LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

Volume 31, No. 1 Spring 2021

WHEN A TITLE VII CASE ISN'T

David Porter
Kienbaum, Hardy, Viviano, Pelton & Forrest, PLC

Two years ago, the U.S. Court of Appeals for the Sixth Circuit held that parties to an employment contract cannot shorten the timeframe for filing a Title VII claim.[1] To do so, it had to confront an earlier decision that, by many accounts, had held just the opposite.[2] As it turned out, the earlier decision did not involve a Title VII claim at all, prompting the question: if the earlier panel *thought* it was resolving a Title VII claim, is that decision binding under stare decisis?

Thurman, Logan, and the Phantom Title VII Claim.

In *Thurman v. DaimlerChrysler, Inc.,* the plaintiffs filed a federal lawsuit that included a Title VII claim.[3] After an involuntary dismissal, the plaintiffs returned to federal court with a second suit that, according to the Court of Appeals, "alleg[ed] the same claims as the previous suit."[4] The defendant moved to dismiss "all claims" in the second lawsuit as untimely, citing a provision in the plaintiffs' employment contracts shortening the statute of limitations to six months.[5] The district court granted the motion, and the Court of Appeals affirmed using reasoning that didn't differentiate among the plaintiffs' claims.[6] "[A]ll of Ms. Thurman's claims," it held, "[were] time barred by the six-month limitations period."[7]

Fast forward roughly ten years, the defendants in *Logan v. MGM Grand Detroit Casino,* armed with a similar contractual limitations defense, argued to the district court that *Thurman* had settled the timeliness of the plaintiff's Title VII claim. By then, it had support from more than a few judicial decisions citing *Thurman* for the proposition that Title VII claims could be contractually shortened. Even the magistrate judge in *Logan,* on its way to recommending summary judgment for the defendant, acknowledged *Thurman* as a decision involving a Title VII claim, though one that lacked independent treatment of the claim.[8]

Then an intrepid lawyer from the Equal Employment Opportunity Commission got involved as amicus in support of the plaintiff's appeal. Living up to his friend-of-the-court status, he pulled the second complaint from *Thurman* and found no Title VII claim anywhere in the pleading. "Title VII" *Thurman,* it seemed, was no Title VII case at all.

No matter, the *Logan* defendant argued. What mattered was that the *Thurman* panel *thought* it was deciding a Title VII claim. That much was apparent from the face of the *Thurman* opinion. So, "[e]ven if an earlier panel committed an 'analytic error,' " it said, " 'that precedent nonetheless constitutes binding *stare decisis.*' "[9]

The *Logan* panel disagreed on the first point. After reviewing the *Thurman* opinion, it "d[id] not believe that the *Thurman* panel was actually mistaken about what type of case it was hearing[.]"[10]

But *Logan* did not stop there. It continued: "Further, even if [the defendant] is correct, and the *Thurman* panel somehow mistakenly thought it was deciding a Title VII case," its statement about Title VII would have been dicta and thus not binding on the *Logan* panel.[11]

But is that true?

Stare Decisis: A View from the Precedent-Setting Court

Not every statement in a judicial opinion is binding under the doctrine of *stare decisis.* Statements that are not binding are commonly called "dicta," usually in contrast to "holdings," which are binding.[12]

A comprehensive standard for distinguishing holding from dicta, precedential from not, has proven elusive.[13] One approach limits a decision's holding to "the principle of law on which the decision is based,"[14] which "is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them."[15] Another measures precedential effect by "the outcome in light of the material facts."[16] And yet another equates a decision's holding to the rule as articulated by the precedent-setting court.[17]

Common to each of these approaches is this sometimes-silent premise: The precedent-setting court has—or ought to have—primary control over defining the precedential scope of its decision. This is self-evident for the third approach,[18] but it is also true for the first two approaches, which measure a decision's precedential scope based on the facts the court relied on. As Professor Goodhart explained in his seminal work on distinguishing dicta from precedent, the facts, as found and deemed material by the precedent-setting court, are sacrosanct for purposes of *stare decisis*:

> If there is an opinion which gives the facts, the first point to notice is that we cannot go behind the opinion to show that the facts appear to be different in the record. We are bound by the judge's statement of the facts even though it is patent that he has mistated them, for it is on the facts as he, perhaps incorrectly, has seen them that he has based his judgment.[19]

Logan's Troublesome *Stare Decisis* Analysis

Returning to *Logan's stare decisis* analysis, it is important to recall the starting premise of the Court's *stare decisis* reasoning: "[E]ven if . . . the *Thurman* panel somehow mistakenly thought it was deciding a Title VII case . . . ."[20] Proceeding from the premise that the precedent-setting court had a particular view of the record, *Logan* reasoned that it need not follow *Thurman's* phantom Title VII analysis because it would have been dicta, which it defined as "language [that] is [not] essential to the holding's reasoning."[21] "Even if the *Thurman* panel mistakenly thought differently," *Logan* said, *"Thurman* was not a Title VII case at all," so "any logic concerning the applicability of the decision to Title VII [could] be conceptually removed from the decision without affecting the outcome."[22]

(Continued on page 2)

CONTENTS

STATEMENT OF EDITORIAL POLICY

Labor and Employment Lawnotes is a quarterly journal published under the auspices of the Council of the Labor and Employment Law Section of the State Bar of Michigan. Views expressed in articles and case commentaries are those of the authors, and not necessarily those of the Council, the Section, or the State Bar. We encourage Section members and others interested in labor and employment law to submit articles, letters, and other material for possible publication.

Stuart M. Israel, ***Editor***
John G. Adam, ***Associate Editor***

WHEN A TITLE VII CASE ISN'T

(Continued from page 1)

This reasoning pays lip service to the assumed premise. If, as *Logan* assumed, the precedent-setting court genuinely believed that it was deciding a Title VII case, then it is impossible to "conceptually remove[ ]" any reference to Title VII without affecting the outcome that it believed it was reaching. To paraphrase Professor Goodhart, "We are bound by [the *Thurman* panel's] statement of the facts even though it is patent that he has mistated them, for it is on the facts as [the *Thurman* panel], perhaps incorrectly, has seen them that [it] has based [its] judgment."[23]

To be sure, in many cases, reasonable minds will differ on what facts the precedent-setting court thought were critical to its ultimate conclusion.[24] But *Logan* is unique in that, by assuming that the prior panel determined something to be true, it automatically made that fact necessary to the outcome from the perspective of the precedent-setting court. Having done so, it left only one (logically coherent) answer to the *stare decisis* question.

But *Logan* answered differently, and in so doing endorsed an analytical approach that will lead to undesirable results. With help from industrious attorneys with docket access and an interest in blunting unfavorable precedent, facts once judged to be *indisputably* critical to a particular rule of law can be scrubbed from the rationale, thereby creating a new rule in an old decision.[25] Yesterday's "precedent" is now today's first draft.

A similar, more subtle tactic sometimes used by the Supreme Court (and, arguably, *Logan* when it found that *Thurman* did not, in fact, believe it was addressing a Title VII claim) in which it selectively emphasizes or deemphasizes facts in a prior decision has been criticized as "inconsistent with the rule of law."[26] But one needn't be a *stare decisis* disciple to appreciate the difference between a subtler approach to navigating precedent and one that give future courts license to ignore facts that all agree were essential to the earlier court's decision. Especially in the court of appeals, which resolves far more cases and is far more constrained by horizontal *stare decisis.* Permitting the more blatant approach endorsed by *Logan*'s logic to take hold there will threaten to destabilize the law where it matters most.

Parting Thoughts

Logan may give attorneys extra incentive to scour the record in closed cases to find new facts that open the way to distinguishing troublesome precedent. But for those opposing such *Logan*-inspired efforts, the answer may be found in *Logan*'s own playbook: argue its dicta.[27]

—END NOTES—

[1]*Logan v. MGM Grand Detroit Casino,* 939 F.3d 824 (6th Cir. 2019).

[2]*Thurman v. DaimlerChrysler, Inc.,* 397 F.3d 352 (6th Cir. 2004).

[3]*Id.* at 355.

[4]*Id.*

[5]*Id.*

[6]*Id.* at 357-58.

[7]*Id.* at 359.

[8]*Logan v. MGM Grand Detroit Casino,* No. 16-cv-10585, ECF No. 51, PageID.1072 (E.D. Mich., Feb. 12, 2018).

[9]*Logan v MGM Grand Detroit Casino,* 6th Cir. No. 18-1381, Def's Appeal Br., R. 17, p. 12, quoting *Sami & Ali, Inc. v. Ohio Dep't of Liquor Control,* 158 F.3d 397, 405 (6th Cir. 1998) (Krupansky, J., concurring).).

[10]*Logan,* 939 F.3d at 836.

[11]*Id.*

[12]*See, e.g.,* DICTUM, Black's Law Dictionary (11th ed. 2019).

[13]*See* Mary Massaron Ross, *An Advocate's Toolbox,* Mich. B.J., Aug 2002, at 24, 26 (discussing three approaches to determining precedent).

[14]*Id.* (quoting Terence Ingman, The English Legal Process 283 (7th ed 1983)).

[15]Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case,* 40 Yale L.J. 161,182 (1930).

[16]Ross, *An Advocate's Toolbox,* Mich. B.J., Aug. 2002, at 26.

[17]*Id.*

[18]*Id.* (noting that, under this approach, "[t]he breadth with which a rule is announced will ... have a great deal of impact on how broadly the decision will apply as precedent.").

[19]Goodhart, *Determining the Ratio Decidendi of a Case,* 40 Yale L.J. at 170.

[20]*Logan,* 939 F.3d at 836.

[21]*Id.*

[22]*Id. Logan* also separately stated that, because there was no Title VII claim before *Thurman,* it "had no authority to adjudicate the applicability of such a defense to Title VH." *Id.* This independent rationale, which seems to suggest that a decision issued by a court that lacked Article m jurisdiction is not precedentially binding, is outside the scope of this piece.

[23]Goodhart, *Determining the Ratio Decidendi of a Case,* 40 Yale L.J. at 170.

[24]Michael Dorf, *Dicta and Article III,* 142 U. Pa. L. Rev. 1997, 2036 (1994) ("[EJvery material fact in a case can be stated at different levels of generality, each level of generality will tend to yield a different rule, and no mechanical rules can be devised to determine the level of generality intended by the precedent court." (Quoting Melvin Eisenberg, The Nature of the Common Law 53 (1988)).

[25]*Cf. Adelman Steel Corp. v. Winter,* 610 So. 2d 494, 502 (Fla. Dist. Ct App. 1992) ("It matters not whether the record in *Perez* shows that the internist was unauthorized because that fact was not set forth in the opinion as a material basis for the court's decision; and for us to treat that fact as a material distinction in this opinion would amount to our rewriting the *Perez* opinion.").

[26]Dorf, *Dicta and Article III,* 142 U. Pa. L. Rev. at 2024.

[27]S*ee Logan,* 939 F.3d at 836. ■

LOOKING FOR *Lawnotes* Contributors!

Lawnotes is looking for contributions of interest to Labor and Employment Law Section members.

Contributions may address legal developments, trends in the law, practice skills or techniques, professional issues, new books and resources, etc. They can be objective or opinionated, serious or light, humble or (mildly) self-aggrandizing, long or short, original or recycled. They can be articles, outlines, opinions, letters to the editor, cartoons, copyright-free art, or in any other form suitable for publication.

For information and publication guidelines, contact *Lawnotes* editor Stuart M. Israel at smi@smisrael.com or associate editor John Adam at jga@legghioisrael.com.

MERC NEWS

Ashley Rahrig, ***Departmental Analyst***
Bureau of Employment Relations

2020 Annual Report – The 2020 Annual Report is now available on the agency's website at www.michigan.gov/merc. The Report highlights MERC stats and other information covering the 2020 fiscal year (October 1, 2019 through September 30, 2020). The MERC Annual Report was instituted by former MERC Chair Edward Callaghan with the FY 2013 report and has since continued.

Rules Revision Project – MERC Staff recently began the process of reviewing possible rule changes. A few highlighted areas in light of the agency's COVID-19 experiences relate to electronic case filing, service of process on MERC cases, remote processes and hearings. Focus groups were also assembled to discuss various processes that could likely impact the agency's existing rules. Stay tuned to the MERC website as the formal rule making process commences toward Spring 2021.

MERC Chair Receives Biden Appointment – In January 2021, Former MERC Chair Samuel Bagenstos stepped down from the Commission to accept a Presidential appointment with the Biden Administration as General Counsel of the White House Office of Management and Budget. Former Chair Bagenstos was appointed to a 3-year term in MERC in December 2019. The agency wishes him great success in this new role.

BER Director Vacancy – In January 2021, Sidney McBride was promoted to Director of the Bureau of Employment Relations after having served as Interim Director for nearly 12 months. Since being with the agency, he has held positions of Administrative Law Specialist, Labor Mediator, and Mediation Division Administrator. Sidney came to MERC in 2009 after 20+ years with Wayne County Circuit Court that included experiences in Union and Management roles. He succeeds longtime BER Director, Ruthanne Okun, who served as BER Director for more than 20 years.

No Cost Virtual Training Sessions – The agency offers no cost training to management and labor representatives in several critical areas involving represented workplaces. If interested, e-mail a brief description of your group(s) and which training modules you would be interested in receiving to BERinfo@michigan.gov. The sessions will include hypothetical and actual scenarios. Training modules currently being offered include:

MERC e-File Basics
MERC Basics & Beyond
Collaborative Bargaining (Interest Based Bargaining)
Interest Based Problem Solving (non-CBA)
Labor Management Committees
Collective Bargaining Basics
Grievance Processing & CBA Administration Basics ■

BARRING CLASS ACTION ARBITRATION — A DECISION OF *EPIC* PROPORTIONS

Steven H. Schwartz
Steven H. Schwartz & Associates, P.L.C.

Many corporations have arbitration agreements for non-union employees mandating that a claim in arbitration be resolved through a separate proceeding, and the employee is barred from participating in a class action or collective arbitration. Having arbitrated FLSA, ERISA, Title VII discrimination and independent contractor/employee status matters, one thing is clear: be careful what you ask for, you may get it.

The U.S. Supreme Court ruled in *Epic Systems v. Lewis* that arbitration agreements which bar an individual from participating in a class action or collective arbitration are enforceable.[1] The Court's majority ruled that the Federal Arbitration Act provided that such agreements must be honored.[2] Presumably, under the same reasoning, arbitration agreements that either required or allowed class action or collective arbitration would also be enforceable.

Arbitration clauses are frequently written into employment agreements or business contracts by lawyers who never have arbitrated or litigated a case for a client. More often, boilerplate arbitration clauses are cut and pasted from a previous contract with little or no attention paid to the practical ramifications of such a clause.

In the opposite situation, experienced attorneys for employers might decide to prohibit a class action or collective arbitration on the assumption that some, if not most, employees or former employees will not pursue an individual arbitration. If that assumption is correct, the employer's potential liability is reduced. An additional strategic reason, at least for cases that are close either factually or legally, is that different arbitrators may come up with different rulings, again reducing the potential liability of the employer.

However, there are significant unintended consequences to mandating separate, individual arbitrations. First, if an employer is sued in a class action or a case with multiple plaintiffs, it will likely be able to obtain a court ruling forcing the dispute into separate arbitrations for each employee, provided there are signed arbitration agreements requiring individual arbitrations. However, obtaining that procedural "win" in court requires legal defense costs, but does not conclude the matter, it merely changes the forum.

Under most employment arbitration agreements, the employer will bear all, or nearly all of, the arbitration filing fee. If there are dozens or even hundreds of claimants, that cost alone can be significant. Further, most employment arbitration agreements provide that the employer will pay all the arbitrator's fees and expenses. In this example, the employer must pay dozens or more arbitrators, rather than one, to obtain a ruling for each claim.

The claimants' attorneys may use these duplicate costs as a strategic cudgel over the employer. Instead of one filing fee and one arbitrator adjudicating the case, there may be dozens or more arbitrators handling each individual matter. The arbitrators will be hearing the same evidence and evaluating the same factual and legal issues that one arbitrator would have considered in a class action or collective arbitration. Further, depending on the nature of the dispute and the number of claimants, some of the arbitrators may need to travel out of state to attend hearings, again increasing the cost of the arbitration proceeding.

Prosecuting numerous, similar arbitrations also puts a burden on the attorneys for both sides. For small plaintiffs' law firms, the strain of handling a hundred separate arbitrations may exceed the firm's resources. This may require assigning a significant percentage of the cases to other plaintiffs' law firms. In order to handle all the repetitive pleadings, overlapping hearings, motions on procedural issues, and client contact, both the employees and employer may need to be represented either by multiple law firms (or a large law firm that divides the cases amongst numerous attorneys). This creates an inefficiency by requiring multiple lawyers to conduct a review of the same documents, preparation for similar depositions and trial preparation. If the employer loses a matter involving a statute that allows the successful claimant to recover attorneys' fees, such as the FLSA or Title VII, the employer will be assessed the attorneys' fees of multiple attorneys representing claimants.

Scheduling the arbitration hearings with multiple claimants involving parallel matters also raises procedural issues for attorneys from both sides. Stacking the cases one after the other may result in a considerable delay for the individual claimants who are at the end of the line. Holding separate hearings during the same time requires different attorneys from both sides handling the matters. For example, if there are fifty parallel, separate arbitration hearings, Claimant Number 50 may have to wait a year or more to have a hearing held, particularly if multiple days of hearing are required. On the other extreme, if Claimants 1, 2 and 3 will have their five days of hearing held during the week of May 1, both sides will need three sets of attorneys to try the cases.

Having separate, individual arbitrations may result in fundamental unfairness to some claimants or the employer. Since arbitration decisions are not binding precedent, one arbitrator may grant a motion for summary disposition, particularly when the motion is based on legal arguments, while another arbitrator denies the motion. Both parties should expect that they may receive different rulings on evidence objections, procedural or discovery issues, and rulings on the merits of the case. Thus, Claimant 1 may win his case while Claimant 2, with parallel factual and legal issues, may lose hers.

There are some techniques to streamline separate, individual arbitrations and make them more efficient:

(1) Hearings can be held concurrently, in the same location (or virtual setting) with multiple arbitrators watching. In this instance, one arbitrator would be designated to rule on evidence objections.

(2) Testimony by expert witnesses or some fact witnesses in the first case could be videotaped and played in subsequent cases. This would avoid both sides having to pay expert witness fees for repetitive testimony and might avoid some travel costs for fact witnesses.

(3) The parties could agree to litigate 5 or 6 test cases and hold the others in abeyance. After obtaining rulings from those first set of cases, the parties might see a pattern that would enhance a global settlement. Alternatively, the parties could attempt mediation to resolve some or all the remaining cases, after seeing how the first set of cases were resolved by the arbitrators.

(4) The parties could agree whether the decisions of arbitrators on summary disposition motions, in the initial set of arbitrations, should be presented or not presented to arbitrators in subsequent matters. Alternatively, the parties could agree that if a given number of arbitrators grant or deny a motion for summary disposition, their rulings are binding on arbitrators in subsequent matters.

Holding separate, individual arbitrations changes the procedural landscape of resolving disputes and significantly affects the cost of the arbitration process. Defense attorneys should carefully weigh the impact of having separate versus class action or collective arbitrations before drafting arbitration clauses. Both claimants' and defense attorneys should evaluate the procedural impacts of holding separate arbitrations early in their representation of their clients.

—END NOTES—

[1]138 S.Ct. 1612 (2018).
[2]9 U.S.C §1 *et seq.* ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

A mediator facing a complicated case with contentious parties and difficult issues will often start with the easy stuff.

> Shall we agree to break for lunch at about 12:30?
>
> How about if we order sandwiches from the deli downstairs?
>
> And we'll go until about 5:00, okay?

The idea is to begin with quick agreement on a few simple issues. This does two things: it demonstrates that agreement is possible, and it develops what the literature calls a "habit of agreement." The hope is that the momentum developed on the easy stuff might carry over to the more difficult questions.

Another gimmick we use is to get the disputants to agree to a common theme. "We have a lot of areas of conflict, and a lot of work to do here," we might say, "but ultimately everyone agrees the goal is to do what's best for little Wanda June, right?" Or, "Whatever differences we may have, at least we can agree that the sooner we get this matter settled the better. We all have more important things to do than argue with each other. Do we agree?"

The theory is that neither party will want to admit out loud that all they care about is causing pain to the other side or that they really have nothing better to do with their lives. Once both sides agree, the mediator can gently remind them of their agreement later when things get dicey.

So what would happen if we applied these techniques to the discussions about to take place across the aisle in the legislature or between congress and the new administration? What would be the easy stuff? What would be the theme that everyone could support? (Or at least pretend to support).

Justice Oliver Wendell Holmes Jr. is supposed to have said, "I like to pay taxes. With them, I buy civilization."[1] Few of us would say we *like* to pay taxes, but the fact that taxes are the way we buy civilization is hard to deny.

We all have different priorities. Some of us think we need more defense spending. Some of us think we need more spending on social programs or infrastructure or climate or health care or education. But we can all agree that making progress on any of those priorities is going to take money. And that money is not going to fall from the sky. It's going to have to come from taxes. There just isn't anyplace else for it to come from. If people pay their taxes, we can argue and debate and horse trade and log roll and wheedle and cajole and work out a deal. But if people don't pay their taxes there's nothing to talk about. None of these things is possible without the money to do them. So the first order of business is to get people to pay their taxes, right?

There are three ways people avoid paying taxes. The first is plain old cheating. People under report their earnings and overestimate their deductions. Then they hope their returns aren't audited. Rich people are able to hire accountants, lawyers, and "wealth managers" to make their returns complicated and expensive to audit and their cheating difficult to prosecute.

The second way of avoiding taxes is through politics. People who are wealthy enough to make political contributions benefit from the legislation that supports their favorite tax policies. Cutting the budget of the IRS so it conducts fewer audits is an example. Capital gains tax is another. There is no earthly reason that income derived from passive investments should be taxed at a lower rate than income from wages. The only explanation is that rich people like it that way, and rich people are the ones who donate to campaigns and elect politicians.

The third way people avoid paying taxes is by hiding money in off-shore tax havens. The tax expert Lee Sheppard summed up the situation in a famous article in *Forbes* back in 2010. She wrote:

> Tax havens are the financial whorehouses on the edge of town. We fuss about them, howl that the activity is illegal, but we don't shut them down, because the town fathers are in there with their pants around their ankles.[2]

This is precisely right. Some people are not contributing their fair share to the costs of running our civilization. It's hard to change this because these people tend to be rich and powerful, and, as Nicholas Shaxson pointed out in *Treasure Islands: Tax havens and the men who stole the world*, "there is no group more rich and powerful than the rich and powerful."[3] And, more than anything else, they want to keep it that way. More than they want clean air and water, more than functioning roads and bridges, more than safe food and drugs, more than anything, rich people want to stay rich. Forever. And not just rich, richer than anyone has ever been before.

The money rich people hide from the tax man is money stolen from the rest of us and from all we could possibly accomplish. A recent report by the Tax Justice Network shows that worldwide during the Covid pandemic a nurse's annual salary has been removed from the economy and hidden in a tax haven every *second*.[4]

We have to try to imagine what that amount of money could accomplish if it was put to productive use. And then we have to close down the whorehouse. Do we agree?

—END NOTES—

[1]https://www.goodreads.com/quotes/17105-i-like-to-pay-taxes-with-them-i-buy-civilization

[2]https://www.forbes.com/2010/07/22/tax-finance-havens-economy-opinions-columnists-lee-sheppard.html?sh=6117bc665f49

[3]p. 296 of the 2016 Vintage paperback

[4]https://www.taxjustice.net/reports/the-state-of-tax-justice-2020/ ■

EMPLOYER-PAID STUDENT LOAN DEBT PAYMENTS: A NEW PROPOSAL TO WATCH FOR AT THE BARGAINING TABLE?

Ryan J. L. Fantuzzi
Kirk, Huth, Lange & Badalamenti, P.L.C.

Around the time most people were spending their $600 stimulus checks on food, shelter, and Roomba robot vacuum cleaners, keen labor and employment lawyers were studying Congress' $2.3 trillion coronavirus relief package for obscure legal changes.[1] Among the Act's lesser-known provisions include a monumental change in educational assistance programs.[2]

An education assistance program is a tax-free employee benefit created by Section 127 of the Internal Revenue Code in which an employer pays for the tuition or other educational expenses of its employees.[3] These programs have been around for decades. Most often the programs take the form of tuition reimbursement, which contain stipulations that the employee (1) receive prior approval to take the course, (2) attain a certain course grade, and (3) take courses that are job-related (e.g. *not* University of South Carolina's "Lady Gaga and the Sociology of Fame" or Tufts University's "Demystifying the Hipster").

The primary business reason educational assistance programs exist is that they purportedly help employers recruit excellent job candidates and train current employees. A more cynical business reason that these programs exist is that they provide employees a tax-free benefit, which is also tax deductible for the employer.[4] Under an educational assistance program, employees may exclude up to $5,250 they receive from their employer for educational assistance.[5]

Historically, "education assistance" under Section 127 consisted only of employer payments for employees' education expenses. It excluded employer payments to employees' student loans. In other words, "education assistance" included *current* education expenses, but excluded *past* education expenses. If the employer paid $5,250 to an employee's student loans, the event would be considered taxable income. But that changed in March 2020 when Congress passed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") and broadened the meaning of "education assistance" by including employer payments to employees' student loans.[6] The CARES Act amended Section 127(c)(1) by expanding the meaning of "educational assistance" to include "the payment by an employer, whether paid to the employee or to a lender, of principal or interest on any qualified education loan . . . incurred by the employee for education of the employee."

But the CARES Act amendment had a catch—it was to expire after a mere nine months, too short of a time for employers to adopt a student loan payment program. December's lame-duck coronavirus relief act however, extended the amendment through January 1, 2026, signaling that tax-advantages of certain employer payments of student loans are here to stay.[7]

Now that Section 127 educational assistance programs include employer payments made to student loans, the question remains: What rules must employers follow when establishing a program? First, to qualify as a tax-free and tax-deductible program, the program must be described in a "separate written plan."[8] Second, the program must not discriminatorily favor highly compensated employees (within the meaning of section 414(q)).[9] Third, not more than five percent of the amounts paid by the employer may be provided to the owners of the company.[10] Fourth, the eligible employees cannot be provided with a choice between participation in the program and other remuneration includible in gross income.[11] Finally, reasonable notification of the availability and terms of the program must be provided to eligible employees.[12]

Federal student loan debt has tripled since 2007—from $516 billion to $1.5 trillion.[13] Forty-two million Americans have federal student loan debt.[14] Employers looking for a competitive edge in recruiting highly educated candidates may look to establish educational assistance programs with employer payments of student loans. Labor organizations looking to bargain a benefit for younger workers (the ones most likely to have student loans) might wish to propose an educational assistance program at the bargaining table. Both management and labor should keep their eyes out for these programs in the future.

—END NOTES—

[1]H.R. 133 — Consolidated Appropriations Act, 2021, Public Law No: 116-260.

[2]One lesser-known provision buried in the Report by the Select Committee on Intelligence requires the Director of National Intelligence to submit a report to the congressional intelligence and armed services committees on threats posed by "unidentified aerial phenomena" (i.e. UFOs). See https://www.intelligence.senate.gov/publications/intelligence-authorization-act-fiscal-year- 2021.

[3]26 U.S.C. 127.

[4]This is not tax advice. Work with your certified public accountant.

[5]26 U.S.C. 127(a)(2).

[6]Public Law No: 116-136.

[7]H.R. 133 —Consolidated Appropriations Act, 2021, Public Law No: 116:260, Title I - Extension of Certain Expiring Provisions, Section 120, Exclusion for certain employer payments of student loans.

[8]26 U.S.C. 127(b)(1).

[9]26 U.S.C. 127(b)(2). Section 414(q) sets forth two tests for determining if an employee is a highly compensated employee - an ownership test and a compensation test. An employee is a highly compensated employee if he or she satisfies either of the two tests. Generally, an employee is a highly compensated employee if he or she is a 5% owner or if he or she had annual compensation in excess of $120,000. This is a summary of the rule. Please see your certified public accountant for the most accurate tax advice.

[10]26 U.S.C. 127(b)(3).

[11]26 U.S.C. 127(b)(4).

[12]26 U.S.C. 127(b)(6).

[13]See Federal Student Aid Portfolio Summary at https://studentaid.gov/data-center/ student/portfolio.

[14]*Id.* ■

MERC UPDATE

John A. Maise
White Schneider PC

A summary of two recent decisions impacting the Michigan Employment Relations Commission (the Commission) follows. Decisions of the Commission may be reviewed on the Michigan Department of Licensing and Regulatory Affairs website (www.michigan.gov/LARA).

***Technical, Professional and Office Workers Association of Michigan v Renner,* Unpublished Opinion Per Curium of the Court of Appeals, No. 351991 (Jan 7, 2021), 2021 WL 68322, MERC, LC No. 00-000034**

In January 2021, the Michigan Court of Appeals issued a definitive ruling affirming that unions do not have a right to charge fees for the costs of representation to nonmembers. We covered this case briefly approximately one year ago, when the Commission issued its underlying ruling.

To briefly recap, the recent United States Supreme Court decision, *Janus v American Federation of State, County, and Municipal Employees,* 585 US ____, 138 S Ct 2448 (2018), contained several lines of dicta which implied that under some conditions, unions might be able to charge nonmembers for the costs of representative services provided directly to them, such as the costs for arbitration or for pursuing a grievance. Specifically, footnote 6 of the *Janus* decision read as follows:

> There is precedent for such arrangements. Some states have laws providing that, if an employee with a religious objection to paying an agency fee "requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure" … This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment Rights.

As we recall, the Commission rejected the interpretation of this language as providing a right to all unions to charge fees for representation costs. Rather, the approach taken by the Commission was that the *Janus* decision itself did not create any new rights, but left the door open to State legislatures to add statutes that would allow unions to recoup some of those fees - pointing to a recent law passed in Rhode Island as an example.

The reasoning of the Commission was affirmed by the Michigan Court of Appeals, which found that PERA prohibited unions from charging fees for representation services to nonmembers in its current iteration. The Court of Appeals rejected several arguments from the union, explicitly clarifying that there is no right in Michigan law to charge nonmembers fees to cover the cost of representation.

The first argument that the Court of Appeals rejected was that the fees charged were not subject to the jurisdiction of the Commission because they involved internal union rules pursuant to Section 10(2)(a) which gives unions the right to "prescribe its own rules with respect to the acquisition or retention of membership." The Court of Appeals noted that the issue at bar was not related to "the acquisition or retention of membership," but rather to the question of services to individuals who were explicitly nonmembers. Moreover, the Court of Appeals pointed out that even if the fee were determined to be an internal union rule prescribed under 10(2)(a), it could still be unenforceable under PERA if it "invades or frustrates an overriding policy of the labor laws."

Next, the Court of Appeals explained that the failure to provide direct representation services was discrimination against nonmembers by restraining them from exercising their own Section 9 rights. As such, the practice of charging nonmembers fees for direct representation services begins to tread on the duty of fair representation that comes hand in hand with a union's position as the exclusive bargaining representative. The Court of Appeals also notes that unions have an interest in representing nonmembers in grievance procedures solely for the benefits of nonmembers, as there are often precedential effects - such as past practice and comparable for future grievance - that can result from those processes.

At this point, there is no longer a question that unions are not permitted to charge fees for representation to nonmembers for the provision of direct representation services in grievances or arbitration. Absent intervention by the Michigan Legislature providing an amendment to PERA, this is unlikely to change going forward.

***Ypsilanti Community Schools -and- Teamster Local 243 -and- Deanne Freeman -and- Leslie Harris,* Case No. 19-H-1710-CE; 20-A-0017-CE; 20-A-0016-CE (Jan 12, 2021)**

Teamsters Local 247 filed an unfair labor practice charge which was consolidated with unfair labor practice charges filed by Deanne Freeman and Leslie Harris against Ypsilanti Community Schools (the District) alleging that the District did not hire the employees in question as a result of discrimination for prior union participation. For background, the District had a contract with a private company, Durham, for transportation services. Eventually, the District created its own in-house transportation department by hiring its former Durham contractors. However, the District did not hire Freeman or Harris, allegedly as a result of their prior union participation as stewards. An Unfair Labor Practice Charge was filed by the Teamsters, and the Teamsters' counsel filed additional charges on behalf of Harris and Freeman due to concerns regarding standing.

Administrative Law Judge Calderwood ultimately ruled in favor of Harris and Freeman, finding that anti-union animus motivated the refusal to hire them and ordered the District to reinstate them and provide backpay. The District appealed the decision to the Commission. The Commission agreed with Judge Calderwood that the evidence supported that the true reason behind the failure to hire Harris and Freeman was rooted in their prior participation in with the Teamsters.

This case contained an interesting question regarding the jurisdiction of the Commission because the District was motivated by conduct in which "Freeman and Harris engaged while employed by a private contractor." This was not determinative because MCL 423.210(1)(c) prohibits hiring discrimination based on membership in a labor organization and not any one in particular. As the District's refusal to hire these employees was rooted in discrimination prohibited by PERA, the failure to hire those particular employees was an unfair labor practice on the part of the District.

With respect to the underlying issue of whether the ALJ erred in finding an anti-union animus, the Commission grants great deference to the ALJ's findings of credibility. Judge Calderwood found the employer's witness to be "self-serving" and "pretextual," and the District was unable to present any "clear evidence" which would be necessary to overturn the credibility determination of the ALJ. This demonstrates the importance of preparing witnesses before the ALJ, as many cases before the Commission will come down to a determination of credibility between union and employer witnesses. If a finding is contingent on a factual determination, there is very little room to appeal the ALJ's findings. ■

INCORPORATING A MEDIATION STEP INTO GRIEVANCE PROCEDURES OF COLLECTIVE BARGAINING CONTRACTS

James B. Perry
Dickinson Wright PLLC

Most Collective Bargaining Contracts have an internal dispute resolution procedure between the Union and the Employer called the Grievance Procedure. Grievance Procedures generally feature two, three, or four steps ending in Arbitration before a neutral Arbitrator. The Arbitrator is a third-party, mutually selected and paid by the parties to settle any dispute, which was not resolved in the steps of their Grievance Procedure.

The Grievance Procedure provides a mechanism for Unions, the employees they represent, and occasionally, for Employers, to engage in an orderly procedure to claim that their Contract is being violated by the other party. The Grievance Procedure is a substitute for formal litigation in a court of law or for "self help" like work stoppages by Unions during the term of a Collective Bargaining Contract. In the public sector, it is intended to avoid disruptive actions such as "blackboard flu" or "blue flu", since many public employees, unlike their private sector counterparts, do not have the right to strike.

But, every Employer and Union should ask whether their contractual Grievance Procedure is effective in achieving the goal of settling disputes quickly and efficiently, at a reasonable cost, without ruining the relationship between the parties. Arbitration is an adversarial proceeding. Regularly relying on an Arbitrator to decide contentious issues could be distracting and expensive. It could also damage the ongoing relationship between the parties.

What can be done to make a Grievance Procedure more effective? My recommendation, after 42 years of representing all types of Employers in every imaginable dispute over disciplinary actions and contract interpretation, is to include a Mediation Step in a contractual Grievance Procedure, as the last step of the Grievance Procedure, before Arbitration.

I recommend a Mediation Step in Grievance Procedures for three reasons:

(1) Speedier Resolution

(2) Lower Costs

(3) Involvement of a Neutral Mediator in a Collaborative Process

1. Speedier Resolution

The 2020 Annual Report from The American Arbitration Association (AAA) shows that there were 5738 arbitration case filings with the AAA in 2019. The average time from the case filing to the issuance of a decision by an Arbitrator was 252 days, over eight months! The average time in Michigan was 213 days which is better than the national average, undoubtedly due to the talents of the members of this Section. In states with large numbers of filings, the average time from an Arbitration filing until issuance of the Arbitrator's award was even longer, as shown on this chart:

State	No. of Cases	Time
Pennsylvania	863	256 days
Massachusetts	632	296 days
New Jersey	360	338 days

Obviously, the time from filing of a Grievance to the issuance of an Arbitrator's decision is even longer. Waiting eight months to a year for a decision over an issue of Contract interpretation that may arise repeatedly during that Contract, could lead to chaos over that issue in the workplace. Likewise, a discharge case taking that much time to be resolved could result in significant back pay and lost benefits liability for the Employer as well as tremendous risk for an employee who may have difficulty making ends meet without employment. Mediating the Grievance after two or three steps of the Grievance Procedure would be much quicker, generally within 30 to 60 days of filing a Grievance.

2. Lower Costs

According to the AAA's 2020 Annual Report, the average cost per day charged by an Arbitrator is $1600 but, there is a significant range of costs for Arbitrators. More popular, experienced Arbitrators charge significantly more, particularly in many states that have more Arbitrations.

State	Max Daily Charge	Average Daily Charge
New York	$3600.00	$1800.00
Maryland	$3000.00	$1800.00
New Jersey	$2900.00	$1900.00

Here, in Michigan, we are fortunate to have a plethora of very experienced Arbitrators whose average daily charges of $1200 are significantly lower than the national average. However, the cost of an Arbitrator is only one of the costs of Arbitration. If a party is represented by outside counsel, legal fees become part of its costs. I am not suggesting that parties arbitrating cases should avoid engaging outside counsel. If a Grievance over a disciplinary action or contract interpretation is important enough to arbitrate, experienced counsel should be involved in order to present the case more effectively.

To effectively present an arbitration case, witnesses supporting the party's case must be interviewed and their testimony must be organized by each party's advocate. Witnesses should also be prepared for not only direct examination from their counsel, but also for questions from the Arbitrator, as well as cross-examination by the opposing party. Cross-examination of witnesses supporting the opposing party's case must also be prepared by each party. Lost time of the witnesses from their normal duties is a hidden cost of any Arbitration. Often briefs are filed after an Arbitration Hearing. Most Arbitrators charge two or three days for an Arbitration, when a Hearing lasts one day, as the Arbitrator takes at least another two days to study the testimony, exhibits and/or briefs and to actually write the Decision.

For a Mediation, much of this Hearing preparation would not be necessary, as Mediation is not an adversarial procedure. Although preparing for Mediation does require investigation of the facts, the relevant Contract provisions, documents, and possibly elements of relevant employment law, a party presenting its case for Mediation can simply summarize these items in a brief position statement. This position statement can be in writing or even could be orally presented at the Mediation. Since the Mediator is an outside third-party, a Mediation generally begins with each party simply informing the Mediator of the nature of the dispute and outlining its position. Generally, this is done in joint session with both parties present. Presenting, examining and cross-examining witnesses is not necessary in a Mediation. Once Mediators understand the dispute, they usually conduct private caucuses with each party to probe settlement possibilities. These can often result in resolution of the dispute in less than half a day.

The Federal Mediation and Conciliation Service supplies Mediators to the parties not only to assist them in negotiating contracts, but also for dispute resolution during the term of a contract. These Federal Mediators conduct mediations, without charge, to the parties. Most state employment agencies employ Mediators to help the parties negotiate Contracts and resolve disputes. Here, in Michigan, and in many other states, there is no charge for a State Mediator. Those of us with significant experience with the Federal and State Mediators here in Michigan will universally attest to their skill, expertise and value in resolving disputes.

3. Involvement of a Neutral Mediator in a Collaborative Process.

The Mediators in Michigan, and in most jurisdictions, are labor relations professionals with a labor or management background and sometimes have worked for both Unions and Employers. Mediators have experience with all kinds of disputes over disciplinary actions and contract interpretation. They are there to help the parties reach an agreement that resolves the issue and not to decide which party may be right or wrong. Because they are neutral outsiders, without a stake in the outcome, often they can say things to one party that would be contested if the same comment came from the other party.

Mediation is also confidential. It allows all types of solutions to be considered in a private, collaborative setting, not an adversarial proceeding. For example, a case over whether a promotion was given to the proper applicant under a clause requiring promotions to be awarded to the "senior qualified applicant," can be particularly contentious. If an Arbitrator rules that the junior employee was qualified and the senior employee was not qualified, it could damage the morale of not only the senior Grievant, but also other senior employees. During this Mediation, the Employer and Union agreed that the decision promoting the junior employee would stand, as he really was qualified, while the senior employee was not. But, the parties agreed that the senior applicant would be trained over the next year, to become qualified for a future opening. In this way, the morale of the senior employee and other senior employees who were watching the case was maintained. Such a sensible win-win solution would not be possible from an Arbitrator, who merely decides whether a Contract has been violated.

A danger for advocates is becoming so convinced of the righteousness of their position that they undervalue the risk and the potential that the other side may prevail. Mediators are valuable in educating each party about the weakness of their position as well as the strength of the opposing position. An explanation of the risk of arbitrating a case, coming from a neutral third-party can often be much more persuasive than the same explanation from the opposing advocate. A Mediator, who has no stake in the outcome, can often reach a party who is proceeding with the Grievance out of emotion. An experienced Mediator can have much more credibility with an intransigent party when explaining the likelihood that the party may lose. Often these discussions are in private caucus, with a Mediator, without the other party being present.

Finally, a Mediator can present proposals or even "supposals" that can be identified as the Mediator's without being from either party. Often, the same suggestion, coming from a different source, can be greeted by a totally different response. This use of the Mediator to float ideas back and forth confidentially can help dramatically where a party cannot publicly back off from an unreasonable position, even though privately it could be receptive to a more flexible counter-proposal. An experienced, neutral Mediator can assist the parties in removing impediments to resolution which ultimately can cause the parties to solve their dispute without damaging their relationship.

4. Conclusion

Due to the speed of resolution, the lower cost, and the added value of involving an experienced neutral Mediator, I recommend adding a Mediation step to any Grievance Procedure. Even parties who are interested in using Mediation during the term of a Collective Bargaining Contract, which doesn't contain a Mediation Step, can mutually agree to engage in Mediation for a specific Grievance. To do so, they could agree to extend the time limits and hold any other requirements of arbitrating the Grievance in abeyance, while they try Mediation. In my experience, Mediation is well worth a try. ■

WRITER'S BLOCK?

You know you've been feeling a need to write a feature article for *Lawnotes*. But the muse is elusive. And you just can't find the perfect topic. You make the excuse that it's the press of other business but in your heart you know it's just writer's block. We can help. On request, we will help you with ideas for article topics, no strings attached, free consultation. Also, we will give you our expert assessment of your ideas, at no charge. No idea is too ridiculous to get assessed. This is how Larry Flynt got started. You have been unpublished too long. Contact *Lawnotes* editor Stuart M. Israel at smi@smisrael.com or associate editor John Adam at jga@legghioisrael.com.

MANAGING OPENING OFFERS: "ARE YOU REALLY GONNA MAKE ME COMMUNICATE THAT NUMBER?"

Sheldon J. Stark
Mediator and Arbitrator

What is 168,000,000?

168,000,000 is the number of search results on the web for the term "mediation." While there is much to be said about mediation, when boiled down to its least common denominator, mediation is nothing more than an assisted negotiation. Mediators – neutral, unbiased and objective – assist the parties negotiate a settlement of their differences by improving communication; translating messages so they are better heard and received; exploring needs and interests; encouraging realistic assessments of risk; and removing impediments to resolution. Mediators assist in weighing the cost of continuing the conflict and refocus attention on the future. And, when the time arrives to exchange numbers, mediators can help the parties improve their proposals by pointing out the many ways unrealistic, over-the-top opening offers can poison the well, cause consternation and derail the path to resolution. Serving as a counselor and advisor, the mediator assists the participants in developing more productive proposals likely to stimulate positive counter-proposals. This is called "negotiation coaching."[1] If all they do is communicate numbers without push back or comment, mediators add little value. In this article, I will suggest how to "set the table" for a successful mediation process and oversee and encourage a positive and productive pre-mediation exchange of information (Part I); choose the right moment to open the negotiation process (Part II); and provide well-informed advice to advocates and parties to formulate constructive proposals (Part III).

PART I: SETTING THE TABLE: The Pre-Mediation Process

The process of managing a positive negotiation begins long before first numbers are exchanged. A proper foundation must be laid starting the instant all parties agree to our service.

My process is to initiate a pre-mediation conference call with the following elements:

(1) *Logistics:* Make disclosures, learn negotiation history, encourage advance exchange of information and documents, determine whether mediation is voluntary, identify participants and arrange scheduling, duration and due dates.

(2) *Process design:* Fit the mediation process to the dispute. Are the parties agreeable to a mediator's opening remarks? Do they prefer an all caucus/shuttle diplomacy model or are they open to joint sessions? Will they set aside traditional zealous advocacy in favor of a joint problem solver mindset? Can we begin with a facilitative approach, becoming more evaluative only after the process has unfolded and the parties approve?

(3) *Dispute dynamics:* Obtain a preview of the conflict and its peculiar dynamics to better prepare myself for service. To view the pre-mediation conference call agenda, see https://www.starkmediator.com/wp-content/uploads/sites/4/2019/06/Agenda-for-PreMediation-Conference-Call.pdf

I encourage the lawyers to take full advantage of the unique opportunity presented by mediation to speak directly to the decision maker on the other side. Rather than default to an all-caucus, shuttle diplomacy model in every case, I suggest they consider the option of joint sessions and how joint sessions might be productive. I assure them I have the experience and skill set to manage the process safely. In my experience joint sessions work and work well. Rarely do I see the "nightmare" scenarios the advocates fear so much. If things start to go sideways, moving back to caucus is always available. See, https://www.starkmediator.com/why-you-should-consider-joint-sessions-in-your-next-mediation-2/

I remind participants that mediation is not a fact-finding process. It is not an adjudicatory process. Mediation doesn't determine who is right and who is wrong. Nor does it establish who is telling the truth and who is not. I'm not a decision maker. There is no need to persuade me. Rather, mediation is a dispute resolution process. The decision maker is on the other side. When the parties serve as zealous advocates, therefore, they antagonize rather than persuade one another. Accordingly, I ask them to commit to being joint problem solvers. Everyone at the table has the same problem: mediator, advocates and parties. How do we resolve this dispute? What does it mean to be a joint problem solver? Joint problem solvers don't try to score every point. Joint problem solvers make reasonable concessions. They use the language of diplomacy. They try to *understand* each other's perspective whether they agree or not. Joint problem solvers listen to each other with an open mind. Mediation is also an opportunity to learn information critical to proving claims and defenses should the matter not settle. And, of course, if the dispute does not resolve, everyone is free to return to traditional zealous advocacy. I urge the lawyers to inform their clients of these changes to avoid the impression counsel has lost faith or confidence in the representation.

I provide educational materials to assist the litigators and their clients in preparing for mediation. https://www.starkmediator.com/wp-content/uploads/sites/4/2013/10/2013 Article Making the Most of Mediation.pdf

I offer suggestions for developing a strategic mediation plan to better achieve their goals. https://www.starkmediator.com/a-success-primer-for-mediation-achieving-client-goals-through-strategic-preparation/[2] If the parties are willing to participate in a joint session, I offer materials to assist them in putting their presentations together. https://www.starkmediator.com/wp-content/uploads/sites/4/2020/04/Stark-Mediator-Effective-Presentation-Directions.pdf

Helping the parties learn to get the most out of the mediation process gains their trust, gives them hope, improves their preparation, and helps them achieve more of their goals and objectives. Our professionalism and process assistance build their confidence in us, creating an openness on their part when the time comes to listen to our suggestions and follow our advice.

EXCHANGING INFORMATION: Written Mediation Advocacy

I encourage the lawyers to *exchange* their mediation summaries and to do it a week in advance. The more each side is familiar with

the theories, approach, evidence and arguments of the other, the better prepared they will be to respond to important points while sitting at the mediation table. Receiving the summaries in advance gives each side time to research and pull together their own information in response.[3] On the other hand, if the information in the written submissions is confidential and not disclosed to the other side, the mediator is "hand-cuffed," restricted in regard to which risk issues to address. In an employment dispute, for example, defense counsel may point out confidentially that plaintiff falsified his application for employment, committing resume fraud. Perhaps they're saving it for the plaintiff's deposition or for cross examination at trial.

Since mediation settles most disputes and trials occur in less than 1% of all cases, saving it makes little sense. Far better that plaintiff's counsel be aware that her client's credibility is compromised when evaluating the risk of non-resolution. Openly sharing the information gives the mediator a tool for exploring the risk of effective impeachment.

I also provide an option to supplement shared submissions with a "mediator's eyes only" letter, particularly where advocates are not ready to share every piece of sensitive information such as client needs and interests. If the parties have particular non-monetary goals and objectives for the mediation process, this is an opportunity to let the mediator know in advance. An apology or acknowledgement, for example, or a letter of introduction or neutral reference, a *nunc pro tunc* resignation, retention of company car or computer, future business opportunities, reputation repair, etc.

I also recommend focusing their writing on persuading *each other.* The decision maker on the other side should be their primary audience, not the mediator. See, https://www.starkmediator.com/articles-links/crafting-effective-mediation-summary-tips-written-mediation-advocacy/

Regrettably, some advocates believe their own client is the principal audience. This generally results in a summary filled with verbal assaults and invective which only serves to antagonize or alienate at the very moment their goal should be getting through to the decision maker on the other side. Sometimes their zealous written advocacy pushes beyond what the evidence supports, and – while it may earn kudos from their client - undermines their credibility with opposing counsel. If they have the "goods," they should highlight them with exhibits and attachments. If they don't, exaggerating and making unsupported inferences is not helpful. All these problems have an impact on opening numbers because they drive emotions – both ways. They "rev up" their own clients and create unrealistic expectations that the lawyer then asks the mediator to help walk back. And, it typically serves to further alienate or escalate readers on the other side.

Sometimes advocates close their written submissions with a settlement offer that is irritating at best, incendiary at worst. Numbers are always the loudest message, and an aggressive number in a mediation summary sends a powerful unintended message: *This case is not going to settle because I have a totally unrealistic assessment of its value!*

At times the number is orders of magnitude higher/lower than previously communicated. The message received: we're wasting our time. One side may have agreed to participate in mediation because the last offer was within a reasonable range. When the mediation summary has a far different number, the result is *bad.* It leads to outrage. Emotions escalate. Parties threaten to walk. Precious time, energy and capital is spent calming the waters and encouraging parties to give the process another chance.

Don't misunderstand me: If an advocate can blackboard significant numbers, their summary should surely disclose them. Their theory of damages and how the numbers were arrived at should be provided and explained: Lost wages and benefits in an employment case; medical costs, replacement services, economic loss and mental pain and suffering in an injury case; or lost profits in a commercial transaction gone bad. Opposing parties need to know in advance how damages are projected in order to evaluate the situation and obtain sufficient authority to settle. But, an over-the-top dollar figure at the end of the summary to "show how serious this case is"? Not so much! See, https://www.starkmediator.com/wp-content/uploads/sites/4/2019/07/Why-You-Should-Avoid-Putting-A-Dollar-Demand-Offer-in-Your-Written-Mediation-Summary.pdf

Spending the first hours of the mediation process dealing with consternation caused by a provocative written number is frustrating for the mediator and everyone else at the table. It is often followed by a whole litany of complaints and accumulated grievances about how the other side has handled every aspect of the litigation. "Shel, I need to put this number in context, so you understand why we're so disappointed!" Provocative numbers undermine good will and derail our best efforts to reach an agreement – to say nothing of the added expense to parties forced to pay for the wasted hours in attorney and mediator time.

PART II: ARRIVAL AT THE MEDIATION TABLE: Timing

Who Goes First?

One of the most important questions for the day of mediation is "whose turn it is to make the first offer?" If there have been no prior negotiations, most negotiators and negotiation coaches believe it is the plaintiff's turn to put out the opening number. First, it is traditional for the plaintiff to start. (It confuses the defense when they don't want to; and not in a good way.) Second, plaintiff brought the case. Presumably, plaintiff knows the value of his or her claims. Accordingly, Plaintiff should tell the defense what he/she wants. Third, "anchoring" research shows going first is in plaintiff's best interest.[4]

If a party made a settlement proposal before arriving at the mediation table, it is the offerees responsibility to respond and throw out the first number once the mediation process kicks off. I liken it to a tennis match: One party lobbed the ball over the net by making an offer before mediation, the other party should lob it back with a counteroffer.

This should be simple, straight forward and commonsensical. Years ago, when I represented clients, I wouldn't have dreamed there was any controversy around this. Turns out, there is. The same arguments are made by advocates on either side of the "v.": "We didn't reply to the offer because it was outrageous. Tell them to give us a reasonable number and we'll answer it." Experienced mediators know this to be a fool's errand. Every advocate on the planet rejects such requests with righteous indignation: "I'm not going to negotiate against myself! This is the number. If they don't like it, we're done here!" As noted in Part III, there are techniques to help us move past this potential impasse.

(Continued on page 12)

MANAGING OPENING OFFERS: "ARE YOU REALLY GONNA MAKE ME COMMUNICATE THAT NUMBER?"

(Continued from page 11)

Advance Preparation

Most participants reach the table on the day of mediation with a top or bottom line or range for what they hope to achieve. Some have a strategic plan in the form of an offer/concession strategy. The best are also flexible: They bring a plan, but they listen and adjust based upon fresh insight or new information. Typically, they have conducted a thorough review of their file, analyzed the facts and law, diagnosed the risks as then understood, identified the strengths and weaknesses, calculated potential damages or loss and assessed the amount of their claim or exposure. Sometimes the lawyers have negotiated with their own clients about settlement value.[5] Most often, based on their top or bottom line, they establish their opening number and obtain client approval. As mediator, are you ready to hear it? I suggest not. I recommend investing time in risk assessment *first* before soliciting a party's previously prepared opening number.

If the mediator does her job properly, that opening number might very well change in a good direction as a result. Here's why:

No one can exercise good judgment about whether to settle and on what terms unless and until they have as much information as possible. Mediation is an excellent process for the transfer and sharing of information. Mediators are responsible for making certain each side has all the information available so the parties can exercise good judgment.[6] Assuming the participants are open minded and flexible, their opening numbers *after* a robust discussion of risk will be far more productive than not. Such information includes *inter alia*:

- What is the story each side tells and is that story plausible? If plausible, what are the chances a decision maker will find it persuasive? Is the story sympathetic and easy to tell? Will the jury have the patience necessary to listen to the end? If the story is believed, what is the most likely outcome?

- What is the best evidence each side can marshal? How persuasive is it? What is the risk such evidence will be excluded by a Motion *in Limine*? Does exclusion of the evidence increase the likelihood and risk of an appeal – requiring more time, more attorney fees, more risk – and possible reversal?

- How credible are the witnesses – the parties in particular – and how do they come across? Will a jury like them? How likely are they to motivate a jury their way? What impeachment material is available? Does anyone *appear* to be lying even if they are not?[7]

- What's the judge's predisposition? What's the court's track record granting or denying dispositive motions in similar cases? What's the risk this dispute will be dismissed, or the sails trimmed in some crucial fashion?

- What might jurors be like in the venue where trial will be held? In employment cases, for example, Wayne County jurors generally believe an employer must have good cause to terminate an employee. In Kent County, by contrast, every juror is familiar with the employment at will doctrine. Do verdict sizes in Genesee County differ from those in Ottawa County?

- As no more than 1% of all cases in state and federal court make it to trial, what is there about this dispute that might be different? And, in the wake of the COVID-19 pandemic, when does anyone expect to see a jury trial at the courthouse?

- What are the big risks for each side? Where are the holes in the claims or defenses? Perfect cases are few and far between. Rarely is liability a "lay down hand" or the defense a "slam dunk". Longtime trial lawyer turned mediator William "Bill" Sankbiel, likes to say, "I've never seen a case I couldn't lose." If the parties try the case 10 times, how many times would the plaintiff recover a verdict? How many times a "no cause?"

The "Softening Up" Process

In my experience, litigators focus on their strengths and minimize their weaknesses. Parties sometimes convince themselves they have *no* weaknesses. Parties and advocates are both prone to fall in love with their claims and defenses leading them to sweep potential "warts" under the carpet. As Shakespeare taught us, "love is blind." *The Merchant of Venice, Act 2 Scene 6.* For that reason, the opening numbers parties bring to the table may reflect a myopic – and therefore unrealistic – vision of risk. Risk impacts valuation. Most people prefer to manage their risk than take a chance on the outcome of a dispositive motion or trial. As a result, the more appreciation a party has for risk, the more reasonable their numbers. Mediators help the parties examine their risks in large part to challenge party certainty about the outcome and enhance flexibility in a productive direction. Accordingly, the numbers parties had in mind at 9:30 am are not as relevant as their numbers several hours later after engaging in risk assessment. *Then* is the time to place numbers on the table for consideration.

After examining their risks, a party may remain resolute, stubbornly attached to the numbers they came with. Okay. It's their case, their money, their decision. We should, however, understand why.[8] Parties may prefer to take their chances at trial notwithstanding the risks. No problem. That's their right.

Mediation is a voluntary process. Settlement is voluntary. Mediators assist in the negotiation, they do not compel resolution. While the parties may request a mediator's proposal and some of us are willing to provide one, it is not generally our job to tell the parties what their case is worth.

This is their conflict; their right; their risk; their money. But, before they choose between settling and rolling the dice, it's our responsibility to identify and help them weigh those risks realistically. If they remain steadfast, that is their choice. On the other hand, if the parties and counsel have been doing things right, they have been listening and processing what they heard. They have learned invaluable information. Perhaps they learned something new, or arrived at a fresh understanding, or recognized a risk previously overlooked, or increased concern for a problem previously minimized. After several rounds of offers and counteroffers, they probably have a much better appreciation of how far apart they really are.[9] In other words, they have received value for their investment in the mediation process.

When is the Right Time?

Knowing when to solicit an opening number is a judgment call. While we are engaged in "softening them up" the parties may grow impatient. "Can't we cut to the chase? Look what time it is!" Impatience can be driven by many factors: attorney and mediator hourly rates; frustration with progress; pessimism about whether the dispute will settle; resentment that their beloved theories are challenged, etc.[10]

To address impatience, I point out that if the case doesn't settle, there is great value in letting the process unfold. Enhanced risk assessment, better understanding of how the other side will present their claims or defenses, a sense of the other side's best numbers, and appreciation for where each side is coming from are invaluable. Good advocates want and need this information. It helps them do their jobs. Good lawyers are often helpful in tamping down party impatience. They recognize the value of information. Party impatience nonetheless must be respected. Accordingly, I make strategic decisions: which risks to discuss first, what to save for later rounds, and when to back off. Strategic mediators always save a few good risk questions for later rounds to generate additional movement when needed.

"After You, My Dear!"

When the time comes to open the exchange of numbers, it is helpful to know the negotiation history. What numbers have previously been exchanged, if any? Most parties are willing to share.[11] As noted above, if there have been no discussions, the first number should come from the plaintiff.

Sometimes, however, plaintiff counsel wants the defense to throw out the first number. I try to discourage that. "In the history of American jurisprudence," I like to say, "no plaintiff's lawyer has ever been happy as a result of making defendant go first." It confuses defense counsel. It undermines plaintiff's credibility and reduces respect for counsel's judgment. It sharpens suspicion. "What are they up to?" Because an opening defense number is likely to "anchor" the negotiation at a disappointing level, making the defense go first is rarely in the plaintiff's best interest. See *supra* at fn 4.

Where the defense should open because plaintiff presented a demand prior to mediation, they sometimes demand a *new* number from plaintiff. If defendant treated the demand as unserious and refused to respond, they may be equally reluctant to do so at the mediation table. "We're not in the same ballpark. Our ballparks aren't even in the same city! How do we respond to that? We can't!" To avoid impasse before we've even started, I am generally willing to request a new number from plaintiff "for purposes of mediation." "Yes, it's their turn," I say in plaintiff's caucus room, "but your number didn't reflect *any* risk. Much time has passed. A lot of water under the bridge. You have a lot more information. You acknowledge the number was your best day in court – and maybe then some. They're been unwilling to reply. They remain reluctant. Now that we're here and we've had a good discussion of risk, will you at least consider proposing a more productive number that takes some of that risk into account?" Sometimes, after deliberating, plaintiff counsel agrees.

If not, I return to the other room and seek flexibility from the defense side. There are several ways to move forward.

- "What number *would* you respond to? If they started with a better number, what would your counter have been? Can I offer your hypothetical counter and explain that you've authorized me to make it on the basis that you're trying to show good faith not respond to an unrealistic demand?"

- "You think this is a ridiculous, unrealistic number and you're worried about the message you're sending if you reply. Why not respond with an equally ridiculous number and send the same signal back?" I call this the "bookend" approach learned from Jon Muth.

- "What if we pretend this is already Round 2? Where would you expect to be to get Round 2 off to a good start? If you authorize a good counter, I'll work hard to get you a number you haven't heard before that you maybe also won't like, but you'll see it as progress."

When the parties have agreed to mediation voluntarily, it is rare that one or the other intervention doesn't get the negotiation moving.

PART III: MANAGING OPENING OFFERS

Communicating Unrealistic Numbers – or Not!

Because opening numbers can threaten to derail the entire process, I am a strong believer in pushing back when the mediator anticipates a hostile reception and risk of an equally aggravating response.

Often, opening offers reflect battles fought long before we arrived at Mediation. Opening offers may be hampered by this history. Sometimes the opening proposal is a significant departure from a number previously communicated. For example, perhaps someone offered a modest number "way back when" intended for a "quick and dirty" resolution at the beginning of the litigation process. Even though rejected at the time, "quick and dirty numbers" retain an emotional power. Offerees in this situation consider the new numbers "negotiating backwards," and express deep resentment.

Even when much time has passed, significant sums have been expended on attorney fees in the interim, or lost profits or lost wages have accumulated, the offeree can't stop thinking about that earlier offer. Of course, "nothing is more expensive than a missed opportunity." H. Jackson Brown, Jr. "That was then," I like to say. "It didn't happen. This is now. Mediation is a forward-looking process. Let's try to move forward from here."

Thomas Jefferson famously preferred "… dreams of the future to the history of the past."

Recognizing Unrealistic Opening Numbers

How do we know when a number is too aggressive? I try hard to remain neutral as long as possible. I try not to form an opinion about the merits *or* the value of the case until I know significantly more than I'm likely to know when the first numbers are communicated. I may never know "the right number." Ultimately, the "right number" is for the parties to determine. Nonetheless, it's generally as clear as day when an offer is totally out of whack.

(Continued on page 14)

MANAGING OPENING OFFERS: "ARE YOU REALLY GONNA MAKE ME COMMUNICATE THAT NUMBER?"

(Continued from page 13)

First, of course, offerees *tell* you what's wrong with the number. They may or may not be spinning us. Listen to their reasoning. Does it make sense? After years of service as a litigator and mediator, I may not be ready to say what the case is worth, but I generally can tell whether we're dealing with a five, six or seven figure claim. If a demand is multiples of projected economic damages alarm bells should be going off. If a demand exceeds policy limits, it doesn't take a ton of experience to question how it will be received. If the goal is to keep the negotiation going, something must be done.

Accordingly, I ask permission to push back. Will they consider whether there's a better way to open?[12] No one has ever refused to engage in reconsideration – whether they ultimately change their number or not.

- "Why would you choose to start with an over-the-top, hyper-aggressive offer?" The answer usually begins with "They need to understand that this is a serious case and we're not fooling around!" In fact, such numbers send the opposite message. "What do you think will be their reaction? What if you were in their shoes? Whatever message you intend, what message will they receive?" "Is there a risk they're going to walk out?"

- Or, I ask them to anticipate the number they'll hear back. "What number do you expect in reply?" Experienced plaintiff's lawyers generally acknowledge it will be in the "insult" range. "If that's the case," I ask, "why start there?" If the demand exceeds policy limits, I ask their experience with previous insurance carriers. "Have you *ever* settled a case in excess of policy limits? Let me ask it another way: when was the last time you settled a case *for* policy limits without a trial?" And, of course, the bigger the disparity, the easier it is for the other side to say no. The recipient might just as well spend the money on defense, take the risk and hope for a better offer down the road.

- "Is the number an 'outlier?' Won't they recognize it as such? Isn't this number many multiples of your actual losses? What's their incentive to continue the mediation process?"

- If the offeror initially won't recognize their numbers risk ending the negotiation, I share the reaction I anticipate based on past experience. Overly aggressive numbers cause consternation. They aggravate. They inflame. They incite a reaction and it won't be pretty. The other side may well conclude that they're wasting their time. The wheels can come off the bus. Over-the-top numbers can bring the process to a screeching halt with the parties even more escalated than they were before.[13] "Isn't it a bit early to start down that path? Do you want to run that risk? Or would you like to try something else?"

I don't tell parties what they should settle for. It's their case, their claims, their lives, their money. My coaching addresses first numbers, not last.[14] I tell plaintiffs I don't know what their bottom line is, and don't want to know.[15] Surely, they've included enough water in their opening number that there is ample room to move in the early rounds of negotiation. I urge taking a small risk to see if their "generosity" is reciprocated. If it isn't, there's ample time to slow down and dig in.

I understand I'll never know the case as well as the advocates. There may be many important things of which I am not aware. In other words, my coaching advice can be off the mark. Accordingly, parties should not feel compelled to accept my recommendations. "If you don't follow my advice, it doesn't hurt my feelings," I like to say. "You know the case far better than I do. Feel free to ignore what I've said."

If the party *insists* I communicate an over-the-top offer I will do so. Before the other side explodes, however, I remind them they have three options:

1). They can pack up and bring the negotiation to a halt. I encourage rejection of this option.

2). They can stay and proffer an equally unproductive counteroffer mirroring the offer.

3). They can remain and propose a number that gets the process back on track. "Can you be the mature, sensible party this morning? We can certainly wrap the number in an explanatory message. I'll even help you craft it. For example, 'To us, your last number was unproductive. We thought about leaving, but we want to show our good faith and willingness to reach resolution. We came here to settle, but we obviously have serious disagreements about value. We've authorized the mediator to communicate the right number for *this* round. And, we still have room to move. This is not a take it or leave it. Please don't read this as a sign of weakness, but a sign of our resolve: an effort to keep the process going in a case that really should be settled.'"

Unfortunately, even when the party selects Option 2 or Option 3, the atmosphere may be poisoned and the foundation for a sound, productive negotiation jeopardized. Ironically, if the counteroffer is the equal opposite (Option 2), it is almost inevitably met with disbelief, consternation and complaint from the very negotiators who started it. Competitive bargainers don't like it when the other side fights fire with fire. It sometimes helps to ask the offeror, now visibly upset, to "join me on the balcony", look down from a process perspective, and recognize that the other side has its own valuation. "This probably isn't the number they planned to start with. They are simply responding to an unrealistic demand with an equally unrealistic counteroffer simply to close the round. Don't jump to the wrong conclusion about where they really are."[16]

Sometimes, over-the-top offers and matching counteroffers can result in multiple rounds where the parties move in inches, continuously antagonizing and frustrating each other. This is human nature. We act reciprocally.[17] Too many reciprocal baby steps and our mediator optimism starts to lose its attraction for the participants. I ask whether the lawyers would like to avoid such a "death spiral." Instead, I suggest that it might be worth taking a risk and starting with a more realistic demand. "Reciprocity works both ways," I explain.[18] "If you make them a productive offer, I'll do what I can to persuade them to return the favor. We call that making

reciprocal concessions. If they don't reciprocate with a number that affords you optimism, it's still early. You won't have given away much, you retain ample room to move and you can slow back down in the next round. They will get *that* message." This approach encourages both parties to "fast forward" the process, reward good behavior and reinforce productive proposals.

Developing a Rationale for Each Offer

Offers that come "packaged" with a solid rationale or explanation are the most productive. If the offeror has not brought one to the table, I help develop one. A rationale avoids the dead end of "my (arbitrary) gut feeling is better than your (arbitrary) gut feeling." In an employment discrimination case, for example, plaintiff should pull together a breakdown of economic losses, past and future.

- What assumptions is the breakdown based upon?
- When do you expect plaintiff will find comparable employment or get back on her feet?
- If future damages are an element, how many years are projected and why?
- In an age case, for example, when did plaintiff plan to retire?
- Attorney fees are recoverable as an element of damage in discrimination and civil rights cases. Accordingly, the lawyers should check their billing records for a precise accounting of attorney fees and costs to include in the explanation. Attorney fee dollars complete the plaintiff's rationale.

A much more productive negotiation results when the defendant can see the assumptions and address them from the defense perspective. By laying out *its* assumptions, the defense presents a rational basis for a counter number. Rationales provide the basis for a productive discussion.

The same principles apply in a commercial case. If experts have been retained, I encourage the lawyers to exchange their damage reports. If they haven't hired experts, I ask them to bring lost profit documentation and how they expect to project damages at trial. Again, an exchange over specific numbers and assumptions is more productive and less frustrating than stubborn generalized "gut feeling" proposals and counterproposals without a rational basis.

If the mediator can get the first exchange of numbers off to a good start, chances are subsequent rounds will also be productive and less frustrating. A properly managed opening round lays the foundation for a resolution both sides can accept.

Conclusion

The mediator's role is to assist the parties in negotiating resolution of their conflict. Negotiation coaching is an essential component of that. As the only person who spends time in both rooms, the mediator is uniquely situated to give insightful coaching advice in the negotiation process. Mediators choose the best time to introduce the exchange of numbers. Mediators anticipate how offers will be received and what the reaction might be. Experienced counsel *ask* for the mediator's take on such questions. Parties willingly consider mediator coaching *because* we have gained their confidence in us and our judgment. They have placed their trust in us and *want* to know what we think. We have provided them with a good process, read their papers, listened to their stories, asked good questions, understood their perspective, and explored the cost of continuing the conflict. We helped identify and weigh their risks neutrally and objectively. We explained why we think they should modify their proposals or buttress them with additional rationale. As a result of the effort we have made, parties are willing to listen to us and follow our counsel. Coaching makes a difference. Managing opening offers matters. Coaching may not guarantee success, but it does reduce contention, encourage rational exchange, and dramatically improve the prospects for a WIN/WIN resolution.

—END NOTES—

[1]See, https://www.starkmediator.com/articles-links/i-know-what-your-job-is-reframing-the-role-of-mediator/

[2]Parties who prepare for mediation by developing a strategic offer/concession plan in advance generally do better than those who "plan" to bargain reactively. Reactive bargainers may not exercise their best judgment in negotiation when buffeted by the winds of emotion. Negotiators who bring an offer/concession strategy to the table must be flexible, however, prepared to make adjustments based on what they learn through the process.

[3]This prevents parties from avoiding discussion of a risk because, they assert, there wasn't time to investigate or they hadn't anticipated an issue.

[4]Opening offers have a strong effect on negotiations. "The first offer typically serves as an anchor that strongly influences the discussion that follows. In research documenting this price anchoring effect, psychologists Daniel Kahneman and Amos Tversky found that even random numbers can have a dramatic impact on people's subsequent judgments and decisions." From the Harvard Project on Negotiation. https://www.pon.harvard.edu/daily/negotiation-skills-daily/price-anchoring-101/

[5]Settlement negotiations often resemble a three-ring circus. In the left ring, plaintiffs counsel is negotiating with her client, trying to rein in overly optimistic expectations. In the right ring, defense counsel is pressing defense representatives for more authority to reach a settlement number. In the center ring, the advocates negotiate with one another over a final resolution.

[6]Will Rogers taught us that good judgment comes from experience. Experience, he added, comes from bad judgment. The hope is mediators have had enough experience to bring good judgment to the process.

[7]When Jack Lemon was a young actor coming up in Hollywood, George Burns took him under his wing. "Kid," he supposedly advised, "in this business sincerity is everything... (pause)... And if you can fake that, you've got it made!"

[8]Was the original number approved by a committee or significant other, for example, who is not available to discuss making a change? Perhaps an adjournment is in order.

[9]If it is unclear how much a party has been educated by the process, it can be helpful to ask them in a private caucus setting to articulate where the other side is coming from in their own words. It can also be helpful to ask parties to list the risks they themselves face.

[10]Impatience can be very real. Pressure to move faster, however, can also be an effort to hijack the discussion and avoid facing hard truths.

[11]Practice tip: Always ask about negotiation history with both lawyers present. It's remarkable how often they do not agree as to who made the last offer or how much it was! As a matter of routine, I ask for negotiation history in the pre-mediation conference call when all lawyers are on the call. If they've exchanged offers in writing, I ask for copies.

[12]I often hear criticism of mediators who simply carry numbers back and forth. Litigators tell me they *want* a mediator who pushes back and offers suggestions for more productive proposals. "That's what we hired you for!"

[13]This violates "The First Rule of Mediation: Do No Harm." Allen T. Stitt, ADR Chambers, Toronto, Canada. Stitt cautions that mediation should not make the relationship between parties or counsel worse than it was before. He believes it is our job to manage the process and attempt to *prevent* escalation.

[14]Where necessary, of course, I am always ready to coach closing numbers as well.

[15]Dick Soble taught me not to ask. The answer is rarely honest and generally paints the party into a corner it's difficult to get out of. I've heard their "bottom line", their "bottom bottom line", and their "bottom, bottom, bottom line." Moreover, as noted, the top or bottom line in the morning is far less important than the one modified by rigorous risk assessment.

[16]As you might expect, before communicating an equally aggressive counteroffer, I push back in that room. Mediators must be symmetrical and even-handed. I consider it equally my obligation to manage opening counteroffers.

[17]This danger is reduced where the mediator has encouraged the parties to develop in advance an offer/concession strategy.

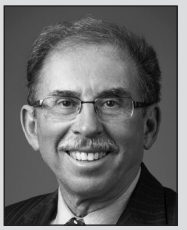
[18]See *Influence, The Psychology of Persuasion* by Robert B. Chialdini, Ph.D., "Chapter 2, Reciprocation: The Old Give and Take ... and Take." Harper Collins. ■

THE 2021 STATE BAR OF MICHIGAN LABOR AND EMPLOYMENT LAW SECTION

DISTINGUISHED SERVICE AWARD

presented to

DANIEL SWANSON



The State Bar of Michigan Labor and Employment Law Section Distinguished Service Award is presented to persons who, for a period of 20 years or more

- have made major contributions to the practice of labor and employment law;
- reflect the highest ethical principles, including principles of civility and professionalism;
- have advanced the development of labor and employment law;
- have a long-established commitment to excellence; and
- are recognized and respected by all constituents in the labor and employment community.

Past Recipients

1997	Theodore Sachs	2010	Leonard D. Givens
1998	William M. Saxton	2011	Thomas J. Barnes
1999	George T. Roumell, Jr.	2012	George N. Wirth
2000	Theodore J. St. Antoine	2013	Joseph A. Golden
2001	Erwin B. Ellman	2014	Janet C. Cooper
2002	James E. Tobin	2015	Richard Mittenthal
2003	John E. Brady	2016	Kathleen L. Bogas
	Joseph C. Marshall III		John R. Runyan, Jr.
2004	Gordon A. Gregory	2017	Michael Pitt
2005	Carl E. Ver Beek		David Calzone
2006	Robert J. Battista	2018	Stuart M. Israel
2007	H. Rhett Pinsky		Timothy H. Howlett
2008	Leonard R. Page	2019	Megan P. Norris
2009	Sheldon J. Stark	2020	Barry Goldman

AWARD PRESENTATION TO DANIEL SWANSON

Tad T. Roumayah

Over his 42-year-plus career, Dan Swanson has made significant and enduring contributions to the practice of labor and employment law. Dan has also done the difficult, but necessary, work of actively mentoring younger members of the Section, including yours truly. In short, Dan is a pillar of the Section and is well deserving of this honor.

Dan has practiced in the area of employment law for virtually his entire career. Although he initially represented employers, over the past twenty-five years, his practice has evolved to a majority plaintiff-side practice. Today, he is one of the most respected and successful plaintiff-side employment lawyers in the Section. He routinely represents employees in breach of employment contract, Title VII, Elliot-Larsen Civil Rights Act, Americans with Disabilities Act, Family and Medical Leave Act, Whistleblowers' Protection Act, and other employment-related claims.

A longtime member of the Section and Council, Dan served as Chair of the Council from 2014 to 2015. During his tenure as Council member and officer, he was instrumental in efforts to improve communication with Council members and to prepare and implement the Section's strategic plan. He has remained a valuable resource to the Council even after his term ended. Over his career, Dan has also chaired the Oakland County Bar Association Labor & Employment Section, served on the Board of Directors of the American Constitution Society, and served on the Michigan Association for Justice Executive Board. A consummate professional, Dan has also served on the Thomas M. Cooley Law School Professionalism Advisory Committee.

In addition to his service to the practice, Dan has served the broader community through his time as Chairperson and Member of the Board of Directors of Cass Community Social Services, a Detroit-based agency dedicated to providing food, housing, health services, and job programs. Dan has also served as an officer and member of the Board Directors of Birmingham Country Club.

Dan speaks and writes extensively on employment law topics. He has shared his expertise on "The Today Show," "Good Morning America," as well as CNN Headline News, and Fox Business and News Networks. His writings have been featured in the Michigan Lawyers Weekly, Detroit Legal News, and the Institute of Continuing Legal Education.

Dan has received numerous accolades including Michigan Lawyers Weekly "Leaders in the Law," Best Lawyers—Employment Law, DBusiness Top Lawyer, Super Lawyers, AV Preeminent Lawyer—Martindale-Hubbell, and most recently, LawDragon's 500 Leading Plaintiff Employment Lawyers. Dan has also received a Recognition for Pro Bono Service from the U.S. District Court for the Eastern District of Michigan.

Dan was honored to receive the Michigan Defense Trial Counsel 2019 Respected Advocate Award. Each year, the MDTC honors a member of the plaintiff's bar with this award, which recognizes that lawyer's history of successfully representing clients and adhering to the highest standards of ethics, mutual respect, and civility.

Perhaps one of the most important ways that Dan has served the Section is that he has been instrumental in mentoring and training several young lawyers who have gone on to become respected and productive members of the Section in their own right. As one of Dan's mentees, I know firsthand that Dan invests significant time and effort in developing young attorneys and sets a concrete example of how to practice employment law in a competent, ethical, and professional manner. His peers in the Section, both on the plaintiff and defense sides, can attest to Dan's legal acumen and professionalism.

I am honored and privileged to present the 2021 Distinguished Service Award to Dan Swanson. ■

REMARKS OF DAN SWANSON

I am honored, humbled and gratified by being selected to receive the Distinguished Service Award.

At the outset, I want to thank the Section for selecting me for the award and most importantly, I want to thank my friend and partner, Tad Roumayah, for nominating me for the award.

They say it takes a village to raise a child. Well it also takes a village for a person to become a successful attorney. My village consists of my wife, Leslie, my children, Marc and Heather, my many law partners (past and present) including my good friend, former partner Don Gasiorek, and my many friends in the Labor and Employment Law Section. In addition, I can't forget to mention my assistant for the past 30 years, Annette DeCoste, who is the best. I thank all the members of my village who have supported, educated and put up with me during my 43 years of practicing law.

I am humbled by receiving this award. The criteria for the award are very tough and set very high standards. Those criteria include making major contributions to the practice, demonstrating the highest ethical principles, advancing the development of labor and employment law, being committed to excellence and finally, being recognized and respected by the labor and employment law community. The only criterion left off that list is an ability to walk on water. Needless to say, I don't walk on water and while I have worked hard achieve those other criteria, at best, I remain a work in progress.

The past recipients of this award are giants in our profession. I consider those past recipients to be the all-star team of the Labor and Employment Law Section and I feel privileged to become a member of that team.

The past recipients of this award are men and women who I have admired for achieving the award criteria. Whether at Section seminars and meetings, the court room or a local watering hole, many of those past recipients taught me by example how to practice law and what it takes to meet those award criteria. I will be forever grateful to all of them including, John Brady, Shel Stark, Joe Golden, Mike Pitt, Kathy Bogas, Megan Norris, David Calzone and Tim Howlett.

Professor Ted St. Antoine was the recipient of this award in 2000. Professor St. Antoine is a great teacher, writer and lecturer. It took all those attributes and more, for him to teach me labor and employment law at the University of Michigan Law School. I enjoyed Professor St. Antoine's course so much, that I took his labor and employment seminar. As I look back, it was Professor St. Antoine who inspired me to pursue a career in employment law and I will remain forever thankful for the opportunity to have been his student.

As I have thought about this award, I reflect back on a statement Dr. Martin Luther King made shortly before his death in 1968. Dr. King said "The arc of the moral universe is long, but it bends toward justice."

Over the years, those words have inspired me as a lawyer in good times and bad times. Those words continue to inspire me today.

I consider it a privilege to practice labor and employment law.

As lawyers, all of us in our own way, every day, have an opportunity and obligation to contribute toward making this a more just society and country. This opportunity is not limited to just our law practice. We all have an obligation to give back to our profession and community by way of public service and volunteer work including being involved in the Labor and Employment Law Section, donating our time and talent to social and community organizations dedicated to feeding and housing the poor, educating kids and helping others in need.

I urge everyone in these challenging times to remember Dr. King's words and to continue to fight the good fight as lawyers to achieve the lofty professional standards established for this award and equally as important, to promote justice for all in our country. ■

LAWNOTES AUTHOR APPOINTED AS MAGISTRATE

Kevin P. Kales has become a member of the Michigan Workers' Compensation Board of Magistrates. Kales was appointed by the governor and confirmed by the senate in January 2021. Magistrates hear cases filed with the Workers' Disability Compensation Agency. Kales was a long-time member of Legghio & Israel, P.C. He began service as a magistrate on February 1, 2021. He is expected to hear cases in Detroit, Traverse City, and Gaylord.

Lawnotes congratulates Magistrate Kales, but warns that being a judge means you never know if your jokes are actually funny.

Two weeks before his appointment, Kales' article on the lawyer's role in presenting medical expert evidence appeared in *Lawnotes.* See, Kales, "Influencing Expert Opinions," Vol. 30, No. 4 *Labor and Employment Lawnotes* 10 (Winter 2021). Is there a cause-effect relationship between publishing in *Lawnotes* and professional recognition? That is a rhetorical question, of course. ■

ON REWRITING

Stuart M. Israel

I repeat a well-loved (by me) anecdote about the vanity of judges.

As the story goes, a law clerk drafted a letter to the Queen for the signatures of British appellate judges. The draft began: "Your Majesty, keenly conscious as we are of our many grave deficiencies…." One self-regarding judge protested this expression of humility. The final letter began: "…keenly conscious as we are of *one another's* grave deficiencies…."[1]

I am "keenly conscious" of *other* lawyers' "grave" writing deficiencies. I suffer others' dense, difficult, digressive, diffuse briefs, letters, contracts, etc. Borrowing from Mark Twain—"if words had been water, I had been drowned, sure."[2]

Twain recognized: "Nothing so needs reforming as other people's habits."[3] So, in the spirit of *pro bono publico*, I offer free advice to deficient legal writers. I put them on the road to better writing, paved by the late William Zinsser, writer, editor, and teacher. No promotional fees were paid for my endorsement of Zinsser, but would be welcome.[4]

1. Zinsser wrote: "Rewriting is the essence of writing well: it's where the game is won or lost." Or probably he rewrote that. Anyway, Zinsser observed, most writers are not able to say in first drafts exactly "what they want to say, or say it as well as they could."[5]

"Meaning is remarkably elusive." Zinsser provided an illustration, maybe prompted by an interrogatory in a Title VII case: "an interoffice memo from a supervisor requesting 'a list of all employees broken down by sex.'"[6]

2. Zinsser instructed: "You won't write well until you understand that writing is an evolving *process.*"[7] He prescribed "successive rewritings and rethinkings," necessary to "mold" your writing "into the best possible form."[8]

A sound writing process, Zinsser taught, entails "pruning and revising and reshaping" to make your writing "tighter, stronger and more precise," to eliminate "every element that's not doing useful work." Most first drafts, Zinsser opined, can be cut by half "without losing any information" or "substance" or "the author's voice." He summarized: "Simplify, simplify."[9]

3. These are sound and tested principles.

Shakespeare wrote: "brevity is the soul of wit."[10] Twain advised: "use plain simple language, short words and brief sentences" and don't let "fluff and flowers and verbosity creep in."[11] About the adjective, Twain recommended, "when in doubt, strike it out." Twain warned of the "adverb plague."[12] Dr. Seuss rhymed:

> So the writer who breeds
> more words than he needs,
> is making a chore
> for the reader who reads.[13]

Playwright and poet Richard Brinsley Sheridan wrote that "easy writing's curst hard reading." It has been reported that Ernest Hemingway profanely disdained all first drafts.[14]

Justice Louis D. Brandeis reportedly said: "There is no great writing, only great rewriting." His law clerks recounted "that in his endless rewriting Brandeis had made as many as sixty changes in a draft of ten pages and had revised an opinion for the twentieth or thirtieth time."[15] Nice.

4. These principles seem self-evident, but often are not practiced. "Few people realize how badly they write," Zinsser observed. Good writing takes thought, attention to detail, and practice. "Nobody becomes Tom Wolfe overnight, not even Tom Wolfe."[16] "Writing is hard work."[17]

5. Writing "is an act of thinking," Zinsser taught. "Clear thinking becomes clear writing; one can't exist without the other." "Clear writing is the logical arrangement of thought."[18]

Rewriting tests the soundness, logic, and clarity of the writer's thinking. It exposes flawed reasoning, omission, superfluity, disorganization, unnecessary repetition, fluff, flowers, verbosity, and other "grave deficiencies" that interfere with the effectiveness of the writer's communication to the reader.

"All writing is ultimately a question of solving a problem," Zinsser wrote. The new "three R's" maybe should be "reading, 'riting and reasoning." "Reasoning," he lamented, "is a lost skill of the children of the TV generation, with their famously short attention span."[19] That 1988 observation is so quaintly Twentieth Century, you might text or tweet.

On the subject of short attention spans and "reading, 'riting, and reasoning," at the risk of sounding curmudgeonly, I say as we embark on the third decade of the Twenty-First Century: What's the matter with kids today!?[20]

6. As Duke Ellington put it, "things ain't what they used to be." Many recently diplomaed and degreed persons are electronically-blessed but book-deprived—circumstances which don't seem to hurt their self-esteem, but which impede their "reading, 'riting, and reasoning."

Ah, books. I witnessed the 1971 birth of Borders in Ann Arbor, its impressive national growth, and its tragic death at a tender age in 2011. I see that many schools have cut back on reading and writing rigor. They no longer teach how to parse sentences, discern themes, detect symbolism, or write research papers without Wikipedia.

You might love or hate or be indifferent to *Hamlet, A Tale of Two Cities, The Adventures of Huckleberry Finn, The Red Badge of Courage, 1984,* the Gettysburg Address, the Declaration of Independence, the Constitution, "Invictus," and *The Elements of Style*—but don't you have to read them before you decide on love, hate, or indifference?

7. Economist Walter Williams, echoing historian and classicist Victor Davis Hanson, recently reflected on "the greatness of previous generations." Those generations built railroads, dams, interstates, factories, and cities, came out of the Great Depression to win World War II, defeating the Axis powers in four years, and—using "primitive computers and backward engineering"—landed on the moon in 1969.[21]

Professor Williams, from 1950 to 1954, went to Benjamin Franklin High School, "ranked the lowest among Philadelphia's high schools." He and his English classmates read *The Canterbury Tales, Macbeth, and Julius Caesar.* Professor Hanson rhetorically asks: "does anyone believe that a college graduate in 2020 will know half the information of a 1950 graduate?"

Professor Hanson ruminates: "Our ancestors were builders and pioneers and mostly fearless. We are regulators, auditors, bureaucrats, adjudicators, censors, critics, plaintiffs, defendants, social media junkies and thin-skinned scolds. A distant generation created; we mostly delay, idle and gripe."

A depressing rumination.

But I digress. My topic is writing. I've never built a highway, or landed on Omaha Beach under fire, or helped get to the moon. But I spent plenty of time reading. I learned enough to admire the clarity of Williams' and Hanson's writing and understand their concerns about the trajectory of things current.

8. Back to rewriting. Consider one of its objectives: brevity. Zinsser instructed: "short is usually better than long." "Short words

and sentences" are easier on the reader's "eye" and "mind."[22]

The "reader should be given only as much information" as the reader needs to understand the writer's point "and not one word more."[23] "Don't annoy your readers by overexplaining," Zinsser wrote.[24]

As Dr. Seuss put it, "the briefer the brief is, the greater the sigh of the reader's relief is."[25]

Your legal research and writing (hereinafter "LR&W") instructor (including, but not limited to, tenured, tenure track, contract, and adjunct professors, lecturers, and teaching assistants) maybe did not assign Dr. Seuss ("Seuss") during your first (1st) year LR&W class, maybe because Seuss was not a *juris doctor* or maybe because your instructor figured you would learn the value of brevity by reading the succinct and clear prose displayed in most law review articles.

Whatever. Zinsser warned that you will annoy your readers "by telling them something they already know or can figure out."[26]

You do not want to annoy—or even bore—the federal judge who will decide your client's legal fate. You do not want to spend precious space in your page-limited summary judgment brief quoting Rule 56, elaborating on the "genuine issue as to any material fact" standard's abstract nuances, or string-citing appellate decisions which muse about the standard in inapposite contexts.

There are few federal judges who don't already know, or can't quickly figure out without your help, *everything* they need to know about Rule 56. If necessary, the judge's law clerk can read the Wikipedia "Summary Judgment" entry. It cites the rule and pertinent Supreme Court decisions—in case your federal judge has a memory lapse.[27]

———

Brevity and logic and clarity and simplicity are your objectives. Writing is thinking—and art. Michelangelo took a block of marble and chipped away everything that didn't look like *David.* Take your early drafts and red-pen everything your readers don't need to understand your point. You may not always achieve beauty, but as Zinsser says, you will be "writing well."

Concluding—for now—my efforts to reform "other people's habits," cure their "grave deficiencies," and put them on the road to "writing well," I offer the late Elmore Leonard's tenth rule of writing: "Try to leave out the part that readers tend to skip."[28]

If at first you don't succeed, rewrite.

—END NOTES—

[1]Frank E. Cooper, *Writing in Law Practice* (1963), at 3, note 8 (emphasis added).

[2]*A Connecticut Yankee in King Arthur's Court* (1889), chapter XXII.

[3]*Pudd'nhead Wilson* (1894), chapter XV.

[4]The books by William Zinsser are *On Writing Well—The Classic Guide to Writing Nonfiction,* first published in 1976 (*"Well"*) and *Writing to Learn* (1988) (*"Learn"*). I also recommend W. Strunk Jr. and E.B. White, *The Elements of Style* (3rd ed. 1979), or the classic edition, or whatever the latest edition may be. Who doesn't?

I am confident that your appreciation of *my* effort to reform *your* writing deficiencies is of biblical proportions. *Proverbs* 12:1 teaches: "Whoso loveth knowledge loveth correction." The proverb points out that one who "hateth reproof" is "brutish."

This is not my first effort to elevate the state of legal writing. See, *e.g.,* chapter 12, "Language and Writing," in Israel and Goldman, *Opinions—Essays on Lawyering, Litigation and Arbitration, the Placebo Effect,* Chutzpah, *and Related Matters* (2016) (available at amazon.com). It seems, however, that, like Twain, "every effort I make" to reform the state of legal writing "misses fire." Twain failed to reform jury selection which, he opined, put "a premium upon ignorance, stupidity, and perjury." *Roughing It* (1872), chapter 48.

[5]*Well* at 83; *Learn* at 15.

[6]*Learn* at 15.

[7]*Well* at 84 (emphasis in original).

[8]*Learn* at 16.

[9]*Well* at xii, 7,11, and 16; *Learn* at 65.

[10]The quote comes from the prolix Polonius in *Hamlet*, Act 2, Scene 2, whose own verbosity does not dilute the wisdom of his advice.

[11]This advice, according to twainquotes.com, the impressive website by Barbara Schmidt, comes from Twain's March 20, 1880 letter to D.W. Bowser.

[12]The adjective advice comes from *Pudd'nhead Wilson,* chapter XI. The adverb advice comes from Twain's "Report to a Boston Girl," *Atlantic Monthly* (June 1880), according to twainquotes.com

[13]This is from Dr. Seuss, "A Short Condensed Poem in Praise of Reader's Digest Condensed Books" (1980), which reads in its entirety:

It has often been said
there's so much to be read,
you can never cram
all those words in your head.

So the writer who breeds
more words than he needs
is making a chore
for the reader who reads.

That's why my belief is
the briefer the brief is,
the greater the sigh
of the reader's relief is.

And that's why your books
have such power and strength.
You publish with *shorth!*
(Shorth is better than length.)

[14]The Sheridan quote is from the poem "Clio's Protest" (1819). Attributed to Ernest Hemingway are variations of the declaration: "The first draft of anything is shit." The provenance of this sentiment is addressed at quoteinvestigator.com.

[15]The Brandeis quote is attributed to him all over the internet, but I have not been able to find an original source. The law clerks' account is from Melvin I. Urofsky, ed., *The Supreme Court Justices: A Biographical Dictionary* (1994) at 44. Brandeis memorably published, for example, no doubt the product of painstaking "pruning and revising and reshaping": "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen." About the idea that in government administration of the criminal law "the end justifies the means," Brandeis wrote: "Against that pernicious doctrine this court should resolutely set its face." *Olmstead v. U.S.,* 277 U.S. 438, 485 (1928) (dissent).

[16]*Well* at 17-18. The ability to write well is built on reading what others have written, good, bad, and otherwise. "Writing is learned by imitation," Zinsser taught. We "all need models"; Bach and Picasso "didn't spring full-blown as Bach and Picasso." Zinsser recounted: "S.J. Perelman told me that when he was starting out he could have been arrested for imitating Ring Lardner. Woody Allen could have been arrested for imitating S.J. Perelman," and so on. We "eventually move beyond our models," after "we take what we need" and "become who we are supposed to become," once we figure out "how the language works and what it can be made to do." *Learn* at 15.

[17]*Well* at 9, adding: "If you find that writing is hard, it's because it *is* hard."

[18]*Well* at 8; *Learn* at viii and 53.

[19]*Learn* at 22; *Well* at 49.

[20]The "kids" observation is from the song "Kids," from *Bye Bye Birdie,* the 1960 Tony Award winning Broadway musical, lyrics by Lee Adams. You can watch and listen to various performances on YouTube. The song goes in part: "Why can't they be like we were, perfect in every way? What's the matter with kids today?" I used to see irony in those lyrics. Live and learn.

[21]"The Williams and Hanson columns appeared in various publications, print and electronic. The Williams column, "Today's Americans and Yesteryear's Americans," appeared on or about April 29, 2020. Williams refers to two Hanson columns: "Members of Previous Generations Now Seem Like Giants"—published on or about October 19, 2019—and "Is America a Roaring Giant or a Crying Baby?"—published on or about April 11, 2020. Williams passed away on December 2, 2020.

[22]*Learn* at 64. ; '

[23]*Learn* at 34.

[24]*Well* at 91.

[25]See note 13, which includes Dr. Seuss' endorsement of "shorth" over "length."

[26]*Well* at 91. Strunk and White advise: "Do not explain too much." Aristotle advised: "Nothing too much."

[27]Be not *too* brief. James Thurber reportedly said: "There is no exception to the rule that every rule has an exception." George Orwell, in "Politics and the English Language" (1946), offered six writing rules to cover "most cases." The sixth: "Break any of these rules sooner than say anything outright barbarous."—*barbarous* meaning unrefined. Repetition, for example, is sometimes effective for emphasis, as in Zinsser's imperative: "Simplify, simplify." Or in the advice of Strunk and White: "Clarity, clarity, clarity." Repetition may create felicitous rhythm, as in Robert Frost's "Stopping by Woods on a Snowy Evening" (1923) ("And miles to go before I sleep, and miles to go before I sleep.") or Edgar Allan Poe's "The Bells" (1850) ("How they tinkle, tinkle, tinkle, in the icy air."). One Orwell rule— "Never use a long word where a short one will do."—would not have improved the Gettysburg Address (1863) ("Four score and seven years ago..."). By the way, it seems there are five surviving drafts of Lincoln's speech, with minor variations. Good rewriting. Lincoln used rhythmic emphatic repetition: "...we cannot dedicate, we cannot consecrate—we cannot hallow—this ground" and "government of the people, by the people, for the people." Had he consulted fussbudget editors, Lincoln would have chosen one word among "dedicate," "consecrate," and "hallow," and gone with "87 years ago," and "government, of, by, and for the people." Orwell's fat third rule—"If it is possible to cut a word out, always cut it out."—could have been: "If possible to cut a word, cut." Brevity can be overdone, of course. Some editors even bar long endnotes. *Fuhgeddaboudit!*

[28]Elmore Leonard, *10 Rules of Writing* (2007), rule 10. ■

PAST PRACTICE

John Runyan, Jr.
Nickelhoff & Widick, PLLC

At a National Academy of Arbitrators meeting held in Detroit in 1959, Arbitrator Archibald Cox suggested that before "a rationale of grievance arbitration" could be developed, more work had to be done in identifying and analyzing the standards which serve to shape arbitral opinions. Cox's presentation moved Arbitrator Richard Mittenthal to write his classic article, "Past Practice and the Administration of Collective Bargaining Agreements," which he presented at the 14th Annual National Academy meeting two years later. Mittenthal relied in part upon Arbitrator Benjamin Aaron's presentation at the 1955 National Academy meeting, entitled "The Uses of the Past in Arbitration."

Describing past practice as "one of the most useful and hence one of the most commonly used aids in resolving grievance disputes," Mittenthal observed that past practice "may be used to clarify what is ambiguous, to give substance to what is general and perhaps even to modify or amend what is seemingly unambiguous." With respect to the latter, Mittenthal drew upon the following hypothetical, which Arbitrator Aaron had posited in his 1955 presentation:

> [A] contract asserts that seniority is controlling "in the following situations only: promotions, downgrading, layoffs and transfers." On its face, this language contains no ambiguity whatsoever. By using the word "only," a more exclusive term would be hard to imagine, the parties evidently intended seniority to apply in the four situations mentioned but in no others. Hence, pursuant to the plain meaning of this clause, seniority would not govern overtime assignments and any practice to the contrary would have to be ignored.

However, again relying upon Aaron's 1955 paper, Mittenthal suggested that the above analysis "may be too rigid an approach to the problem because it borrows principles from the law of contracts without giving adequate consideration to the unique characteristics of the collective bargaining contract and the relative flexibility with which even commercial contracts are construed today." Aaron had argued persuasively in his 1955 paper that no matter how clear the language of a collective bargaining contract, it does not always tell the full story of the parties' intentions.

Returning to Aaron's hypothetical, Mittenthal posited some additional facts:

> Suppose, in our hypothetical case, the testimony reveals that the matter of overtime assignments was never considered during the negotiation of the seniority clause-either because the parties overlooked it under the mistaken impression that they had covered all possible contingencies or because the parties concerned themselves only with those situations they had previously experienced. Or suppose the parties simply found this seniority clause in some other agreement and adopted it without discussion. Any one familiar with collective bargaining knows this sort of thing does happen.

Both Mittenthal and Aaron, although presciently predicting that courts might find that they were ignoring the plain language of the agreement, nevertheless found that in such circumstances, a longstanding practice of making overtime assignments by seniority might be used to modify seemingly unambiguous contract language.

With Arbitrator Mittenthal and Aaron's analysis, compare the decision of the United States Court of Appeals for the Sixth Circuit in *International Union of Electrical Workers v. Hurd Corp.,* 7 Fed. Appx. 329 (6th Cir. 2001). *Hurd* involved a "class" grievance over an employer's unilateral change in vacation payments. Although the collective bargaining agreement limited partial vacation pay to employees who had worked between 26 and 39 weeks and *who were laid off for documented medical reasons or who had retired,* Hurd historically had paid vacation pay to *all* employees who had worked the required number of weeks, *whether or not they had experienced a medically-based layoff or had retired.*

In 1997, however, Hurd decided to begin following the precise terms of the agreement, refusing to grant vacation pay to employees who had worked the required weeks *but were absent for reasons other than a medical layoff or retirement.* The Electrical Workers grieved on behalf of 74 employees who had worked between 26 and 39 weeks but were laid off from 13 to 16 weeks during the year for reasons other than medical or retirement. In a series of three separate decisions, the arbitrator ordered Hurd to pay partial vacation pay to all 74 employees, mistakenly concluding that the agreement provided partial vacation pay to employees who had worked more than 13 but less than 26 weeks.

A Tennessee District Court enforced the arbitrator's award, providing that while "the Arbitrator appears to have misread the collective bargaining agreement,... his award represents a plausible interpretation of the contract in light of the uncontradicted evidence of past practice." Upon appeal, the Sixth Circuit disagreed. The Court said that if the language of the contract were susceptible to multiple interpretations and the arbitrator had selected one of those interpretations, it would have no basis to second-guess the arbitrator's decision. The same conclusion would be required, said the Court, if the arbitrator had relied upon Hurd's past practice as a means of determining the meaning of disputed words. However, the Court said neither was the case.

The Court of Appeals disagreed with the District Court's finding that the arbitrator had simply "misapplied" rather than "ignored" relevant contract language. The Court concluded that the arbitrator had in fact ignored relevant language of the contract and further concluded, that when an award conflicts with an express provision of an agreement, the award fails to draw its essence from the agreement. The Court of Appeals also rejected the Union's past practice argument, reasoning that (1) the arbitrator explicitly and repeatedly affirmed that he was relying exclusively upon the language of the contract, as opposed to past practice; and (2) an arbitrator may not consider past practice when the terms of the contract are clear.

Unfortunately, *Hurd* does not stand alone. In *Omnisource Corp. v. Steelworkers Local 9130,* 187 F.3d 377 (6th Cir. 1999),

another unpublished Sixth Circuit decision, the Court affirmed an Ohio District Court decision vacating an arbitration award on similar grounds. Arbitrator Joan Ilivicky had found an employer in violation of a contract which was silent as to the method by which absences were to be covered, relying upon the employer's practice for the duration of three separate agreements of holding over employees in the same classification or calling them in to another shift earning overtime, a practice which she said "had become part of the custom of the workplace and as such a part of the terms and conditions of work."

Arbitrator Ilivicky rejected the employer's contention that it was entitled to change the method by which absences were covered as an exercise of its management rights, but the District Court disagreed. The District Court vacated her award, interpreting management's right to transfer as giving the employer the right to transfer employees for any reason, including covering absences. The District Court further found that Arbitrator Ilivicky's award conflicted with the express terms of the management's rights clause, imposed requirements not found in the CBA and was based on general consideration of equity and fairness. The Court of Appeals agreed, concluding in agreement with *Hurd* that "the arbitrator improperly relied on the law regarding past practices evolving into implied employee rights."

Arbitrator Charles Ammeson has suggested that (1) because past practice is an interpretive route; and (2) because a court may not set aside an arbitrator's award if "there is a[ny] possible interpretive route to the award," the *Hurd* decision must either be an aberration or the Sixth Circuit has expanded the grounds for vacating an arbitrator's opinion.

The view that *Hurd* is an aberration finds support in the Sixth Circuit's decision in *Michigan Family Resources, Inc. v. Service Employees International Union, Local 517M,* 475 F.3d 746 (2007), decided a half- dozen years after *Hurd*. Remember that in *Michigan Family Resources,* the Sixth Circuit, sitting *en banc,* reversed a panel opinion and District Court decision which had vacated Arbitrator Mark Glazer's award in a dispute over a cost-of-living increase. The majority overruled the four part *Cement Divisions* test and in its place, said that Courts should focus on 1) whether the arbitrator acted outside of his authority by resolving a dispute not committed to arbitration; 2) Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award; and 3) in resolving any legal or factual disputes in the case, was the arbitrator "arguably construing or applying the contract?" The majority said that so long as the arbitrator does not offend any of these requirements, "the request for judicial intervention should be resisted even though the arbitrator made 'serious,' 'improvident' or (even) 'silly' errors in resolving the merits of the dispute."

I am happy to report that *Michigan Family Resources* appears to have had a salutary effect on the federal courts' penchant for overturning labor arbitration awards. In *Teamsters Local Union v. The J.M. Smucker Co.,* 541 Fed. App. 529 (6th Cir. 2013), a case involving bumping rights and two competing arbitration awards, the Sixth Circuit reversed an Ohio District Court decision which had vacated the second award. The Court of Appeals agreed with the District Court that the arbitrator's reasoning was "cursory, meandering and generally unclear" but nevertheless concluded that his award should be enforced "no matter how irrational his reasoning." Here, because the contract clearly and unambiguously required that an employee be "affected" by a "layoff or job elimination" in order to qualify for bumping rights, the Court of Appeals disagreed with the lower court that resort to past practice was necessary.

In *Oakwood Healthcare, Inc., v. Oakwood Hospital Employees, Local 2568*, 615 Fed. Appx. 302 (6th Cir. 2015), the Sixth Circuit reversed a decision of Judge Judith Levy of the Eastern District of Michigan, who had vacated an arbitrator's award reinstating a discharged dietary aide who was called "an asshole" or worse when he placed spilled potatoes he had scooped from the floor on a sanitary food preparation table. The Court of Appeals found that the arbitrator was arguably applying the relevant provisions of the contract and the Hospital's work rules.

Finally, in *Spirit Airlines, Inc. v. Association of Flight Attendants,* 644 Fed. Appx. 684 (6th Cir. 2016), an interesting case which I handled under the Railway Labor Act, the Court of Appeals affirmed Judge Patrick Duggan's judgment enforcing an award of a three-member arbitration adjustment board which the Airlines had challenged as violating the majority vote provision of the RLA and the parties' agreement. Relying upon *Michigan Family Resources,* the Court of Appeals emphasized that "(i)n most cases, courts will find that the arbitrator was applying the contract and enforce the arbitrator's decision so long as 'the arbitrator appeared to be engaged in interpretation, and if there is doubt, [courts] will presume that the arbitrator was doing just that.'" The Court also said that "'quotes from and analy[sis] [of] the pertinent provisions of the agreement,' reliance on other indicators of meaning in the face of contractual silence [presumably including past practice], and a lack of any indication that the arbitrator was trying to do anything other than reach 'a good-faith interpretation of the contract' are all 'hallmarks' of an arbitrator's valid interpretation of an agreement."

It appears that the Judges in the Eastern District of Michigan have also gotten the message. Of the four post—*Michigan Family Resources* decisions which I reviewed—all involving attempts to vacate an arbitration award involving an issue of contract interpretation—the court in each case enforced the award.

The jury is still out on the Western District of Michigan. In *Dematic Corp. v. International Union, UAW,* 635 F. Supp. 2d 662 (W.D. Mich. 2009), Judge Paul Maloney vacated Arbitrator Elaine Frost's award in a classic past practice case involving the duration of insurance benefit continuation for employees volunteering for layoff. The contract clearly provided that such benefits would be continued at the employer's expense "for the balance of the month in which the employee is laid off, plus the two full calendar months following layoff." However, the evidence was undisputed that notwithstanding the language of the contract, Dematic had for many years continued insurance benefits for voluntarily laid off employees for up to six months. Arbitrator Frost concluded—in the tradition of Arbitrators Aaron and Mittenthal—that "(u)nder the combined circumstances of the undisputed practice of providing extended insurance benefits, followed by the Bechtel accord, followed by the continued practice of paying those benefits for several more years, ... the parties effectively modified the ... length of benefits language for employees on voluntary layoff."

(Continued on page 22)

PAST PRACTICE

(Continued from page 21)

Judge Maloney concluded that the arbitration award could not stand because "[t]he FAA does not permit an arbitrator to re-write clear contractual terms because they do not comport with subjective personal notions of fairness or good business." Although he paid lip service to the Sixth Circuit's *en banc* decision in *Michigan Family Resources,* noting the start of the trend which I have observed towards a more hands-off approach to arbitral awards, he found two Sixth Circuit decisions affirming "a district court's vacatur of arbitral decisions where the arbitrators flouted their obligation to construe a contract's terms." Inexplicably, however, Judge Maloney also turned for support to the Michigan common law-the very law which Arbitrator Mittenthal had said failed to give adequate consideration to the unique characteristics of the collective bargaining agreement.

Finally, those of you who arbitrate in the public sector and are therefore subject to the vagaries of the Michigan state courts may not have *Michigan Family Resources* to rely upon. In *City of Frankfort v. Police Officers Association of Michigan,* 2009 WL 2952495 (Mich. App. September 15,2009), a panel of the Court of Appeals with one judge dissenting, reversed a trial court decision enforcing an arbitral award involving the application of a seniority-terminating provision to an employee who was laid off years before the provision was negotiated. The majority noted that *Michigan Family Resources* recognized a presumption in favor of the conclusion that the arbitrator was engaged in contract interpretation but concluded that when the arbitrator "admits that the contract language is clear and unambiguous, yet still issues an award that is contrary to those clear and unambiguous words, we feel that we have been presented with the 'rare case' where vacating is required."

In another police case, *City of Kentwood v. Police Officers Labor Council,* 483 Mich 116 (Mich 2009), we barely dodged a bullet where the Court of Appeals reversed a trial court's order vacating an arbitration award involving the right to a "take home" vehicle. In dissenting from the order denying the City's application for leave to appeal from the adverse Court of Appeals' decision, Justices Markman and Corrigan indicated that they would have reinstated the trial court's order vacating the arbitration award, noting that "[t]o the extent the parties' past practice may [have supported the arbitrator's award], the zipper clause should have precluded any argument that these past practices survived the parties' mutual agreement in the CBA."

In summary, labor arbitrators and judges often perceive the same set of facts differently. But as Arbitrators Aaron and Mittenthal recognized more than fifty years ago, this difference may simply be the result of the judges' failing to appreciate the unique characteristics of the collective bargaining contract, and the arbitrators' singular focus on unearthing the full story of the parties' intentions. Fortunately, the Sixth Circuit's *en banc* decision in *Michigan Family Resources* appears to have halted, at least temporarily, judicial intrusion into the important role played by labor arbitrators in the collective bargaining process. ■

DEALING WITH ANONYMOUS COMPLAINTS—AN INVESTIGATOR'S PERSPECTIVE

Linda G. Burwell
National Investigation Counsel, PLLC

Imagine representing a company whose president calls you because she received the following note:

> This note is being sent to you out of respect for the Company whose name doesn't deserve to be dragged through the mud because of 'one bad apple'. Frank is intimidating and bullying people trying to get them to quit.

The note is unsigned and the president has no idea who wrote it or who sent it. The president has called asking for your advice on how to handle the issue. What do you tell her? Does she need to investigate? If so, to whom should she talk?

Anonymous complaints can come in many different forms and from many different sources. They can be a singular note slid under the president's office door as in the above hypothetical. They can be a note or email from multiple individuals. They can be many different individuals complaining to different people through different sources, one after another. They can be from attorneys on behalf of certain unnamed individuals (current and/or former employees). They can be calls to a hot-line or anonymous correspondence to board members. There have been instances where managers and directors created a separate email address with a fictitious name in order to communicate their collective complaints.

Anonymous complaints are becoming more prevalent in #MeToo situations. For example, one anonymous individual may complain on behalf of another unnamed individual. Or a supervisor may complain on behalf of an identified "victim," but that "victim" doesn't want to be named.

Does the Company Need to Investigate?

Coming back to our hypothetical, the first issue to resolve when getting this type of note is whether the company should investigate the concern. After all, the note doesn't disclose much about the issue except for the name of the alleged wrongdoer and the general nature of the alleged wrongful acts.

Even with so few facts, there could be several reasons to investigate. For example:

- There may be a legal duty, such as Title VII, or other law (just because an individual doesn't use the correct language, doesn't mean it isn't covered);
- There may be a company policy that prohibits the behavior (this might include the handbook, written stand-alone policies, mission statement, core values, bylaws, etc.);
- There may be an organizational reason. For example, the anonymous complaint is consistent with previously noted concerns about a specific department, specific person, high turnover, etc. (A good executive has an awareness of the state of her organization: does this concern seem like something that should be explored to get to the bottom of it?); or

- It just might be the right thing to do – this could be an opportunity to gather facts to see what, if anything, is broken, check the pulse of employee morale or simply show employees that the company takes concerns seriously.

An employer does not need to know who submitted the concern in order to investigate that concern (or at least develop some background information to decide whether it should be treated as a complaint). This is true even if the company's handbook or complaint policy requires a signed complaint. While companies are encouraged to have a clear complaint policy and procedure and are well within their rights to require employees to follow their policy (even one that requires a signed written complaint), it can be a mistake to apply this too literally and fail to investigate because the individual did not follow the procedure for filing a complaint, by, for example, submitting an unsigned written complaint or missing the filing deadlines. Concerns raised about events beyond the statute of limitations often occur in the #MeToo context. Some have been many years (even decades) past the deadline. One might be inclined to dismiss such a claim automatically and question why the concern was raised so much later, why the complainant wasn't the individual who came forward and/or why the complaint wasn't signed. Be careful of that response. Although the lapse of time or other failure to follow the company's policies most likely will prevent an individual from bringing a claim against the company under the law or the company's policy, the company may be deemed to be "on notice" of the issue for the next complainant. Gathering additional facts could help determine the extent of the conduct and the number of individuals involved or if there are others impacted by the conduct, and whether a hostile environment or toxic culture may persist, and could assist the company not only to defend future lawsuits, but, more importantly, fix existing issues.

To Whom Should the Company Talk?

Another issue to resolve is how the company should locate and reach out to the anonymous complainant(s)? To whom should the company talk? The company should be careful not to focus all of its attention on learning *who* filed the complaint. It is often much more important to learn more about the alleged conduct than to "out" the complainant. It would also be a mistake to dismiss outright a concern simply because the company assumes it knows who brought the concern and believes that individual to be a disgruntled employee with documented performance issues (or disgruntled applicant or former employee). The company might very well be mistaken about the identity of the complainant. Even if the complainant is a disgruntled employee who is on the verge of being terminated for performance issues, the concerns raised by that employee could nonetheless be legitimate and, left unchecked, could cause unwanted turnover of high performing employees.

Similarly, leaders may focus too much energy on how the complainant obtained certain information, or on the complainant's own performance issues, rather than on the concerns brought forward by the complainant. One example of a company's misguided focus on the complainant and the complainant's actions rather than on the alleged conduct, is *Perez v. Progenics Pharmaceuticals, Inc.,* No. 1:2010-cv-08278, S.D. NY (2016) where the complainant sent a letter to the company's general counsel accusing the company of committing fraud by issuing a false press release regarding clinical trials of a drug. The company fired the complainant the next day and spent its efforts to determine how the complainant had improperly accessed files to find the information to lodge the complaint, rather than whether there was indeed a misstatement in its public statements. The claimant was ultimately awarded $1.6 million dollars for his wrongful termination.

Applying these considerations when determining whom to interview in the context of our hypothetical, the company could be well served by narrowing down the issues or the department where Frank or the alleged victims work but the company may wish to peel the layers back slowly. It could be a mistake to send a general email identifying Frank or asking everyone if they have a problem with Frank. EEOC Guidelines offer some instruction. According to the EEOC, an effective harassment complaint system balances privacy and process to ensure the alleged harasser is not judged prematurely. *Promising Practices for Preventing Harassment,* https://www1.eeoc.gov//eeoc/publications/promising-practices.cfm ?renderforprint=1. Thus, the company should balance being able to gather information with the need to protect the claimant's and respondent's privacy. Again, look to people who are likely to be aware of the kinds of actions complained of, either as potential victims or co-workers. Instead of asking about Frank, it may prove helpful to ask the employee about the department and whether there are any concerns about people leaving the department and whether they have any knowledge of why people have left or are leaving. Use your investigative skills to read the witnesses carefully. Look for common threads in witnesses' accounts, or inconsistencies. You can get a good sense of Frank's management style without naming Frank.

Before reaching out to individuals, determine what is the best way for you to gather all the information. Company records are a good source of information. In our hypothetical, an organizational chart should show who is in Frank's department and who works with him. Other records may show whether resignations in Frank's department are unusually frequent or unexplained. They may show what his direct reports' performance reviews look like. Do some people seem to fall out of favor? Are there issues with the way he communicates in writing with others?

There are also certain things for the company to consider before beginning to interview witnesses in older "MeToo" situations where the alleged acts occurred years ago or where the witnesses are no longer around. For example: how should the employer locate the individuals with knowledge and/or determine whom to interview? Who is the best person to make the introductions? Will you need multiple people to make the introductions? What if there are individuals who aren't capable of providing information? All of these different situations will challenge your skills and ingenuity, and each will require a unique and tailored approach, but there is almost always a reasonable path to available information.

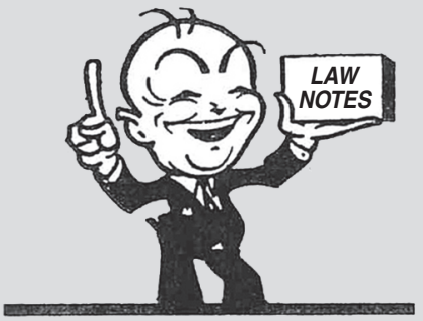
Conclusion

The anonymous complaint imposes some unique demands and challenges to an organization and to the person tasked with the investigation. Your counsel to the company should be focused on the core objective of helping your client learn whether there is a legitimate allegation of bad behavior that should be investigated, and assist your client to balance the interests of the various participants, and the company, in seeking to learn the facts and be in a position to take appropriate action, if warranted. And, of course, as in most cases, it is important for the company and its investigator to document why it did, or did not do something, or why it deviated from its normal practice. ■

Labor and Employment Law Section
State Bar of Michigan
The Michael Franck Building
306 Townsend Street
Lansing, Michigan 48933

Presorted Standard
U.S. Postage
PAID
DETROIT, MI
Permit No. 1328

INSIDE *LAWNOTES*



- Steven Schwartz assesses *Epic Systems.* David Porter considers the strange circumstances of *Thurman* and *Logan*.
- Ryan Fantuzzi looks at the future of collectively-bargained education loan assistance to attract and retain employees. John Runyan writes about past practice and labor arbitration.
- Linda Burwell gives an investigator's perspective on anonymous workplace complaints. Stuart Israel writes about rewriting.
- Shel Stark addresses opening offers in mediation. Jim Perry suggests incorporating mediation steps in grievance procedures.
- Labor and employment decisions and developments from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC, MDCR and EEOC news, websites to visit, and more.

- Authors Linda G. Burwell, Ryan J.L. Fantuzzi, Barry Goldman, Stuart M. Israel, John A. Maise, James B. Perry, David Porter, Ashley Rahrig, Tad T. Roumayah, John Runyan, Jr., Steven H. Schwartz, Sheldon J. Stark, and Daniel Swanson.