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WHAT'S INSIDE

Letter from the Chair

by: Brandon J. Evans

As you may have heard, we recently held our annual summer conference. This year it was held on Mackinac Island. Our speaker was John E. Moore, III and his presentation was called "The Lawyer's Compass", which focused on building trust in client relationships. Okay, with that description I know that you are oozing with jealousy because you did not attend. Here is how I experienced the weekend.

My wife and I left our kids with the grandmas Friday morning and arrived at The Grand Hotel in time to grab lunch, a buffet; but it was far and away the best buffet I've ever had. From there we walked downtown, checked out a few shops and rented bikes to explore the island. We biked the eight miles around the perimeter of the island together. She wanted to do more shopping, I wanted to do more biking, so we went separate ways for another hour or so.

After that it was time to get ready for the first event, The Reception on the Porch. If you have ever attended the Upper Michigan Legal Institute ("UMLI") or the State Bar of Michigan Bar Leadership Forum ("BLF"), you will likely remember this event. We planned our summer conference to allow our guests to kickoff their weekend with this event. It's a cocktail hour that allows UMLI, BLF, and our conference attendees to network with the State Bar of Michigan Board of Commissioners, Presidents, and executive staff, who also hold an annual event at the hotel the day before. Anytime you can network with lawyers from around the state, leaders from a wide range of practice areas, state bar Presidents, and even Michigan Supreme Court Justices while enjoying the views on a beautiful June day from the porch of the Grand Hotel, you know it will be a memorable experience.

From there it was time for a five course meal with my wife, colleagues and their significant others followed by an after party of sorts, also held every year, in the President's suite. In the morning my wife and I had breakfast in bed followed by more biking for me and running for her. We both ventured onto the trails throughout the island and randomly ran into each other one time during our adventures, which was pretty lucky considering she ran 15 miles and I biked 30 miles. We finished in time to have the lunch buffet again right before my seminar started at 1 pm.

I could go on about Saturday and Sunday, but I think you get the idea. The summer conference was a fun and enjoyable weekend for my wife and I, and I got to earn some continuing legal education credits while networking with colleagues. And don't worry if biking or running are not your thing. There are plenty of other activities (shopping, golfing, hiking, site seeing, etc.) to keep you busy in the purposely planned free time.

I hope that you will consider attending future summer conferences and other Litigation Section events. The section is in good hands going forward, and I am sure next year's event will be even better. Five of our council members attended the BLF in addition to our summer conference, and you could immediately see the benefits. They were busy brainstorming and planning for next year and years to come.

Thank you for your membership and interest in our section, and I hope you will consider getting involved. The best way to do that is to contact me or another Governing Council member to see what opportunities are currently available.

I hope this letter finds you enjoying the summer.

Cordially,
Brandon J. Evans
Chair
Litigation Section, State Bar of Michigan

Broadly worded indemnification provisions in corporate bylaws may compel payment of a minority shareholder plaintiff's litigation expenses for an oppression lawsuit under MCL 450.1489.

by: Dan Artaev[*]

Business attorneys in Michigan are familiar with the indemnification provisions of the Michigan Business Corporations Act (the "Act"), which authorize a corporation to pay for the litigation-related expenses of its "corporate directors, officers, employees, and agents."[1] A corporation often adopts indemnification provisions in its bylaws to induce its directors to serve on the board. But consider a common scenario within a closely-held corporation, where the director or officer also happens to be a shareholder. If that individual sues for "willfully unfair and oppressive conduct" under Section 1489,[2] does the corporation pay the plaintiff's attorney fees as well? Or is "indemnification" limited solely to costs of defense?

The answer depends on whether the corporation limited indemnification in its bylaws. The Act does not preclude plaintiff attorney fees. Unless the bylaws specifically address payment of plaintiffs' expenses, courts may enforce the bylaws to "indemnify" the oppressed plaintiff.

1. The Michigan Business Corporations Act broadly authorizes corporations to indemnify their officers and does not limit "indemnification" to only costs of defense.

Section 561[3] of the Act broadly authorizes corporate indemnification of a person if:

- That person is a party to a suit or proceeding;
- That suit or proceeding is not an action by or in the right of the corporation;
- The person is a party because he or she is or was a director, officer, employee, or agent of the corporation; and
- The person acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the corporation or its shareholders.

The sole provision in the Act to limit "indemnification" to defense expenses is the mandatory reimbursement in Section 563: "To the extent that a director of officer…has been successful on the merits or otherwise in defense of an action, suit, or proceeding…the corporation shall indemnify him or her…." In contrast, Section 561 only states that "[a] corporation has the power to indemnify a person…against expenses, including attorneys' fees…actually and reasonably incurred by him or her in connection with the action"[4] without any mention of "defense."

The use of the word "defense" in Section 563 (but not any of the surrounding sections) is important because it shows legislative intent to allow plaintiff indemnification. Statutes must be read as a whole to ascertain the intent of the Legislature.[5] Further, statutes that relate to the same subject must be read and construed together.[6] Section 563 provides for mandatory indemnification of successful litigants, but only "in defense of an action, suit or proceeding referred to in section 561…."[7] No other section mentions "defense of an action." The Legislature is presumed to be aware of the rules of statutory interpretation,[8] as well as the law on the same subject matter,[9] so the Legislature deliberately chose to limit section 563's mandatory indemnification to successful defense. This means the Legislature also deliberately chose not to limit any of the other indemnification provisions.

2. The term "indemnify" means to reimburse for loss or damage sustained, regardless of whether such loss is sustained as a plaintiff or defendant in a lawsuit.

But does not the word "indemnification" itself mean only defense costs? No, there is no such limitation in the Act or other extrinsic source. The Legislature did not define "indemnification" or "indemnify" in the Act. It is well-established that clear and unambiguous language in a statute is given its plain and ordinary meaning.[10]

Black's Law Dictionary defines "indemnification" as "the action of compensating for loss or damage sustained."[11] To "indemnify" means "To reimburse (another) for a loss suffered because of a third party's or one's own act or default."[12] Merriam-Webster's Dictionary defines "indemnify" as "to make compensation to for incurred hurt, loss, or damage."[13]

Applying this plain language definition to the Act's indemnification provisions – MCL 450.1561 *et seq* – it is clear that a corporation can indemnify a party for the expenses of litigation incurred by defendants as well as plaintiffs that meet the statutory criteria. Indeed, looking at Section 561, permitted "indemnification" includes "expenses, including attorneys' fees." Without defining "indemnification," and declining to limit Section 561 to defense costs, the Legislature gave corporations the necessary flexibility to indemnify plaintiffs and defendants.

3. The Act limits plaintiff indemnification to those plaintiffs whose causes of action arise out of the plaintiff's role as a director, officer, employee, or agent of the corporation.

Section 561 of the Act does require the person seeking indemnification be a party "by reason of the fact that he or she is or was a director, officer, employee, or agent of the corporation." The plaintiff shareholder in a closely-held corporation suing for oppression under Section 489 is often a director, officer, employee, or agent of the corporation, and thus may meet the Act's criteria. Indeed, Section 489(3) states that [w]illfully unfair and oppressive conduct may include the termination of employment...."[14] Actionable oppressive conduct may also include removal of the plaintiff from the board of directors, termination of the plaintiff's role as an officer, and other actions to dilute the plaintiff's role in the management of the corporation.[15] "[S]hareholders in close corporations are often members of the corporation's management."[16]

Accordingly, to assert indemnification, the oppressive conduct as a shareholder must link to the plaintiff's role as director, officer, employee, or agent of the corporation. The plaintiff must allege that their termination or removal as a director, officer, employee, or agent of the corporation compromises their right to participate in corporate decisions, affects the best interests of the corporation, or that the adverse actions are otherwise linked to the dilution of their shareholder interests. Without the link between the plaintiff's dual role as shareholder and director/officer/employee/agent, the Act may preclude plaintiff indemnification.

4. Caselaw has not yet recognized the possibility of corporate plaintiff indemnification.

There are no published Michigan cases that recognize the possibility that a plaintiff may be able to rely on a corporate indemnification provision, even where the plaintiff shareholder's lawsuit arises out of their status as a corporate director, officer, or employee. Other states have not directly considered the issue either, although at least one New York court has adopted a plain-language interpretation of New York's statutory indemnification provisions to compel a corporation to advance attorney fees incurred in defense of a counterclaim.[17] In *Schlossberg,* the plaintiff (who was a shareholder, director, and former officer of the defendant corporation) sued the corporation, and the defendant corporation counterclaimed. The plaintiff moved for advancement of his attorney fees and costs incurred in defending against the countersuit. The New York Supreme Court approved the motion, applied the plain language of the corporation's bylaws, and held that the bylaws "contemplate[] the indemnification of directors and officers not only in defense of suits by third parties but also in intra-company actions such as the instant one."[18] Further, the court held that Section 722 of the New York Business Corporation Law was consistent with the bylaws, and the New York Legislature did not intend to preclude indemnification for counterclaims. However, the New York Supreme Court did not address whether the indemnification would be available to the plaintiff absent the counterclaims. Delaware law also offers no guidance, as its statutory scheme expressly limits advancements of litigation costs to those related to "defense."[19]

5. Corporations that choose to "indemnify" their directors, officers, employees, and agents in their bylaws are bound to indemnify them as both plaintiffs and defendants.

Because the law does not bar indemnification of a plaintiff director or officer who is a plaintiff to an oppression action under Section 489, the corporate bylaws control the corporation's indemnification obligations to its directors, officers, employees, and agents. "The bylaws of a corporation, so long as adopted in conformity with state law, constitute a binding contract between the corporation and its shareholders,"[20] and "[t]he bylaws may contain any provision for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation."[21]

More often than not, a corporation will recite the statutory indemnification provisions in its bylaws with only minor changes, or even adopt indemnification "to the fullest extent permitted by law."[22] Once the corporation adopts the bylaws, the bylaws create an obligation to the directors and officers. Notably, the corporation is prohibited by law from revoking indemnification retroactively in response to a lawsuit or other adverse action.[23] Of course, corporations have great leeway to craft their bylaws and can choose how to structure the bargain. A corporation should consider adding indemnification-limiting language to the bylaws.[24]

Plaintiff's lawyers should carefully inspect the indemnification provisions of the defendant corporation's bylaws and seek payment of their legal costs under MCL 450.1564c where possible. At the same time, corporate attorneys drafting bylaws should consider the scope of director/officer/employee/agent indemnification and limit that scope where appropriate. Under the plain statutory language of the Business Corporations Act, offensive indemnification remains a possibility, especially in shareholder-oppression lawsuits brought under MCL 450.1489.

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ENDNOTES

1 MCL 450.1261(e) ("A corporation…shall have power in furtherance of its corporate purposes to do all of the following…indemnify corporate directors, officers, employees, and agents.")

2 MCL 450.1489; see also MCL 450.2489 (providing for a cause of action for willfully oppressive and unfair conduct in a nonprofit corporation).

3 MCL 450.1561.

4 MCL 450.1561.

5 *Macomb County Prosecutor v Murphy,* 464 Mich 149, 160 (2001).

6 *In re MCI Telecommunications Complaint,* 460 Mich 396, 417 (1999).

7 MCL 450.1563 (emphasis added).

8 *People v Clark,* 274 Mich App 248, 252 (2007).

9 *Wayne County v Wayne County Retirement Comm'n,* 267 Mich App 230, 244 (2005).

10 *Dep't of Human Servs v Davis (In re LE),* 278 Mich App 1, 22 (2008).

11 *Black's Law Dictionary, T*hird Pocket Edition, p. 350.

12 *Id.* at 351.

13 http://www.merriam-webster.com/dictionary/indemnify.

14 MCL 450.1489(3).

15 "Shareholder's rights are typically considered to include voting at shareholder's meetings, electing directors, adopting bylaws, amending charters, examining the corporate books, and receiving corporate dividends." *Franchino v Franchino,* 263 Mich App 172, 184 (2004).

16 *Id.*

17 *Schlossberg v Schwartz,* 43 Misc 3d 1224(A), 1224A; 2014 NY Slip Op 50760(U), ¶ 2; 992 NYS2d 161 (Sup Ct).

18 *Id.*

19 8 Del. C. § 145(a) and (e).

20 See *Allied Supermarkets, Inc v Grocer's Dairy Co,* 45 Mich App 310, 315 (1973).21 MCL 450.1231.

22 See for example ICLE, Bylaws, Abbreviated Version with Indemnification Provisions, Form 3.04. Available at: http://www.icle.org/modules/FormBank.

7.01 Indemnification of Directors and Officers: Third Parties Claims. The corporation shall, to the fullest extent authorized or permitted by the Act or other applicable law, indemnify a director or officer (an "Indemnitee") who was or is a party or is threatened to be made a party to a threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal, other than an action by or in the right of the corporation, by reason of the fact that he or she is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, or other enterprise, whether for profit or not, against expenses, including attorneys' fees, judgments, penalties, fines, and amounts paid in settlement actually and reasonably incurred by him or her in connection with the action, suit, or proceeding.

23 MCL 450.1565(c).

24 ICLE suggests the following clause, expressly designed to limit the potential "indemnification" exposure to defense costs only:

7.03 Actions Brought by the Indemnitee. Notwithstanding the provisions of Sections 7.01 and 7.02 of this Article, the corporation shall not be required to indemnify an Indemnitee in connection with an action, suit, proceeding or claim (or part thereof) brought or made by the Indemnitee except as otherwise provided herein with respect to the enforcement of this Article, unless such action, suit, proceeding or claim (or part thereof) was authorized by the board of directors of the corporation.

Considerations in Deposing a High-Ranking Official or Opposing the Deposition of a High-Ranking Official

*by: Michael T. Berger**

One issue that may arise in a litigation involving a large business or governmental entity is whether to depose a high ranking official within the entity, such as a CEO or mayor. This usually occurs regardless of whether or not there is evidence that the official has knowledge of the issues at the heart of the litigation. Trying to depose a high-ranking official oftentimes can cause costly and unnecessary expense for both parties. There are certain rules in both state and federal courts that attorneys need to be aware of before deciding to depose a high ranking official or opposing the deposition of a high-ranking official. This includes being keenly aware of the differences between the rules in Michigan state courts on these issues and the Sixth Circuit's rules, which apply in Michigan's federal district courts.

Michigan adheres to Apex-Deposition Rule, as explained in *Alberto v. Toyota Motor Corp,* 289 Mich. App. 328, 336 (2010). It provides that

> "before a plaintiff may take the deposition of a high-ranking or 'apex'… corporate officer, the plaintiff ***must demonstrate*** both that… ***the corporate officer possesses superior or unique information relevant to the issues being litigated*** and that the information cannot be obtained by a less intrusive method, such as by deposing lower-ranking employees."[1] ***(emphasis added).***

The party opposing the deposition must demonstrate through sworn testimony and/or other documentary evidence that the proposed deponent is a high-ranking official that lacks personal knowledge or unique or superior knowledge of information relevant to the litigation, then the burden shifts to the party seeking the deposition to show that relevant information cannot be obtained without deposing the high ranking official.[2] This doctrine serves two purposes: (1) it "promote[s] efficiency" during discovery by requiring proof that the deposition will be fruitful, (i.e. "that the officer has superior or unique personal knowledge of the facts relevant to the litigation") and (2) it protects high ranking officials from annoyance, harassment, undue burden and/or undue expense.[3] These protections are important because high ranking officials "often have no particularized or specialized knowledge of the day-to-day operations or the particular factual situations that lead to litigation."[4]

Attorneys who seek to depose a high-ranking official should be very familiar with the requirements of the Apex Deposition Rule. Attorneys seeking to depose these individuals should conduct enough discovery to lay the foundation that the high-ranking official has superior or unique knowledge that would allow the deposition to move forward. The attorney should also conduct a cost-benefit analysis to determine whether taking the high-ranking official's deposition will provide a significant enough impact in the case to be worth the deposition. This should include accounting for the cost of potential motion practice opposing the deposition. Remember, if the party opposing the deposition shows that its high-ranking official lacks personal knowledge or unique or superior knowledge of information relevant to the litigation, then the ***burden shifts*** to the party seeking the deposition to demonstrate that the official has unique or specialized knowledge.

On the other hand, attorneys representing the entity and their high-ranking officials need to conduct a careful analysis of their own when determining whether to let a high-ranking official's deposition to move forward or whether to oppose it. These attorneys should be very familiar with the entity's structure, operation, and needs to know what type of information the high-ranking official has personal knowledge of, as well as what information the lower-level employees have personal knowledge of. Attorneys representing entities and their high-ranking officials need to conduct their own cost-benefit analysis to determine whether to oppose a deposition of a high-ranking official.

These attorneys need to remember that they bear the ***initial burden*** of demonstrating that the entity's high-ranking official does not have personal knowledge of relevant facts and need to be able to demonstrate this with documentary evidence and/or testimony. Even if the Apex Deposition Rule may not be applicable, these attorneys may want to consider a motion for a protective order under MCR 2.302(C)(1), arguing that protections should be given to prevent "annoyance, embarrassment, oppression, or undue burden or expense."

Attorneys who practice in federal court need to be aware that the Sixth Circuit specifically disavowed the Apex Deposition Rule (called the "Apex Doctrine" in the federal courts) for business entities in *Serrano v. Cintas Corp,* 699 F.3d 884, 902 (2012). Thus, unlike the Michigan rule, the Sixth Circuit does not recognize that there is inherent harassment or abuse when trying to depose an opposing party's high-ranking official. Rather, an attorney opposing the deposition must move for a protective order and needs to show that the court should protect the high-level official from "annoyance, embarrassment, oppression, or undue burden or expense."[5] The court will determine whether one of these requirements is fulfilled by balancing the rights of the party seeking discovery with the need to prevent a fishing expedition.[6] The party moving for the protective order bears the burden of demonstrating that protection is needed.[7]

Though the Apex Doctrine does not apply in the Sixth Circuit, attorneys seeking the deposition of a high-ranking official still needs to make the same considerations as an attorney litigating in state court. They need to review their discovery and determine whether the high-ranking official will provide anything of substance to their case and whether that substance will be worth the expense of a deposition. These attorneys need to consider whether their opposing counsel will move for a protective order and whether the expense of engaging in motion practice is necessary for their case. Though the party moving for the protective order will have the burden of showing why the protective order is necessary, the Sixth Circuit has concluded that where the party seeking the deposition does not rebut evidence that the high-ranking official does not have personal knowledge of the facts in issue and fails to explain what the high-ranking official may possibly reveal, then a protective order is appropriate.[8]

Attorneys representing an entity and its high-ranking officials also need to conduct an analysis similar to a state-court practitioner's to determine whether to oppose the deposition, but need to keep in mind that there is no burden-shifting in federal court, unlike state court. If the attorney, the entity, and the high-ranking official decide to oppose the deposition, the attorney should move for a protective order and use documentary evidence and testimony, including testimony from the high-ranking official, that demonstrates that one of the Rule 26(c)(1) harms are fulfilled. In *Elvis Presley Enterprises v. Elvisly Yours, Inc.,* 936 F.2d 889, 894 (6th Cir. 1991), this was accomplished by having the CEO that the opposing party wanted to depose complete an "affidavit stating that she had no knowledge" relevant to the issues of the litigation and that included "some evidence that [the] primary purpose in deposing her would be to harass and annoy her." Likewise, in *Lewelling v. Farmers Ins. of Columbus, Inc.,* 879 F.2d 212, 218 (6th Cir. 1989), the moving party produced representations that the high-ranking official that the plaintiff wanted to depose had no knowledge as to the facts pertinent to the cause of action. In that case, there was also evidence that the deposition was noticed in bad faith or for harassment because the plaintiff stated that the deposition would be canceled if the potential deponent merely agreed to meet with the plaintiff's attorney to discuss settlement.[9]

An interesting caveat to the Sixth Circuit's rule is that it is not clear whether the Sixth Circuit recognizes or does not recognize the "apex doctrine" for governmental officials. This is because the high-ranking official in *Serrano* was a high-ranking business official, not a government official. Many other circuits recognize that the apex doctrine applies to governmental officials and that absent exceptional circumstances a top-ranking government official should not be called to testify as to the reasons for taking official action.[10] In fact, the Supreme Court expressed concern with high-ranking government officials being deposed in *United States v. Morgan,* 313 U.S. 409, 421-422 (1941). That conclusion was echoed by the Sixth

Circuit in *Warren Bank v. Camp,* 396 F.2d 52, 56 (6th Cir. 1968). More recently, the Sixth Circuit echoed the language of the "apex doctrine" in *Watson v City of Cleveland,* 202 Fed. Appx. 844, 852 (6th Cir. 2006), when it concluded that a mayor should not be deposed because he had very little information regarding the plaintiff's claims and that the information was available from another source. Of course, the concern with relying on either *Warren Bank* or *Watson* is that both opinions pre-date *Serrano.*

Practitioners representing governmental entities in the Eastern District of Michigan or Western District of Michigan may want to argue that the "apex doctrine" is applicable to their high-ranking officials because, if it does apply, then their high-ranking officials should not be deposed unless exceptional circumstances warrant the deposition. More specifically, the apex doctrine would assume that deposing high-ranking government officials inherently causes harassment and abuse.[11] However, this strategy should be used with caution because a district court may determine that *Serrano* is the controlling authority for that issue. Thus, relying solely on the "apex doctrine" could be detrimental to opposing the deposition.

In conclusion, scheduling the deposition of a high-ranking official in a business or governmental entity is unlike setting up the deposition of a low-level employee. In those instances, there is a strong possibility of a discovery dispute between the parties. So, both parties should be familiar with the controlling authority that applies to the high-ranking official in order to determine whether to depose a high-ranking official or whether to oppose the deposition. Attorneys should consider the value of the testimony or opposing the deposition and whether that value is worth the expense. If motion practice is needed, both parties should be prepared with documentary evidence to demonstrate whether the official should or should not be deposed.

ENDNOTES

1 *Alberto v. Toyota Motor Corp,* 289 Mich. App. 328, 333 (2010).

2 *Id.* at 338.

3 *Id.* at 339.

4 *Id.*

5 *Serrano,* 699 F.3d at 901; Fed. R. Civ. P. 26(c).

6 *Bush v. Dictaphone Corp., 1*61 F.3d 363, 367 (6th Cir. 1998).

7 *Eagle v. Hurley Med Ctr.,* 292 F.R.D. 466, 478 (E.D. Mich., 2013).

8 See *Graves v. Bowles,* 419 Fed. Appx. 640, 645-646 (6th Cir. 2011).

9 *Id.*

10 See *Bogan v. City of Boston,* 489 F.3d 417, 423 (1st Cir. 2007); *In re F.D.I.C.,* 58 F.3d 1055, 1060 (5th Cir. 1995); *In re U.S.,* 197 F.3d 310, 313 (11th Cir. 1999); *Kyle Eng'g Co. v. Kleppe,* 600 F.2d 226, 231-32 (9th Cir. 1979) *Franklin Sav. Ass'n.,* 922 F.2d 209, 211 (4th Cir. 1991) *Lederman v. New York City Dept. of Parks & Recreation,* 731 F.3d 199, 203 (2nd Cir. 2013); *Simplex Time Record Co v. Secretary of Labor,* 766 F.2d 575, 586 (D.C. Cir. 1985).

11 *Serrano,* 699 F.3d at 901.

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The Basics of Litigating Adult Guardianships and Conservatorships: Anything But Basic

*by: Patrick Cherry & Nathan Piwowarski**

As the baby boomer generation continues turning 29, year after year (hi, Mom!), our nation's life expectancy continues to grow, and inadequate social supports fail to meet the increasing need for elder services, our legal system is beginning to process more and more adult guardianships and conservatorships.[1] If you haven't been involved in an adult guardianship or conservatorship contest, you may be soon. Having litigated, as a team, almost 200 adult guardianships and conservatorships just in the last year, we have learned some important lessons.

Guardianships and conservatorships *are* litigation. While guardianships and conservatorships are "proceedings" under the court rules, *see* MCR 5.101(B), it is all too easy to see them as simple matters where nobody is likely to show up and only a half-hearted effort is necessary. In reality, few of these cases involve a person who is totally incapacitated and bed-bound. In our experience, it is far more common for the respondent to be *partially* incapacitated – and lacking insight into her limitations. Individuals like this are out and about in the world, oftentimes engaging in health – and wealth-destroying behavior. In addition, many of these cases will have a family member, or other interested party, who wants to have a say in court too. In short, *expect* the person in need of protection to resist; *expect* family members or financial exploiters to fight.

The three hurdles: incapacity, necessity, priority. To establish the guardianship or conservatorship, the petitioner must meet a two-fold burden by the clear and convincing evidence standard. First, she must demonstrate that the respondent is a "legally incapacitated individual"[2] or is "unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance."[3] In conservatorship proceedings, the petitioner also has the option of convincing the respondent that she needs a conservator on account of age-related infirmity, rather than incapacity;[4] this latter basis should be considered as a way of gracefully settling a contested case in which the respondent has marginal capacity.

Second, the petitioner must demonstrate that there is a compelling need to appoint a guardian or conservator for the respondent.[5] Here, the respondent's lawyer should press the court and petitioner to exhaust *all* viable alternatives to guardianship and conservatorship, and to intervene as little as practicable – as expressly required by law. [6]

Third, the petitioner also must convince the court to appoint the petitioner's nominee as guardian or conservator. While MCL 700.5313 and 5409 seem to set clear-cut priorities, we regularly see litigants surprised when the respondent nominates someone outside of the normal order of statutory priority. The respondent's nomination could block the appointment of the respondent's spouse, previously-nominated power of attorney, or long-term trusted helper. We also see regular litigation concerning a nominee's suitability.[7]

Be prepared for trouble. Be prepared for any of the following scenarios when you walk into the courtroom: (1) the hearing is uncontested, but the judge requires proofs[8] (including the timely submission of the report of the health professional),[9] (2) someone shows up and contests the proceeding,[10] (3) you have to run a full contested hearing on the spot, (4) you receive a written objection and appearance of opposing counsel with no prior notice,[11] or (5) the respondent ends up being out of the jurisdiction but demands to be present at the hearing.[12]

Pre-hearing discovery and motion practice can help you prepare for any problems that might present themselves at the first hearing. Otherwise, you can never be sure how it will go. Since you might not obtain your ultimate relief at the first hearing (i.e., appointment of a permanent fiduciary), always consider requesting interim relief, such as the appointment of a temporary guardian or conservator, a protective order, or having the court exercise the powers of a guardian.[13]

Consider protective relief. Protective relief is a crucial part of your toolkit. It should be considered as an alternative to conservatorships, and as a potential complement to conservatorships and guardianships.[14] Protective relief can be incredibly helpful in stabilizing a person's financial affairs, medical needs, or placement until the court can make a final determination by appointing temporary fiduciaries or granting specific protective relief.[15] It can fix broken estate plans, institute commonsense post-incapacity estate plans, and bless transactions that would otherwise cause conflict-of-interest problems for the attorney-in-fact or conservator.

Notice is a big deal. Notice is jurisdictional. While some courts assist with service or have guardians ad litem serve certain papers, do not count on them. Ultimately, the party requesting relief is responsible for notice.[16] While any adult (including an interested person) can serve probate papers, we suggest using a process server who is going to get it right.[17] Also, be mindful of the special rules that apply for legally-incapacitated people, including children.[18] Remember, the respondent must always be served in person at least seven days before the first hearing.[19] Finally, carefully consider who the "interested persons" are under MCR 5.125. The "interested person" rules are detailed and vary between guardianships and conservatorships. They often require nested legal analyses: for example, after a close look at MCL 700.2102 and 2103 (which identify a decedent's heirs), the "presumptive heirs" might include the descendants of the respondent's deceased child, or a childless widower's nieces and nephews.

Rediscover discovery. Think in advance about what discovery tools will make your hearing run smoother. In general, the civil discovery rules govern these cases.[20] Issue subpoenas to obtain documents that you need, either from the respondent or third parties.[21] Consider whether you need to compel the examination or deposition of a crucial witness (and remember that, if a person's decision-making capacity is at issue, the normal rules governing doctor-patient privilege do not apply). Finally, use appropriate pretrial motions to compel discovery or narrow the issues to be litigated at the first hearing.[22]

Engage in pre-hearing advocacy with the guardian ad litem. Oftentimes, if you engage the guardian ad litem (GAL) immediately upon her appointment, you can lay a good foundation so that the GAL is informed before meeting the proposed ward for the first time. This helps inform the GAL as to what questions to ask, get the ward's opinion on the nominated fiduciary, and address any issues that are known before the first hearing. Remember, also, that the court may consider the GAL's report, even if its contents may not be admissible under the rules of evidence.[23] And the GAL may be cross-examined by an interested party.[24] This means that, the better you inform the GAL, the more she can learn during her investigation, and the more you can bring out under cross-examination.

Guardians and conservators need help after being appointed. This seems like common sense, but in our practice, we probably underemphasized this for years. In a contested guardianship or conservatorship, it is easy to throw all of your energy into getting the guardian or conservator appointed, and then leave them largely to their own devices. As part of your routine practice, you should be educating fiduciaries about the rules of the road: inventory, accounting, interim reports, conflict-of-interest and commingling issues, and other problems that routinely cause fiduciaries to stumble.

Even when it's over, it ain't over. At any time, any interested person – including the respondent – can petition to have a guardianship or conservatorship modified or terminated. At that point, the guardian or conservator bears the burden of convincing the court that the guardianship and/or conservatorship should continue as previously ordered.[25] We always treat these as "de novo" hearings.

Every court is different. This is the single best advice anyone has ever given us and so we pass it on to you. Until you have filed enough petitions within one court to feel comfortable, you should regularly check in with the staff to make sure that you are following its local system for doing things. They may tell you that "it's fine," but don't accept that. Ask how you can make it better. There is almost always something they would like you to tweak.

Patrick Cherry and Nathan Piwowarski represent private clients in guardianship and conservatorship cases as well as the Michigan Department of Health and Human Services Adult Protective Services as Special Assistant Attorneys General. Their representation in these matters spans more than twenty counties in Northwestern Lower Michigan. Mr. Cherry currently serves as the Treasurer for the Litigation Section. Mr. Piwowarski chairs the Legislation Development and Drafting Committee and is a Council Member of the Probate and Estate Planning Section. For more information, visit www.mwplegal.com.

ENDNOTES

1 "The growth in the number and proportion of older adults is unprecedented in the history of the United States. Two factors – longer life spans and aging baby boomers – will combine to double the population of Americans aged 65 years or older during the next 25 years to about 72 million. By 2030, older adults will account for roughly 20% of the U.S. population." State of Aging and Health in America 2013, 8 (Centers for Disease Control), *available at* https://www.cdc.gov/aging/pdf/State-Aging-Health-in-America-2013.pdf (last accessed 03/30/2018). In the authors' region of practice, we see a long-term upward trend in guardianships, and a stable-to-upward trend in conservatorship and protective order proceedings. You can review your local courts' filing trends at http://courts.mi.gov/education/stats/caseload/Pages/default.aspx.

2 MCL 700.5306 (as to guardianships).

3 MCL 700.5401(3)(a) (as to conservatorships). supra at 378; McGill, supra at 407-408.

4 MCL 700.5401(4).

5 See MCL 700.5306 (as to guardianships) and MCL 700.5401(3)(b) (as to conservatorships).

6 In several passages, the Estates and Protected Individuals Code (EPIC) identifies alternatives to guardianship, which include: appointing a limited guardian, appointing a conservator, signing a patient advocate designation, entering a do-not-resuscitate order, signing a physician orders for scope of treatment form, or executing a durable power of attorney. As to guardianship, see MCL 700.5303(2), .5305, and .5306.; as to conservatorship, see MCL 700.5406(4), .5407(1), and .5408.

7 Suitability contests require the lawyers to marshal the case-specific facts, which are best explained by Constance L. Brigman in the Michigan Guardianship and Conservatorship Handbook (ICLE, current to 04/20/18), §2.10: "Factors to consider include (1) willingness to spend the time necessary to become acquainted with the individual's needs, (2) willingness to search for services that will provide for those needs, (3) ability to make decisions after considering the best interests of the ward, (4) the proposed guardian's relationship with the individual, (5) the proposed guardian's empathy for the individual, (6) the proposed guardian's current willingness to have continuous contact with the individual, and (7) the proposed guardian's willingness to make difficult decisions. In determining suitability, the court also looks at the potential for a conflict of interest. . . . ."

8 Even if the petition is unopposed, MCR 5.104 allows the court to require testimony. An order granting a petition to appoint a guardian may only be entered on the basis of testimony at a hearing. MCR 5.104(C).

9 MCR 5.405(A)(1) requires submission at least five days in advance of the hearing for it to be admissible without the testimony of the professional or problems under the hearsay rule.

10 See MCR 5.119(B)-(C).

11 While, under MCR 5.108(E), "[a] written response or objection may be served at any time before the hearing or at a time set by the court," don't be that lawyer if you can avoid it.

12 "In a proceeding concerning a conservatorship, guardianship, or protected individual, if the subject of the petition wants to be physically present, the court must allow the individual to be present." MCR 5.140(C)

13 We consider this latter form of relief—available under MCL 700.5312—underused.

14 See MCR 5.402(A) (multiple prayers for relief).

15 See MCL 700.5312, 700.5408, MCR 5.403(A).

16 MCR 5.102; 5.107(A), 5.402(C).

17 See MCR 5.103(A).

18 See MCR 5.105(D).

19 MCR 5.402(C).

20 The general rules of discovery apply under MCR 5.131(A), but the *scope* of discovery is limited to matters raised in proceedings. MCR 5.131(B). See *Shefman v Miller, Canfield, Paddock & Stone, PLC* (In re Estate of Wetsman), unpublished opinion per curiam of the Court of Appeals, issued December 23, 2014 (Docket No. 317081).

21 *Cf. Brown v Townsend (In re Brown),* 229 Mich App 496, 582 NW2d 530 (1998) (decedent's estate, counsel for personal representative held the power to issue subpoena even where civil action for wrongful death had not been filed).

22 See MCR 5.142.

23 MCR 5.121(D)(1).

24 MCR 5.121(D)(2).

25 MCL 700.5310(4).

Adding Power to Truth: Three Books to Help You Advocate

*by: David C. Sarnacki**

"The best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."

- Justice Oliver Wendell Holmes Jr., dissenting in *Abrams v. United States*

Advocacy is hard. And competitive. While we are building our arguments, someone else is simultaneously trying to tear them down. This article highlights three resources for adding strength to our arguments and for withstanding attempts to destroy them.

Cross Examination: A Primer for the Family Lawyer focuses our attention on persuasion under difficult circumstances. The assumption is that we are confronted with witnesses who are not cooperating. How can we effectively expose the truth and advocate for our client's position?

This cross examination primer is a valuable addition to our reference materials. It is practical, designed for immediate application, and covers the essential principles of cross examination. Since it is targeted specifically to the family-law bar, we will find pointers for many of our current and future cases.

Stephen Gassman's 194-page book addresses the major areas for cross examination in divorce cases. There are chapters devoted to the commandments of cross examination, preparation, and choosing not to cross examine. There are chapters on principles of persuasion (primacy, recency and trilogies), methods of impeachment, styles of cross examination. And there are chapters devoted to cross examination techniques (looping, combative witnesses, closing escape hatches), evidence (collateral evidence, bad acts, conviction, objections) and witness preparation.

Gassman also includes a significant chapter on cross examination of experts, another chapter on the reliability of scientific expert testimony, and appendices for cross examination of forensic psychiatrists and business valuation source materials (IRS Revenue Rulings 59–60 and 68–609).

Gassman's stated goal is: "we can learn to be competent cross examiners, so that cross examination advances rather than detracts from our case." His primer shows how communication and persuasion can be used to advance our client's position and to simultaneously weaken our opponent's position. While presenting a wealth of information, Gassman also notes the role of professional judgment, learned by trial and error: "As the saying goes, 'Good judgment comes from experience, and experience comes from bad judgment.'"

Gassman sprinkles relevant quotations throughout his work, uses practical headings, and shows how to implement the principles with boxes of examples. He is a family-law litigator in New York and has previously co-authored: Evidence for Matrimonial Lawyers, Matrimonial Valuation, and the Library of New York Matrimonial Law Forms.

Demonstratives: Definitive Treatise on Visual Persuasion presents practical information to help us add visual power to our arguments. We can create arguments and convey them with not only our words (written and spoken) but also with powerful images. The power of those images flows from effective graphics pointing the way to our requested relief.

This Demonstratives treatise gives us everything we need to move beyond words alone and into the realm of images: images for exhibits, motions and briefs, depositions, and trials.

Demonstratives begins with the theory of visual exhibits and evidence. To implement that theory, the authors' analysis is: from Goal to Strategy to Visuals. The starting point is always the why and whether or not a demonstrative will advance our

goal. From there, a strategy is developed focusing on the specific information to be emphasized, the options for visualization, the availability of supporting data, and the best medium for the message.

The authors reveal the core design principles of: knowing our target audience; focusing on the speed of communicating the precise point of the demonstrative; and determining which data to emphasize. Demonstratives takes the theory and moves it into practical applications.

Significantly, there is a third section of the book (the largest section) dedicated to "Demonstratives Visual Encyclopedia." The table of contents allows for easy entry into nine chapters devoted to specific design topics. The final chapter, chapter 16, is the "Inspiration Index." There are nearly 100 pages packed with examples of demonstratives advocating from Goal to Strategy to Visual. The index includes: bullet lists, charts, tables, comparisons, data charts, documents and callouts, flow charts, maps, organizational charts, timelines and illustrations, and animation stills.

This 246-page treaties was put together by three authors. **Daniel Bender** is an attorney with litigation experience who moved into litigation consulting in 2007. He has published numerous articles in law-related journals. **Pierre Kressman** is a graphic designer with decades of trial-consulting experience. **Jason Fowler** is an intellectual-property litigator.

Images with Impact: Design and Use of Winning Trial Visuals is a 372-page reference book on why to use and how to use images to persuade. The book is practical and easy to incorporate into our arguments of case themes and theories.

Images with Impact is rock solid. The topics are presented clearly and comprehensively. The mental processes for brainstorming, creating, editing, and using are highlighted. And the possibilities for turning themes into pictures are depicted with realistic examples and sometimes multiple options.

Kerri Ruttenberg moves through four parts on her journey to effective trial visuals. First, she describes the principles of visual communication and why it matters in the courtroom. Second, she moves to the basic tools for courtroom images, including charts, graphs, timelines, maps, photographs, graphics and diagrams, and animation. Each tool is given sufficient attention so that it can be incorporated into our advocacy. Third, the basic principles of graphic design are summarized so that whatever we come up with is effective. And fourth, consideration is given to identifying potentially misleading visuals, tips for creating visuals, tips for using those visuals in the courtroom, and legal considerations addressed in the court rules and case law.

Ruttenberg provides good, practical summaries of the principles in each chapter, and she includes healthy doses of visuals on nearly every page. She shows what not to do, and why not. And she shows what to do and why.

Ruttenberg is a Washington, DC trial lawyer. She has experience trying cases throughout the country, in both the criminal and civil dockets. Her book is enhanced through the support of four graphic design teams: Barnes & Roberts; Chicago Winter; Core Legal Concepts; and RLM Trial Graphix. The diversity of examples from these varied sources enhances the opportunities for inspiration.

D. Bender et al., Demonstratives: Definitive Treatise on Visual Persuasion (2017 American Bar Association). $89.95.

S. Gassman, Cross Examination: A Primer for the Family Lawyer (2017 American Bar Association). $89.95.

K. Ruttenberg, Images with Impact: Design and Use of Winning Trial Visuals (2017 American Bar Association). $129.95.

**David C. Sarnacki publishes poems about our collective joys and struggles of being human ["Cry, Smile, Wonder" — available on Amazon.com] and practices family law, mediation and collaborative divorce in Grand Rapids.*

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