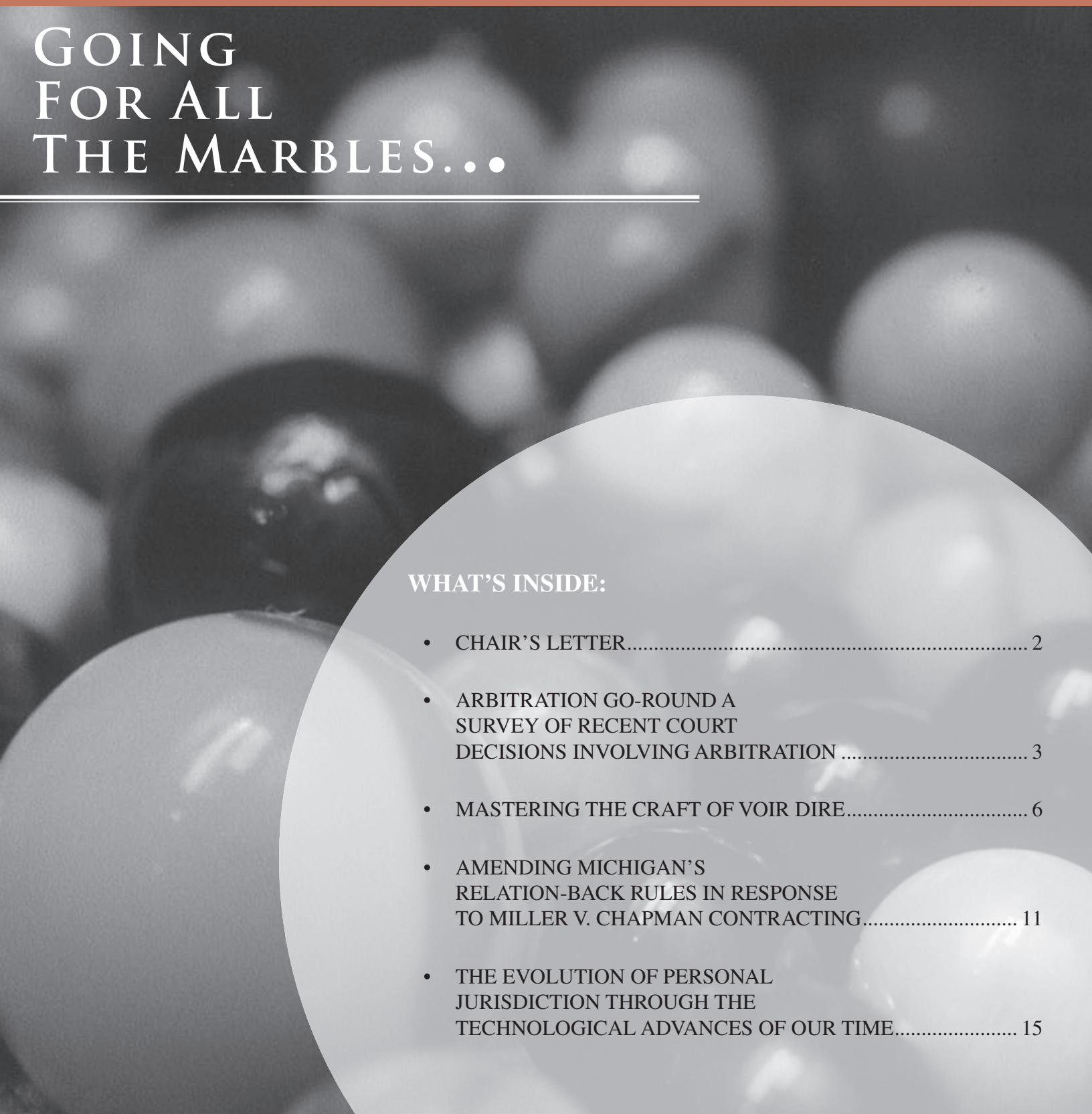
THE LITIGATION NEWSLETTER

SUMMER 2008

GOING FOR ALL THE MARBLES...



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Address correspondence and items for publication (hard copy and disk if possible) to:

Dari Craven Bargy *Esq.*
MILLER CANFIELD PADDOCK & STONE
277 South Rose St.
Kalamazoo, Michigan 49007
(269) 381-7030
Email: bargy@millercanfield.com

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CHAIR'S LETTER

by: ***Susan Wilson Keener***

Keener Law Offices, PLC

Dear Colleagues:

The Litigation Section of the State Bar of Michigan has had a very active and hard working Council this year seeking to provide you with membership benefits, services and educational opportunities. I hope you have been able to attend one or more of our excellent continuing legal education programs in the Masters in Litigation Series or Litigation Boot Camp II. One of the Masters programs held in March, 2008, entitled *The Cybersleuth's Guide to the Internet,* was geared toward honing the litigator's skills in fact-finding through the internet. ICLE reports that the program achieved record attendance, filling the venue to capacity.

We are now heading into those precious weeks of summer when you may long to find some time with family and friends, as a respite from your hectic profession, or some time to brush up some skills to boost you in your work. If either of these goals is on your list for the summer, you will not want to miss this year's summer conference which is just around the corner. **The 2008 Litigation Summer Conference** (July 25-26, 2008) will be held at the newly renovated Summit Village of Shanty Creek Resort in one of the most beautiful areas in Northern Michigan. This destination resort offers fine dining, a full-service spa, great golf, and breathtaking views as just some of the highlights of one of Michigan's finest resort locations. The Section will again host its popular "Mountain Top" reception for attendees on Friday evening.

In addition to a fabulous resort atmosphere, we are extremely fortunate to have as our speaker Gerry Williams, nationally known speaker who has mastered the expertise of presenting excellent "hands on" negotiation seminars. He will present "The Complete Legal Negotiator". The program will allow you to perfect your negotiation skills with expert guidance from a one-of-a-kind instructor. Improve your results immediately with insights gleaned at this multimedia hands-on program. You will walk away from the program with the skills to diagnose and respond appropriately to opponents who create unnecessary difficulties, deal with uncooperative and aggressive negotiation styles, reach "getting to yes" solutions and counsel and educate clients throughout the dispute resolution process.

Our Litigation Section Newsletter editors are always interested in providing opportunities to section members to publish articles of interest to litigators. The Section has developed guidelines to assist you in having your article ready for publication. Contact one of the newsletter editors; Dari Craven Bargy or Lynn Shecter, if you have an article to offer or would like more information on the guidelines. What a great way to market your expertise and knowledge.

On behalf of the Officers and Council of the Section, we welcome your input and participation in our Section's activities and continuing legal education programs offered in the upcoming year by the Section.

Sincerely,

Sue Keener

ARBITRATION GO-ROUND
A Survey of Recent Court Decisions Involving Arbitration

by: ***Lynn H. Shecter****

The United States Supreme Court has just invalidated a contractual provision permitting the vacatur and modification of an arbitration decision under the Federal Arbitration Act where "the arbitrator's conclusions of law are erroneous." *Hall Street Associates, LLC v Mattel, Inc,* 2008 U.S. LEXIS 2911,* 8. The Supreme Court held that the grounds for vacatur and modification provided by §§ 10 and 11 of the FAA are exclusive. Section 10 of the Act[1] lists grounds for vacating an award, while § 11[2] names those for modifying or correcting one.

The decision, however, was remanded for possible consideration by the Court of Appeals as to whether the lower Court's decision concerning the original arbitrator's ruling could be addressed under the heightened review available, not under the FAA, but the case management authority derived from Rule 16 of the Federal Rules of Civil Procedure. The Supreme Court has held that parties can opt out of the federal act, provided the state arbitration statute does not contain provisions that would undermine the federal act's aim of facilitating the resolution of disputes involving maritime or interstate commerce by arbitration. Compare *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University,* 489 U.S. 468, 476-79, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989), with *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 686-87, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996). Thus, it remains important to view the standards by which Michigan courts have analyzed arbitration decisions.

These issues are of increasing importance as alternative dispute resolution becomes more popular. There are two forms of arbitration: statutory and common law. *Wold Architects & Engineers v Strat,* 474 Mich. 223, 229; 713 N.W.2d 750 (2006). *Wold, supra* at 231, 235. Common-law arbitration agreements, unlike statutory arbitration agreements, may be unilaterally revoked at any time before an award is rendered. *Id.* at 238. Statutory arbitration is governed by MCL 600.5001 *et seq.* Common-law arbitration is any agreement to arbitrate that does not comply with the requirements of § 5001, i.e., that the agreement is in writing and provides that a judgment of any circuit court may be rendered upon the award. All that is required is a clear indication that the parties intended to submit the dispute to arbitration and to be bound by the decision. 6 CJS, Arbitration, § 26, pp 89-90. *Kohler Oil Co. v. B & D Party Store,* 2007 Mich. App. LEXIS 2870, 3-4 (Mich. Ct. App. 2007).

The most recent decisions of the Court of Appeals[3] have not departed from the traditional standard of limited review of arbitration decisions.[4] In fact, the Court has applied this standard to reverse a trial court's vacation of an arbitration decision, to approve the grant of extraordinary authority to an arbitrator, and even to note that errors of law are not fatal to an arbitration decision. Of interest was that it was not even necessary for the arbitration agreement to be in writing.

It is almost axiomatic that judicial review of an arbitration award is limited. *Saveski v Tiseo Architects,* Inc, 261 Mich. App. 553, 555; 682 N.W.2d 542 (2004). An arbitration award may be vacated on application of a party only if it was procured by corruption, fraud, or other undue means; if there was evident partiality by an arbitrator appointed as a neutral[5],corruption of an arbitrator, or misconduct prejudicing a party's rights; if the arbitrator exceeded his or her powers; or if the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights. MCR 3.602(J)(1).

Generally, the parties are free to designate the terms and conditions of their arbitration, including the powers of the arbitrator. Arbitrators exceed their powers only whenever they act beyond the material terms of the contract from which they primarily draw their authority. *Dohanyos v Detrex Corp* (After Remand), 217 Mich. App. 171, 176; 550 N.W.2d 608 (1996). "[C] ourts may not substitute their judgment for that of the arbitrators and hence are reluctant to vacate or modify an award when the arbitration agreement does not expressly limit the arbitrators' power in some way." *Gordon Sel-Way, Inc v Spence Bros, Inc,* 438 Mich. 488, 497; 475 N.W.2d 704 (1991).

* *Lynn H. Shecter, of Roy, Shecter & Vocht, P.C., Bloomfield Hills, has a practice devoted to complex litigation, and employment and consumer-related litigation and class actions. She is also a member of American Arbitration Association employment and consumer panels.*

However, "[t]he character or seriousness of an error of law which will invite judicial action to vacate an arbitration award . . . must be error so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." *DAIIE v Gavin,* 416 Mich. 407, 443; 331 N.W.2d 418 (1982). It therefore is doubtful that a contractual provision such as that presented in *Mattel,* would survive, as an error of law which did not reach this level does not appear to be reversible. The arbitrator's findings of fact are not reviewable. *Id.* at 429.

An attempt to provide more power to the arbitrator occurred in *Glasnak v Garmo,* 2008 Mich App Lexis 373 (Feb. 21, 2008), a commercial case. This involved a dispute concerning whether plaintiff was required to make capital contributions as a member of a limited liability company.

> The stipulated orders referring these consolidated matters to arbitration specifically provided that the arbitrator was to be granted "extraordinary powers" and empowered to "consider equitable resolutions . . . and . . . make such determinations as shall be deemed by him/her to be fair and equitable." As part of the relief awarded …the arbitrator awarded a return of plaintiff's investments… relief …authorized by the [Michigan Limited Liability Company Act]…MCL 450.4515(1). Further, the relief was within the broad scope of the "extraordinary" authority granted to the arbitrator to "consider equitable resolutions" and "make such determinations as shall be deemed…to be fair and equitable." *Id,**2-3.

The Court of Appeals supported this exercise of the arbitrator's authority. The *Glasnak* panel not only upheld this extensive application of power, but also rejected the legal challenges, finding there was no error of law apparent from the face of the arbitration award, or inconsistent with statute. *Id,* *9.

Even more freedom for the arbitrator was seen in the decision in *Toll Bros v Fekete,* 2008 Mich. App. LEXIS 376 (Mich. Ct. App. 2008), an employment discrimination appeal from the arbitrator's decision that termination was motivated in part by gender discrimination. The parties' agreement was consistent with the requirement that arbitration awards "must be in writing and contain findings of fact and conclusions of law", *Rembert v Ryan's Family Steak Houses, Inc,* 235 Mich App 118, 165; 596 NW2d 208 (1999), but did not include specific requirements regarding the scope of formal findings of fact or conclusions of law. *Toll Bros. v. Fekete,* 2008 Mich. App. LEXIS 376 (Mich. Ct. App. 2008) *4.

The Court of Appeals found, however, that the eight-page arbitrator opinion summarizing the evidence and explaining his findings and conclusions satisfied the requirement of a written decision setting forth the findings and conclusions on which the decision was based. *Id.* at 4-5.

> Our Court has concluded that arbitrators have exceeded their powers whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." Dohanyos, supra at 175-176. As explained in Gavin, supra at 429:Arbitration by its very nature, restricts meaningful legal review in the traditional sense. As a general observation, courts will be reluctant to modify or vacate an award because of the difficulty or impossibility, without speculation, of determining what caused an arbitrator to rule as he did. The informal and sometimes unorthodox procedures of the arbitration hearings, combined with the absence of a verbatim record and formal findings of fact and conclusions of law, make it virtually impossible to discern the mental path leading to an award. Reviewing courts are usually left without a plainly recognizable basis for finding substantial legal error. It is only the kind of legal error that is evidence without scrutiny of intermediate mental indicia which remains reviewable, such as that involved in these cases. In many cases the arbitrator's alleged error will be as equally attributable to alleged "unwarranted" factfinding as to asserted "error of law." In such cases the award should be upheld since the alleged error of law cannot be shown with the requisite certainty to have been the essential basis for the challenged award and the arbitrator's findings of fact are unreviewable. *Toll Bros. v. Fekete,* 2008 Mich. App. LEXIS 376, 6-7 (Mich. Ct. App. 2008)

Where the arbitrator did not keep a record of the findings in a case at all, the Court of Appeals relied on *Saveski v Tiseo Architects, Inc,* 261 Mich. App. 553, 556-557; 682 N.W.2d 542 (2004). In *Saveski,* the Court determined not to extend the requirement of *Rembert v Ryan's Family Steak Houses, Inc,* 235 Mich. App. 118; 596 N.W.2d 208 (1999), a claim under

the Civil Rights Act, MCL 37.2101 *et seq.* requiring an arbitrator to record the findings of fact and conclusions of law that led to the arbitration award. The *Saveski* Court specifically found that extending the application of this requirement to arbitration of more commonplace contractual matters would unnecessarily encumber the informal and efficient arbitration procedures envisioned and fostered by the Supreme Court's holding in *DAIIE v Gavin,* 416 Mich. 407, 434; 331 N.W.2d 418 (1982)]. Therefore, the arbitrator was not required by law to produce specific findings of fact and legal conclusions. 261 Mich. App. at 557. Accordingly, an ordinary contractual case will not require a record. *Active Internet Mktg. v. Auto Net Fin. Servs.,* 2008 Mich. App. LEXIS 175, 5-6 (Mich. Ct. App. 2008).

The Court of Appeals then appears to be continuing a trend toward more flexibility for the arbitrator and arbitration process.

ENDNOTES

1. Title 9 U.S.C. § 10(a) (2000 ed., Supp. V) provides:

   "(a) In any of the following cases [*13] the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

   "(1) where the award was procured by corruption, fraud, or undue means;

   "(2) where there was evident partiality or corruption in the arbitrators, or either of them;

   "(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

   "(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

2. Title 9 U.S.C. § 11 (2000 ed.) provides:

   "In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration –

   "(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in [*14] the award.

   "(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

   "(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

   "The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties."

3. All decisions analyzed were unpublished.

4. "[T]he existence and enforceability of an arbitration agreement are questions of law for a court to determine de novo." *Michelson v Voison,* 254 Mich. App. 691, 693-694; 658 N.W.2d 188 (2003).

5. This does not apply, of course, to an arbitrator appointed by a party in a three-arbitrator panel.

IMPORTANT DATES

July 25-26, 2008	Summer Conference at Shanty Creek Resorts, Bellaire, Michigan
September 19, 2008	Litigation Section Meeting at State Bar Annual Meeting
October 14, 2008	Masters in Litigation: Trials - Tips, Tactics and Practical Tales, Plymouth, MI

**Meetings are open to all members. Please contact Susan Wilson Keener at skeener@keener-law.com*

MASTERING THE CRAFT OF VOIR DIRE

by: ***Kathleen L. Bogas****

Jury selection and communication with the jury are the most important parts of the trial. Some judges refuse to let attorneys conduct their own voir dire or curtail the amount of questioning by the attorneys because they believe it is unnecessarily time-consuming and permits attorneys to grandstand and take control of the courtroom. The trend appears to be going more in that direction. Judges who have been trial attorneys, or those who can adequately control abuses, understand that voir dire properly conducted by attorneys is the most effective way to seat a balanced, fair jury where any biases that exist are revealed.

I learned the importance of voir dire from a defense attorney opposing me in a case early in my career. His name was Jack Vandermale. By the time Jack was finished with his voir dire I knew the verdict would not be in my client's favor and I was right. He spoke to the jury as if he were in their living room having coffee or at a bar having a drink. He talked about the realities of life and drew on their life experiences to convince them that my theory of liability had an unrealistic application to everyday life. Jack knew that he could not have such a personal conversation or connection with the jury during his opening statement or closing argument so he took the opportunity of voir dire to become their friend and the person of reason that they could identify with throughout the trial.

EACH CASE IS UNIQUE

Not every juror sitting on a case has had direct personal experience with the subject matter. Not all jurors have lost a loved one to a catastrophic event; not all jurors have been injured due to someone else's negligence; not all have business acumen or a scientific background.

However, whatever jurors feel about a particular case or set of circumstances, they are likely to feel strongly. Their general attitudes are ingrained before they receive the jury summons. These attitudes and views, bolstered by their life experiences, will be important indicators of their views in a case.

Fairness is usually the central theme in any civil trial. Jurors approach the cases as human stories and see their job as having to determine who is right and who is wrong. By the time jurors get the law in the form of jury instructions they have already come to some conclusions about who is right and what is fair. During jury selection you must discover and fully explore the biases that will drive them to reach their conclusions.

THE DEMEANOR OF THE ATTORNEY IS AS IMPORTANT AS THE WORDS SPOKEN

Some attorneys become very nervous and dread voir dire. Surveys suggest that voir dire is the stage of the trial that litigators like the least.

Many times, due to lack of preparation, lack of forethought, or just because they don't know how to do it, attorneys become paralyzed when conducting voir dire. The rules we apply so well in opening statements and closing arguments about being yourself, establishing rapport with the jury, etc. are soon forgotten by even the most experienced litigator.

Lawyers fear jury selection because we have a lack of control over the jury selection, i.e., we cannot formulate all of the questions and answers ahead of time; we do not know what the answers to our questions will be. This is contrary to what we are taught about trial preparation, that is, we are to maintain control.

We also feel unfamiliar with the jurors and are afraid of the unknown, and saying or doing something that will have far reaching effects on our case.

** Kathleen L. Bogas is a past president of the Michigan Trial Lawyers Association and the National Employment Lawyers Association. She is past chairperson of the Negligence Council and currently is Co-Chair of the Judicial Qualifications Committee of the State Bar.*

Ms. Bogas has been inducted into the American College of Trial Lawyers and is also a member of the College of Labor and Employment Lawyers and the American Board of Trial Advocates. In 2001 she was awarded the Respected Advocate Award from the Michigan Defense Trial Counsel. She has been listed in the Best Lawyers in America since 1989.

All of these fears can be alleviated by simply preparing thoroughly for jury selection. As much time, thought and preparation should be given jury selection as you give your opening statement, closing argument, and all other aspects of the trial.

All of the things we have been taught to apply in the other parts of the trial can equally be put to use in jury selection.

Trial Rule #1: Establish a rapport with the jury during your opening statement and follow it through until the end of the trial. Be yourself and do not talk down to the jurors.
Voir Dire Rule #1: Establish a rapport with the jury during voir dire and follow it through until the end of the trial. Be yourself and do not talk down to the jurors.

Trial Rule #2: Be conversational in your opening statement and closing argument.
Voir Dire Rule #2: Be conversational in your voir dire.

Trial Rule #3: Be a good listener to the answers given by all of the witnesses. Remember: It is not just about your questions. Listen to the answers and follow-up on information given, if appropriate
Voir Dire Rule #3: Be a good listener to the answers given by all prospective jurors. It is your only opportunity to talk with them. Remember: It is not just about your questions. Listen to the answers and do follow-up.

Trial Rule #4: Be interesting in your approach to opening statement, closing argument and questioning of witnesses.
Voir Dire Rule #4: Be interesting in your questioning of the jurors during voir dire. Tailor questions to each person.

Trial Rule #5: Put thought into the order in which you are going to present your witnesses.
Voir Dire Rule #5: Put thought into the order in which you ask voir dire questions and the order in which you question the jurors.

Trial Rule #6: Give thought as to how you will address your client and other witnesses.
Voir Dire Rule #6: Give thought as to how you will address each juror by using their name pronounced correctly.

Trial Rule #7: Never disrespect the judge or opposing counsel during the trial.
Voir Dire Rule #7: Never disrespect the judge, opposing counsel, or a potential juror during voir dire.

Attorneys forget that jurors often are more nervous than the lawyers. They are in an unfamiliar setting and are not sure what their role is, let alone where the telephones and bathrooms are. Try to put them at ease. Explain why you are asking unusual, intrusive questions.

Do not make the fatal error of cross-examining a juror. There is nothing more damaging to a relationship between counsel and a juror, or others who identify with the juror, than when the juror feels that he/she has been cross-examined. By listening sincerely and responding with appropriate questions to the juror's answers, there will be the perception of a conversation rather than a cross-examination. You will make no friends with any of the jurors by showing disrespect to the feelings or beliefs of any of them.

If a juror gives an answer you do not like, do not fall into the trap of trying to argue with the juror in an attempt to change their mind. You won't. Do not attempt to use a prospective juror's answer to a question to show the other jurors how absurd that person's position is. You will only alienate the other prospective jurors.

Involve your client in the jury selection process. Get their thoughts on the type of person they believe would be best suited to hear their case. When you are going through the voir dire process and exercising peremptory challenges, ask your client what he/she thinks. If they have strong feelings about a certain juror, heed their advice. It is their case, not yours.

STEREOTYPING IS ILLEGAL IN THE LAW AND DANGEROUS IN VOIR DIRE

Many of us have used the practice of stereotyping jurors and challenging them based on those stereotypes. Think about who you would select for your case based on the following criteria:

- older v. younger
- salaried employee v. hourly wage earner v. unemployed
- supervisor v. line employee
- high school graduate v. college graduate
- employee of small company v. employee of large company
- low income v. median income v. high income
- rural resident v. urban resident
- male v. female

– person who has suffered injuries v. person who has not
– person who has been a party to a lawsuit v. one who has not
– socially aware person v. one who has other interests
– banker v. social worker
– law enforcement employee v. teacher
– Catholic v. Jewish
– Caucasian v. person of color

Too many attorneys become demographic dependent; that is they select their jurors based on things such as age, race, sex, religion, or career. Studies show that there is no correlation between demographics and verdicts. Psychologists have stated, and life experiences tell us, that stereotypes concerning demographic groupings are usually wrong. People's attitudes and beliefs are not merely a function of race, age, sex, career, etc. Not all women are compassionate. Not all young people are idealistic. Not all rural residents are conservative. Not all social workers have a strong social conscience. Not all people of color are liberal, e.g., Clarence Thomas.

Unfortunately, many attorneys make the assumption that all jurors react the same way to the same basic experiences. This leads attorneys to not ask about specific experiences and the juror's reaction to the events. Remember: It is the impact of the experience on the juror that is important, not the experience in and of itself.

This is not to say that you should disregard a person's occupation, residence, family and employment situation. Rather, they are pieces to consider together with many other factors that you learn about the juror during the actual questioning.

THE METHODOLOGY OF JURY SELECTION CAN BE LEARNED

To learn what voir dire is, is to learn what it is not. It is the only opportunity to talk with the jury and observe, giving them your undivided attention.

When the jury pool walks in, observe them in a friendly manner. Observe their dress, reading materials, and who they appear to be friendly with in the pool. If questionnaires are available, review the handwriting, spelling and neatness.

You want to get the jurors talking as much as possible. Asking questions that elicit only "yes" or "no" answers tell you little about a juror. Follow up on any information that is provided. If the juror appears to be one that you do not want on the jury, keep him/her talking. To remove someone for cause you must put them at ease and get them talking.

Always ask open-ended questions. Do not ask questions that imply the answer. This will get the jurors talking freely. This is different from your approach as a questioner of witnesses during a trial. With jurors, however, you want to go on a fishing expedition in a conversation as opposed to questions and answers.

Ask follow-up questions and listen to the answers. Talk to the jurors individually. When asking questions about life experiences ask whether they or anyone close to them have had such an experience rather than limiting it to "you or anyone in your family." Many people spend much more time with their friends than they do with their family.

Tailor your voir dire questions to your particular case and the problems in the case. For example, if an important witness is of Middle Eastern descent, you want to find out if there is any generalized hostility or suspicion of untruthfulness because of Sadam Hussein or other information received about the Middle Eastern world. If an important witness is gay and that will somehow be disclosed to the jury, what attitudes a prospective juror has may impact on the credibility of the witness. If the defendant has many witnesses and will rely heavily on documents, question how that will impact the prospective jurors. Do not follow the same script for every case. Be flexible in your approach with each juror.

The internet is a tool which can be utilized if you have adequate time and information. In a recent trial we had not completed jury selection in one day. Overnight we "googled" each prospective juror and discovered that one had been involved in a documentary production concerning a subject closely related to a matter in the trial. There was no way in which voir dire would have exposed that past involvement. The following day we brought the information to the attention of the Judge (who was conducting the voir dire) and he explored the issue with the juror. While the challenge for cause failed, a preemptory was used which otherwise would not have been.

YOU CAN EXPOSE THE BIASED JUROR

Jurors come to court with a predisposition to believe one side or the other. They come with attitudes toward corporations, employers, damages, attorneys and people who sue others. With effective questioning some of those attitudes will become known to all in the courtroom. It is the job of the attorney to discover the predisposition and as many of the attitudes of each potential before they are permitted to sit as a juror.

Million dollar verdicts are no longer intimidating to jurors. However, most jurors want to see justification for the damages before they make a large award. Large verdicts are oftentimes angry verdicts that occur when jurors believe that defendant has tried to hide facts, taken no responsibility for the corporation's actions, and showed no sympathy or empathy.

While the public's perception of attorneys is low, this does not carry over during an actual trial. Jurors judge the attorneys by their demeanor and actions in the courtroom. Professional advocacy and preparation is viewed with respect.

Some prospective may express the opinion that there is a litigation explosion and attorneys believe that impacts jury verdicts. However, if the facts justify a verdict for the plaintiff the concern of any juror about any litigation explosion can be overcome.

The best way to discover and explore a juror's biases and how, or if, these general areas apply to them is to engage the juror in a conversation. While you can use voir dire to educate the jury about your case and the law, the real purpose of voir dire is to reveal the truths about the jurors. You cannot do that by asking "conditioning questions" such as: "Do you understand (or realize) that the law is . . . ?" Who cares what the answer is. Who cares what, if anything, the juror has learned from that question. It is a wasted question. Consider whether or not you want to incorporate this into your next voir dire: "Will you follow the judge's instructions as to the law?" Who cares what the answer is. No matter what the answer and no matter what you say, the juror will do whatever his/her life experiences and biases lead him/her to do.

Do not stop any conversation you are having with a juror during voir dire because you are afraid you will "poison" the remaining jurors by any statements made by a bad juror. I learned early on that you did everything you could to keep the offensive juror quiet so that the other jurors would keep an open mind. That "wisdom" is faulty. One negative juror cannot suddenly "infect" other jurors by merely voicing an opinion. Attitudes, beliefs and biases are not contagious in the jury box. It is far better to have people who have these attitudes say them out loud during the jury selection process rather than waiting for jury deliberations.

You can use the negative statements made by a juror to discover the biases of the other jurors. When a juror makes a negative statement, reinforce the statement in a polite manner by saying "Ms. Smith, I'm glad you brought that up. What do you think of that concept, Mr. Jones?" By respectfully acknowledging the comment you can use it as a springboard to find out the true biases of the other jurors. If you are not chastising or scornful of the first juror the other jurors will be more likely to reveal their biases without fear of being judged. During this process identify jurors who are hostile to your case and let them talk, maneuvering them into making statements that reveal their biases. Once they are revealed, you should be able to successfully challenge these jurors for cause.

Always ask if they have heard of or know anything about the case. If a prospective juror indicates any knowledge consider a separate questioning of the person. Media reports are seldom, if ever, accurate. Gossip or "words on the street" suffer the same lack of truthfulness. This is one area you do not want other potential jurors to hear discussed since it can only lead to further dissemination of misinformation.

During your conversations with the jurors watch their body movement and facial expressions. Body language can be an important clue as to the true feelings of the jury, although again be careful of stereotyping. Someone who is attentive, personable, and open needs to be reckoned with in the same manner as someone who does not make eye contact and mumbles. Leaders and followers can be identified this way.

JUDGE CONDUCTED VOIR DIRE

When the judge conducts voir dire the attorney faces further challenges. You become an observer rather than a participant. If you ask for attorney conducted voir dire and it is denied, do not feel that you have been defeated. Provide the judge with a comprehensive voir dire with the questions which are most important to you in a separate section. Do not assume that the judge will ask all of the standard questions (what is standard for one may not be standard for another). However, you need to highlight and be ready to explain why a question is important/relevant to your case. Do not shy

away from requesting the questions that you believe need to be asked even though they may look ridiculous on paper. Be prepared to explain to the judge why each is important.

When the judge elicits information or a response to which you want to follow up, make sure you present that to the judge. Do not back away and accept less than a full voir dire. If you do not ask for good voir dire, you will never get it.

JURY QUESTIONNAIRES CAN BE EFFECTIVE TOOLS

Voir dire questionnaires can be an effective tool in revealing biases that a juror may not disclose openly before others. The questionnaire is not a substitute for voir dire. It should be tailored for use in a particular case and in consultation with a jury consultant.

The first hurdle is to get the judge to agree to the use of the questionnaire. File a motion requesting the use of a questionnaire. There are many arguments to be made in favor of a questionnaire. The questionnaire saves valuable court time by eliminating the need to repeat the same questions to each of the jurors. The follow-up questions can be specifically tailored to suit each prospective juror's background as indicated on the completed questionnaire. Jurors who might hesitate in the public setting of the courtroom to reveal private information relevant to their jury service are more likely to be candid when filling out a private questionnaire. Where counsel and the court have agreed that certain juror characteristics will result in automatic dismissal for cause, jurors with those traits can easily be identified and excused.

In your motion seeking to use a supplemental questionnaire, offer to have your office make copies of the questionnaires for distribution to the parties following their completion. The logistics of how the questionnaires can be handled should be set forth in the motion so that the judge is not concerned about those issues when reviewing your motion rather than focusing on why a questionnaire is necessary.

The form of the questionnaire is important. Unlike voir dire, the questions should be closed-ended. The questions should be designed to reveal areas for possible follow-up during the voir dire and written in easy to understand language. Boxes to be checked or blanks to be filled in with short answers is best the format.

USE OF JURY/TRIAL CONSULTANTS

Jury/trial consultants are being used more frequently by trial attorneys. Some employ their services as early as when the attorney is retained on a case to assist in discovery and witness deposition preparation.

Some attorneys use jury/trial consultants shortly before trial to assist in conducting mock jury trials, theme development, witness preparation, demonstrative evidence preparation and/or profiling the best possible jurors. Jury/trial consultants sit with attorneys during voir dire and at times throughout the course of the trial to alert the attorney on the body language and reactions of the jurors to testimony and witnesses. If money is no object, why not engage as many services as possible to provide as much information as possible?

However, I do not believe that attorneys who have limited funds are hampered by not having someone by their side giving input into who should be selected to sit on a jury. Any attorney who has dealt with people a lot, who has tried a number of cases, who knows how to communicate with people and actually listens to them, does not miss a beat in trusting his/her own gut reaction and feelings about who will be the best juror. Too many times huge verdicts are awarded in cases where a defense attorney has relied almost exclusively on the jury/trial consultant "because that is their area of expertise." Never rely exclusively on someone other than yourself.

You will be person interacting with the jury. You want them to be comfortable with you and you want to comfortable with them. It is your jury.

ENJOY THE EXPERIENCE OF VOIR DIRE

Effective jury selection is an art.
Effective jury selection can be learned.
Effective jury selection can expose biases.
Jury selection is the most important part of the trial.
Enjoy it – don't dread it!

AMENDING MICHIGAN'S RELATION-BACK RULES IN RESPONSE TO MILLER V. CHAPMAN CONTRACTING

by: ***Eric Westenberg****

In the April 2007 decision of *Miller v. Chapman Contracting,* 477 Mich. 102, 730 N.W.2d 462 (2007), the Michigan Supreme Court, over vigorous dissents by Justice Elisabeth A. Weaver and by Justice Marilyn Kelly[1], held that the relation-back doctrine codified in MCR 2.118(d) does not permit the substitution or addition of parties in an amended pleading. The effect of this decision is to distinguish between the addition or substitution of a party and the addition of claims and defenses for relation-back purposes. This distinction is contrary to the policies underlying the Michigan rules of practice and the great weight of authority from other jurisdictions. Perhaps in recognition of these facts, the Michigan Supreme Court has opened an administrative file, No. 2007-14, to consider whether the Michigan Court Rules should be modified to allow party additions or substitutions in cases in which the policies underlying the relation-back doctrine are satisfied. As discussed below, there is ample reason to change the Michigan Court Rules to avoid the result that the Supreme Court reached in *Miller v. Chapman Contracting*.

The decision in *Miller* involved a personal injury lawsuit over a 2000 accident in which Buddy Miller was severely injured when his vehicle was struck by another vehicle owned by one of the defendants. Miller filed for personal bankruptcy in 2002. All of Miller's rights with respect to this accident were transferred to the bankruptcy trustee, and the trustee retained an attorney to bring suit to recover damages for the injuries sustained in the 2000 accident. That attorney erroneously named Miller as plaintiff in this lawsuit.

Less than two weeks before the statute of limitations expired, defendants answered the complaint, and included the affirmative defense that Miller lacked standing to bring suit, as the real party in interest was Lewis, the trustee in bankruptcy. When the limitations period expired, defendants filed a motion for summary disposition. At that point, Miller filed a motion to amend the complaint to substitute trustee Lewis as plaintiff. The circuit court denied this motion to amend and granted defendant's motion for summary disposition. The Court of Appeals affirmed in an unpublished opinion. 2006 Mich. App. LEXIS 399 (Mich. Ct. App., Feb. 16, 2006).

The Michigan Supreme Court affirmed this decision and adopted the Court of Appeals' decision as its own. The Court began its analysis by determining that the motion to substitute the bankruptcy trustee for Miller was a motion to add a party, rather than a motion to correct a misnomer. Therefore, the "misnomer" exception that allows parties to "correct inconsequential deficiencies or technicalities in the naming of parties" was not available to the plaintiff. *Miller,* 477 Mich. at 107 (citing *Wells v. Detroit News, Inc.,* 360 Mich. 634, 641, 104 N.W.2d (1960)).

The Court then went on to conclude that MCR 2.118(d) does not permit a change in parties to relate back to the date of the original complaint, even when the defendant is aware of the identity of the real party in interest and therefore would not be misled by permitting the amendment. MCR 2.118(d) provides that "[a] n amendment that adds a *claim or defense* relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth, or attempted to be set forth in the original pleading." [Emphasis added]. Because this rule does not explicitly include a change in parties, the Court held that such an amendment could not relate back to the original pleading. As the Court explained, "it has been long understood that the expression of specific exceptions to the application of a law, as here, implies there are no other exceptions." *Miller,* 477 Mich. at 108. Thus, despite the two dissents, the majority concluded that the plaintiff's suit was correctly dismissed.

The majority opinion grounds the reason for refusing to allow the substitution of the bankruptcy trustee for Miller

* *Eric Westenberg is a second-year evening student at the University of Detroit Mercy School of Law. His areas of interest include litigation, intellectual property, ADR and computer law. He currently works for Miller, Canfield, Paddock and Stone P.L.C. as an e-discovery specialist. Eric can be contacted at ericwestenberg@comcast.net.*

to relate back to the original pleading on the fact that MCR 2.118(d) does not include the words "addition or substitution of a party." This understanding of the relation-back doctrine under MCR 2.118(d) threatens, as the dissent correctly points out, to allow procedural "gamesmanship to take precedence over the orderly disposition of an injured party's cause of action." *Miller,* 477 Mich. at 109 (Kelly, J., dissenting). Indeed, in *Miller,* there is no dispute that defendants understood the bankruptcy trustee was the real party in interest, and that permitting the change in plaintiffs would not have resulted in any additional facts or legal claims being presented in the case.

The relation-back doctrine addresses the tension between strict statute of limitations and modern notice pleading. Statutes of limitations protect defendants from "surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared.'" *Cowles v, Bank West,* 476 Mich. 1, 21, 719 N.W.2d 94 (2006) (citing *American Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 554, 94 S.Ct. 756 (1974)). The relation-back doctrine tempers the impact of the statute of limitations by providing that, if an amended pleading arises out of the transaction or occurrence set forth in the original pleading, the amendment relates back to the date of the original pleading and the amendment is protected against the bar of an intervening statute of limitations. Permitting a change in the pleading to relate back to the date of the original complaint does not contravene the policies supporting statutes of limitations when a party has notice of the transactional base before the expiration period so they will be "prepared to defend against all claims for relief arising out of that transaction." *LaBar v. Cooper,* 376 Mich. 401, 406, 137 N.W. 2d 136 (1965). Thus, under MCR 2.118(d), if a party has notice of the transactional base from which a claim can arise before a limitations statute extinguishes the action, a subsequent amendment adding or substituting a claim or defense does not infringe upon the rights created by the statute of limitations.

There is no rational basis for Michigan to distinguish between the addition of a claim or defense and the additional of a party as long as a defendant has notice of the plaintiff's claim and will be prepared to defend against that claim. Indeed, the Federal Rules of Civil Procedure treat a motion to add or substitute a party defendant in a similar manner as a motion to add or claim or defense. Fed. R. Civ. P. 15(c)(3). Although Rule 15(c)(3) provides no textual guidance for the amendment procedure to add or substitute a *plaintiff,* the Advisory Committee notes to the federal rules explain 'the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs." Fed. R. Civ. P. 15(c) Advisory Committee's Note. The Committee also recognizes that parties are further guarded from prejudice because "the court will require the scope of the amended pleading to stay within the ambit of the conduct, transaction or occurrence set forth in the original pleading." *Id.*

Over the past thirty years federal courts have permitted party additions to avoid the formalistic gamesmanship so evident in the *Miller* case. *See Metro. Paving Co. v. Int'l Union of Operating Eng'rs,* 439 F.2d 300(CA 10 1971); *Cicchetti v. Lucey,* 514 F.2d 362 (CA 1 1975); *Staren v. American Nat'l Bank and Trust Co.,* 529 F.2d 1257 (CA 7 1976); *Davis v. Piper Aircraft Corp.,* 615 F.2d 606 (CA 4 1980); *Stoppelman v Owens,* 580 F Supp 944 (DC 1983); *Rosenbaum v. Syntex Corp.,* 95 F.3d 922 (CA 9 1996); *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.,* 106 F.3d 11 (CA 2 1997); SMS Fin., *Ltd. Liability Co. v. ABCO Homes, Inc.,* 167 F.3d 235 (CA 5 1999); *Plubell v. Merck & Co.,* 434 F.3d 1070 (CA 8 2006).

Similarly, when other state courts have addressed this issue, the vast majority permit party additions and substitutions to relate-back to the date of the original pleadings as long as the policies of the relation-back doctrine are satisfied. *See Vorhees v. Baltazar,* 283 Kan. 389, 153 P.3d 1227 (2007); *Hedel-Ostrowski v. City Of Spearfish,* 679 N.W.2d 491, 2004 S.D. 55 (2004); *Save Our Creeks v. City of Brooklyn Park,* 682 N.W.2d 639 (Minn App 2004); *Estate of Kuhns v. Marco,* 620 N.W.2d 488 (Iowa 2000); *Stein v. Smith,* 358 Md. 670, 751 A.2d 504 (2000). This approach has not interfered with the courts' interest in resolving disputes in a timely fashion, but it has prevented parties from unjustly avoiding a determination of the merits of their claims. Indeed, as a court has explained, "[a]s long as [the] defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action against him, his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitations defense." *Nagle v. Commercial Credit Business Loans, Inc.* 102 F.R.D. 27, 32 (D.C.Pa.,1983) (citing C. *Wright, Miller & Cooper, Federal Practice & Procedure,* § 1501 at 524 (1971)).

Indeed, at least one Michigan case previously took the same position. In *Hurt v Michael's Food Ctr,* 220 Mich App 169; 559 NW2d 660 (1996), where plaintiff argued the court erred in not permitting the addition of a party plaintiff and the concomitant false imprisonment

claim along with the malicious prosecution claim which was submitted to the jury, the Court of Appeals held that it was required to rely on *Employers Mutual Casualty Co v Petroleum Equipment, Inc,* 190 Mich. App. 57, 63; 475 N.W.2d 418 (1991)[2] because of Administrative Order No. 1996-4, requiring it to adhere to the rule of the earlier case. The Hurt panel would have preferred to rely on *Hayes-Albion Corp v Whiting Corp,* 184 Mich. App. 410; 459 N.W.2d 47 (1990), and hold that the relation-back rule extends to the addition of a new party. 220 Mich. App. at 179.

Relevant to the discussion at bar, the *Hurt* court, citing *Hayes-Albion,* held:

> Where the original plaintiff had, in any capacity, an interest in the subject matter of the controversy, the defendant had notice of the interest of the person sought to be added as a plaintiff, and the new plaintiff's claim arises out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, then a new plaintiff may be added and the defendant is not permitted to invoke a limitations defense.
>
> * * *
>
> As noted in Hayes-Albion: A key consideration in whether the court will allow the addition of a plaintiff is whether the defendant had notice within the statutory period of the "added" plaintiff and his claims. . . . If the defendant had the requisite notice of the "added" plaintiff and since the transactional base of the claim would have been pled before the period of limitation ran . . . the defendant would be prepared to defend all claims arising out of the transaction and would not be prejudiced by the addition of a plaintiff.
>
> Although Michigan's relation-back rule was borrowed from FR Civ. P 15(c), the federal rule now has an additional provision addressing the addition of party defendants, thus making the application of the rule to plaintiffs easier by analogy. However, we find that the interpretation of the federal rule as applied to adding plaintiffs is helpful in looking at the question before us.
>
> "As long as defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action against him, his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitations defense. This seems particularly sound inasmuch as the courts will require the scope of the amended pleading to stay within the ambit of the conduct, transaction, or occurrence set forth in the original pleading. [6A Wright, Miller & Kane, Federal Practice & Procedure (2d ed), § 1501, pp 154-155.]" [184 Mich. App. at 417-418].

See also Doan v Chesapeake & 0 R Co, 18 Mich. App. 271; 171 N.W.2d 27 (1969); *Plowman v Satkowiak,* 22 Mich. App. 425; 177 N.W. 2d 641 (1970).

Hurt v. Michael's Food Ctr., 220 Mich. App. at 180-181.

The facts in *Miller* illustrate why Michigan should amend its rules to bring its approach to the applicability of the relation-back doctrine to a change in parties in line with the overwhelming majority of jurisdictions. Miller's complaint was filed before the statute of limitations expired. The complaint set forth the factual allegations and the legal basis for his claims. Permitting the substitution of the bankruptcy trustee for Miller would not have changed any of the factual allegations or any of the legal claims being asserted against the defendants. Moreover, the defendants knew that the bankruptcy trustee was the real party in interest prior to the expiration of the statute of limitations. To allow a statute of limitations defense in a context where the defendant has notice of a claim and is not unfairly prejudiced, as Justice Kelly explains, is nothing more than a "contrived legal technicality" used to extinguish an otherwise valid claim. *Miller,* 477 Mich. at 109 (Kelly J., dissenting). In fact, even the majority in *Miller* did not have any objection to permitting the relation-back doctrine to apply beyond the fact that the text of the rule did not expressly permit the amendment.

Our modern practice has wisely rejected the *Bleak House* days when contrived technicalities can be used to

extinguish to a party's claim. Accordingly, the Michigan Supreme Court should seriously consider acting on the administrative file it has opened and amending MCR 2.118(d) to provide for substitution or addition of parties provided the party against whom the amendment is sought has notice of the transactional base and will not be unfairly prejudiced by a defense on the merits. The rule should expressly state, as is the case with the addition of a claim or defense, an amended pleading that adds or substitutes a party will relate-back to the date of the original pleading provided: (1) notice of claim was secured before the expiration of the statute of limitations, and (2) there is an absence of unfair prejudice. *See, e.g., Morris v. Chewning,* 201 Ga.App. 658, 411 S.E.2d 891 (Ga. App. 1991) (interpreting Georgia's amended and supplemental pleadings statute, Ga. Code Ann., § 9-11-15). Such a rule would allow a party to substitute another party in a situation, such as *Miller*, when all the parties were aware of the proper party, the failure to name the proper party was a result of an attorney's mistake, and there could be no prejudice to the opposing party by permitting the substitution. Similarly, under the proposed rule, substitutions would be permitted when an individual partner is substituted for a corporate entity or when an administratix is substituted for an injured plaintiff. *See U.S. v Bell,* 724 P.2d 631, 639 (Colo. 1986) (citing examples of plaintiff modification amendments).

The Michigan Court Rules instruct our courts that the rules are designed to "secure the just, speedy, and economical determination of every action and avoid the consequences of error that does not affect the substantial rights of the parties." MCR 1.105. The change in rules proposed in this article is consistent with this goal and will prevent the formalistic game-playing that the defendants engaged in the *Miller* case. Such a change in the rules will also align the Michigan rules with the rules followed by most jurisdictions and is a logical extension of Michigan's willingness to allow relation-back pleadings. The Supreme Court, therefore, should amend the relation-back rules to allow for a substitution of parties when the policies underlying that doctrine are satisfied.

Endnotes

1. Justice Michael F. Cavanagh joined Justice Kelly's dissent.

2. *Employers held:* Although an amendment generally relates back to the date of the original filing if the new claim asserted arises out of the conduct, transaction, or occurrence set forth in the original pleading, MCR 2.118(D), the relation-back doctrine does not extend to the addition of new parties.

THE EVOLUTION OF PERSONAL JURISDICTION THROUGH THE TECHNOLOGICAL ADVANCES OF OUR TIME

by: *Benjamin Steffans*[1] *and Bernard Fuhs*[2]

Throughout history, technological advances have forced courts to adapt. Recently, Michigan courts, both state and federal, have addressed whether email can satisfy the statute of frauds[3] and other in-writing requirements.[4] Also, the electronic-centered changes to the Federal Rules of Civil Procedure, and the to-be-adopted changes to the Michigan Rules of Court signify technology's impact on the judicial system. Unfortunately, the courts' case-by-case approval often results in apparent confusion and unpredictability. Such is the situation with personal jurisdiction.

Technological advances (such as email) have pushed the traditional personal jurisdiction analysis beyond its contemplated limits. Like the statute of frauds, personal jurisdiction has been subject to reactionary decisions resulting in apparent confusion. By discussing modern—and historical—authority, this article attempts to alleviate that confusion. Hopefully after reading this article, it will be clear that technology has not substantially changed traditional personal jurisdiction analysis.

PERSONAL JURISDICTION BEFORE THE DIGITAL AGE

In *Pennoyer v Neff,*[5] the United States Supreme Court began its somewhat confusing analysis of personal jurisdiction by affirming a lower court's dismissal for lack of personal jurisdiction in a real property dispute case. In *Pennoyer,* the Supreme Court held that the lower court did not have jurisdiction over a party because the party was a non-resident of the state, was not personally served with process, and did not personally appear in the forum. Such a circumscribed analysis was to be greatly expanded as technology evolved.

Fifty years later, in *Hess v Pawlowski,*[6] the United States Supreme Court determined the impact that the automobile had on personal jurisdiction analysis. In *Hess,* a non-resident injured a Massachusetts resident in Massachusetts while driving his automobile. The injured party served the non-resident under a Massachusetts statute, which stated that any person who used the highways in Massachusetts effectively appointed a resident-registrar to accept service on his or her behalf. The Court, citing *Pennoyer,* held that the statute was unconstitutional as it violated the Due Process Clause of the United States Constitution. In so holding, the Court reiterated that to obtain personal jurisdiction over a non-resident, there had to be actual service on him—or someone—authorized to accept service for him—within the state. The Supreme Court would change this position substantially, however, with the advent of "minimum contacts."

In *International Shoe Co v Washington,*[7] the United States Supreme Court brought "minimum contacts" into the legal lexicon in a tax dispute case. Indeed, the Court altered the personal jurisdiction analysis and dispensed with the restrictive approach endorsed by Pennoyer and its progeny. The Court determined that a court can exercise personal jurisdiction over a defendant so long as that defendant has "minimum contacts" with the state such that the exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice." Thereafter, in *Hanson v Denckla,*[8] the Supreme Court stated that a defendant must "purposefully avail" himself of the forum state in order for a court in that state to exercise personal jurisdiction.

In *World-Wide Volkswagen Corp v Woodson,*[9] the Supreme Court adopted the phrase "purposeful availment" in a case involving automobiles sold in one state but driven in another. In *World-Wide Volkswagen,* the plaintiffs purchased a car in New York from the defendant, a New York automobile dealer, to drive to Arizona. Plaintiffs were injured in an automobile accident while driving the car in Okalahoma. Plaintiffs sued the defendant in Oklahoma. The Court held that an Oklahoma court could not exercise personal jurisdiction over the New York defendant as that defendant did not purposefully avail itself of the privileges of conducting business in Oklahoma.

At first blush, it appears that courts respond to technology developments by modifying their personal jurisdiction analysis. However, an exacting review reveals that assumption's speciousness. The personal

jurisdiction analysis, despite arising in different factual contexts, remains the same and asks only one question: did the defendant have minimum contacts with the forum state? This revelation, supported by the review of cases immediately below, should give technologically-averse litigators much comfort.

COMPUTER-AGE PERSONAL JURISDICTION OVER CORPORATIONS

In *CompuServe, Inc v Patterson,*[10] the Sixth Circuit Court of Appeals first addressed personal jurisdiction via internet sales and marketing. In *CompuServe,* the defendant, a resident of Texas, marketed his product over the internet through the plaintiff, a company incorporated in Ohio. The defendant later claimed that, through this marketing process, the plaintiff infringed upon his trademark. The plaintiff disagreed and filed suit in Ohio. The Sixth Circuit, in reversing the trial court's finding that an Ohio court lacked personal jurisdiction over the Texas-based defendant, held that the defendant had "knowingly made an effort—and, in fact, purposefully contracted—to market a product in other states, with Ohio-based CompuServe, operating, in effect, as his distribution center."[11]

In *Zippo Mfg Co v Zippo Dot Com,*[12] Inc, the Western District of Michigan analyzed the exercise of personal jurisdiction over a company that maintained a website. The court divided the possible outcomes into three categories:

> (1) personal jurisdiction is established when a defendant does business over the internet;
>
> (2) personal jurisdiction is not appropriate when the internet use involves a passive website that merely provides information; and
>
> (3) personal jurisdiction may be appropriate in the case of interactive websites where a user may exchange information with the host computer.

The court ultimately determined that it could exercise personal jurisdiction over the defendant because it had contracted with numerous internet service providers and individuals in the forum state. *Zippo* and *CompuServe* established a framework for litigators to use when analyzing whether a court has personal jurisdiction over corporate defendants. This framework familiarly focuses on the extent to which the defendants availed themselves of the forum state. The *Zippo* court recognized this similarity, stating:

> [w]ith this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on internet usage is in its infant stages. The cases are scant. Nevertheless, our review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet.[13]

In short, according to *Zippo,* the information superhighway is no different from *World-Wide Volkswagen's interstate highway.*

COMPUTER-AGE PERSONAL JURISDICTION OVER INDIVIDUALS

In *ACS Consultant Co v Williams,*[14] plaintiff sued three former employees, alleging trade secret violations and breach of contract. Plaintiff filed suit in Michigan despite the fact that one of the defendants resided in California. That defendant moved to dismiss, claiming that a court in Michigan could not properly exercise personal jurisdiction over him because:

> (1) the employment contract was signed in Miami, Florida;
>
> (2) he worked in California;
>
> (3) the causes of action at issue arose from his alleged activities in California; and
>
> (4) he was only in Michigan on one occasion for a couple of days in his life, and that was for employment purposes on behalf of the plaintiff.

In short, the defendant made the traditional argument, claiming that he did not have sufficient contacts with Michigan to allow a Michigan court to exercise jurisdiction.

Although the court disagreed with defendant on the merits, it agreed with him that the traditional analysis applied. Specifically, the court found that the defendant did purposefully avail himself of the privilege of doing business in Michigan through his contacts with Michigan. In support of this conclusion, the court emphasized the following facts:

> (1) the defendant utilized the plaintiff's email system and accessed its proprietary software, both of

which were maintained on the plaintiff's servers located in Michigan;

(2) he participated in regular telephone calls with the plaintiff's executives in Michigan as part of his employment;

(3) he emailed reports to the plaintiff in Michigan;

(4) he accessed the plaintiff's computer system in Michigan for many purposes, including to misappropriate the plaintiff's trade secrets, to raid its valuable skills database, and to thwart its recruiting; and

(5) the cause of action arose, at least in part, in Michigan.

Importantly, the court noted that it did not have to find that the defendant was physically present in Michigan in order to fulfill the purposeful availment requirement; rather, the use of Michigan-based computer servers, coupled with the conduct described above, was sufficient to establish personal jurisdiction in Michigan.

ACS, like *CompuServe,* demonstrates how little the computer has changed the traditional personal jurisdiction analysis. While *ACS* talks in terms of computer servers and email, analytically it is identical to the traditional analysis which, at times, talked in terms of horses and highways. The court's continuous reference to contacts and fairness supports the idea that technology has not changed the analysis.

WHAT IS NEXT?

Although the above cases provide some guidance regarding computer-age personal jurisdiction, two preliminary issues remain unresolved. First, one can expect the Supreme Court to address computer-age personal jurisdiction in the near future. The Court periodically addresses personal jurisdiction issues, particularly as new technology, like the internet, emerges. Litigators should be aware of the lack of Supreme Court jurisprudence in this area and be vigilant. Second, a question remains regarding whether email contact, alone, is sufficient to establish personal jurisdiction over an individual. In *ACS,* the defendant engaged in jurisdiction-conferring conduct beyond merely emailing the forum state. Whether *ACS* would have been decided differently had he only emailed his Michigan employer remains unresolved.

In addition to these two preliminary issues, it remains unclear how far computers will extend personal jurisdiction. For example, if a Michigan resident sends an email to a California resident, and that email is routed through a server in Colorado, does a Colorado court have personal jurisdiction? Did the sender purposefully avail himself of Colorado? Does it matter if he knew that the email would be routed through Colorado? Would it be different if it involved the U.S. Postal Service and a piece of mail was routed through Colorado on its way to California? This type of situation may require the voice of the Supreme Court.

HOW TO PREPARE

This article attempts to make one point: despite changing technologies, the personal jurisdiction analysis remains largely the same. Litigators should not be averse to addressing computer-age personal jurisdiction because it involves mysterious and unfamiliar technology.

Instead, litigators should comfortably know that today's gigabyte is yesterday's bicycle, and today's information superhighway is yesterday's interstate highway. As such, when addressing a personal jurisdiction issue that involves computers, comfortably focus on the familiar: to what extend did the defendant avail himself or herself of the forum state? And when you answer that question, do not hesitate to rely on traditional forms of contact—personal presence, state of contracting, etc.—in addition to computer-based forms of contact.

CONCLUSION

Cases like *CompuServe, Zippo,* and *ACS* Consultant illustrate the evolution of personal jurisdiction in the late-20th and early-21st Centuries. Although the internet did not exist when courts formulated the framework for analyzing personal jurisdiction, their analysis has proven easily adaptable. When confronting the establishment of jurisdiction through the use of computer servers hundreds, even thousands, of miles away, courts have continuously relied on the traditional contact-based analysis. Litigators should take comfort in this revelation and not fret when confronting personal jurisdiction questions that involve computers or the internet.

Endnotes

1. Mr. Steffans is an attorney at Butzel Long, where he practices in the fields of labor and employment law. He can be contacted at Steffans@butzel.com

2. Mr. Fuhs is an attorney at Butzel Long, where he concentrates his practice in the areas of business litigation and general corporate law, with significant

experience in the following areas: non-compete/non-disclosure/trade secret, franchise law and litigation, business disputes, corporate and limited liability organizations and operation, corporate transactions, and finance law. He can be contacted at Fuhs@butzel.com

3. *E.g., Continental Identification Products, Inc v Entenmarket Corp,* 2008 US Dist LEXIS 257 (W.D .Mich. 2008); *Dow Chemical Company v General Electric Company,* 2005 US Dist LEXIS 40866 (E.D. Mich. 2005).

4. *E.g., Kloian v. Domino's Pizza,* 273 Mich. App. 449 (2006) (applying MCR 2.507(G)).

5. 95 U.S. 714 (1877).

6. 274 U.S. 352 (1972).

7. 326 U.S. 310 (1945).

8. 357 U.S. 235 (1958).

9. 444 U.S. 286 (1980).

10. 89 F.3d 1257 (6th Cir. 1996).

11. *Id.* at 1263.

12. 952 F Supp 1119 (W.D. Penn. 1997).

13. *Id.* at 1123-24.

14. 2007 US Dist LEXIS 15120 (E.D. Mich 2007); *see also Kelly Services v. Eidnes,* 530 F Supp 2d 940 (E.D. Mich. 2008); *Kelly Services v. Noretto,* 495 F. Supp. 2d 645 (E.D. Mich. 2007).

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