THE LITIGATION NEWSLETTER

Winter *2000*

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CHAIR'S LETTER

Ted C. Farmer

Dear Members,

Let me quickly tell you what most excites me right now about the Litigation Section 2000: We are going to have great programs! Please save the Masters in Litigation program mailers from ICLE, a series which we are doing with ICLE. Please mark the dates and plan to attend these programs and our summer conference. They are sure to get you fired up to excel as trial attorneys, and you'll meet a lot of nice people.

Very truly yours,

Ted C. Farmer

JURY DELIBERATIONS

Ted C. Farmer

In our last newsletter, I shared my observations during the trial itself when I sat as a juror last summer. In this article, I'd like to share my memories of our deliberations.

The important lesson I learned was that there is a lot more leadership out there than my preconceptions allowed for. We go into a jury trial trying to identify the potential leaders, for and against our position. We make our pitch to them, hoping they will sell it to those we perceive as the followers. But true leaders can hide. True leaders may not even know they are a leader. True leaders may just be thoughtful, likeable or persuasive persons having an opinion. In the end, I believe I now know less than before about which jurors to persuade. My confession of ignorance is that I now will only assume that I should value every juror in the box as someone worth persuading.

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The deliberation process taught me of my ignorance. At the beginning, we knew to select a foreperson. Naturally, everyone said I should do it. I declined because I just wanted to be part of the jury, not held separate because of my lawyer label. (Of course, that's not how I said it to them.) Anyway, after a brief, uncomfortable silence, we got a volunteer. This juror was a good man who clearly felt that he had experience "running" a meeting. He began to organize it, and did so in a facilitative way, inviting everyone to speak in turn as we went around the table, offered our initial impressions and our initial vote. I had heard before about the fabled initial straw vote. Yes, juries obviously do take one right away. Ours was nowhere near our ultimate verdict. There may be a lawyer's lesson here. It may be this: during instruction, I'm sure the Judge gave us the dummy charge (you know, reason together, listen to each other's opinions, etc.). I don't remember hearing it. I doubt the other jurors remembered it either. But we did it anyway. If you have a close case, you may want to incorporate that into your closing argument. Tell them that their initial vote may be totally different from what they ultimately decide, and that they should listen to each other and reason together. Maybe then the jury will consider you wise when they take that first straw vote and learn that they have some talking to do.

After our straw vote on the ultimate issue, we turned to the verdict form. We followed instructions. We worked through it. So, yes, the negotiating and drafting of that form are important. But the form doesn't answer all of the jurors' questions. I learned that as a lawyer, when I go through the verdict form in closing argument, I need to identify for the jury where they are on their own, and tell them so. In our case, we tried a third-party automobile negligence case. When we came to the question about whether the plaintiff suffered a "serious impairment," I quietly watched my fellow jurors discuss what that meant. Some wanted to ask the Judge to define it better for us. Ultimately, we talked about all the appropriate, important considerations on that issue. But what I think a good lawyer needs to say to the jury is that, regardless of whether you call it a question of fact, a mixed question, or a case element, this question is one that you jurors decide. It is solely the decision of you jurors based on whatever facts you decide are important (and if you decide it favorably to me, no one could disagree with you).

Now you might hope that working through a verdict form is a logical progression. Just ones and zeros. Not so. I learned that juries don't clearly decide each question then move along. We recognized where we were unsure on elements or questions, then moved forward to see what next decision we had to make. Ultimately, we found we could reach consensus on a verdict without articulating a specific headcount on the issues or elements preceding it. We then worked backward and all agreed, answering the questions "correctly" to support that verdict. Was this sound reasoning? Absolutely. Was this a good, just decision? Absolutely.

How did we get there? Those silent, unsuspected leaders. They aren't corporate CEOs. They aren't military brass. They are good people who value their own opinion. They are workforce team players who believe in earnestly getting the job done well. They are women you might wrongly label "housewife," but who have organized 50 people, thousands of articles and complex logistics for a church rummage sale. They are computer geeks who made their employer a modern financial success by implementing e-commerce. They are the "power behind the throne" types who haven't been found out. There are more closet leaders out there than I can shake a stick at. But by carefully inserting their opinion at the right time and in the right way, they can sway important decisions.

As I said in our last issue, I invite you to write in with your own experiences. I will continue my career-long search for how to persuade juries, and I'm sure you will too.

JUDICIOUS JUDICIAL ADVICE ON PERSUASION & EXPERTS

David C. Sarnacki
Miller, Johnson, Snell & Cummiskey, PLC

Looking for some sound advice on what makes experts persuasive? Ask a judge. Better yet, ask a skulk of them. After all, who watches more trials, more experts in the spotlight, more results than our trial bench?

This article culls a 14-point plan from the bottom line on judicious judicial advice. For the comments of individual of state court and federal judges, see my previous articles: "Effective Advocacy in Divorce Trials," 78 *Mich Bar J* 20 (Jan 1999) and "Effective Trial Advocacy in Federal Court," 74 *Mich Bar J* 644 (July 1995).

Experts in General

1. Judges and juries look for **the honest expert**, one who may be trusted regardless of who is paying the bill. This means avoiding exaggerations, limiting expertise where appropriate, and agreeing with uncontroverted facts and scientific principles on cross-examination. The more impartial, the better the impression.

2. Judges and juries look for **communication skills**. This means easily understood explanations and short, direct answers to all questions.

3. Judges and juries look for **logic**. This means a step-by-step, logical progression toward the opinion itself.

4. Judges and juries look for **qualifications**. This means experience and expertise that fits squarely with the subject matters in question.

Mental Health Experts

5. Judges and juries look for **a clear nexus** between the expert's conclusions and the relevant issue in the case. This means a tangible link between the testimony and the ultimate issue to be decided by the trier of fact.

6. Judges and juries look for professional assistance in **understanding human behavior**. This means explaining why a person did or did not do something that the trier of fact might have otherwise expected under the circumstances (i.e., counterintuitive features of human behavior).

7. Judges and juries look for **a solid foundation**. This means, if at all possible, an ongoing relationship with the patient over an appreciable period of time, together with appropriate anecdotal evidence.

Financial Experts

8. Judges and juries look for **an understandable, comprehensive and sophisticated written report**. This means each opinion is documented with sound underlying facts and data, such as: revenues, costs, earnings, discount factors and interest rates; asset appraisals; photographs; sales prices for any comparables; the net annual income to the owner from operation of the business; and the like.

9. Judges and juries look for **an ability to summarize** data clearly. This means clear and concise answers.

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10. Judges and juries look for **demonstrative evidence**. This means graphs and charts that are easily understood.

11. Judges and juries look for **depth of knowledge** of the particular business being evaluated. This means not merely relying a rule of thumb for that particular type of business.

12. Judges and juries look for **"conservative" assumptions, methods and theories** that reduce the risk of error and adverse impact on the parties. This means: observing all rules that govern the accounting or valuation questions at issue; giving objective testimony subject to those professional rules; presenting the company's financial records and other independent valuation sources for similar businesses; acknowledging the weaker points in the expert's presentation; and the like.

13. Judges and juries look for **an ability to differentiate** the opposing expert's report and testimony.

14. Judges and juries look for **defects** in the basis of the opinions. This means probing for important facts or data missed by the expert or for limitations on the expert's qualifications.

PRE-FILING INVESTIGATION IN EMPLOYMENT LITIGATION

Bradley K. Glazier
Bos & Glazier, PLC

The process of investigating an employment case begins with the initial client interview and ends with the close of formal discovery. This article addresses various techniques and sources of information that are available before the case is filed. In addition to giving the plaintiff's attorney ammunition to begin the formal discovery process, a thorough pre-filing investigation is required by courts interpreting Rule 11 of the Federal Rules of Civil Procedure and comparable state rules. See, e.g., MCR 2.114 ("The signature of an attorney or party ... constitutes a certification by the signer that (1) he or she has read the document; (2) to the best of his or her knowledge, information and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing case law....").

To convince yourself and the court that your pleading is "well grounded in fact," it is essential to review all available employment records and to speak with at least the most significant potential witnesses. Of course, some witnesses you will be unable to contact without using the formal means of discovery available only after suit is filed. Discovery of these witnesses is beyond the scope of this article.

Even after the law suit is filed, it will be cheaper and more efficient to interview potential witnesses without relying upon the formal deposition process. Such informal contacts have been approved by the courts. See, *Stempler v Speidell,* 100 N.J. 368, 382 (1985) (personal interviews are an accepted, informal method of assembling facts and documents in preparation for trial and their use should be encouraged to reduce the cost of preparing for trial).

Contacting Current and Former Employees of the Defendant

To prove liability issues it is useful if not essential to rely upon the testimony of current and former employees of the defendant. These witnesses have often overheard the statements that your plaintiff relies upon to support an oral contract of employment. Current or former employees are also frequently witnesses to direct evidence of discrimination such as disparaging remarks about your client's age, race, sex etc. In any event, it will be the rare employment case where you will not want to speak to some current or former employees.

If your client maintained a personal phone book with the names and home phone numbers of current and former employees, it will be a simple task to contact the employee or former employee at home to ask about his or her knowledge of these events. However, you must be aware of the ethical constraints on such contacts before you begin your investigation.

The ethical rules will vary from state to state, but most states have adopted the American Bar Association's Model Rules of Professional Conduct ("Model Rules"). The Model Rules distinguish between contacts with represented and unrepresented persons. There is no prohibition on *ex parte* contacts with unrepresented persons. However, Model Rule 4.3 does require certain disclosures to be made to such persons. The Rule states, in part: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested."

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The ABA has also issued a formal opinion, No. 91-359, which states that Model Rule 4.3 "requires that the lawyer contacting a former employee of an opposing party make clear the nature of the lawyer's role in the matter giving occasion for the contact, including the identity of the lawyer's client and the fact that the witness's former employer is an adverse party." Therefore, even if an *ex parte* contact is permitted, the lawyer must tell the person contacted the following:

- He or she is a lawyer,
- He or she represents a client in connection with the termination of the client's employment with the person's former employer, and
- He or she must confirm that the person is not being represented by a lawyer.

If requested by the person being contacted, the lawyer should also disclose that the person is under no requirement to talk to the lawyer. Finally, it is advisable to record the "warnings" referenced above and the conversation after securing the consent of the person contacted.

Contacting Former Non Management Employees

The ethical rules and court cases allow contacts with former non management employees without alerting counsel for the company. In ABA Formal Opinion 91-359, the committee charged with responsibility for interpreting the Model Rules, refused to extend Rule 4.2 to preclude *ex parte* contacts with former employees of an opposing corporation. Rule 4.2 states:

> In representing a client, a lawyer shall not communicate about the subject matter of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The comment to Rule 4.2 discusses whether a "party" can include an employee of an organization. The comments state:

> In the case of an organization, this rule prohibits communication by a lawyer for one party concerning the matter in representation with persons having managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization . . . or whose statement may constitute an admission on the part of the organization.

Since a non managerial former employee's statements cannot be imputed to the company or constitute an admission of the company, they may be contacted without alerting the company's counsel. See, *Valassis v Samelson*, 243 F.R.D. 118 (E.D. Mich. 1992).

Contacting Former Management Employees

Some courts have held that it is improper to contact former management employees of a corporate defendant without first seeking the consent of the company's attorney. *Porter v Arco Metal Co*, 642 F. Supp. 1116, 1118 (D. Mont. 1986); PPG *Industries, Inc v BASF Corp*, 134 F.R.D. 118, 121 (W.D. Pa. 1990). These courts have focused on the language in the comment to the rule stating that persons whose acts or omissions "may be imputed to organization" are off limits.

A majority of jurisdictions refuse to read the prohibitions of Rule 4.2 so narrowly and allow

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ex parte contacts with former employees without restrictions. See, *In re Domestic Air Transportation Antitrust Litigation*, 141 F.R.D. 556 (N.D. Ga. 1992), *Siguel v Trustees of Tufts College*, 52 Fair Empl. Prac. Cas. (BNA) 697 (D. Mass. March 12, 1990). Because of the conflict in the cases, however, the law in the appropriate jurisdiction must be consulted before initiating *ex parte* contacts with this group of former employees.

Contacting Current Non Management Employees

Current non management employees may be contacted unless (1) their acts or omissions may be imputed to the organization for liability purposes or (2) their statements may constitute an admission by the company. Model Rule 4.2. The Michigan Bar Association addressed this issue directly in a February, 1990 reported opinion. In RI-44, the attorney's client was fired from a company for alleged sexual harassment of three clerical employees, one of whom had since left the company. The client's lawyer sought an opinion on whether, without consent of the company's inside counsel, he could contact the current and former employees who had made the allegations against his client. The informal opinion of the Michigan State Bar was that such contacts were permissible under Model Rule 4.2. The ruling states that "it would seem in a wrongful termination cause of action, the employees whose actions or omissions are imputed to the company, or whose statements constitute an admission, are those employees who acted upon the information from the clerical employees, i.e., those employees who terminated the client." RI-44. (February 1, 1990).

In the context of a wrongful discharge case, it will only be a supervisor or manager whose acts will be imputed to the corporation for liability purposes. Only a supervisor or manager has the authority to terminate or take disciplinary action against another employee. Similarly, a statement by a non managerial employee about the reason or motive for a termination will likely be beyond the scope of his or her employment and would not be an admission under the exception to the hearsay rule. See, Fed. R. Evid. 801(d)(2)(D). Therefore, while it may be improper to contact a truck driver whose company was represented by counsel if you represented a client injured in an automobile accident with the truck driver, (See, *Valassis v Samelson*, 143 F.R.D. 118, 123 (E.D. Mich. 1992), the same contact would be permissible in a wrongful discharge lawsuit. Neither the truck driver's actions or statements would be imputed to the company or be considered admissions of the company under the rules of evidence. Therefore, *ex parte* contacts with non management employees are usually permissible.

Contacting Current Management Employees

Management officials of a company are off limits for *ex parte* contacts while investigating a lawsuit against the company. The comments to Rule 4.2 state: "this rule prohibits communication by a lawyer for one party concerning the matter in representation with persons having managerial responsibility on behalf of the organization . . ." The purpose of the rule is to protect the sanctity of the attorney client relationship and to prevent one party's attorney from exploiting the lack of legal knowledge of a momentarily uncounseled adverse party. *Hanntz v Shiley, Inc*, 766 F. Supp. 258, 265 (D.C. N.J. 1991). The courts have held that this purpose is violated when a lawyer contacts a manager for a company. See, *Consolidated Coal v Bucyrus Erie Co*, 89 Ill 2d 103, 432 NE2d 259 (1982). (Employees within the "control group" of the company may not be the subject of *ex parte* contacts by an investigating lawyer).

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The consequences of an improper contact with a party represented by counsel are often severe. For instance, in *Cronin v Eight Judicial District Court*, 781 Pac. Report. 2d 115 (1989), the Nevada Supreme Court upheld the disqualification of the plaintiff's attorney from a case on the grounds that he violated that state's equivalent of Model Rule 4.2. The attorney in Cronin had interviewed a hotel's security management employees after suit had been filed against the hotel for injuries sustained in a robbery.

Obtaining Documents

Favorable documents are critical to the success of an employment case. Because it is likely that an employer will be able to establish some basis for its decision to terminate your client which does not run afoul of any discrimination statutes or other theories of recovery, it is essential to have documents which will support your theory of the case. When asked to choose between testimony and a contemporaneously recorded document, jurors will accept the document 9 times of out 10. The critical documents that are available in pre suit discovery fall into the following categories:

- Employment Records
- Agency Records
- Medical Records

Documents Maintained by Your Client

You may be surprised to learn the sheer volume of documents that your client has maintained about his or her employment over the years. If there was some warning preceding the termination, your client may have taken copies of the documents home. If your client was escorted off the premises and not allowed to take any documents, ask him or her to document the records in the filles which will support the case. You can then compare the client's list with the documents eventually produced by the employer. Of most use to you during litigation will be the following types of documents that you should attempt to secure from your client:

- Performance Evaluations
- Records Showing Raises and Bonuses
- Notes and letters of commendation
- Company Handbooks and Policy Manuals

The performance evaluations (assuming they show a long span of positive performance) can be used to rebut the reasons offered by the employer for the termination. Employers often keep a running tally of each employee's raises and bonuses. These documents help illustrate a history of successful performance and can be used to argue for the use of an "inflation factor" for calculating future lost wages. See, *Chamberlain v Bissel*, 547 F Supp 1067 (W.D. Mich). (Court calculates lost wages using a 6% inflation factor to reflect plaintiff's average salary increase with defendant).

Handwritten "at-a-boy's" written by the boss is another example of documentary evidence to rebut the reasons offered by the company for your client's termination. Thank you letters sent by clients or customers of the former employer praising your client are also helpful. Even birthday cards or holiday greeting cards with a sentimental message about what a great job your client has done or what a value he or she has been to the company are useful. All such documents should be inspected by a paralegal or someone else trained to understand the significance of the documents to your theory of the case.

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Finally, the company handbook or personnel policies should be inspected to determine whether they contain promises of "just cause" employment. Even if no such promises are included, many handbooks and personnel policies set forth a progressive discipline policy. Evidence of a failure to follow the policies may be used as evidence supporting a claim that there was an improper motive behind the termination. See, *Giacoletto v Amaz Zinc Co*, 954 F.2d 424, 427 (7th Cir. 1992). If your client did not keep a copy of employee handbook, ask him or her if there is a co-worker who is still friendly with the employee and who would let the employee borrow the handbook.

Documents Maintained by the Employer

If your client did not maintain copies of the documents referenced in the section above, the law of some states require the employer or former employer to copy certain documents for your client. For instance, Michigan, California and Illinois have laws requiring employers to make available an employee's personnel file for inspection and copying. See, e.g., Michigan's Bullard Plawecki Right to Know Act, MCLA § 423.501; Cal. Labor Code § 1198.5; Ill Rev. Stat. Ch. 18, §2001, *et. seq*. Also, compare the documents produced to documents you have received prior to filing suit. For instance, if the employer was obligated to produce your client's personnel file under the terms of a state statute, request the file again in formal discovery and compare the results. Some statutes provide or suggest that the employer cannot use documents that fall within the definition of a "personnel file" and which were not produced when originally requested.

Even in those states which do not require the employer to turn over such documents, the corporate counsel or outside company lawyer may be willing to share such documents if he or she is convinced that you will file suit regardless of whether the documents are produced. Tell the opposing lawyer that you need the documents to decide whether or not to pursue the case. Remind the lawyer that you will get to see the documents eventually anyway. Promise reciprocity and agree to be up front about producing any relevant documents in you or your client's possession. Experienced employers' counsel will often produce documents to help you evaluate the case under these circumstances.

Administrative Decisions and Records

A great source of information to assist in evaluating a case is the EEOC or state equivalent file. If the employee filed a claim with such an agency, you can request a copy of the file once the investigation has been closed. See, 29 C.F.R. Part 1610. Generally, if you send a letter indicating that you have an interest in the file or are reviewing the case to determine whether to accept the matter, the agency will cooperate. The agency may remove some material in accordance with its own internal protocols, but even after material is removed, the file should still contain information regarding the employer's response to the charge which will help you decide whether to take the case.

For some public employers, the Freedom of Information Act may be the source of limited information useful to evaluating a potential case. See, 5 U.S.C. § 552. However, many employment related documents will be exempt from disclosure under the act.

Medical Records

In handicap discrimination cases under the ADA or state equivalent statutes, medical records may be important to prove liability issues or to rebut

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employer defenses. In other employment litigation matters, medical records will be relevant to damages. If you place your client's emotional state at issue with a claim for emotional distress damages, your opposing lawyer will want to know what other life events may have impacted on his or her emotional state. Why not secure such records at the outset of the case and offer to produce the records to your opposing counsel when asked instead of sending him a release and creating a situation where your opposing counsel has access to records which you have never seen?

Always include a brief explanation about the nature of the case to ease the doctor's fears that you are his target. It is also helpful to meet with the doctor early on to gain an ally in your case against the employer. Most doctors are willing to assist so long as they believe your client and understand their limited role in the case.

Documents Maintained by Past Employers

In addition to requesting information from your client about his or her past employers (jobs held prior to the position from which your client was terminated or demoted), contacting the past employers themselves is sometimes necessary. The "after acquired evidence doctrine" has caused employer counsel to subpoena plaintiffs' prior employment files in the hopes of finding evidence of resume fraud. If you have questions about your client or future client's past employment record, send a request for his file, along with an authorization to release the file to you.

Conclusion

Pre-filing investigation is necessary in employment cases both to avoid imposition of sanctions and to assure that the cases you file are ones that you will be proud to take to trial. By conducting a thorough investigation, attorneys can limit their exposure to cases that they wish they had never filed in the first place.

SHAREHOLDERS' RIGHTS TO ACCESS CORPORATE BOOKS AND RECORDS: THE EBB AND FLOW OF JUDICIAL ENFORCEMENT

Edward H. Pappas
Daniel D. Quick*

The ability to inspect a corporation's records is often a necessary tool for the minority shareholder to preserve his or her rights. At the same time, a shareholder's inspection right can be abused to harass the corporation.

Common law, and now the Michigan Business Corporation Act (MCL 450.1487, MSA 21.200(487)), provides that shareholders have the right to inspect the corporation's books and records. However, the right is not absolute and must be for a proper purpose. Over the past 140 years, Michigan courts have vacillated as to how much protection to give to shareholders, often guided by an unstated equitable review of the parties' positions and motives.

In Michigan, since at least 1861, a stockholder has had the common law right to examine the records, books and papers of the corporation at reasonable times and for proper purposes. In *Bishop v Walker*, 9 Mich 328 (1861), The Michigan Supreme Court noted that even in the absence of a statutory right, common law granted a shareholder the right of inspection so long as the demand was proper, "at a proper time and place, and for a proper reason." *Id*. at 330. Such a demand, however, would not be permitted "to gratify idle curiosity." *Id*. In addition, the court ruled that a request to inspect all of the books, records and papers of the company is too broad. *Id*.

After *Bishop*, court rulings confirmed that the purpose of the inspection must relate to the interests of the shareholder. *Eldred v Elliott*, 161 Mich 262 (1910); *Woodworth v Old Second Nat'l Bank*, 154 Mich 459 (1908). In *Eldred*, The Michigan Supreme Court held that a shareholder's interest in ascertaining the value of his stock was a proper purpose and justified broad inspection. Further, the *Woodworth* court noted that although inspection is permitted only for a "proper purpose," the corporation had the burden of proving that the purpose was improper. *Id*.

In 1921, The Michigan Legislature enacted Act No. 84, Pub. Acts 1921, which provided as follows:

> The books of every corporation containing its accounts shall be kept, and shall at all reasonable times be open in the city, village or town where such corporation is located, or at the office of the treasurer of such corporation within this state, for inspection, by any of the stockholders of said corporation, and said stockholders shall have access to the books and statements of said corporation and shall have the right to examine the same in the said city, village or town or at said office.

The Michigan Supreme Court considered the 1921 statute in *Slay v Polonia Pub Co*, 249 Mich 609 (1930). The plaintiff in *Slay* owned one share of stock, and sought mandamus to compel the officers of the corporation to permit him to inspect and examine the books and statements of the

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corporation. The Michigan Supreme Court noted that at common law, a shareholder must have a proper purpose to inspect corporate records, citing both *Woodworth* and *Eldred, supra.* The court held that notwithstanding the common law, because the statute did not contain such a limitation, a shareholder's request to examine a corporation's books does not need to be accompanied by a statement of purpose, since it is assumed that the request is made for a proper purpose. However, the court held that where a corporation refuses the request and a plaintiff files a writ of mandamus, the statute is not at issue. Instead, the court reasoned, because a writ of mandamus is discretionary, a court may not enforce the inspection right "except for a just cause and a proper purpose." *Id*. at 613. The court found that the plaintiff's purpose was not proper where the corporation demonstrated that the shareholder was an employee of a rival publisher and was seeking the information for the purpose of unfair competition.

In 1948, The Michigan Legislature enacted MCL 450.45, which provided as follows:

> The books of account and stock books of a corporation shall be open to the inspection of every shareholder holding of record, in the aggregate, 2 percent of the outstanding capital stock of the corporation (or 2 percent of any class of such stock, if 2 or more classes have been issued) and who shall have been a shareholder of record for at least 3 months prior thereto, at all reasonable times for any proper purpose.

In *George v International Breweries Inc*, 1 Mich App 129 (1965), the plaintiff shareholder made a request seeking inspection of stock transfer books and records for the purpose of getting either himself or his nominee on the board of directors. The Michigan Court of Appeals held that this was a proper purpose and ordered the corporation to allow inspection. The court also ruled that even though the shareholder did not own the requisite two percent of stock for over three months, the fact that he owned some stock for three months was sufficient to mandate inspection.

One year later, in *Tornga v Michigan Gas & Electric Co*, 4 Mich App 109 (1966), a plaintiff shareholder who owned 71 shares of stock in his own name and an additional 4,151 shares as a custodian sought inspection of corporate records. The Michigan Court of Appeals ruled that because the plaintiff's name was listed as the record title holder of all of the shares, the shareholder held the necessary two percent of outstanding capital stock and therefore was entitled by statute to inspect the stock ledger listing the names and addresses of all shareholders and the number of shares held by them respectively.

In 1973, Section 45 was repealed and replaced with the current statute, MCL 450.1487, MSA 21.220(487). The statute is extremely detailed, and reinstitutes through legislation all of the common law obstacles to access to books and records – plus some. The basic operative language (in section (2)) is that a shareholder may "inspect for any proper purpose the corporation's stock ledger, a list of its shareholders, and its other books and records, if the shareholder gives the corporation written demand describing with reasonable particularity his or her purpose and the records he or she desires to inspect, and the records sought are directly connected with the purpose. A proper purpose shall mean a purpose reasonably related to such person's interest as a shareholder." The corporation has five days to produce the information, after which time the shareholder can sue. The shareholder has the burden of proof on all matters. Section five mandates that the court "shall" award to the shareholder costs and reasonable attorneys fees incurred if an order issues upholding the inspection right, "unless the corporation proves

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that it failed to permit the inspection in good faith because it had a reasonable basis to doubt the right of the shareholder or director to inspect the records demanded."

In *North Oakland Co Bd of Realtors v RealComp, Inc*, 226 Mich App 54 (1997), plaintiff was a shareholder in defendants. After being permitted to review the defendants' general ledger, additional requests were denied. Plaintiff then sent a written request for certain documents, the stated purpose being to "monitor the financial health of [defendants] inasmuch as the affairs of the two corporate respondents directly affected its investment and position of stockholder." After the request was denied, Plaintiff filed suit, complete with an affidavit setting forth several additional alleged purposes for the inspection, "including concerns regarding allocation of computer equipment, allegedly improper employee benefits, discrepancies between actual expenditures for tax line charges and the operating budget, expenditures in hiring certain employees, and reaffirmation of plaintiff's ownership interest." The circuit court denied plaintiff's petition to compel compliance, holding that plaintiff had failed to meet its burden of demonstrating a proper purpose.

The Court of Appeals reversed. After summarizing common law cases in a manner somewhat lenient to shareholders, the court restated its view of the law:

> Consistent with the common law in this state and the holdings of courts in other jurisdictions with similar statutes, we hold that a proper purpose for inspection of corporate records under § 487 is one that is in good faith, seeks information bearing upon protection of the shareholder's interest and that of other shareholders in the corporation, and is not contrary to the corporation's interests. See, generally, anno: Purposes for which stockholder or officer may exercise right to examine corporate books and records, 15 ALR2d 11, §§ 2, 7, 8. Although idle curiosity or mere speculation of mismanagement are insufficient to justify an inspection, we do not believe that the Legislature intended in enacting § 487 to erect a formidable obstacle for shareholders in seeking an inspection of corporate records.

The court then held that, because plaintiff's action was essentially one for mandamus, "it was not for the circuit court to evaluate the merits of plaintiff's allegations of mismanagement but rather to determine only whether plaintiff had satisfied the statutory prerequisites for a § 487 inspection." While the defendant submitted an affidavit countering plaintiff's allegations of mismanagement, the court held that this was relevant only inasmuch as the court retained the ability to more specifically tailor what documents would be reviewed.

The last part of this ruling raises an obvious question: if the circuit court could limit production based upon management's rebuttal of "the merits of plaintiff's allegations of mismanagement," then how can the court avoid substantively evaluating plaintiff's claims as well? The holding of this case may simply be that any good faith reason is reason enough to get past the threshold and be entitled to *an* inspection, but just how detailed that inspection can be will be tempered by the underlying facts and equities.

The common law and statutory right of shareholder access to corporate books and records goes back to the beginning of Michigan jurisprudence. Legislation and the courts' enforcement of shareholders' rights seems to have progressed in a complimentary fashion: when the legislation offered little guidance, the courts applied common sense limitations, while when the legislation appeared restrictive, the courts interpreted it consistent with the equities of the case and with the economic disparity between shareholder and corporation, which lies at the heart of the doctrine.

JUDGES WANTED

Dear Litigation Section Members:

The University of Michigan Law School is seeking attorneys to serve as judges for its 2000 Client Counseling Competition. The purpose of the competition is to give students an opportunity to conduct three mock initial interviews with fictional clients whose roles will be played by undergraduate students. Practicing lawyers serving as judges observe these interviews and then provide constructive feedback to the students. Here are the essential details:

When:	**Saturday, January 29, 2000** **8:30 a.m. to 1:15 p.m., with lunch immediately following**
Where:	**Hutchins Hall** **University of Michigan Law School**
Subject Area:	**Consumer Law**

Breakfast will be served between 7:50 and 8:20 a.m. The Competition rounds will take place between 8:20 a.m. and 12:30 p.m. and will consist of two sessions. Lunch will take place between 12:30 and 1:50 p.m. A minimum of 24 judges are needed. If there are more people interested in judging, the Competition is set up to accommodate multiple judges for each session. In fact, the more judges who participate, the better the experience for the students. Each judge will watch, score and give feedback to competing students at least two times.

People interested in judging should contact me or my secretary, Sherry Kozlouski at (734) 764-0516 (e-mail: dbaum@umich.edu or sherryk@umich.edu).

Thank you for spreading the word about this to Litigation Section members. Please call me if you have any questions.

Sincerely,

David H. Baum, Director of Student Services
University of Michigan Law School
Phone: (734) 764-0516
Fax: (734) 647-5226
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