THE LITIGATION JOURNAL

FALL 2015

EDITOR IN CHIEF – JEFFREY A. CRAPKO

WHAT'S INSIDE

Letter from the Chair

by: Michael P. Donnelly

Dear Fellow Litigation Section Member:

I am happy to announce that the following members have been elected to the 2015-2016 Board of the Executive Council of the Litigation Section: Marcy Tayler, The Kitch Firm, Chairman; Michael J. Butler, Bernstein & Bernstein, Chair-elect; Paul Hudson, Miller Canfield, Secretary; and, Brandon Evans, Kendricks, Bordeau, Adamini, Greenlee & Keefe, P.C., Treasurer.

As we close out the 2014-2015 Litigation Section term, we are poised for big changes in the Litigation Section. Plans are underway for the first ever Litigation Institute, which is currently set for October 13 and 14, 2016. We will be assisting ICLE in putting together a fantastic program full of prominent national and local speakers, all with an eye to providing both the most experienced litigator and the new lawyer with the latest techniques and tools to win every case. We will continue to hold our very popular Summer Conference and provide an array of other seminars to help the practitioner.

The Section will continue to take a proactive approach to monitoring and reviewing proposed legislation and changes to the court rules that affect the litigator, aggressively protecting the interests of the Section's members. The Section will continue to produce the Litigation Section Journal. The current edition contains great articles on a variety of subjects, ranging from non-compete clauses to the U.S. Supreme Court same-sex marriage case.

As always, the Section leadership welcomes and encourages your participation in Section events. We have multiple opportunities for attorneys to get involved, including by writing articles for the Journal and joining the Executive Council. Please consider taking an active role in the Section.

Thank you for the opportunity and honor to serve as the Chairman of the Litigation Section for the last year. I look forward to seeing all of you at the next Litigation Section event

Best Wishes,

Michael P. Donnelly

Immediate Past Chairman

Litigation Section, State Bar of Michigan

Obergefell and Employment Issues

*by: James D. Boufides and John H. Willems**

Following the U. S. Supreme Court's June 26, 2015 decision in *Obergefell v. Hodges,* same-sex marriage is legal in the United States.[1] Although *Obergefell* was not an *employment* discrimination case, its implications for employers are nevertheless immediate, various, and in some areas, predictably uncertain. While it is clear that homosexual families based in legal marriage must now be treated the same as heterosexual marrieds, the decision only settles one aspect of the ever-expanding constellation of gender issues in the employment setting and, as in every solution to a specific problem, is likely to give rise to new and other problems in its wake.

The Decision

In *Obergefell*, same-sex couples in Michigan, Ohio, Kentucky, and Tennessee sued various state agencies and officials for denying them certain benefits available to heterosexual couples, including marriage, survivorship, and adoption benefits. In the highly controversial 5-4 decision, the Court held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment protect same-sex couples' right to marriage and its benefits, and that any laws to the contrary "burden the liberty of same-sex couples" and "abridge central precepts of equality."[2] A necessary predicate for the Court's conclusion is that there is a constitutional right to marry — although the *Obergefell* dissents vehemently deny that the Court may define what marriage is.[3]

Obergefell was the Court's second ruling in favor of gay rights in recent years, following on its 2013 decision in *U.S. v. Windsor,* in which the surviving spouse of a same-sex marriage attempted to claim the estate tax exemption for surviving spouses and was barred from doing so by the Defense of Marriage Act ("DOMA"), which defined marriage as a union between one man and one woman for all purposes under federal law. The Court also held DOMA to be unconstitutional,[5] thus granting same-sex married couples federal tax, immigration, and Family Medical Leave Act benefits, among many others.

But *Obergefell* reaches much farther than *Windsor,* making clear that there is no basis in law for distinguishing between opposite-sex marriage and same-sex marriage; indeed, it violates the Fourteenth Amendment to do so. Marriage is marriage, period.

Employment Benefits

So what does this mean for employers? There exists, in employment as in other spheres of social and economic life, a superstructure of law and regulation premised on the heterosexual definition of marriage. Until *Obergefell*, those employers (and their insurers) who sought to treat gay and straight families similarly with respect to medical insurance and other benefit programs used the work-arounds — adopted in a number of communities and some states — of "civil unions" or "domestic partnerships." This led to the anomalous result – almost a permitted form of marital status discrimination — that heterosexuals were required to marry to receive familial benefits (because they could) while gays and lesbians were not so required (because they couldn't). As a result of *Obergefell*, employers and their insurers must now evaluate (and may jettison) these work-arounds so that same-sex couples now not only have the *right* to marry, but are *required,* like opposite-sex couples, to do so to receive like benefits. Or, employers could continue to recognize "domestic partnership" arrangements

and allow both gay and straight non-married couples to be treated like families based in legal marriage.

Exercise of Religion

In the employment arena, this expansion of Fourteenth Amendment coverage is likely to be tested against the First Amendment's protection of the exercise of religion. In *Burwell v. Hobby Lobby,* a decision authored by Justice Alito (one of the *Obergefell* dissenters), the Court held that the plaintiff closely-held corporations could refuse to provide abortion coverage as a medical benefit as required by the Affordable Care Act ("ACA").[6] Applying the federal Religious Freedom Restoration Act of 1993 ("RFRA"), the Court held that the ACA requirement "substantially burdened" the exercise of the religion by the companies in that they were compelled to choose between violating sincerely held religious beliefs or paying millions of dollars in fines.[7]

A claim similar to that presented by the employers in *Hobby Lobby* could be mounted, perhaps in the context of a challenge to the already extant prohibition against discrimination based on marital status, found in Michigan's Elliott-Larsen Civil Rights Act ("ELCRA").[8] If not there, some employers may attempt to carve out a similar First Amendment-based religious objection to same-sex marriage in some fashion. So far, at least one business has lost such a case in its state's court of appeals.[9] It will be interesting to see how these challenges play out state-by-state, and whether the issue will be back before the Supreme Court in the near future.

For employers generally however, the thornier questions will arise where an employee refuses, on the basis of sincerely held religious beliefs, to carry out their job duties with respect to same-sex couples, whether with respect to fellow employees, clients or members of the general public, and whether such refusal may be the basis for discipline (or other job action) or must be accommodated.[10] Such employees who are subjected to job action and claim religious discrimination will present a somewhat new analytic perspective than the more typical religious discrimination claims, which tend to revolve around denial of opportunities for prayer, dress, failure to hire or denial of career opportunities, but might well fit into a hostile environment theory.

Sexual Orientation Discrimination

Until now, sexual orientation has not been recognized as a protected classification under most anti-discrimination laws, including in Michigan. More than implicit in *Obergefell* is the Court's foreshadowing that discrimination against persons — in employment or otherwise — because of sexual orientation will be ubiquitously illegal very soon. In Michigan, as in other states, considerable controversy and debate remains about including sexual orientation in discrimination laws. *Obergefell* — even in its dissents – seems to be close to ending *that* debate, forecasting odification or application of what will likely soon be the law of the land — that sexual orientation is protected against unequal treatment by the U.S. Constitution. As the recent rejection by voters in Houston of a proposed ordinance barring discrimination against homosexuals shows, however, local resistance to the expansion of such rights will continue to be a significant barrier.

ENDNOTES

1 *Obergefell v. Hodges,* 135 S.Ct. 2584, 2593–95 (2015).

2 *Id.* at 2604. The Court's ruling invalidated all laws prohibiting same-sex couples from getting married or being eligible for the same rights and benefits as opposite-sex couples.

3 *Id.,* at e.g., 2611–12.

4 *U.S. v. Windsor,* 133 S.Ct. 2675, 2682–83 (2013).

5 *Id.* at 2695–96.

6 *Burwell v. Hobby Lobby Stores, Inc.,* 134 S.Ct. 2751, 2784–85 (2014).

7 *Id.* While the Court accepted the government's argument that it had a compelling interest in the provision of cost-free contraceptives, the Court found that the government had failed to show that it met the required "least restrictive means" showing in light of the substantial burden imposed.

8 MCL 37.2202(1) (a). However, discrimination lawsuits based on marital status under the ELCRA have relied on "*if* one is married rather than *to whom* one is married." *Miller v. C.A. Muer Corp,* 420 Mich. 355, 362 (1984) (emphasis in original). *See also, Noecker v. Department of Corrections,* 203 Mich.App. 43, 46, 512 N.W.2d 44, 45 (1993) (protection of marital status does not consider "the identity, occupation, or place of employment of one's spouse"). So at this moment, a Michigan employer could still legally discriminate against a gay employee on the basis of sexual orientation, while being prohibited from doing so on the basis of a same-sex marriage.

9 *Craig v. Masterpiece Cakeshop, Inc.,* ___ P.3d ___, 2015 WL 4760453 (Colo. App. Aug. 13, 2015).

10 The intersection of religious beliefs and the obligation to carry out the duty of office was immediately tested by Kim Davis, County Clerk in Rowan County, Kentucky. Ms. Davis refused to issue marriage licenses to same-sex couples defying a federal district court order to do so, reinforced by the Sixth Circuit, *Miller v. Davis,* 2015 WL 4866729 (E.D. Kentucky, August 12, 2015), *aff'd.*No. 15-5880 (6th Cir. August 26, 2015): "In light of the binding holding of *Obergefell,* it cannot be defensibly argued that the holder of the Rowan County Clerk's office, apart from who personally occupies that office, may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court." *Id., at 2.* Davis' appeal to the U.S. Supreme Court was denied August 31, 2015. After being jailed for contempt for a short period, Davis relented and allowed her clerks to issue the licenses.

*John Willems is a principal in the Miller Canfield Labor and Employment Group, specializing in public sector law and private sector employment litigation. He is also a recognized composer and musician and active in supporting the arts and cultural communities in Michigan and gaining recognition for their contribution to Michigan's economy. James Boufides is an associate in Miller Canfield's Employment and Labor Group. He graduated from the University of Michigan Law School in 2013.

Understanding Non-Compete and Confidentiality Agreements

*by: John Mucha III**

Your client hired Joe fifteen years ago as a senior project manager and he is intimately familiar with your client's business practices and customer relationships. He has access to all sorts of confidential and proprietary information and a database loaded with information on customer preferences and profitability. All of that is information not generally available to the public but very much desired by your client's competitors. What can you do to protect against the unfair advantage that your client's competitors would suddenly enjoy if Joe left to work for your competitor with all of that information?

If crafted carefully, a non-compete agreement and a confidentiality agreement can help protect you.

Non-Compete Agreements

The main reasons for non-competes sought by employers are:

- To ensure that employees don't become an unfair competitive threat in the geographic area they previously serviced after their employment has been terminated;
- To make it more difficult for competitors to unfairly obtain knowledge of one's business practices by hiring away employees;
- When a business is sold, to ensure that the seller does not form a rival company that would unfairly undermine the buyer's business plans for the acquired business;
- To ensure that franchise buyers adhere to territorial guidelines so as not to impinge on sales of other franchise operators.

Michigan courts will not enforce non-compete agreements that are unreasonable or where the threat of damage to business interests is not adequately defined. To be "reasonable", the non-compete agreements cannot exceed what is necessary to protect the legitimate business interests of the business or employer. Non-competes may only protect against *unfair* competition, not all competition.

Michigan Courts take into account many factors in determining what is "reasonable". These include:

- the degree to which the restrictions in the non-compete would interfere with the ability of the employee to use his talents and earn a living;
- the geographic scope of the restrictions;
- the duration of the restriction;
- the severity of the penalties for breaching the non-compete agreement;
- the degree to which the business interests of the enforcing party would be harmed if the non-compete were not enforced.

Michigan courts are inclined to enforce non-compete agreements only when they are *necessary to protect the legitimate business interests of the business or employer.* The more specific the restriction, such as a list of named competitors considered off limits for future employment, or a list of protected customers off limits for future transactions, the more likely that the courts will find the non-compete agreement to be reasonable.

Courts are particularly sensitive to overly broad non-compete agreements that extend to a broad geographic range or span a too-lengthy period of time. Even if those factors are reasonably limited, the court will look closely at whether a legitimate business interest is worthy of protection at the expense of his employer, and whether that employer has a legitimate business interest in seeing that such information, skills and expertise are not unfairly obtained by a competitor. Accordingly the more highly placed or uniquely skilled the employee is, like Joe in our hypothetical, the more likely it is that a court will find the employer to have a legitimate business interest deserving of court protection, and thus more likely to find the non-compete agreement to be reasonable.

Recently, the Michigan Court of Appeals upheld a verdict of over $1 million in damages for breach of a non-compete in the case of *Best Team Ever, Inc. v. Prentice,* Case No. 309026 (Mich. App., June 23, 2015) (unpublished opinion). In so ruling, the Court found that five years was a reasonable duration for the non-compete under the circumstances, even though most Michigan courts had previously found that a duration of three years or less was a reasonable duration. The Court reasoned that it would take the new owners of defendant's restaurant business at least five years to convert the goodwill of defendant's business into the purchaser's own goodwill, and that the breach of the non-compete in that period upset the ability of the plaintiff purchaser to obtain the intended benefit of the transaction.

What if the non-compete agreement is found to be unreasonable?

Courts have a few options if they find that a previously signed non-compete agreement is, in their option, unreasonable. Courts *may* limit and/or reform the terms of a non-compete agreement in order to render it enforceable. But, the courts are not *required* to reform the terms of a non-compete. They could in fact, rule that those components make the entire agreement unenforceable as written.

Protecting Confidential Information More Specifically

Protection of trade secrets is a matter separate from, but often intertwined with, non-compete agreements. Parties are free to contract to limit the use of sensitive information acquired in one's employment with a company, or (in the case of a sale of a company) known to the company's seller. Even without a specific agreement between an employer and employee, or between a business purchaser and business seller, Michigan law provides some degree of protection to confidential information. The Michigan Uniform Trade Secrets Act (MUTSA), MCL § 445.1901–1910, defines a "trade secret" as:

"[I]nformation including a formula, pattern, compilation, program, device, method, technique, or process that is both of the following:

(i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Examples of readily identifiable trade secrets include things such as engineering specifications, construction practice, internal marketing and business planning documents, sensitive pricing and cost information, and unique customer information.

More difficult to classify as a trade secret is information that is more general in nature or derived from personal notes, such as the identity of customers one has worked with and/or general knowledge of an industry, because it is not always clear whether such information was obtained (or ascertained) by independent means, rather than obtained from the employer. If the information is a matter of general knowledge in the industry it will be less likely to be treated as a trade secret. However, knowledge of specific vendors, vendor capabilities, and pricing can be

a trade secret under MUTSA, even if all of the information theoretically might be obtained through publicly available means, as long as the information is not *readily* ascertainable.

To benefit from these general protections, the owner of the confidential information has a duty to maintain the secrecy of the information. If the owner of the confidential information does not take reasonably prudent steps under the surrounding circumstances to maintain the secrecy of its information, the information may lose its protected status. For example, if the owner of the information shares the information with others, or allows others to readily access (either intentionally or unintentionally) the information in its possession, such information may no longer be given protected confidential status.

Non-disclosure and confidentiality agreements allow an employer to expand the scope of the protections beyond those provided for under MUTSA. The company protecting its trade secrets by specific agreement can protect information that might not otherwise qualify for MUTSA protection, and can prohibit employee practices that otherwise might be acceptable. For example, a written confidentiality agreement might prohibit maintaining private lists of customers or taking those privately-created lists upon termination of employment, practices which might otherwise be acceptable in the absence of a signed confidentiality agreement.

One of the keys to the enforcement of confidentiality agreements is to be very clear in the agreement that a breach would cause damages. Parties often include a pre-determined amount of "liquidated" damages to aid in the later enforcement of the agreement. Provided such liquidated damages are reasonable (instead of a penalty), and can be justified as an approximate measure of actual damages (such as the costs of developing the customer base, or the unique method or technique being protected), a court may be more likely to enforce the confidentiality and non-disclosure agreement.

Unlike non-compete agreements, there are **no duration or geographic limitations necessary** in a confidentiality agreement. Such agreements may be perpetual and worldwide.

Those who are found by the court to have breached trade secrets are liable to have to pay significant damages. Money damages may include lost sales and profits, the costs of the amount of time, labor and money expended by the plaintiff in designing, fabricating and testing the trade secret, payment of royalties and other damages provable with reasonable (but not necessarily exact) certainty. If a plaintiff sues and wins, the court may also award reasonable attorneys' fees if it finds that the defendant acted willfully or maliciously. Recently, in the case of *Walbridge Industrial Process LLC v. Atlas Industrial Contractors, LLC,* Wayne County Circuit Court, Case No. 13-003711-CK (March 25, 2015), a Wayne County jury awarded $5.3 million to the plaintiff (former employer) company, allocated against the former employee and the new employer, after the former employee had e-mailed himself sensitive files and used that information in his new employment.

Final Thoughts

Non-compete agreements are regularly upheld by Michigan courts if they are found to protect the legitimate interests of a company or employer. However, courts will hesitate to enforce agreements that are unreasonable and are too harsh in relation to the interests being protected.

Business owners should also be protective of confidential information and trade secrets, and place limits on employees as well as vendors regarding access and use of such information. Well-crafted confidentiality agreements with well defined, but reasonable, damages for breach can protect against the loss of valuable trade secrets, business methods and customer information.

John Mucha is a 1987 graduate of the University of Michigan Law School and past Chair of the Litigation Section. He is a Partner in the law firm of Dawda, Mann, Mulcahy & Sadler, located in Bloomfield Hills, where he specializes in commercial litigation, business torts, real estate litigation, construction litigation, zoning and land use matters.

Is a Promise of Continued Employment Still Sufficient Consideration to Support a Non-Competition Agreement in Michigan?

by: Daniel D. Quick*

It is a common fear among employers that their most trusted and skilled employees will leave the company to work for a competitor, taking with them confidential information or goodwill. Accordingly, businesses often use non-compete clauses and other restrictive covenants. Often, employers threaten to fire their employees if they refuse to sign the covenants, thus, offering "continued employment" as consideration for the agreement. In Michigan, cases going back to at least twenty five years have repeatedly held that "mere continuation of employment is sufficient consideration to support a non-compete agreement in an at-will employment setting."[1]

States vary dramatically on this issue; some take the same position as Michigan, while others require additional, non-illusory consideration beyond continued employment.[2] A recent Michigan Court of Appeals decision suggests that the state may move away from its absolutist position and open the door for arguments attacking the sufficiency of continued employment as adequate consideration, at least in some circumstances.

The Traditional Michigan Position

Traditionally, Michigan law has provided that mere continuation of employment is sufficient consideration to support a noncompete agreement in an at-will employment setting. The modern incarnation of this principle is actually from a federal court opinion,[3] which has been repeatedly cited as accurate by subsequent courts, usually without discussion. The Michigan Court of Appeals recently provided some analysis in *Posselius v Springer Publishing Company.*[4] In *Posselius,* a discharged employee challenged the validity of a contractual limitations period and non-competition agreement, arguing that it lacked consideration and was, therefore, unenforceable. In rejecting this argument over a dissenting opinion, and in addition to quoting *Robert Half Int'l,* the court noted the Supreme Court's ruling *In re Certified Question,* 432 Mich. 438, 441, 443 N.W.2d 112 (1989), which, in a different context, held that continuing at-will employment was sufficient consideration and was not illusory. The court further noted that other states have gone various ways on the issue, but concluded that "there is some legal merit, generally speaking, in the analysis suggested by the dissent, but it simply does not find any support in Michigan law." The dissent argued vehemently against the validity of this particular agreement:

> Obviously, the now-at-will employee is free to discontinue working if he or she deems that remaining promise to be no longer sufficient. Critically, however, that is turned on its head under the circumstances of this case. Instead of an employer rescinding a promise that is inherently not expected to be entirely permanent in the first place, the situation at bar involves taking an existing unilateral contract, and in exchange for nothing whatsoever, requiring the employee to make an additional promise of his or her own beyond merely performing in execution of that unilateral contract. Again, under these circumstances, I believe that there is such a profound lack of obligation on the employer's part that there has been a complete failure of consideration. While I agree with the majority's observation that

Michigan case law does not "support" this conclusion to the extent that I find no case law explicitly dictating it, I also find no case law precluding it, and ample authority for finding it not only legal but just.

Other State Approaches

While many states follow the same rule as Michigan, other states differ in their approach. For example, North Carolina and Pennsylvania both hold that continued employment is not sufficient consideration, thus, requiring employers to offer some other form of compensation.[5] Others states, such as California, hold that non-competition agreements are categorically unenforceable as against public policy.[6]

Not all states have adopted such bright line rules on the topic. For example, in Illinois, the First District Appellate Court held that employers must offer at least two years of continued employment to constitute adequate consideration to support a valid restrictive covenant.[7] While the Illinois law may seem fairly straight forward, not all federal courts applying Illinois law have been willing to apply the two year rule.[8] Therefore, in Illinois, the consideration analysis may be different depending on whether the case is in state or federal court.

Further, other jurisdictions have held that continued employment promised in exchange for signing a non-compete agreement must be for a substantial time after the covenant was signed.[9] However, those jurisdictions offer few bright lines to clarify what duration of continued employment will suffice to serve as sufficient consideration.

Is Michigan Changing Course?

A recent Michigan Court of Appeals decision, now accepted for hearing by the Michigan Supreme Court, recently took up this issue. In *Innovation Ventures, LLC*,[10] the plaintiff contracted with the defendant, Liquid Manufacturing, to bottle 5-Hour Energy drinks. Additionally, the plaintiff contracted with the defendant, K&L Development, to market 5-Hour Energy. As a condition of doing business together, Innovative Ventures forced the defendants to sign contracts containing various restrictive covenants including non-competition agreements.[11]

Innovation Ventures, approximately two weeks after entering into the agreements, ended its business relationship with the defendants. In response, K&L Development and Liquid Manufacturing came together and began working to compete with 5-Hour Energy. Innovative Ventures responded by bringing suit alleging that the defendants breached their contracts and violated their non-competition agreements. [11]

The court recognized that "[m]ere continuation of employment is sufficient consideration to support a noncompete agreement," thus, "the agreements, on their face, contained valid consideration for the execution of the [contracts]."[12] However, the court's analysis did not stop there. The court went on to note that Innovative Ventures did not deliver the consideration it promised to the defendants for entering into the agreements, *i.e.,* continued employment. Citing cases for the principle that "a complete or substantial failure of consideration may justify the rescission of a written instrument," the court identified various decisions from other jurisdictions that support the position that continued employment, promised in exchange for signing a non-compete agreement, must be for a substantial time after the employee signed the covenant. Accordingly, the court held that "although the agreements purported to provide valid consideration, there was no genuine issue of material fact that the discontinuation of the business/employment relationship within two weeks of the signing of the agreements constituted a failure of consideration." In reaching this conclusion, the Court did not take head-on the rationale stated previously by the panel in *Posselius* (which had been issued six months previously).

On July 1, 2015, the Michigan Supreme Court granted Innovation Ventures's application for leave to appeal.[13] The Supreme Court will ultimately determine whether continued employment must continue for a substantial time, or whether a mere promise of continued employment is sufficient.

Implications for the Future

The Michigan Supreme Court ruling may have important implications on how Michigan employers conduct business, and whether out-of-state employers will be willing to bring their business into the state. The appeal will likely attract several amicus briefs. If the Michigan Supreme Court upholds the *Innovation Ventures* decision, it will force employers to promise some length of continued employment, or pay bonuses or other consideration to their employees in exchange for signing the restrictive covenants. Depending upon the standard adopted, it could take years for the law to coalesce around established rules and principles such that employers can act with certainty with their at-will employees.

On the other hand, the fact that leave was granted suggests that perhaps the Court will follow the majority opinion in *Posselius* and preserve the existing rule. To go another way would require the court to distinguish non-compete agreements from other sorts of contracts where continued employment has already been held to constitute adequate consideration, as argued in *Posselius*. It is possible that the Court could strike a middle-ground by allowing consideration of the length of post-execution employment to be considered as one aspect as to whether the non-compete, *in toto,* is reasonable under Michigan law, a review which is already a fact-intensive inquiry, and a result which would not do any violence to existing Michigan contract law principles. Either way, one more issue of Michigan law surrounding the ever-contentious field of non-compete agreements will be settled.

ENDNOTES

1. *QIS, Inc v Indus Quality Control, Inc,* 262 Mich App 592, 594; 686 NW2d 788, 789 (2004). *See generally,* Pappas, McNeill & Quick, *Michigan Business Torts,* § 3.5 (ICLE, 2013).
2. *See Michigan Business Torts, supra,* and Tinio, "Sufficiency of consideration for employee's covenant not to compete, entered into after inception of employment," 51 A.L.R.3d 825 (1973 & suppl.).
3. *Robert Half Int'l, Inc. v. Van Steenis,* 784 F.Supp. 1263, 1273 (E.D. Mich., 1991).
4. *Posselius v Springer Pub Co, Inc,* No. 306318, 2014 WL 1514633 (Mich Ct App April 17, 2014).
5. *See Kadis v. Britt,* 224 N.C. 154, 29 SE.2d 543, 548–49 (1944); *see also George W. Kistler, Inc. v. O'Brien,* 464 Pa. 475, 347 A.2d 311, 316 (1975).
6. *See Armendariz v Foundation Health Psychare Services, Inc.,* 24 Cal 4th 83, 123 n 12; 6 P3d 669, 696 (2000).
7. *Fifield v Premier Dealer Servs, Inc.,* 993 NE.2d 938 (Ill. App. Ct.) app. den. 996 NE.2d 12 (Ill. 2013).
8. *See Montel Aetnastak, Inc. v. Miessen,* 998 F Supp 2d 694, 716 (ND Ill 2014).
9. *See, e.g., Lucht's Concrete Pumping v. Horner,* 255 P.3d 1058, 1063 (Colo 2011); *Brown & Brown, Inc. v. Mudron,* 379 Ill. App. 3d 724, 728; 887 NE.2d 437 (2008); *Summits 7, Inc. v. Kelly,* 178 Vt. 396, 405; 886 A.2d 365 (2005); *Curtis 1000, Inc. v. Suess,* 24 F.3d 941, 946 (7th Cir., 1994) (citations omitted) (explaining that Illinois law requires "that for continued employment to count as consideration it must be for a 'substantial period.'"); *Zellner v. Stephen D Conrad, MD, PC,* 183 A.2d 250, 256; 589 NYS.2d 903 (1992) (explaining that, although an employer has the right to terminate the employment of an at-will employee at any time, and forbearance of that right is a legal detriment that can constitute consideration, "[i]t is certainly true that this detriment would have little meaning if the employer exercised his right to terminate the employment shortly after the execution of the agreement."); *Central Adjustment Bureau, Inc. v. Ingram,* 678 SW.2d 28, 35 (Tenn 1984); *Simko, Inc v. Graymar Co,* 55 Md. App. 561, 567; 464 A.2d 1104 (1983).
10. *Innovation Ventures, LLC v. Liquid Mfg., LLC,* No. 315519, 2014 WL 5408963 (Mich. Ct. App. Oct. 23, 2014).
11. *Id.* at *5.
12. *Innovation Ventures, LLC,* 2014 WL 5408963 at *10.
13. *Innovation Ventures, LLC v Liquid Mfg, LLC,* 865 NW2d 28 (Mich 2015).

*Daniel D. Quick is a business trial attorney with Dickinson Wright PLLC in Troy. Summer associate Brandon L. Debus contributed to this article.

An Overview of the 2015 Amendments to the Federal Rules of Civil Procedure

*by: Ken Treece**

Barring unforeseen congressional action, on December 1, 2015, amendments to the Federal Rules of Civil Procedure will go into effect. These amendments are designed to facilitate the "just, speedy, and inexpensive determination of every action," as mandated by Rule 1. Indeed, Rule 1 itself is amended to clarify that its obligations fall upon both the "courts and the parties." In that regard, cooperation and proportionality are overarching themes running throughout the amendments. A brief summary of the most significant changes to the Rules follows.[1]

Amendment to Rule 4. Summons

Rule 4(m) is amended, reducing the time for service of the complaint from 120 days after filing to 90 days. The Committee Notes offer the reminder that "[s]hortening the time to serve under Rule 4(m) means that the time of the notice required by Rule 15(c)(1)(C) for relation back is also shortened."

Amendment to Rule 16. Pretrial Conferences; Scheduling; Management

Subsection 16(b)(2) governs the time for issuance of a scheduling order. This subsection is amended to reduce the time to issue the order, absent good cause for delay, to the earlier of "90 days after any defendant has been served" [down from 120 days] or "60 days after any defendant has appeared" [down from 90 days]. The Committee Note emphasizes the goal to "reduce delay at the beginning of litigation."

Subsection 16(b)(3) governs the content of scheduling orders. Subsection (b)(3)(B)(iii) is amended to add "preservation" to the topics that may be addressed concerning electronically stored information ("ESI"). Encouraging discussions amongst the parties and the court regarding preservation can alleviate the concerns of both over- and under-preservation of potentially relevant ESI.

Subsection 16(b)(3)(B)(iv) concerns agreements regarding claims of privilege, and is amended to expressly reference Federal Rule of Evidence 502. Rule 502 (specifically Rule 502(d)) allows the court to enter an order protecting any disclosure, inadvertent or otherwise, from operating as a waiver in the pending proceeding or in any other federal or state proceeding. Rule 502(d) was intended to reduce the time and cost associated with privilege review prior to document productions. The rule is promoted here and in the amendment to Rule 26(f)(3) to encourage parties to use it to their advantage.

Subsection 16(b)(3)(B)(v) is added. It provides that the scheduling order may "direct that before moving for an order relating to discovery, the movant must request a conference with the court." According to the Committee Note "[m]any judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion."

Amendments to Rule 26. Duty to Disclose; General Provisions Governing Discovery.

Rule 26(b) governs the scope of discovery and its limits. Subsection 26(b)(1) is amended by incorporating the "proportionality" factors currently listed in subsection 26(b)(2)(C)(iii) and adding to them. Specifically, the subsection now limits permissible discovery to nonprivileged, relevant information that is "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." This change actually restores the proportionality factors to where they first appeared in the 1983 amendments. The Committee Note states that "[t]his change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections."

Subsection 26(b)(1) is amended by deleting the often-invoked "reasonably calculated to lead to the discovery of admissible evidence" provision. The subsection now reads, "Information within this scope of discovery need not be admissible in evidence to be discoverable." The Committee Note explains that this change was needed because the "reasonably calculated" language "has been used by some, incorrectly, to define the scope of discovery." The language was never intended to expand the scope of discovery, but simply to preclude objections based on admissibility of otherwise relevant evidence.

Rule 26(d) governs the timing and sequence of discovery. Subsection 26(d)(2) is added to allow for delivery of Rule 34 requests twenty-one days after a party has been served (1) upon the party served or (2) by the party served to the plaintiff or any other party that has been served. Subsection 26(d)(2)(B) provides that the Rule 34 requests will be deemed served at the first Rule 26(f) conference. The purpose is to allow for substantive, meaningful discussion of discovery needs and limitations prior to and at the conference.

Rule 26(f) concerns the conference of the parties and the discovery plan. Subsection 26(f)(3)(C) and (D) are amended in parallel with Rule 16(b) to provide that discovery plans may address preservation of ESI and whether to incorporate any agreements regarding disclosure of privileged materials into a court order under Federal Rule of Evidence 502.

Amendment to Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

Rule 34(b) governs the procedure for making and responding to Rule 34 discovery requests. Subsection 34(b)(2)(A) is amended in conjunction with Rule 26(d)(2) and provides that a response delivered thereunder is due "within 30 days after the parties' first Rule 26(f) conference."

Subsection 34(b)(2)(B) is amended to require that grounds for an objection be stated "with specificity." Additionally, if the responding party elects to produce copies of documents or ESI rather than permit inspection, the "production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response." With regard to the level of specificity required, the Committee Note provides this example:

> An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources.

Subsection 34(b)(2)(C) is amended to require that an "objection…state whether any responsive materials are being withheld on the basis of that objection." The Committee Note does not contemplate the need for a log or other detailed description. "An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been 'withheld.'"

Amendment to Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

Rule 37(e) has undergone the most significant change. It formerly concerned itself only with the failure to provide ESI due to the "good faith, routine operation of an electronic information system." Now, it provides a graduated scale of sanctions a court can apply depending on specific factual findings required by the Rule. As written it applies only to ESI.

In cases where the responding party has lost relevant ESI responsive to a discovery request, the court must consider the following:

1. Has ESI been lost "that should have been preserved in the anticipation or conduct of litigation?" If the answer is "Yes," move on to the next question. If the answer is "No," judicial action is not authorized.

2. Was the loss of ESI "because a party failed to take reasonable steps to preserve it ***and*** it cannot be restored or replaced through additional discovery?" (emphasis added.) If the answer is "Yes," move on to the next question. If the answer is "No," judicial action is not authorized.

3. Was the loss of ESI "intended to deprive another party of the information's use in the litigation?" If the answer is "No," move on to the next question. If the answer is "Yes," the court may "presume that the lost information was unfavorable to the party," "instruct the jury that it may or must presume the information was unfavorable to the party," or "dismiss the action or enter a default judgment."

4. Was the loss of ESI prejudicial to another party? If the answer is "Yes," the court may upon finding such prejudice "order measures no greater than necessary to cure the prejudice," such as attorney fees or allowing additional discovery, but not including those measures set forth in item 3, above. If the answer is "No," judicial action is not authorized.

The Committee Note makes clear that the amended rule is the only source of sanctions a court may rely upon when ESI under a duty to preserve is lost. "[The Rule] authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used."

Quick Take-Aways

It is easy to see that reducing the time and cost of litigation, but not at the expense of doing justice, lay at the heart of this amendments package. However, there are some particulars that will require an immediate adjustment in the life of the federal court practitioner.

- The time for service of process is reduced from 120 to 90 days.
- The phrase "reasonably calculated to lead to the discovery of admissible evidence" is deleted. Any form discovery responses or objections that rely on the "reasonably calculated" language should be purged.
- Twenty-one days after a party is served, Rule 34 document requests may be delivered to the served party, and the served party may deliver such requests to the plaintiff. The requests will not be deemed served until the first Rule 26(f) conference.
- Given the increased focus on proportionality, draft more targeted, precise Rule 34 requests. Seek the most critical information first, and fill in the gaps later. This should result in fewer objections and quicker document productions.
- Objections to Rule 34 requests must be stated with specificity and also must state whether any documents are being withheld pursuant to the objection.
- There is now a uniform standard for sanctions for spoliation of ESI. Courts may no longer rely on "inherent authority" to sanction a party for loss of ESI.

ENDNOTES

1. The Rules package transmitted on April 29, 2015 by the Supreme Court of the United States to both houses of Congress can be found here:

   http://www.uscourts.gov/file/document/congress-materials. The Committee Notes referenced and quoted herein are a part of this package.

** Ken Treece is a senior attorney at Miller, Canfield, Paddock and Stone, PLC. He is a member of the firm's e-Discovery & Legal Tech Services Group.*

What about us?
Lawyer Collection Cases After *Fraser Trebilcock Davis & Dunlap PC v. Boyce Trust 2350* and the Proposed Amendment to MCR 2.403(O)(6)

*by: Lindsay James**

A law firm, like any other business, has issues collecting from clients who, for whatever reason, fall behind in payment and/or refuse to pay their bills. This sometimes leads to the filing of a lawsuit in district or circuit court for collection. It requires the time, effort, and expense of at least one attorney in the office devoting his/her time to the matter (drafting the complaint, participating in discovery, motion practice, and/or perhaps a trial). Instead of billing on matters for paying clients, the law firm is forced to spend even more time on a matter which already has required more time and effort than it may have been worth. For this reason, most of us keep these types of matters in-house and pursue them on our own. Short of another firm agreeing to take the case on a contingency basis, paying another firm to collect is likely throwing good money after bad. Making matters worse, former clients may defend by asserting some sort of professional negligence claim, whether merited or not.

This is a scenario that was recently experienced by a southeast Michigan law firm in a case that went all the way to the Michigan Supreme Court.

The facts are familiar. The law firm did work for a client. The client was dissatisfied and did not pay. The law firm sued the former client in circuit court. The matter proceeded to case evaluation, where the law firm accepted and the former client rejected. The case then proceeded to trial, where the law firm obtained a verdict above the evaluation number, which set the firm up to collect case evaluation sanctions from the former client. Right?

MCR 2.403(O)(1) provides:

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation.

The phrase "actual costs" is defined as:

> (a) those costs taxable in any civil action, and
>
> (b) a ***reasonable attorney fee*** based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.

MCR 2.403(O)(6) (emphasis added). The law firm filed a post-judgment motion seeking case evaluation sanctions, and the trial court granted the motion. The sanctions were hefty in that the attorney fees comfortably exceeded the verdict amount. The trial court "recognized that an individual litigant (including one who is an attorney) cannot recover attorney fees for engaging in self-representation, but, relying on certain language from *Kay v. Ehrler,* 499 U.S. 432 (1991), concluded that this prohibition did not extend to a corporation such as Fraser Trebilcock seeking to recover a fee for legal services performed by its member lawyers."

The Court of Appeals, also relying on *Kay v. Ehrler,* affirmed the decision to allow the award of fees "despite caselaw establishing that an individual attorney-litigant may not recover such fees for self-representation." A dissenting judge

concluded that the case of *Omdahl v. West Iron Co. Bd. of Ed, 478* Mich. 423; 733 NW2d 380 (2007) (discussed below) extended to and foreclosed the law firm's request for fees.

The Supreme Court unanimously reversed, holding that the work the law firm performed was not an "attorney fee." *Fraser Trebilcock Davis & Dunlap PC v Boyce Trust 2350,* – N.W.2d –; 2015 WL 3495514 (June 3, 2015), relying principally on *Ohmdahl*. In *Ohmdahl,* the Supreme Court dealt with a pro se litigant (who also happened to be an attorney) who sought statutory attorney fees as a result of the filing of a successful Open Meeting Acts action. The Court held that an "attorney is defined as an agent of another person, [and that] there must be separate identities between the attorney and the client before the litigant may recover actual attorney fees." Because there was no agency relationship between Mr. Ohmdahl and *himself*, he was not entitled to attorney fees in the case. Essentially, if Mr. Ohmdahl was not required to shell out money to an *attorney* to litigate the case, he did not deserve to be awarded *attorney* fees, and his time would not be compensated.

That rationale carried the day in *Fraser,* with the Court holding that "in the case of an individual attorney-litigant, the requisite distinction in identity between attorney and client is lacking, there is no attorney-client relationship from which an 'attorney fee' may arise." The law firm argued that its situation was different from *Ohmdahl* because an incorporated law firm is an entity distinct from its member lawyers. Therefore, when the lawyers appeared on behalf of the law firm in the collection case, the agency relationship was present. This did not persuade the Court, however, as it found no practical distinction between the law firm as plaintiff and the law firm as its purported counsel in the litigation. It was basically the same set of characters operating under the same name. The Court further declined to adopt *dicta* from the U.S. Supreme Court's case in *Kay,* which noted in a footnote that "an organization is not comparable to a *pro se* litigant because the organization is always represented by counsel, whether in-house or *pro bono,* and thus, there is always an attorney-client relationship." In the end, the Court left for another day whether there would be a different result in Michigan if a corporate entity sought attorney fees for litigation activities of in-house counsel.

The *Fraser* case presumably led the Michigan Supreme Court to consider the following amendment to the case evaluation rule. On July 6, the Court proposed the following changes to MCR 2.403(O)(6):

> (b) a reasonable ~~attorney~~ fee based on a reasonable hourly or daily rate as determined by the trial judge for legal services necessitated by the rejection of the case evaluation, which may include legal services provided by attorneys representing themselves or the entity for whom they work.

The Staff Comment makes it clear what the goal is, to "allow a reasonable fee to be included in a request for costs by attorneys who represent themselves or who are employed by a party to the case for legal services provided after case evaluation is rejected." The Court is soliciting comments through September 1, 2015.

Would this be a good change?

For attorneys, this would be a welcome addition. It provides a clearer avenue to be made whole when we get stiffed. Under the current rule and precedent, the case evaluation rule, for us, is defensive only. Because there is no incentive for the former client defendants to accept the case evaluation award since there is no sanctions threat, the former client defendants have a tactical advantage. As self-represented attorney plaintiffs, however, we need to weigh the potential effects of not accepting like any other litigant. As the Court held in *Fraser,* "the purpose of MCR

2.403(O) is to encourage settlement by plac[ing] the burden of litigation costs upon the party who insists upon trial by rejecting a proposed mediation award." In cases with self-represented attorney-plaintiffs, as the Rule is presently construed, the intended purpose will not be served.

The ruling also extends broader than a law firm's collection cases against former clients. For example, in cases where *we* are sued for whatever reason (again, assuming self-representation), the case evaluation rules will not provide us sanctions as defendants.

The result also is unfair in that we are required to devote time and effort in the collection case. Our time is valuable and could be spent billing on other matters. Time spent on the collection case is time lost by an otherwise productive attorney. The matter also may not necessarily be assigned to another attorney in the firm who may not be as busy, as it is often the case that the attorney handling the underlying matter may need to handle the collection case because of his/her familiarity with the matter.

Further, in terms of the literal language, are these not "attorney fees" when the work is performed by an *attorney?* They *are* attorney's fees. Was it right for the Court to look to dictionary definitions of what an attorney is in light of clear language like this? If we are essentially not "attorneys" when we bring an action to recover our firm's fees in our collection cases, are we not "attorneys" subject to the ethics rules in such cases? I would presume the answer is that we still are. And if we still are, then isn't this an unfair double standard?

If the argument above sounds like it was written by an attorney — it was. In fairness, there are other factors we as a bar should consider.

For example, would the rule open up the possibility of an attorney windfall? Caselaw is clear that the case evaluation rule is not intended to produce a windfall to attorneys. In *Fraser,* the verdict amount was $73,501.90; yet the ultimate fee award was $102,000, and this was after a 1/3 reduction in the fees sought. Assuming the firm could collect it, the firm would be compensated for the amounts the client owed the firm, *plus* another $102,000. Not bad at all. It may stretch reasonableness to suggest that the firm would have been otherwise able to employ its attorneys to net $102,000 in the open market for those hours spent on the collection case. With the caveat that we do not know exactly what occurred in the case, it also may be debatable whether hiring another law firm would have ended up costing the Fraser law firm in excess of $100,000 to litigate the case. When we represent clients, we often make certain billing choices in order to make sure our clients are treated fairly and because we want to keep them long-term. Those considerations are probably not the same when we handle a matter in-house.

Perhaps a middle position would be to not award firms the amounts billed at their standard market rates as a case evaluation sanction, but instead at some rate which takes account for the fact that the work was done in-house. Like anyone in commerce, a premium is paid by the buyer of goods or services. Law firms operate no differently. Perhaps the solution is to award a rate which takes the profit out of the equation and compensates solely for time lost. So while we may not earn what we would have earned in the open market, we don't take a monetary bath either.

Another issue is whether it is fair for us to be distinguished from *pro se* litigants, who, like us, have to take time away from work, business, or pleasure to litigate cases. Why should we be treated differently simply because we are attorneys? It may be an open question whether the proposed new language is intended to address *pro se* litigants and effectively overrule *Ohmdahl,* particularly with the extra language at the end of the proposed MCR 2.406(O)(6).

While the proposed rule would bring clarity to this issue in terms of the case evaluation rule, what about other statutes? Who is to say the Legislature will follow suit and strike out the word "attorney" from "attorney fees" in current statutes or otherwise make explicit that self-represented lawyer parties are entitled to be compensated for their time litigating successful cases? *Ohmdahl* is still on the books and will continue to control those cases.

In light of circumstances such as these, firms should, as we do, consider putting an attorney fee and costs of collection provision in their retainer agreements. That way, the right to attorney fees in any collection suit is a matter of contract, diminishing the importance of the case evaluation sanctions rule. It is unclear from the *Fraser* case whether the law firm had such a provision in its retainer agreement. Had it done so, that may have effectively avoided the case evaluation sanctions issue because fees would have been part of their judgment.

It remains to be seen what kind of reaction the Supreme Court gets to the proposal of the new rule. The only parties who stand to be negatively affected are those who do not pay their bills, not the most sympathetic bunch. But as a bar we should consider all of the above factors (and more) in determining how we organize and police our profession regarding the economic needs and realities of the practice of law.

*Lindsay James is an attorney at The Meisner Law Group, P.C. in Bingham Farms, Michigan.

State Bar of Michigan
Litigation Section Council Directory
September 2016-2017

OFFICERS:

Marcy Tayler, *Chair*
Detroit

Michael Butler, *Chair-Elect*
Lathrup Village

Paul Hudson, *Secretary*
Kalamazoo

Brandon Evans, *Treasurer*
Marquette

COUNCIL MEMBERS

TERM EXPIRES 9/30/16

Michael O. Fawaz, Royal Oak

Hon. Donald A. Johnston, III, Grand Rapids

Kevin J. Stoops, Southfield

James M. Straub, Saint Joseph

TERM EXPIRES 9/30/2018

Daniel L. Moffitt Bingham Farms,

Thaddeus E. Morgan, Lansing

Daniel P. Steele, Livonia

TERM EXPIRES 9/30/2017

Jeffrey A. Crapko, Troy

Rachel S. Croke, Detroit

Albert J. Dib, Royal Oak

Kristopher K. Hulliberger, Royal Oak

Daniel J. McGlynn, Troy

Bernard C. Schaefer, Grand Rapids

COMMISSIONER LIAISON

Daniel D. Quick, Troy

LITIGATION SECTION
State Bar of Michigan
306 Townsend Street
Lansing, MI 48933-2012

NONPROFIT
U.S. POSTAGE PAID
LANSING, MI
PERMIT NO 191