs in these recent cases were unsuccessful, public-facing statements regarding diversity and inclusion are fraught with risks and must be carefully worded. More importantly, they must be truthful. In the wake of social movements such as #MeToo and public demonstrations such as those following the deaths of George Floyd and Breonna Taylor, issues surrounding diversity and inclusion remain in the public spotlight. Shareholders, investors, and even competitors are likely to remain sensitive to statements that they perceive as false or misleading, and companies should carefully evaluate their public statements and disclosures before making them.

Risk Prevention

Growing demand for ESG initiatives has led to public statements promising certain actions, and these promises may create risks just like financial or other reporting can expose companies and their directors and officers to liability. Companies making disclosures in securities filings are publicly committing to meet their ESG goals, and to the extent they fail to meet those goals, activist litigants are likely to seek to hold them accountable. This is particularly true in an era of increased social awareness and efforts to raise the profile of diversity and inclusion initiatives. What's more, even where lawsuits are unsuccessful, ESG-related claims have the potential to cause meaningful reputational harm to the companies being sued. In turn, even these unsuccessful lawsuits may have their intended effect of harming financial performance and negatively impacting investor and public relations.

In sum, the importance of publicly addressing ESG issues is a growing trend. The responsibilities that accompany that trend are only beginning to emerge, and history suggests that litigation over the coming years will more clearly define how accurate and forthcoming companies must be in their ESG messaging. Inadequate disclosure or failure to comply with formally announced ESG initiatives may result in not only regulatory enforcement action, but also class action suits by investors and derivative shareholder claims. Regardless, businesses must be knowledgeable of their initiatives before they go live, well versed in their public disclosures and the steps needed to implement their goals, and appreciate the financial and reputational risks associated with noncompliance.

Some precautionary measures that can be taken include enhanced due diligence in transactions and adequate representations and warranties in contractual agreements. Regulators and agencies like the U.S. Department of Treasury have called for more robust disclosures.[32] Stock exchanges like Nasdaq have implemented rules regarding board diversity requiring companies to have one diverse board member by 2023, and two by 2025.[33] U.S. Customs and Border Protection is preventing products produced with forced labor from entering the United States.[34] Proactively taking remedial action to avoid negative ESG publicity is a critical step necessary to minimize risk. Companies and their C suites should ask themselves: do our existing ESG policies align with our values? How will they be perceived by investors? Are our goals achievable or overly am-

bitious? How frequently do we review our policies? Do we have the resources needed to live up to our ESG expectations? Are those resources properly allocated?

As the regulatory environment is fluid and evolving, answers to these questions will be critical to businesses' ability to manage ESG-related risk.

ENDNOTES

1. Robert M. Riley is Honigman's Chief Value Partner and Co-Chair of its Appellate Advocacy Practice Group. He represents international manufacturers, private equity firms, and closely held businesses in complex commercial, shareholder, and appellate disputes.
   Jewel M. Haji concentrates her practice on complex commercial litigation matters, including shareholder disputes and issues arising out of private equity transactions. Jewel serves on Honigman's Diversity & Inclusion Workgroup and the Attorney Development Committee.
   Daniel Lemon is a commercial litigator who is licensed in Michigan and Ohio. He handles complex business disputes and represents companies facing regulatory investigations and enforcement actions, including those brought by the Securities and Exchange Commission.
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13. *Id*. at 10850–56.
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16. *Native Vill. of Kivalina v. Exxon Mobil Corp*., 569 U.S. 1000 (2013).
17. *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 416 (2011).

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19. *Id*. at 429.
20. *See In re Danaher Corp Shareholder Litig*, ___ F. Supp. 3d ___, 2021 WL 2652367 (D.D.C. June 28, 2021); *City of Pontiac Police and Fire Ret. Sys. v. Caldwell*, No. 20-CV-06794-LHK, 2021 WL 2711750 (N.D. Cal. July 1, 2021); *Ocegueda on behalf of Facebook v. Zuckerberg*, 526 F. Supp. 3d 637 (N.D. Cal. 2021).
21. *Ocegueda*, 526 F. Supp. 3d at 643.
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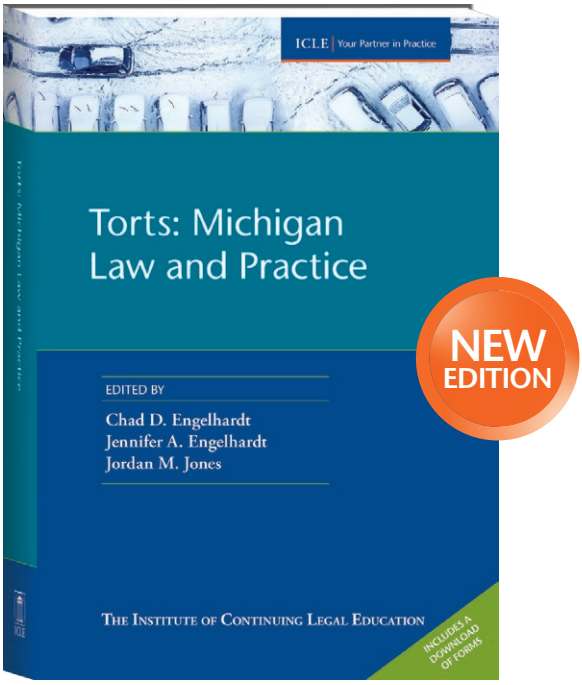

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ICLE's Litigation Toolbox

By: Rebekah Page-Gourley, Senior Staff Attorney, Institute of Continuing Legal Education (ICLE)

Initiating a Case in Michigan Courts

Although a lawsuit officially begins with the filing and service of a complaint, litigators know that a huge amount of preliminary considerations and actions precede that pivotal moment. Along with our expert contributors, ICLE has created focused tools and guidance to help Michigan lawyers initiate litigation successfully. The various resources range from comprehensive books and informative On-Demand Seminars to step-by-step How-To Kits and downloadable sample forms.

Take, for example, our Michigan Causes of Action Formbook, which provides critical guidance as you gather and analyze preliminary facts, determine your client's goals (i.e., whether they seek monetary damages or to change someone's behavior), and assess the pertinence of the various potential legal claims. The book breaks down over 120 common causes of action, succinctly outlining the controlling law, required elements, damages available, applicable jury instructions, and more. The first chapter includes helpful tips on information gathering (e.g., ask your client to sign all of the necessary records authorizations when they sign their fee agreement) and the drafting process (e.g., "[b]egin each cause of action with an allegation of duty, whether common law, statutory, contractual, or otherwise"). And perhaps most significantly, it includes sample complaints for all the causes of action discussed.

For those interested in a quick but highly informative video option, the On-Demand Seminar "Start Your Case: Complaint, Summons, and Service" provides practical advice on the nuts and bolts of filing and serving a complaint in Michigan. The panelists discuss a variety of topics, including initial issues like notice and statutes of limitations, considerations with e-filing and paper filing, how to complete the summons, and the best ways to effectuate service. They stress the importance of thinking creatively when making suggestions to the judge about ways to complete service. For example, using email or communication apps such as What'sApp can be excellent options, particularly for international defendants.

In addition to the resources discussed above, ICLE Premium Partners can access a variety of helpful guidance on the ICLE website, including:

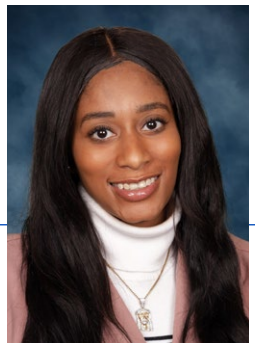
- Michigan Civil Procedure. This authoritative book includes comprehensive, continually updated chapters on jurisdiction and venue (chapter 1), written notice and statutes of limitations (chapter 2), parties and presuit investigation (chapter 3), and preparing, filing, and serving the complaint (chapter 4).
- Michigan Model Civil Jury Instructions. An essential reference for complaint-drafting, this book offers an easily navigable list of the model instructions for review and downloading
- Court Rules of Michigan Annotated. This online-only resource contains hundreds of case annotations helping you interpret and apply the Michigan Court Rules

- How-To Kits. Numerous kits provide step-by-step guidance for filing a variety of suits, from dog bite to copyright infringement

To find out more about our litigation resources, or to suggest ideas for new content, contact me at rebekahp@icle.org.

Business Divorces and the Shareholder Primacy Norm

By Gerard V. Mantese[1], Nicole B. Lockhart[2], and Brian P. Markham[3]


Ever since there have been siblings, there have been sibling rivalries. Just outside Eden, Cain and Abel set the bar early on. Closer to home, most rivalries won't end in such extreme tragedy, but they can nevertheless burn with the intensity of a hundred suns. And when those petty squabbles of youth—who can run the fastest? Who's the smartest?—bleed into adulthood, the stakes can be significant. When the battle over "who does mom love most" ages into "who would mom have wanted to run the business she left us," the road to shareholder litigation has been paved.

Shareholder fights touch every industry, every state, and the work of a great number of lawyers, accountants, and business advisors. That is probably one of the reasons for the success of TV series like *Succession* and *Empire*, which detail power struggles and intrigue among generations of business owners. As long as businesses continue to be formed, they will also continue to break up and shareholders will continue to fight for their fair share of company assets.

Shareholders are the owners of corporations, so it may be said that directors "work for" the shareholders. Statutory and case law establish that directors have enforceable duties to shareholders—including a duty to maximize shareholder profits. The principle that those in control of a corporation, and directors in particular, owe rigorous fiduciary duties to shareholders is the foundation of the shareholder primacy norm. This concept states that directors and other fiduciaries must operate a company in the shareholders' best financial interests.

The Intersection of Shareholder Primacy, Fiduciary Duty, and Oppression

The shareholder primacy norm has not received extensive discussion in the caselaw across the country. Instead, courts in Michigan and elsewhere rely on the concepts of fiduciary duties and shareholder oppression to articulate the rights of shareholders to be free of abusive, fraudulent, and willfully unfair treatment at the hands of directors and others in control of a corporation. The shareholder primacy norm is worthy of discussion in its own right as it places in the forefront the rule that directors have a duty to specifically advance shareholders' financial interests.

Of course, directors have strong fiduciary duties to shareholders. These duties include the obligations to act: (1) honestly and in good faith;[4] (2) with full disclosure and transparency;[5] (3) with loyalty;[6] and (4) with the utmost due care.[7] These duties require the fiduciary to act in the best interests of the beneficiary. There is no balancing of interests. Fiduciaries who breach their duties have significant exposure for any damages their actions cause.

Likewise, directors and those in control of a corporation may be liable for their intentional actions that substantially interfere with or harm shareholders' ownership interests.[8] In the typical oppression scenario, the oppressors act to significantly limit the oppressed shareholders' opportunities to see any financial benefit from their shares. Examples of oppressive acts include situations where those in control unfairly limit or cut

off dividends, engage in discriminatory redemptions, limit access to information, or engage in self-interested transactions.[9]

So, it is the case that the shareholder primacy principle is similar to and complementary to the concepts of fiduciary duty and shareholder oppression. All of these concepts protect shareholders' financial interests but do so from independent philosophical and theoretical perspectives. Fiduciary principles measure an actor's conduct against four specific duties of loyalty, honesty and good faith, full disclosure, and due care. Each duty is significant, and each is significantly different.[10] In contrast, oppression analysis focuses on whether those in control are intentionally and oppressively interfering with the shareholding interests of the shareholder.[11] The oppression cause of action is an equitable one,[12] and a court of equity has broad power to do justice in oppression scenarios:

> That solvent corporations are wrecked for purely selfish and illegal purposes, that minority interests are "frozen out," that business immorality has run amuck under the assumption that courts are powerless, is too true. But the assumption is wrong. Judicial hesitancy does not mean judicial atrophy or paralysis. The board of directors of a corporation are but trustees of an estate for all the stockholders, and may not only be amenable to the law, personally, for a breach of trust, but their corporate power under color of office to effectuate a contemplated wrong may be taken from them when, by fraud, conspiracy, or covinous conduct, or extreme mismanagement, the rights of minority stockholders are put in imminent peril, and the underlying, original, corporate *etente cordiale* is unfairly destroyed.[13]

This is similar to the fiduciary duty analysis for sure, as both concepts are concerned with protecting shareholders from financial abuse.

Shareholder primacy expresses elements of both the fiduciary and oppression concepts as a corporate maxim: directors and officers have a duty to act in the shareholders' best financial interests.

Plumbing the Shareholder Primacy Norm in More Detail

The shareholder primacy norm is embedded in the statutes in Michigan and in decades of caselaw. While this doctrine is similar to fiduciary concepts and to shareholder oppression principles, it stands independent of these concepts. Indeed, its most famous elucidation—*Dodge Brothers v. Ford*[14]—did not rely on the oppression statute (which was not enacted until decades later).

Statutory Support for Shareholder Primacy

There is no one provision in the Michigan Business Corporation Act that stands for the notion that shareholders should enjoy the primary benefit of the company's operations. Instead, several statutes patched together create the quilt of shareholder primacy.

Begin with MCL 450.1489, which provides that a shareholder may bring an action for shareholder oppression when directors or those in control take actions that wrongfully interfere with or damage their ownership interests. This is the statutory expression of the idea that the law will protect shareholders and their interests from oppressive and willfully unfair business actions.

Next, we turn to MCL 450.1541a, which provides that a director or officer must act (1) "[i]n good faith," (2) "[w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) "[i]n a manner he or she reasonably believes to be in the best interests of the corporation." These are fiduciary concepts that unleash powerful obligations on officers and directors to act in the financial interests of shareholders.[15]

Finally, consider the dissenters' rights statutes.[16] Dissenters' rights exist to ensure that directors safeguard shareholder value in certain business transactions, such as mergers. The statutes accomplish this by allowing shareholders to challenge the consideration they receive for the disposition of their shares in such transactions.

Caselaw Supporting Shareholder Primacy

Michigan caselaw also solidly supports the share-

holder primacy norm, even if that phrase is not used. Just four examples will suffice. In *Miner v. Belle Isle Ice Company*,[17] the Michigan Supreme Court held that officers and directors must manage the company so as "to produce for each stockholder the best possible return for his investment."[18] Note that the phrasing is not "a reasonable return" or "a good return," but rather "the best possible return."

In the famous case of *Dodge Brothers v. Ford*, the Michigan Supreme Court held that "a business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."[19] Note that although the Court did not use the academic phrase "shareholder primacy norm," this case is widely taught in law schools as a preeminent judicial articulation of these ideas.

In *Miller v. Magline*, the Court of Appeals declared that "where one man or family controls and dominates a corporation, [he or they] must act in the utmost good faith in the control and management of the corporation as to minority stockholders."[20]

Lastly, the Michigan Supreme Court recently affirmed that the primacy doctrine is alive and well in Michigan. In *Murphy v. Inman*, ___ Mich. ___, ___ N.W.2d ___, 2022 WL 1020127 (April 5, 2022) the Court restated its holding in *Dodge* that "directors' fiduciary duties run primarily to the shareholders of a corporation and that the essence of those duties is to obtain the best possible return on the shareholders' investments."

These and many other cases stand for the proposition that the corporation is to be operated so as to primarily benefit the financial interests of the shareholders and to provide profits to them.

The Shareholder Agreement

Beyond the statutes and the caselaw, the most significant source of a shareholder's rights and responsibilities is any existing shareholder agreement. And in construing such agreements, keep in mind that there is an implied duty of good faith and fair dealing in every contract.[21] This is especially potent where contractual duties involve a measure of discretion,[22] such as those that involve the exercise of business judgment.[23] Even when a shareholder agreement purports to provide a party with plenary authority to operate the company, they must do so in good faith and can have responsibility for abuse of that broad power.[24]

Conclusion

The shareholder primacy norm is part of Michigan's jurisprudence, even if this appellation is not used. This can be seen in various statutes and in the caselaw. Along with fiduciary concepts and the law on shareholder oppression, the shareholder primacy norm safeguards the right of shareholders to have those that work for them—the directors—advance their best financial interests.

ENDNOTES

1. Gerard V. Mantese is a trial attorney at Mantese Honigman, P.C., where he handles high-stakes business and shareholder litigation, including business breakups, in courts across the country. Mantese is CEO of the firm's Michigan and New York offices and was recently appointed Chair of the Corporation Law Committee of the New York County Lawyers Association.
2. Nicole B. Lockhart is an associate at Mantese Honigman, P.C., in the Business Litigation Practice Group. Lockhart focuses on shareholder disputes involving closely held companies, franchise and other contract disputes, real estate matters, and disputes concerning entities regulated under Michigan's Medical Marihuana Facilities Licensing Act.
3. Brian P. Markham is an associate at Mantese Honigman, P.C., in its Business Litigation Group and Appellate Practice Group. Markham focuses on business breakups, complex business matters, and, with Mantese, appeals in the United States Supreme Court. *See, e.g.*, Petition for Writ of Certiorari, *Jones v. City of Detroit*, filed March 21, 2022 (No. 21-1292).
4. *See Thomas v. Satfield Co.*, 363 Mich. 111, 927 N.W.2d 741 (1961).

5. *See Schmude Oil Co. v. Omar Operating Co.*, 184 Mich. App. 574, 458 N.W.2d 659 (1990).
6. *See Menhennick Family Trust v. Menhennick*, 326 Mich. App. 504, 927 N.W.2d 741 (2018).
7. *See Castle v. Shoham*, No. 337969, 2018 WL 3746550 (Mich. Ct. App. August 7, 2018).
8. MCL 450.1489. Whereas Michigan's oppression standard requires a showing of oppressive intent, other jurisdictions, such as New York, will find oppression where the control group frustrates the "reasonable expectations" of a shareholder. *See, e.g., Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 72-73; 473 N.E.2d 1173 (1984) ("A shareholder who reasonably expected that ownership in the corporation would entitle him or her to a job, a share of corporate earnings, a place in corporate management, or some other form of security, would be oppressed in a very real sense when others in the corporation seek to defeat those expectations and there exists no effective means of salvaging the investment.").
9. *See, e.g., Miller v. Magline, Inc.*, 76 Mich. App. 284; 256 N.W.2d 761 (1977) (dividend starvation); *Madugula v. Taub*, 496 Mich. 685, 853 N.W.2d 75 (2014) (withholding information) (full disclosure: argued to the Michigan Supreme Court by Mr. Mantese); *Lozowski v. Benedict*, No. 257219, 2006 WL 287406 (Mich. Ct. App. February 7, 2006) (siphoning profits); *see generally* Gerard V. Mantese and Ian M. Williamson, *Litigation Between Shareholders in Closely Held Corporations*, 1 Wayne. St. U. J. Bus. L. 1 (2018).
10. *See* Gerard V. Mantese, *The Fiduciary Duty—Et Tu, Brute?* 99 Mich. Bus. L. J., no. 9, 2020, at 52.
11. *See generally* Gerard V. Mantese and Fatima M. Bolyea, *Shareholder Oppression Litigation—A National Perspective*, 40 Mich. Bus. L.J., no. 3, 2020, at 38; *see also generally* Gerard V. Mantese & Jordan Segal, *Can't We All Just Get Along? Fiduciary Duties in the Corporate and LLC Context*, 36 Mich. Bus. L. J., no. 1, 2016, at 20.
12. *Madugula*, 496 Mich. at 721.
13. *Levant v Kowal*, 350 Mich. 232, 240, 86 N.W.2d 336 (1957).
14. *Dodge Bros. v. Ford Motor Co*., 204 Mich. 459, 170 N.W. 668 (1919).
15. Other jurisdictions likewise have statutes imposing such duties on directors. *See*, e.g., N.Y. Bus. Corp. Law 717(1) ("A director shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances.").
16. MCL 450.1754 through MCL 450.1774.
17. *Miner v. Belle Isle Ice Co.*, 93 Mich. 97; 53 N.W. 218 (1892).
18. *Id*. at 116.
19. *Dodge*, 204 Mich. at 507.
20. *Miller*, 76 Mich. App. at 304.
21. Restatement Contracts, 2d § 205; *see Burkhardt v. City Nat'l Bank of Detroit*, 57 Mich. App. 649; 226 N.W.2d 678 (1975); *see also Vasiliadis v. Rubaii*, No. 349982, 2021 WL 70599 (Mich. Ct. App. January 7, 2021) (finding defendant's fraudulent performance under a consent judgment to be a breach of the implied covenant).
22. *Burkhardt*, 57 Mich. App. at 652.
23. Likewise, bad faith or fraudulent conduct is not protected by the business judgment rule, which otherwise precludes judicial review of business decisions. *In re Caraco Pharm. Labs.*, Docket No. 329933, 2017 WL 2562635 *9 (Mich. Ct. App. June 13, 2017); *see also* Gerard V. Mantese & Emily S. Fields, *The Business Judgment Rule*, 99 Mich. Bus. L. J., no. 1, 2020, at 30.
24. *See Berger v Katz*, No. 291663 2011, WL 3209217, at *4 (Mich. Ct. App. July 28, 2011) ("Although the bylaws gave defendants the general authority to make business decisions . . . that does not mean that defendants were permitted to act in a manner that was willfully unfair and oppressive to plaintiff, as a minority shareholder.").

Converting Your Trial Brief Into a Brief on Appeal

By Elliot J. Gruszka[1]

You worked hard. You carefully crafted, and responded to, discovery requests. You took and defended depositions. You thoroughly researched the issues and moved for (or opposed) summary disposition. Then, after the trial court ruled in your client's favor, the opposing party appealed. Or worse, the trial court ruled against your client, and they want to know what their options are.

If you don't have access to an appellate specialist (either someone in your firm or a trusted referral) you will have to squeeze the appeal into your already crowded schedule. You may ask yourself: can I just recycle my trial brief? The answer will probably not surprise you:

> If you find yourself cutting and pasting large amounts of text from your briefing on the motion to dismiss or the motion for summary judgment, it is time to reconsider your approach. If your client lost, it is unlikely that merely repeating the same arguments will lead to a different result on appeal . . . . Similarly, if your client won, do not just assume that what worked below will suffice in the appellate court.[2]

Although having an experienced appellate practitioner handle the case with fresh eyes is the best option, with some extra work and retooling, your trial brief can serve as an excellent springboard for a successful appellate brief.

The three keys to converting your trial brief into an appellate brief are:

(1) Narrow the issues.

(2) Sharpen the legal arguments.

(3) Revise for an appellate audience.

The importance of the appellate brief

A 2011 survey found that state and federal judges generally consider briefs "equally important, if not more important, than oral argument."[4] Why are briefs so important to judges? Because judges "want your help" in deciding the case and the brief is the best vehicle to deliver that help.[5]

On appeal, you have one job. If you represent the appellant, your job is to convince the court the trial court made a mistake.[6] If you represent the appellee, your job is to convince the court that the trial court did *not* make a mistake, or that any mistakes were harmless.[7] Underscoring the importance of appellate briefing, former Sixth Circuit Court of Appeals Judge Cornelia Kennedy opined, "Your brief is more than a tool to persuade the judge of the correctness of your position; it *should be a tool for the court to use in writing the opinion.*"[8] At a high level, this requires you to use your brief to "tell the reader what the case is about, what law governs the case, and why your client wins under the relevant law."[9] Applying the following strategies, you can use your trial brief as the basis of an appellate brief that writes the Court of Appeals' opinion for it.

Narrow the issues

Faced with a copious number of choices at a restaurant, Will Ferrell quipped to Jerry Seinfeld, "I like a place with a lot of items on the menu 'cause you know they make 'em all *beautifully*."[10] Likewise, an appellate brief containing "10 arguments is almost always a sign that a party is adopting a 'kitchen sink' approach and cannot point to actual, reversible error."[11] Judges routinely report that briefs asserting a multitude of questions presented are viewed as suspect and weak.[12] Instead of raising every possible issue, you must think carefully to "identify the *central issue* so that the brief can be short and to the point."[13] While there may be more than one issue that needs addressing, you *must* cut to the heart of the case to maximize your chances on appeal.

Start by carefully reviewing your trial brief and identifying the discrete issues you raised. Ask critically: which issues have the strongest support in the law and record? Excise any issues that were a reach. What standard of review will apply to each issue? All things being equal, an appellant should choose issues the Court of Appeals will review de novo.[14]

As an appellee, do not accept the appellant's framing of the issues. Instead, carefully consider the arguments you preserved and rank them from strongest to weakest. If you can, arrange your three best issues such that you can structure your argument as follows: (1) The trial court was correct because of A; (2) Even if A does not hold, the trial court was correct because of B; (3) Even if A and B do not hold, the trial court was correct because of C.

For either side, your familiarity with the case is a double-edged sword. You are intimately familiar with *all* the reasons the trial court got it right (or wrong). Trying to retain *all* these arguments in your brief is counterproductive. But you also know better than anyone the two or three *best* reasons your client should win. Think of your trial brief as a distillation of your knowledge of the case and glean from it the framework for your brief on appeal.

Sharpen your legal arguments

Recall that your primary job is to convince the Court of Appeals the trial court erred (or that there was no reversible error). As an appellate litigator, you should assume your audience—research attorneys, law clerks, and judges—has no familiarity with the facts of the case and limited expertise on the applicable law.[15] Thus, you must educate your audience. To do this, you must fully understand the precedent applicable to your case so that you can highlight favorable authority and distinguish adverse authority.[16]

Start by reviewing the cases you cited in the trial brief. Did you rely on persuasive, instead of binding, authority? Unless your case presents an issue of first impression, citing persuasive authority is unlikely to help.[17] Do any of your cases set forth a favorable proposition of law, but have a holding contrary to what you are asking the court to do? Avoid such cases, if possible, unless you intend to distinguish them.[18] Finally, remember not to cite unpublished authority unless you can explain why it was necessary. Appellate judges take the rule regarding unpublished authority seriously.[19]

Next, prune your brief of unnecessary string citations. Select the one or two cases that best support each of your positions and cite only those.[20] A good heuristic for whether a case belongs in your brief is to ask yourself whether it will be self-evident to the reader why you cited it.[21] At the same time, keep in mind that "the basic pattern of legal reasoning is reasoning by example."[22] Your brief must do more than state what the law is. The cases you cite must help the judges draw the conclusion that the law applied to the facts of *your* case means *your* client wins.[23] "This is the hardest part and an advocate's chance to be most helpful to the court."[24] As you decide which cases to keep from your trial brief—or whether you need to find more—consider whether you can analogize the facts of those cases to the facts of

your own. If your trial brief already does this, you can easily transfer your arguments into your new appellate brief.

Write for your audience

Once you have decided what you will keep from your trial brief, it is time to use those raw materials to assemble your brief on appeal. Because of the volume of their caseloads, appellate judges are "a generally impatient reading audience."[25] The attention you have paid to carefully selecting the most important issues and pruning the law to the most important cases will help keep the final product succinct and on topic. But keeping your brief lean and to the point is only part of your job.

No matter how compelling your case, the court must think you are credible for you to be successful.[26] "Without [the court's] trust, no amount of legal writing skills or oral advocacy talent will carry the day."[27] Appellate courts have a reputation for valuing dispassionate argument over tactics that may be effective in trial courts.[28] Such tactics, if employed on appeal "can come across as theatrical," "are rarely persuasive, and can even be counterproductive.[29] All other things being equal, appellate judges will consider simple, concise, non-inflammatory and readable writing to be more reliable—and therefore more persuasive.[30,31]

Your trial brief's statement of facts is usually most ripe for incorporating into your appellate brief. But still consider paring it down to the essentials. If you, like your audience, had no familiarity with the case, what would be important to know?[32] Make sure it is *easy* for your reader to understand the case and to know what record evidence supports your statements.[33]

One author suggests that most of your audience will only look at the statement of facts once and then focus their attention on the argument.[34] He suggests, therefore, keeping the statement of facts to a high level of generality and inserting the detailed facts where they are relevant in the body of the brief.[35]

Finally, your argument section must make it easy for the audience to understand what the law is, how it *should* apply to the facts, and how the trial court did (or did not) apply the law correctly.[36] Therefore, structure your argument this way: Statement of Law – Application of the Law to the Facts – How the Trial Court Erred (or did not err). This structure accomplishes two things. First, it makes the most of the research and writing you did at the trial level. To the extent you are using many of the same cases, you can insert what you wrote already with minor revisions. Second, by making the case of how your client wins under the law, you have primed the court to rule in your favor before it even considers what the trial court did.[37]

Conclusion

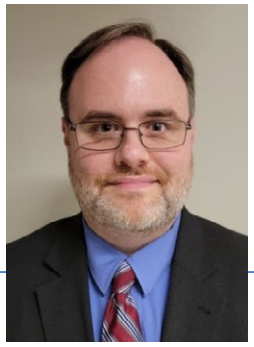
It is no secret that many trial lawyers do not like appeals. If the trial brief could be recycled, it would make your job easier. Unfortunately, given the differences in trial and appellate litigation, a winning brief on appeal needs to be tailored to an appellate audience. Fortunately, you don't have to start from scratch. With careful thinking, diligent pruning, and thoughtful revising, using the principles discussed in this article you can use your trial brief as the basis of a successful appellate brief.

ENDNOTES

1. Elliot Gruszka is the founder of Gruszka Law, P.L.L.C., an appellate litigation boutique in Grand Rapids, Michigan.
2. Belinda I. Mathie, *Writing Appellate Briefs, for Young Lawyers*, 29 APPELLATE PRAC. No. 2, 2 (2010).
3. Jill M. Wheaton & Lauren M. London, *Who, What, When, Where, and Why of Appellate Specialists, The*, 87 MICH. B. J. 18, 19 (2008).
4. Veronica J. Finkelstein & Nicole E. Crossey, *Making Every Word Count: Using Strategic Editing to Increase the Readability of Your Appellate Brief*, 67 DEP'T OF JUST. J. FED. L. & PRAC. 85, 88 (2019).
5. Hon. Cornelia G. Kennedy, *Cornelia G. Kennedy on Appellate Advocacy*, 74 MICH. B.J., no. 1, 1995 at 18, 18.
6. *Id*.
7. *Id*.
8. Kennedy, *supra*, at 19 (emphasis added).
9. Thomas L. Hudson, *Structuring Appellate Briefs*, 21 J. APP. PRAC. & PROCESS 85, 90 (2021).
10. *Mr. Ferrell, For the Last Time, We're Going to Ask You to Put the Cigar Out*, COMEDIANS IN CARS GETTING COFFEE, Season 7, Episode 6 (2016).
11. Mathie, *supra* note 2 at 1.
12. Hon. Jane R. Roth & Mani S. Walia, *Persuading Quickly: Tips for Writing an Effective Appellate Brief*, 11 J. APP. PRAC. & PROCESS 443, 454 (2010).
13. Kennedy, *supra* note 5 at 20 (emphasis added).
14. Hudson, *supra* note 9 at 92.
15. John H. Shepard, *Making Appellate Advocacy More Effective*, 74 MICH. B. J. 32, 32 (1995).
16. Mary Massaron Ross, *Advocate's Toolbox - Techniques to Help Appellate Lawyers Evaluate Precedent and Craft Analytically Precise Arguments*, 81 MICH. B.J., no. 8, 2002, at 25, 25.
17. Richard Kraus & Bridget Brown Powers, B*rief-Writing Tips for the Infrequent Appellate Attorney*, 98 MICH. B. J. 22, 25 (2019).
18. *Id*.
19. *Id*.; *see* MCR 7.215(C)(1) ("Unpublished opinions should not be cited for propositions of law for which there is published authority. If a party cites an unpublished opinion, the party shall explain the reason for citing it and how it is relevant to the issues presented."); *Micheli v. Mich. Auto. Ins. Placement Facility*, ___ Mich App ___; ___ NW2d ___, No. 356559 (Feb 10, 2022), slip op at 5 ("Citizens cites two additional unpublished cases, but Citizens presents no argument in support of those cases' potential applicability. We therefore decline to consider those cases.").
20. Mathie, *supra* note 2 at 2
21. *Id*. at 3.
22. Massaron Ross, *supra* note 16 at 27 (quoting Edward H. Levi, AN INTRODUCTION TO LEGAL REASONING I (1949)).
23. Kennedy, *supra* note 5 at 21.
24. *Id*.
25. K. Tate Chambers, *Foundations of Appellate Advocacy*, 67 DEP'T OF JUST. J. FED. L. & PRAC. 55, 68 (2019).
26. *Id*. at 59.
27. *Id*.
28. Mathie, *supra* note 2 at 2.
29. *Id*.
30. Ryan D. Tenney, *Thinking Like a Lawyer While Writing Like a Human Being: Writing and Editing the Modern Appellate Brief*, 67 DEP'T OF JUST. J. FED. L. & PRAC. 73, 75 (2019).

31. Finkelstein & Crossey, *supra* note 4 at 86.
32. Mathie, *supra* note 2 at 1.
33. *Id*.
34. Hudson, *supra* note 9 at 89.
35. *Id*.
36. *Id*. at 91.
37. *Id*. at 91-92.

Litigating across the Ambassador Bridge – Canadian Law & Practice Tips for Michigan Litigators



By Jason Miller and Ciara Mackey

Canada and the U.S. enjoy one of the largest trading relationships in the world. Ties for American businesses are obvious, and Michigan in particular is Canada's largest trading partner for both imports and exports. The recent impact of just one bridge being closed only drives home further the significance of this relationship. Between cross-border deals, multinational operations, and Canadian affiliates, Michigan attorneys' interaction with Canadian law and litigation on behalf of their clients continues to grow exponentially. Michigan attorneys are also increasingly asked to advise on questions about Canadian choice of law and venue clauses in commercial agreements and about the enforcement of judgments against assets held in Canada.

While our two legal systems share common origins and a strong family resemblance, important differences exist in civil and commercial litigation. This article is intended to provide a high-level introduction to the Canadian system and to a few Canadian litigation topics that may come up for Michigan litigators, allowing you to speak intelligently about Canadian legal issues affecting your clients and to confidently seek out Canadian legal advice.

Talking the Talk

Our friendly northern neighbor enjoys an approach to civility and legal jargon that will seem foreign to many American-trained lawyers (see table below for a few common translations). Judges and lawyers do not wear wigs, but counsel wear robes during trials (although not during pre-trial motion practice) and on appeals, lending an air of respect and politeness to the proceedings. Canadian lawyers call opposing counsel "my *friend*." Of course, these kinds of niceties don't mean that trials are not hard fought, and "my friend" can be said with some invective, but Canadian counsel and judges have great respect for fairness and the boundaries of zealous advocacy. In general, Canadian practice is more collegial than American.

Where the Action Happens

Like the United States, Canada has separate law and court systems at the federal and state (provincial) levels. Canada is a parliamentary confederation of ten provinces and three territories. Criminal law, patents, bankruptcy, immigration, and some other matters are governed by federal legislation. Other areas of law are provincial, including the administration of justice and the rules of civil procedure. Except for Quebec, which follows a French civil law tradition, Canadian law includes both statutory law and common law tradition.

The Canadian court structure and hierarchy is straightforward. The Supreme Court of Canada is the highest court in the land, hearing appeals from both the federal and provincial court systems. The Supreme Court hears commercial matters only after granting leave to appeal and only if the appeal engages matters of public importance and of interest to Canadians generally. In order of increasing importance, each province has provincial courts (dealing with less serious criminal and civil small claims matters); superior courts (the trial level courts of inherent jurisdic-

tion, with constitutional authority to decide almost any litigation arising in the province, and which deal with most civil and commercial litigation matters);[3] and a Court of Appeal, whose decisions are binding as the highest court of each province. Although some provinces call their trial-level superior court the "Supreme Court," there is no provincial supreme court above the Court of Appeal. Within the federal system, there is a Federal Court, Federal Court of Appeal and Tax Court of Canada, which deal only with limited, specialized issues. Unlike in the United States, Canadian Federal Courts do not hear regular civil or commercial disputes, unless the subject matter falls exclusively within the jurisdiction of the Federal Court (such as patent or immigration law). In contrast, provincial superior courts routinely decide disputes involving issues of federal law, particularly bankruptcy and insolvency law.

In the Canadian trial courts, civil jury trials are very rare. Commercial disputes are almost always bench trials. All Canadian judges are appointed rather than elected.

Canadian judicial decisions are now routinely published online and are widely accessible through the Canadian Legal Information Institute (CanLII), canlii.org. CanLII provides a useful and growing (and free!) search tool for Canadian case law, statutes, and legal commentary. For American attorneys trying their hand at Canadian legal research though, it's easy to go astray without the right Canadian law context and search terms.[4] Experienced Canadian counsel is a necessity.

Pick your Province

Canadian and U.S. courts apply relatively similar conflict of laws principles. Without getting into any of the detail of this complex area of law, here are a few key points:

- Canadian courts will generally uphold and apply both choice of law and choice of forum clauses chosen by commercial parties to govern their contract. Absent an agreement or outside the scope of these types of clauses, Canadian courts apply Canadian conflict of laws principles to assume jurisdiction and to identify the proper law and forum for a dispute.

- Choice of forum clauses and mandatory arbitration clauses have received significant recent attention at the Supreme Court of Canada.[5] In general, a party seeking to avoid a choice of forum clause selecting a specific court venue for disputes must show *strong cause* as to why the court should not give effect to an otherwise valid and enforceable clause. Still, these kinds of clauses have been found invalid in some contexts, such as for unconscionability based on an inequality in bargaining power between the contracting parties. Choice of forum clauses must also respect the subject matter jurisdiction of Canadian courts. An agreement to litigate a contract dispute before the Federal Court of Canada will not be given effect.

- Canadian courts may also assume jurisdiction to hear a dispute against non-resident defendants[6] where there is a real and substantial connection between the subject matter of the litigation and the province. However, under the doctrine of *forum non-conveniens*, the court may still decline to exercise jurisdiction over a dispute if another forum also has jurisdiction and would be clearly more appropriate (including, as one factor to consider, because the dispute would be governed by the law of that other jurisdiction).[7] Special rules also apply when considering the jurisdiction of Canadian courts and choice of law in the context of estate administration and family law.

- As in the U.S., Canadian courts can apply the law of another non-Canadian jurisdiction; however, the application of foreign law is a question of fact that requires expert evidence. Absent expert evidence on foreign law, Canadian courts will generally apply the laws of their own jurisdiction to the dispute. Canadian courts also apply the laws of their own juris-

diction (the law of the forum) to procedural matters, including generally the rules of civil procedure and principles of evidence.

- American civil judgments are not automatically enforceable in Canada. However, Canadian courts take a generous approach to recognizing judgments by U.S. courts. The usual procedure is to sue on the judgment in a provincial superior court, hopefully in a province where the judgment debtor has significant exigible assets. In general, a Canadian court will recognize an American judgment so long as the original court had valid jurisdiction under Canadian jurisdictional rules and so long as the judgment was not otherwise obtained by fraud or against public policy. A very small group of states and provinces (Michigan *not* included) have reciprocating judgment enforcement agreements, allowing for a more streamlined process of judgment registration and enforcement under provincial legislation.[8] Once a U.S. judgment has been recognized in a Canadian province, the mechanics of civil judgment enforcement are also matters of provincial jurisdiction and vary widely between provinces, but often mirror U.S. procedure.

Meeting the Deadlines

Each Canadian province has its own limitations statute which determines when a claim becomes time-barred.[9] However, the rules are more similar across the provinces than among the states. The general limitation period for civil and commercial matters is typically two years from the date the plaintiff discovers that it has a claim.

Last year, the Supreme Court of Canada held that a claim will be discovered for the purpose of starting the limitation period "when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn."[10] All that is required is a plausible inference of liability; a potential plaintiff's degree of knowledge has to be more than mere suspicion or speculation, but not certainty of liability or perfect knowledge. Canadian courts expect plaintiffs to act with reasonable diligence and timeliness in commencing litigation, and not to wait for complete or perfect information before deciding to sue.

In evaluating the deadline for your client's claim, COVID-19 may have an impact. At the outset of the pandemic in 2020, several Canadian provinces enacted orders temporarily suspending the application of some statutory limitation periods. The result is a patchwork of limitation period extensions across the country. In Alberta, the general two-year limitations period was suspended from March 17 to June 1, 2020, effectively extending the time to sue for an extra 75 days. In Ontario, the temporary suspension lasted 26 weeks; limitations periods there did not start to run again until September 14, 2020. In British Columbia, the suspension lasted a *full year*. There, a plaintiff with a claim discovered on June 1, 2019 now has until June 1, 2022 to sue. In other provinces, including Manitoba and Saskatchewan, there were no suspensions. If your client may have discovered a claim or expects it may be sued in Canada, it is important to seek Canadian legal advice early to avoid missed deadlines and incorrect assumptions about whether a claim may be time-barred.

Finding "*Your* Friend"

There is nothing like reciprocity on bar admissions or *pro hac vice* for U.S. lawyers in Canada, so you will need to work with Canadian counsel. Canada has a number of full-service law firms with national and international reach. Still, finding good Canadian counsel is pretty much the same as finding good Michigan counsel: word of mouth and referrals are best.

Michigan Term	Canadian Term
• Attorney	• Lawyer, Barrister & Solicitor, or Counsel
• Judge / Your Honor	• Justice (in most Canadian superior courts, there has been a move away from the even more formal "My Lady" and "My Lord")
• Deposition	• Examination for Discovery or Questioning
• Continuance	• Adjournment
• Opinion	• Decision or Reasons for Judgment
• Judgment	• Judgment Roll
• Court of Appeals	• Court of Appeal
• *De novo* appellate review	• Correctness appellate review
• Dicta	• Obiter
• Stipulation	• Consent or Agreement
• Attorney-Client and Work Product Privilege	• Solicitor Client Privilege and Litigation Privilege

ENDNOTES

1. Jason Miller is a senior litigation counsel for The Dow Chemical Company based in Michigan with responsibility for high-profile Canadian litigation matters.
2. Ciara Mackey is a Litigation Partner in the Calgary office of Bennett Jones LLP, an internationally recognized Canadian law firm.
3. The names of each province's superior court vary. For example, the Supreme Court of British Columbia, Alberta Court of Queen's Bench, and Ontario Superior Court of Justice are each superior courts.
4. The right context and applicable procedural rules may vary even within the same province and the same court. For example, in Ontario, the Commercial List exists as a specialized branch of the Superior Court of Justice in Toronto, with its own set of procedural rules designed for insolvency and complex commercial law cases.
5. For example, *Douez v Facebook, Inc*, 2017 SCC 33 and *Uber Technologies Inc v Heller*, 2020 SCC 16, involving the enforcement of standard form terms and conditions between Canadian individuals and large corporations, Facebook and Uber.
6. Assuming no presence-based jurisdiction and no consent or attornment.
7. See in particular, *Club Resorts Ltd v Van Breda*, 2012 SCC 17. Other relevant factors including the comparative convenience and expense for the parties, based on the location of evidence and witnesses, may have less importance now, with the fast acceptance of post-COVID virtual proceedings.
8. For example, under the *Reciprocal Enforcement of Judgments Act*, RSA 2000, c R-6 and *Reciprocating Jurisdictions Regulation*, Alta Reg 344/1985, Alberta has recognized reciprocating agreements with the States of Washington, Idaho, Montana, and Arizona.
9. Of course, there are exceptions and other statutory deadlines applicable for specific types of disputes. Many provincial limitations statutes also set out applicable conflict of law rules for determining which limitation period may apply to a given dispute.
10. *Grant Thornton LLP v New Brunswick*, 2021 SCC 31.

The Successful Post-Hearing Brief in a Labor Arbitration

By Lee Hornberger[1]

This article reviews drafting an effective post-hearing brief in a labor arbitration case.

The post-hearing brief is an important part of the labor arbitration process. The post-hearing brief should clearly tell and remind the arbitrator of the advocate's viewpoint of the case and exactly how the advocate wants the arbitrator to rule. "The use of post-hearing briefs is quite common. Their purpose is to summarize and comment on evidence and present legal argument." [2]

Furthermore,

> As a matter of general practice, parties will file post-hearing briefs to summarize the important facts contained in the record and reiterate the arguments made at the hearing. ... [A] clarifying and persuasive brief can be critical. ... [T]he advocate should write a good brief based on the assumption that it might make a difference.

The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the National Academy of Arbitrators, Federal Mediation and Conciliation Service, and American Arbitration Association states:

> 6. POST HEARING CONDUCT
>
> A. Post Hearing Briefs and Submissions
>
> 1. An arbitrator must comply with mutual agreements in respect to the filing or nonfiling of post hearing briefs or submissions.
>
> a. An arbitrator may either suggest the filing of post hearing briefs or other submissions or suggest that none be filed.
>
> b. When the parties disagree as to the need for briefs, an arbitrator may permit filing but may determine a reasonable time limitation.
>
> 2. An arbitrator must not consider a post hearing brief or submission that has not been provided to the other party.[4]

Concerning the closing of the record:

> If briefs or other documents are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs.[5]

The post-hearing brief should be carefully prepared. The brief should let the arbitrator know the advocate's arguments in a clear and easy-to-read fashion. It should use subtitles. It is helpful if the subtitles are not all capital letters. Regular type with bolding would do quite nicely.

The effective post-hearing brief is courteous and polite. It does not use any invective. It is not tedious. There is a viewpoint that the brief will tell the arbitrator where the brief is going, where it is, and where it has been.

The beginning of the brief should contain a not more than one page summary of the case from the advocate's position. This summary can have an anchoring effect on the arbitrator. The arbitrator will subconsciously remember this summary

as the arbitrator reads the remainder of the brief and writes the award. In addition, this summary can be adapted by the arbitrator to provide the advocate's position in the award document that the arbitrator will write.

If the advocate in the post-hearing brief is going to ask for a burden of proof other than the preponderance of the evidence, there should be discussion justifying that burden of proof and providing authority for that burden of proof.

The post-hearing brief should clarify the issues for the arbitrator. This will include both the substantive and procedural issues. In addition, the brief must clearly inform the arbitrator of the applicable sections of the collective bargaining agreement (CBA) and the page numbers of the CBA where those sections can be found. It is crucial that the arbitrator know exactly where in the CBA the arbitrator can go in order to better understand the case and the parties' viewpoints. If there is a transcript, point out and quote the most important and powerful portions of the transcript.

The goal of the advocate is to make the arbitrator's job easier.

The post-hearing brief should thoughtfully outline the "who, what, where, how, and when" of the case. The brief should emphasize the important parts of the case. After reading the post-hearing brief, the arbitrator should have a clear understanding of who the main actors are, what happened to give rise to the grievance, where the situation occurred, how the situation unfolded, and the timeline of the situation.

The post-hearing brief should be a concise presentation of the case in a professional and courteous fashion. It will summarize in a convincing way the advocate's main arguments, including what happened and precisely what the advocate believed was proven at the hearing.

There should be consideration of citing authorities such as Elkouri & Elkouri as well as published arbitration awards in the brief. If this is done, it is helpful to cite the most recent edition of Elkouri & Elkouri. In addition, if the advocate wants the arbitrator to read a cited arbitration award, a copy of the award should be provided to the arbitrator and the parties when the brief is filed.

The advocate should read some of the arbitrator's prior awards. This will help the advocate know whether the arbitrator considers or at least cites other awards. The advocate should be careful in citing an arbitrator's other awards back to the arbitrator in cases involving different parties. This is because the prior award arose from a different case and a different work environment than the subsequent case for which the brief is being written.

The post-hearing brief should address the unfavorable aspects of the case. The arbitrator should not read about these unfavorable aspects only in the other side's post-hearing brief. This gives the advocate the opportunity to present adverse facts in the best light.

The brief should try to anticipate and answer the arguments of the other side. For example, the brief could say "The other side says . . .," but "this does not control because . . . ." Again, the goal is to make the arbitrator's job easy.

The brief should not contain new evidence or arguments that were not raised at the hearing. The advocate should think very carefully before raising new arguments or citing CBA provisions for the first time. "No new evidence should be included in post-hearing briefs."[6] And "the arbitrator's decision shall be based upon the evidence and testimony presented at the hearing or otherwise incorporated in the record of the proceeding."[7] However, under appropriate circumstances, the arbitrator has the discretion to amend the record to admit appropriate evidence discovered by a party after the conclusion of the hearing.[8]

The advocate should provide a brief to the arbitrator that is easy for the arbitrator to use. In ad hoc and Federal Mediation and Conciliation Service cases, usually there will be simultaneous fil-

ing of a pdf and Word copy of the briefs with the arbitrator. Once the arbitrator has received the briefs from both parties, the arbitrator will cross-serve the pdf copies. Unless the arbitrator indicates otherwise, size 12 Font, Times New Roman, and non-justified right margins should be used.

It can be counterproductive to put too many arguments in the brief. An excessive number of arguments can have a dilution effect. The dilution effect can result in the weaker arguments diluting the power of the better arguments. "[C]luttering a . . . brief with flimsy or tangential arguments . . . can dilute an argument, making the stronger points less persuasive."[9] It has been said that an advocate submits twenty arguments because the advocate could not think of one good argument. Nevertheless, most arbitrators in their awards will respond to every argument made by the losing party.[10]

The post-hearing brief should also tell the arbitrator the relief that the party is seeking. If the arbitrator knows what remedy the party is seeking, it is easier for the arbitrator to write an award section of the arbitration decision which is consistent with the needs of the parties. Carefully consider the wording of the last page of the brief. The end of the brief should tell the arbitrator exactly what the advocate wants the remedy and relief portion of the award to say. This includes reminding the arbitrator of any split-fee or loser-pays-all-arbitrator-fees provision in the CBA. There should be no doubt in the arbitrator's mind as to exactly what a party is asking for and how the party wants that to be worded. This is crucial.

After the brief is written, it should be carefully edited by an individual other than the author. In addition, the advocate should consider having a Devil's Advocate available for these review purposes.[11]

The advocate should consider filing the brief with the arbitrator a day or two before the due date. With "simultaneous" filing, this can do no harm. And it might be helpful to the arbitrator.

In conclusion, the post-hearing brief should tell the arbitrator in a concise, courteous fashion exactly how the advocate wants the arbitrator to rule on the issues and exactly what relief is being requested.

ENDNOTES

1. Lee Hornberger is a former Chair of the State Bar's Alternative Dispute Resolution Section, former Editor of *The Michigan Dispute Resolution Journal*, former member of the State Bar's Representative Assembly, and former President of the Grand Traverse-Leelanau-Antrim Bar Association. He is a member of the Professional Resolution Experts of Michigan (PREMi) and a Diplomate Member of The National Academy of Distinguished Neutrals. He has received the ADR Section's George N. Bashara, Jr. Award. He received a First Tier ranking in Northern Michigan for Arbitration by *U.S. News – Best Lawyers®* Best Law Firms in 2019 and 2020. He is in *The Best Lawyers of America* 2018 and 2019 for arbitration, and 2020 to 2022 for arbitration and mediation. He is on the 2016 to 2021 Michigan Super Lawyers lists for ADR. He holds his B.A. and J.D. *cum laude* from the University of Michigan and his LL.M. in Labor Law from Wayne State University.
2. ELKOURI & ELKOURI, HOW ARBITRATION WORKS 7-36 (Kenneth May ed., 8th ed. 2016).
3. ROGER I. ABRAMS, INSIDE ARBITRATION: HOW AN ARBITRATOR DECIDES LABOR AND EMPLOYMENT CASES 137-38 (2013).
4. Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the: National Academy of Arbitrators, Federal Mediation and Conciliation Service, and American Arbitration Association, *available at* https://www.fmcs.gov/services/arbitration/arbitrator-code-professional-responsibility/.
5. American Arbitration Association Labor Arbitration Rules, Rule 30, *available at* https://www.adr.org/sites/default/files/Labor_Arbitration_Rules_3.pdf.
6. Elkouri & Elkouri, *supra* note 1 at 7-36.
7. Federal Mediation and Conciliation Arbitration Policies and Procedures (29 CFR Part 1404), 29 CFR 1404.13, *available at* https://www.fmcs.gov/services/arbitration/arbitration-policies-and-procedures/.
8. American Arbitration Association Labor Arbitration Rules, *supra* note 4, Rule 31.
9. JENNIFER K. ROBBENNOLT AND JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS 156 (2d ed. American Bar Association, 2021).
10. Abrams, *supra* note 2 at 160.
11. ROBBENNOLT AND STERNLIGHT, *supra* note 8 at 12.

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