STATE BAR OF MICHIGAN
BLS
BUSINESS LAW SECTION

The Michigan Business Law JOURNAL

Volume 39
Issue 2
Summer 2019

CONTENTS

SBM
STATE BAR OF MICHIGAN
Published by THE BUSINESS LAW SECTION, State Bar of Michigan

The editorial staff of the *Michigan Business Law Journal* welcomes suggested business law topics of general interest to the Section members, which may be the subject of future articles. Proposed business law topics may be submitted through the Publications Director, Brendan J. Cahill, *The Michigan Business Law Journal*, 39577 Woodward Ave., Ste. 300, Bloomfield Hills, Michigan 48304, (248) 203-0721, bcahill@dykema.com, or through Kanika S. Ferency, ICLE, 1020 Greene Street, Ann Arbor, Michigan, 48109-1444, (734) 936-3432, ferencyk@icle.org. General guidelines for the preparation of articles for the Michigan Business Law Journal can be found on the Section's website at http://connect.michbar.org/businesslaw/newsletter.

Each issue of the *Michigan Business Law Journal* has a different primary, legal theme focused on articles related to one of the standing committees of the Business Law Section, although we welcome articles concerning any business law related topic for any issue. The primary theme of upcoming issues of the *Michigan Business Law Journal* and the related deadlines for submitting articles are as follows:

Issue	Primary Theme/Committee	Article Deadline
Spring 2020	Regulations of Securities Committee	November 30, 2019
Summer 2020	In-House Counsel Committee	March 31, 2020
Fall 2020	Corporate Laws Committee	July 31, 2020
Spring 2021	Debtor/Creditors Rights Committee	November 30, 2020

ADVERTISING

All advertising is on a pre-paid basis and is subject to editorial approval. The rates for camera-ready digital files are $400 for full-page, $200 for half-page, and $100 for quarter page. Requested positions are dependent upon space availability and cannot be guaranteed. All communications relating to advertising should be directed to Publications Director, Brendan J. Cahill, the *Michigan Business Law Journal*, 39577 Woodward Ave., Ste. 300, Bloomfield Hills, MI 48304, (248)203-0721.

MISSION STATEMENT

The mission of the Business Law Section is to foster the highest quality of professionalism and practice in business law and enhance the legislative and regulatory environment for conducting business in Michigan.

To fulfill this mission, the Section shall: (1) expand the resources of business lawyers by providing educational, networking, and mentoring opportunities; (2) review and promote improvements to Michigan's business legislation and regulations; and (3) provide a forum to facilitate service and commitment and to promote ethical conduct and collegiality within the practice.

The *Michigan Business Law Journal* (ISSN 0899-9651), is published three times per year by the Business Law Section, State Bar of Michigan, 306 Townsend St., Lansing, Michigan.

Volume XXII, Issue 1, and subsequent issues of the *Journal* are also available online by accessing http://connect.michbar.org/businesslaw/newsletter

From the Desk of the Chairperson

By Kevin T. Block

The primary focus of this volume of the *Business Law Journal* are articles based on limited liability company and partnership matters. Many thanks to the Business Law Section's LLC & Partnerships Committee, co-chaired by Donald A. DeLong and Loukas P. Kalliantasis, who coordinated soliciting articles for this volume of the journal.

The Business Law Section's involvement with the Michigan Limited Liability Company Act dates back to the State of Michigan's initial adoption of the Limited Liability Company Act. A group of distinguished lawyers who were active in the Business Law Section's matters, (including many chairs and future recipients of Stephen H. Schulman Outstanding Business Lawyer Awards) helped craft the language that became the Michigan Limited Liability Company Act as adopted in April of 1993 and effective on June 1, 1993. Since that time, the LLC & Partnerships Committee has been involved with numerous amendments to the Michigan Limited Liability Company Act to ensure that the Act remains current with developments in the law.

One of my goals during my tenure as Chair of the Business Law Section was to continue the Law School outreach initiatives started by my immediate predecessor, Mark Peters. Consistent with this goal, at the June meeting, the Business Law Section Council took action in support of programs occurring at the Wayne State Law School, Western Michigan University Cooley Law School, and the Michigan State University College of Law. In particular, the Section will continue to provide small cash awards to winners of the Wayne State Law School Transaction Competition as well as complimentary registration to our Section's Business Boot Camps and Business Law Institute. The Council also pledged its support by way of a sponsorship for the Western Michigan University Cooley Law School Legal Drafting Seminar occurring on October 11, 2019 and a sponsorship of the Midwest Securities Law Institute occurring at Michigan State University College of Law on October 25, 2019.

I would like to highlight a couple of great upcoming Section events. Once again, the Section has partnered with ICLE on the Business Law Institute taking place on October 4, 2019 at the Amway Grand in Grand Rapids. The Business Law Institute presents a great opportunity to learn more about current legal issues in the practice of business law, as well as to network with business law colleagues. The Business Law Section's annual meeting will also take place on October 4, 2019 during the lunch break of the Business Law Institute. Business Boot Camp I: Basic Training for Every Business Lawyer will also be returning in the upcoming months. The Grand Rapids Boot Camp will be occurring on November 4-5, 2019, and the Plymouth Boot Camp will be occurring on January 30-31, 2020. Business Boot Camp provides great training to lawyers new to the business law practice, as well as those experienced lawyers looking to refresh their skills in certain areas.

For those Section members looking to become more involved in Section activities, I would recommend becoming active in one or more of the Section's Committees or Directorships. The current Committees and Directorships are identified on our Section's website. The Committees include a wide range of practice areas including commercial litigation, corporate laws, nonprofit corporations and the Uniform Commercial Code. Directorships include Publications, Programs and Diversity & Inclusion. The leadership of these Committees and Directorships are always receptive to involving new participants.

This will be my last article as Chair of the Section. It has been truly a pleasure to serve the Section. I would like to thank the Section's Officers, Council members, Directorship and Committee Chairs and members, our Section's Administrator, and the members of the Section for all the time and effort they put into Section activities.

2018-2019 Officers and Council Members
Business Law Section

Chairperson: Kevin T. Block, Kerr, Russell and Weber, PLC
500 Woodward Ave., Ste. 2500, Detroit, MI 48226 (313)961-0200

Vice-Chairperson: Jennifer E. Consiglio, Butzel Long PC
41000 Woodward Ave., Bloomfield Hills, MI 48304 (248)593-3023

Treasurer: Julia Ann Dale, LARA, Corporation Securities & Commerical Licensing Bureau
PO Box 30054, Lansing, MI 48909 (517)241-6463

Secretary: John T. Schuring, Dickinson Wright, PLLC
200 Ottawa Ave. NW, Ste. 1000, Grand Rapids, MI 49503 (616)336-1023

TERM EXPIRES 2019:

Keven T. Block—500 Woodward Ave., Ste. 2500, Detroit, 48226
Mark E. Kellogg—124 W. Allegan, Ste. 1000, Lansing, 48933
Ian M. Williamson—1361 E. Big Beaver Rd., Troy, 48083
Hon. Christopher P. Yates—180 Ottawa Ave., NW, Ste. 10200B, Grand Rapids, 49503
Eric A. Zacks— 471 W. Palmer St., Detroit, 48202

TERM EXPIRES 2020:

Brendan J. Cahill—39577 Woodward Ave., Ste. 300, Bloomfield Hills, 48304
Jennifer E. Consiglio—41000 Woodward Ave., Bloomfield Hills, 48304
Bruce W. Haffey—101 W Big Beaver Rd., Ste. 1000, Troy, 48084
Shane B. Hansen— 111 Lyon St. NW, Ste. 900, Grand Rapids, 49503
J. Scott Timmer— 281 Seminole Rd. Fl. 2, Norton Shores, 49444

TERM EXPIRES 2021:

Carrie Leahy—201 S. Division St., Ste. 400, Ann Arbor, 48104
Michael K. Molitor—111 Commerce Ave., SW, Grand Rapids, 49503
James R. Waggoner—151 S Old Woodward, Ste. 200, Birmingham, 48009

EX-OFFICIO:

Diane L. Akers—1901 St. Antoine St., 6th Fl., Detroit, 48226
Jeffrey S. Ammon—250 Monroe NW, Ste. 800, Grand Rapids, 49503-2250
G. Ann Baker—P.O. Box 30054, Lansing, 48909-7554
Harvey W. Berman—201 S. Division St., Ann Arbor, 48104
Bruce D. Birgbauer—150 W. Jefferson, Ste. 2500, Detroit, 48226
James C. Bruno—150 W. Jefferson, Ste. 900, Detroit, 48226
Judy B. Calton—660 Woodward Ave., Ste. 2290, Detroit, 48226
James R. Cambridge—500 Woodward Ave., Ste. 2500, Detroit, 48226
Thomas D. Carney—820 Angelica Circle, Cary, NC, 27518
James L. Carey—23781 Point o' Woods Ct., South Lyon, 48178
Timothy R. Damschroder—201 S. Division St., Ann Arbor, 48104
Alex J. DeYonker—850 76th St., Grand Rapids, 49518
Marguerite M. Donahue, 2000 Town Center, Ste. 1500 Southfield, 48075
Lee B. Durham, Jr.—1021 Dawson Ct., Greensboro, GA 30642
David Foltyn—660 Woodward Ave, Ste. 2290, Detroit, 48226
Richard B. Foster, Jr.—4990 Country Dr., Okemos, 48864
Tania E. Fuller—300 Ottawa NW, Ste. 220, Okemos, 49503
Connie R. Gale—P.O. Box 327, Addison, 49220
Mark R. High—500 Woodward Ave., Ste. 4000, Detroit, 48226
Michael S. Khoury—6632 Telegraph Rd., Ste. 240, Bloomfield Hills, 48301
Justin G. Klimko—150 W. Jefferson, Ste. 900, Detroit, 48226
Eric I. Lark—500 Woodward Ave., Ste. 2500, Detroit, 48226
Tracy T. Larsen—171 Monroe Ave., NW, Ste. 1000, Grand Rapids, 49503
Edwin J. Lukas—1901 St. Antoine St., Ste. 2500, Detroit, 48226
Hugh H. Makens—111 Lyon St. NW, Ste. 900, Grand Rapids, 49503
Charles E. McCallum—111 Lyon St. NW, Ste. 900, Grand Rapids, 49503
Daniel H. Minkus—151 S. Old Woodward Ave., Ste. 200, Birmingham, 48009
Aleksandra A. Miziolek—39550 Orchard Hill Place Dr., Novi, 48375
Cyril Moscow—660 Woodward Ave., Ste. 2290, Detroit, 48226
Ronald R. Pentecost—124 W. Allegan St., Ste. 1000, Lansing, 48933
Mark W. Peters—201 W. Big Beaver, Ste. 500, Troy, 48084
Donald F. Ryman—313 W. Front St., Buchanan, 49107
Robert E. W. Schnoor—6062 Parview Dr. SE, Grand Rapids, 49546
Laurence S. Schultz—2600 W. Big Beaver Rd., Ste. 550, Troy, 48084
Lawrence K. Snider—410 S. Michigan Ave., Ste. 712, Chicago, IL 60605
Douglas L. Toering—1361 E. Big Beaver Rd., Troy, MI 48083
John R. Trentacosta—500 Woodward Ave., Ste. 2700, Detroit, 48226
Jeffrey J. Van Winkle—200 Ottawa Ave. NW, Ste. 500, Grand Rapids, 49503
Robert T. Wilson—41000 Woodward Ave., Bloomfield Hills, 48304

COMMISSIONER LIAISON:

Gregory L. Ulrich— 770 Pear Tree Ln., Grosse Pointe Woods, 48236

2018-2019 Committees and Directorships
Business Law Section

Committees

Business Courts
Chairperson: Douglas L. Toering
Mantese Hongiman, PC
1361 E. Big Beaver Rd.
Troy, MI 48083
Phone: (248) 457-9200
E-mail: dtoering@manteselaw.com

Commercial Litigation
Chairperson: Douglas L. Toering
Mantese Hongiman, PC
1361 E. Big Beaver Rd.
Troy, MI 48083
Phone: (248) 457-9200
E-mail: dtoering@manteselaw.com

Corporate Laws
Chairperson: Justin G. Klimko
Butzel Long
150 W. Jefferson, Ste. 900
Detroit, MI 48226-4430
Phone: (313) 225-7037
E-mail: klimkojg@butzel.com

Debtor/Creditor Rights
Co-Chair: Judy B. Calton
Honigman Miller Schwartz & Cohn LLP
660 Woodward Ave., Ste. 2290
Detroit, MI 48226
Phone: (313) 465-7344
E-mail: jbc@honigman.com

Co-Chair: Judith Greenstone Miller
Jaffe Raitt Heuer & Weiss, PC
27777 Franklin Rd., Ste. 2500
Southfield, MI 48034-8214
Phone (248) 727-1429
E-mail: jmiller@jaffelaw.com

Co-Vice Chair: Paul Hage
Jaffe Raitt Heuer & Weiss, PC
27777 Franklin Rd., Ste. 2500
Southfield, MI 48034-8214
Phone: (248) 351-3000
E-mail: phage@jaffelaw.com

Co-Vice Chair: Marc Swanson
Miller Canfield
150 W. Jefferson Ave., Ste. 2500
Detroit, MI 48226-4415
Phone (313) 496-7591
E-mail: swansonm@millercanfield.com

Financial Institutions
Chairperson: David W. Barton
Bodman PLC
229 Court St.
Cheboygan, MI 49721
Phone: (231) 627-8007
E-mail: dbarton@bodmanlaw.com

In-House Counsel
Co-Chair: Jon M. Canty
NSK Americas, Inc.
Phone: (734) 913-7809
E-mail: cantyj@nsk-corp.com

Co-Chair: Kimberly N. Kinchen
Ford Motor Co.
One American Rd., Ste. 1034 A-6
Dearborn, MI 48126
Phone: (313) 845-2703
E-mail: kkinche1@ford.com

Law Schools
Chairperson: Mark E. Kellogg
Fraser Trebilcock Davis & Dunlap PC
124 W. Allegan St., Ste. 1000
Lansing, MI 48933
Phone: (517) 482-5800
E-mail: mkellogg@fraserlaw.com

LLC & Partnership
Chairperson: James L. Carey
Carey Law Offices, PC
23781 Point o' Woods Ct.
South Lyon, MI 48178
Phone: (248) 605-1103
E-mail: jcarey@careylaw.us

Nonprofit Corporations
Co-Chair: Celeste E. Arduino
Bodman PLC
1901 St. Antoine St., Fl. 6
Detroit, MI 48226
Phone: (313) 393-7593
E-mail: carduino@bodmanlaw.com

Co-Chair: Jennifer M. Oertel
Jaffe Raitt Heuer & Weiss, PC
27777 Franklin Rd., Ste. 2500
Southfield, MI 48034
Phone: (248) 727-1626
E-mail: joertel@jaffelaw.com

Regulation of Securities
Chairperson: Patrick J. Haddad
Kerr, Russell and Weber, PLC
500 Woodward Ave., Ste. 2500
Detroit, MI 48226
Phone: (313) 961-0200
E-mail: phaddad@kerr-russell.com

Small Business Forum
Co-Chair: Bruce W. Haffey
Giarmarco Mullins & Horton, PC
101 W. Big Beaver Rd., Fl. 10
Troy, MI 48084
Phone: (248) 457-7140
E-mail: bhaffey@gmhlaw.com

Co-Chair: Mark C. Rossman
Rossman Saxe, PC
2145 Crooks Rd., Ste. 220
Troy, MI 48084
Phone: (248) 385-5481
E-mail: mark@rossmansaxe.com

Uniform Commercial Code
Chairperson: Darrell W. Pierce
Dykema Gossett, PLLC
2723 S State St, Ste 400
Ann Arbor, MI 48104
Phone: (734) 214-7634
E-mail: dpierce@dykema.com

Directorships

Communication and Development
Kevin T. Block
Kerr, Russell and Weber, PLC
500 Woodward Ave., Ste. 2500
Detroit, MI 48226
Phone: (313) 961-0200
ktb@krwlaw.com

Jennifer E. Consiglio
Butzel Long PC
41000 Woodward Ave., Stoneridge West
Bloomfield Hills, MI 48304
Phone (248) 593-3023
E-mail: consiglio@butzel.com

Julia A. Dale
LARA Corporations, Securities & Commercial Licensing Bureau
PO Box 30054
Lansing, MI 48909
Phone (517) 241-6463
E-mail: dalej@michigan.gov

Mark R. High
Dickinson Wright, PLLC
500 Woodward Ave., Ste. 4000
Detroit, MI 48226-5403
Phone (313) 223-3500
E-mail: mhigh@dickinsonwright.com

Michael S. Khoury
FisherBroyles LLP
31350 Telegraph Rd., Ste. 201
Bingham Farms, MI 48025
Phone (248) 590-2910
E-mail: michael.khoury@fisherbroyles.com

John T. Schuring
Dickinson Wright, PLLC
200 Ottawa Ave. NW, Ste. 1000
Grand Rapids, MI 49503
Phone (616) 336-1023
E-mail: jschuring@dickinsonwright.com

Legislative Review
Eric I. Lark
Kerr, Russell and Weber, PLC
500 Woodward Ave., Ste. 2500
Detroit, MI 48226-5499
Phone: (313) 961-0200
E-mail: eil@krwlaw.com

Nominating
Tania E. (Dee Dee) Fuller
Fuller Law & Counseling, PC
300 Ottawa NW, Ste. 220
Grand Rapids, MI 49503
Phone (616) 454-0022
E-mail: fullerd@fullerlaw.biz

Programs
Catherine Ferguson
Wayne State University Law School
471 W. Palmer Ave.
Detroit, MI 48202

Tania E. (Dee Dee) Fuller
Fuller Law & Counseling, PC
300 Ottawa NW, Ste. 220
Grand Rapids, MI 49503
Phone (616) 454-0022
E-mail: fullerd@fullerlaw.biz

Eric I. Lark
Kerr, Russell and Weber, PLC
500 Woodward Ave., Ste. 2500
Detroit, MI 48226-5499
Phone (313) 961-0200
E-mail: eil@krwlaw.com

Daniel H. Minkus
Clark Hill, PLC
151 S. Old Woodward, Ste. 200
Birmingham, MI 48009
Phone: (248) 988-5849
E-mail: dminkus@clarkhill.com

Mark W. Peters
Bodman PLC
201 W. Big Beaver Rd., Ste. 500
Troy, MI 48084
Phone: (248) 743-6043
E-mail: mpeters@bodmanlaw.com

John T. Schuring
Dickinson Wright, PLLC
200 Ottawa Ave. NW, Ste. 1000
Grand Rapids, MI 49503
Phone (616) 336-1023
E-mail: jschuring@dickinsonwright.com

Publications
Brendan J. Cahill
Dykema
39577 Woodward Ave., Ste. 300
Bloomfield Hills, MI 48304
Phone: (248) 203-0721
E-mail: bcahill@dykema.com

Liaisons

ICLE Liaison
Marguerite M. Donahue
Seyburn Kahn Ginn Bess & Serlin PC
2000 Town Center, Ste. 1500
Southfield, MI 48075
Phone: (248) 351-3567
E-mail: mdonahue@seyburn.com

Probate & Estate Planning Section Liaison
John R. Dresser
Chalgian & Tripp Law Offices
2127 Spring Arbor Rd.
Jackson, MI 49203
E-mail: dresser57@mielderlaw.com

Young Lawyers Section Liaison
James R. Waggoner
Clark Hill PLC
151 S. Old Woodward Ave., Ste. 200
Birmingham, MI 48009
E-mail: jwaggoner@clarkhill.com

IRS and DOJ Continue Global Out-Reach: Did You Get a Letter?

In late July, the IRS began sending letters to holders of crypto currency and expect to send more than 10,000 such letters by the end of August. IRS Commissioner Chuck Rettig, a very well-known civil and criminal tax defense lawyer before taking the mantle earlier this year as IRS Commissioner, gave some very clear advice to letter recipients and others in similar circumstances: "Taxpayers should take these letters very seriously by reviewing their tax filings and when appropriate, amend past returns and pay back taxes, interest and penalties." That seems clear enough. The announcement also leaves the possibility of a criminal investigation wide-open.

While the IRS considers additional guidance, present IRS guidance came in 2014 wherein the IRS stated that gains and losses from the sale or exchange of cryptocurrency must be reported in the same manner as gain or loss on the sale or exchange of property. In other words long-term or short-term capital gain or losses. Remember, the burden is upon the taxpayer to establish cost basis. The failure to do so could result in a zero basis determination. More IRS guidance on calculating cost basis has been promised. Until then, the taxpayer is not excused from reporting and filing.

There are three different types of letters—6173, 6174, and 6174-A. The respective letters provide some insight about how much the IRS already knows about the recipient. Letter 6174-A appears to be the most ominous as that version of the letter specifically states that potential enforcement action may follow.

The letter campaign comes at the same time as the much-covered Facebook plan to launch a new type of cryptocurrency called Libra. A great deal of bi-partisan resistance came from legislators as governments express concerns about the use of cryptocurrency to evade tax and financial reporting obligations and potentially aid in the laundering of illegal money. The takeaway is that cryptocurrency has caught the attention of the tax enforcement community. There is a clear pre-disposition in some legislative and law enforcement circles that the use of cryptocurrency is inherently suspicious and is not *prima facie* evidence of improper motives.

What recipients of the letters must understand is that they received the letters because the IRS already has information that the recipient engaged in one or more cryptocurrency transactions, and the tax return (if filed) does not appear to account for the transaction(s). Letter recipients should consult with experienced tax counsel to consider their options and potential exposure. Because the IRS has already contacted the letter recipient, a voluntary disclosure is not likely available, but other strategies may be employed. A last cautionary note, an amended tax return could also be considered a second false tax return unless the amended tax return covers all relevant matters.

Clients should not discuss the matter with their accountant if there is *any* concern about the completeness or accuracy of the tax return(s). An experienced attorney should be consulted and then perhaps engage an account pursuant to a "kovel" engagement.

"Accidental Americans" Head to French Courts

France entered into a Foreign Account Tax Compliance Act (FATCA) treaty with the United States. Therefore, if you are an American citizen, you can expect your bank operating in France (and many other countries) to share your financial information with the Unites States. The legal challenge was predicated upon the argument that the information sharing violated European Union privacy laws. The Association of Accidental Americans (that is a real organization) plans to continue the fight through the European Commission. The decision does not change the legal requirements for all U.S. citizens, namely the reporting or worldwide income and financial reporting. What has changed is how information is shared amongst countries. Until recently, a person with dual citizenship, who was raised perhaps entirely outside of the United States generally paid little attention to U.S. tax law. The thinking went, "I don't live or work in the U.S., so why would I have to file tax returns in the U.S. and file financial information disclosures?" The United States does not have "citizenship light." If you are in the pool, you are in the pool.

Over the last several years, I have represented individuals from dozens of countries, (yes, Canada, that includes you too), surprised to learn that they have significant exposure to the U.S. tax system. After several years of the Offshore Voluntary Compliance Program, the U.S. Treasury has taken a much harder line of U.S. citizens living abroad not filing the required returns. Every IRS examination and criminal investigation actively searches for evidence of foreign accounts or assets including the inbound and outbound transfer of money. I have seen a single transaction lead to fact-finding resulting in the assessment of significant penalties for failure to file informational returns. Whether this particular litigation or any other is successful is somewhat moot. The legal obligation to report and pay, if required, will not change. Expect the United States to try and figure out who the individuals are behind the Association of Accidental Americans to see if they are in compliance.

For practitioners with clients that have dual citizenship but view their U.S. citizenship as "accidental" or otherwise, there is a methodology to surrender U.S. citizenship. Surrendering their U.S. passport, if the person has a U.S. passport, is irrelevant

to citizenship. Interested individuals should consult an experienced practitioner to understand the immigration and tax implications.

IRS Launces New Campaigns at Foreign Income

This summer the IRS announced six new compliance programs geared toward U.S individuals' offshore income including deferred compensation. You might be noticing a theme.

The latest campaigns will be operated out of the Large Business and International (LB&I) Division of the IRS. There will be a focus on post-OVDP compliance, expatriation (see above), high-income nonfilers, erroneous refundable credits, as well as transfer pricing and compliance with foreign tax authorities.

States Can't Tax Nonresident Trust Payments

The United States Supreme Court ruled that North Carolina may not tax a trust formed in New York that had a trust beneficiary residing in North Carolina. See *North Carolina Dep't of Revenue v The Kimberly Rice Kaestner 1992 Family Trust*, __US__, 139 S Ct 2213 (2019). The case has specific facts that must be considered. This case involved undistributed income related to a North Carolina resident and trust beneficiary. Michigan law has important distinctions from North Carolina law but upholds the concept that a state may not tax undistributed income form a settled trust from another state solely due to the residency of a beneficiary.

The IRS has announced the appointment of Eric Hylton as head of the IRS Small Businss/Self-Employed Division. The division is responsible for civil audits for taxpayers with assets under $10 million. Mr. Hylton was the deputy chief of IRS Criminal Investigation. Is there a message in this appointment?

Eric M. Nemeth of Varnum LLP in Novi, Michigan practices in the areas of civil and criminal tax controversies, litigating matters in the various federal courts and administratively. Before joining Varnum, he served as a senior trial attorney for the Office of Chief Counsel of the Internal Revenue Service and as a special assistant U.S. attorney for the U.S. Department of Justice, as well as a judge advocate general for the U.S. Army Reserve.

 By Michael S. Khoury and Stuart A. Panensky

Technology and Cyber-risk Obligations and Issues for Lawyers and Law Firms

In the Fall 2018 column of the Technology Corner, there was a brief discussion of ABA Formal Opinion 483[1] and the obligations of lawyers in the event of a data breach. Lawyers and law firms are uniquely exposed to cyber-related risks. What should every lawyer be thinking about and doing before that event? This column discusses some of those points and the risks and liabilities that may be faced.

The legal profession is in significant ways completely dependent on computers and technology. We use computers for email and other electronic communications, writing, editing, and saving documents and other work product, storing information and accessing the Internet for cloud applications and a host of other tasks. We receive, store, and create very sensitive and personal information that is critical to our clients. Law firms, more than many other business entities, are prime targets (and victims) of computer-system penetration by unauthorized third parties. Law firms are also vulnerable to the biggest risk faced by all organizations—personnel who are careless or do not follow proper procedures.

The risks associated with the reliance on computers, networks, and the collection and storage of electronic data—cyber risks—for law firms are profound and numerous because the bad guys know that investments in avoiding these risks are not the highest priority for lawyers. "As long as it works" is often the guidance received by IT consultants from their law firm clients (or the IT director from the firm's management) so that a law firm's computer network may be an easy (or at least, an *easier*) target. To highlight the risks, let's consider an example (dramatized a bit to add impact).

A Typical Compromise

A new, millennial-aged associate at your law firm has been given access to a firm-owned laptop computer and had a very bad day at work. But through this young attorney's misfortune, we will explore many of the cyber-risks his actions pose to his (your) law firm.

Our young associate is given an email address (@yourfirm.com) and access to a laptop with the Internet and Microsoft Outlook for email. Being ambitious, the associate Googles "free law updates" and signs up for free email law updates using his new law-firm email address for credentials. He completes a voluntary survey that polls our friend's gender, birthdate, and industry. Under industry, the subject checks off "health services." After signing up for the free service, our associate is bombarded with emails from vendors offering all kinds of services and products.

One of the many emails our subject receives has the subject line "New case." The ambitious young associate opens the email. It says something like "can you help?" and contains an attachment that is a .zip file named "matter." A little confused, but definitely interested, the associate double clicks the .zip file that was not really a .zip file at all, but rather an executable computer program—a virus—that finds a quiet little place in your law firm's computer network to hide and send messages back to its sender reporting where it is and what it sees.

To our blissfully naive victim, there may be no impact to the rest of the work session. Our friend goes back to completing a super-important memorandum of law in support of an appeal that needs to be filed today for a senior partner who is totally unaware that the associate just unwittingly opened a tunnel from his law firm's computer network to the outside world and set the stage for a cyber-attack.

Later that day, after collecting images of all of the data it finds and transmitting that data back to its origin, the virus triggers a ransomware program that selects all of the Microsoft Word documents it finds on the law firm's network and hides them. When our associate friend fires up his next assignment, instead of the usual folders for cases and research projects, he finds new folders with conspicuously suspicious names like "pics" and "naked."

Horrified, our friend reports the issue to IT. It turns out that everyone at the firm is experiencing the same thing. All of the firm's documents are gone. When IT looks closely, along with these various suspicious folders, there is a notepad document that demands a ransom of $250,000 for the safe return of the documents. IT claims it can quarantine the virus and recover the documents from backup, but it is going to take at least 72 hours to recreate all of the files (and IT reports that your firm might not have all of the available space needed to store the backups and recreated documents). During the downtime, there will be no access to firm documents or their accompanying applications. Firm productivity for this period is shattered. Back to pen and paper and books (if they still can be found).

Worse, the malicious party that penetrated the firm's network through our millennial's email reviewed the data it was holding and discovered folders for a medical malpractice case the firm was handling on behalf of a mental health facility. For fun, the villain posts 2000 of the firm's client's patients' mental health records on a website he hosts.

The above scenario is not outrageous. Ask any insurance lawyers professional liability insurance broker. Of course, more often than not, the victim of this kind of phishing scheme is not a millennial-aged freshface (who may, in fact, be more fluent with technology). The above fact pattern, though exaggerated, is not uncommon. It is convenient to demonstrate what one rather innocuous mistake in the use of technology can

expose a law firm to with respect to cyber-risk.

Attorney's Ethical Obligations to Safeguard Data

Even before the advent of cyber-specific risks, the issues raised by the hypothetical were relevant to the fundamental question of how far an attorney's ethical obligations to care for data obtained from a client extends when the data is in electronic format and can be copied, encrypted, deleted, transmitted, and stored with relative ease, often in a matter of seconds.

ABA Model Rule 1.1 requires that a lawyer be competent, and it specifically identifies the use of technology as a required area of competence in the comments. While the Michigan Rules of Professional Conduct do not have this detail (yet) it its comments, it would be prudent to assume that it is implied. ABA Model Rule 1.6(c) provides that lawyers are required to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." ABA Model Rule 1.6(c). Comment 18 to the rule considers what constitutes an attorney's "reasonable efforts" and explains that the attorney's ethical obligation is not violated if "the lawyer has made reasonable efforts to prevent the access or disclosure." ABA Model Rule 1.6(c).

In determining the sufficiency of an attorney's efforts to safeguard client information, the comment considers "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)." ABA Model Rule 1.6(c).

In our hypothetical, could the fictitious law firm be charged with violating its ethical responsibility under this model rule? We might need to know more about its other cyber security policies. For now, we look to the factors set forth in the model rule commentary.

As to sensitivity of information, the data in question included private mental health records (which is protected health information or "PHI"), which our society has deemed to be very sensitive. As to potential additional safeguards, our fictitious firm must consider how the malicious virus was able to get through its email system without being detected as a virus or why an unknown file was able to be downloaded by our naive user in the first instance. Should it examine its firewall policies? Does it even have a firewall? Could there have been a stricter internet usage policy such that the associate would have been blocked for signing up for a free service to begin with? The law firm must further examine how difficult and expensive deploying additional safeguards would be, as well as whether such safeguards would adversely affect the day-to-day practice of law.

Exposure to Cyber Liability

Our example raises several potential legal obligations and potential cyber risks that lawyers and law firms undertake when faced with their own data breaches. Our laws reflect our evolving concerns over identity theft, fraud, and basic privacy. Because this risk is still relatively young, a mosaic of different laws and standards have evolved, originating from several states, the federal government (both the executive and legislative branches), and private industry. However, while there are differences between particular requirements of the various standards, the overall theme of the mosaic is clear.

Businesses, including law firms, have an obligation to protect the personal and sensitive information of their clients and customers. Those that suffer breaches and other events have affirmative obligations under the law. Finally, the mosaic of laws and standards about data protection are being enforced through state and federal regulatory agencies and civil litigation.

Notice Requirements

As ABA Formal Opinion 483 provides, one of the immediate affirmative obligations triggered by a breach of data involving the unauthorized access of personal information is the requirement to notify the affected class of a data breach. State laws require that notice of the data breach be sent to the affected class, and often to state attorneys general and state regulators. The various notice laws are usually highly specific as to the form, scope, and method of notification.

In our fact pattern, the law firm must first determine which jurisdiction's data laws will apply. This issue alone causes conflict and confusion. The hackers' posting of the stolen medical records on a public website potentially impacts individuals that reside in different jurisdictions that have differences in their particular data breach notice laws. In this regard, even though our hypothetical law firm has a single office location, when fulfilling its notice obligations, our law firm must consider the data laws of all of the states where those in the affected class reside.

Because health records are involved, the law firm needs to consider the Health Information Technology for Economic and Clinical Health Act ("HITECH"),[2] which was enacted in 2009 as part of an overall effort to modernize the keeping of medical records and other PHI and update parts of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Relevant to our case, HITECH expressly requires HIPAA "covered entities," including their "business associates," to report PHI data breaches affecting 500 or more individuals to the affected class, the Department of Health and Human Services' Office of Civil Rights ("OCR"), and the media within 60 days of an event. 42 USC 17932.

As defined under HITECH, "business associates" expressly includes entities providing legal services to HIPAA-covered entities such as our hypothetical law firm's mental health facility client. 42 USC 17932. As such, there is no question the law firm is a *business associate* under HIPAA and HITECH and thus responsible under the law to secure PHI, provide appropriate notification in the event of a breach, and otherwise comply with HIPAA standards.

Other kinds of data may trigger other obligations, and the agencies that enforce compliance will vary. OCR enforces compliance with PHI data regulations. State attorneys general often are the most aggressive regulators of privacy regulations under the theory that they are better situated to regulate privacy than the federal government is anyway. The Federal Trade Commission ("FTC") is often the federal enforcement body for other types of data.

Finally, our example law firm may also have to consider the risk of a civil lawsuit from the client or even a class action by the data subjects who may seek damages against the firm in connection with the breach of their data. There are many developing issues in privacy civil litigation including constitutional standing, causation, calculation of damages, and jurisdiction.

Cyber Insurance

For those lawyers and law firms that do not want to face cyber liability and wish to transfer some of this risk to other sources, cyber insurance is available.[3] Cyber insurance policies provide a hybrid of first- and third-party coverages and is really designed to combine certain aspects of traditional insurance policies to comprehensively cover numerous risks associated with the nexus between privacy and technology. In addition to first- and third-party protection, these policies include some non-traditional insurance services such as pre- and post-cyber incident risk management services. At times, cyber insurance provides coverage for non-traditional areas like public relations management and cyber extortion. Specific cyber risks covered include claims that result from unauthorized user access, disclosure of confidential or private information, virus protection, media coverage claims alleging content based injuries (such as libel, slander, defamation, or copyright infringement), traditional claims-made technology errors and omissions, and asset and income protection (first party insurance for property losses involving intangible assets, such as credit card numbers and other intellectual property).

For attorneys and law firms, cyber insurance policies can be sold as a standalone insurance policy or sometimes as an *endorsement* to a lawyer's professional liability insurance policies.

Our hypothetical law firm could certainly use a cyber insurance policy to offset the costs it will likely incur as a result of the breach. Importantly, if the firm had a cyber policy, the insurer would be there at the early stages to use its experience to appropriately guide its policyholder law firm and assist it in retaining breach counsel, public relations firms, IT consultants, and similar professionals, while actively managing the risk and cost.

What Should the Law Firm Do?

This is a common question. Often the risks are so perplexing that the reaction is to ignore the issues. That is the worse thing that a lawyer or law firm can do. To begin with, attorneys that ignore legal and privacy issues raised in the use of technology may be violating their ethical obligations and ABA guidance.

Lawyers and law firms must invest time and money in establishing appropriate privacy policies, training their professional and non-professional staffs, and in procuring the appropriate technology in general and cybersecurity systems in particular.

Lawyers and law firms should expect that clients, especially sophisticated corporate clients, have high expectations from their attorneys. Lawyers must answer questions about their preparedness. Questionnaires to firms on these issues are common in some industries and will become more common across all clients in the future.

Conclusion

Lawyers and law firms are like other companies exposed to cyber risk. Being aware and conscious of the way cyber risk plays out as illustrated above is essential to appropriately managing that risk. Having a plan, managing and engaging IT, understanding your and your client's data, and considering cyber insurance are all necessary and important first steps in being prepared.

NOTES

1. The ABA Standing Committee on Ethics and Professional Responsibility issued this formal opinion on October 17, 2018 entitled "Lawyers' Obligations After an Electronic Data Breach or Cyberattack." It can be found at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_op_483.pdf.

2. *See* Khoury and Fehn, *Changes to HIPAA Privacy and Security Resulting from the HITECH Act*, Michigan Business Law Journal (Summer 2009).

3. *See also*, Khoury and Cooper, *Cyberinsurance: Understanding the Risks*, Michigan Business Law Journal (Fall 2012).

Michael S. Khoury is a partner in the Detroit office of FisherBroyles, LLP, and specializes in business, technology transactions, privacy and data security and international law. He is a past Chair of the State Bar of Michigan Business and Information Technology Law Sections.

Stuart A. Panensky is a partner in the Princeton, NJ office of FisherBroyles, LLP. He is part of the firm's Cyber-Risk, Privacy & Data Security practice group. Mr. Panensky has extensive experience acting as incident response/data breach counsel to companies in multiple industries including professional services, healthcare, financial institutions, technology, retail and hospitality.

.

Although operating under a common purpose and overarching set of rules, each court conducts itself differently from the rest and practitioners should familiarize themselves with the practices of the courts. The business courts are no different. This article introduces two of Michigan's business courts and the judges who preside over them: the Macomb County Business Court, and its judges, Judge Richard L. Caretti and Judge Kathryn A. Viviano; and the Genesee County Business Court, and its presiding judge, Judge F. Kay Behm.

The Macomb County Business Court

The Macomb County Business Court was the first specialized business docket in Michigan, and has approximately 250 business cases filed each year. Judge Caretti and Judge Viviano split the business docket evenly; they each have a blended docket which consists of business, general civil, and criminal cases. Judge Caretti and Judge Viviano hold motion calls for all types of cases on Mondays

Judge Viviano

After graduating from Wayne State University Law School, Judge Kathryn A. Viviano first worked for a prominent firm in the area, practicing commercial litigation. She then worked at Viviano and Viviano, where she gained experience in many areas of law. Judge Viviano was elected in November 2010 and served on the family court until 2015. In 2015, she initially took on a 100% civil docket, and assumed Judge John Foster's business docket upon his retirement. Judge Viviano's docket today consists of business, general civil, and criminal cases. She was recently reappointed to a six-year term.

Judge Caretti

Judge Richard L. Caretti earned his law degree from the Detroit College of Law, which he attended at night while working full-time as a Detroit police officer. After law school, Judge Caretti obtained experience in business litigation through private practice at a prominent firm and then as a name partner at his own firm. He was appointed to the bench in 2002. Judge Caretti joined Judge Viviano as the second Macomb County Business Court judge in 2015. He was recently reappointed to a six-year term. Judge Caretti's docket consists of business, general civil, and criminal cases.

Discovery

Neither Judge Caretti nor Judge Viviano require a particular discovery protocol; they note that attorneys are welcome to use the forms on Macomb County Circuit Court's website. When asked about the use of discovery masters, Judge Caretti stated that he is "not a fan" and has never appointed one. He does, however, encourage lawyers to resolve discovery disputes ahead of court. Judge Caretti may tell lawyers before him on a discovery dispute to go into a jury room and resolve their issues. If the lawyers are unable to do so, he will resolve it on the record and may impose sanctions (although he has never imposed discovery sanctions to date). Judge Viviano generally approaches discovery disputes in the same way as Judge Caretti.

Initial Business Conference, Mediation, and Case Evaluation

The Macomb County Business Court judges both hold initial business conferences ("IBC") as a substitute for early disposition settlement conferences. The triggering event which sets the date of the IBC is the answer or motion in lieu of an answer filed in response to a complaint. The attorneys must file a joint statement ahead of the IBC. The IBC gives the parties an opportunity to discuss the case with the judge, explore the possibility of early settlement, and identify issues that would require a customized scheduling order.

Judge Caretti typically does not order early mediation at the IBC stage, unless it appears that there is a good chance of settlement. Likewise, Judge Viviano will order early mediation at this stage if, after consultation with the attorneys, there appears to be a good opportunity for settlement. If not, Judge Viviano often sets cases for an early settlement conference after a short period of discovery to determine if early facilitation is appropriate. Judge Viviano finds that many cases are not ready for early substantive settlement negotiations. Both of them do, however, order case evaluation. Both Judges Caretti and Viviano allow attorneys to opt out of court case evaluation for private case evaluation. In private case evaluation, an agreed attorney mediates the case. Failing settlement, the mediator returns an award that is treated like a unanimous case evaluation award under MCR 2.403. The Macomb County Business Court has a specialized case evaluation panel for business cases.

The judges both note that their doors are always open for a settlement conference, though the settlement conferences are typically not scheduled as a matter of course until after case evaluation. Judge Viviano does hold early settlement conferences when appropriate.

Words of Wisdom

Both judges had the same advice to litigators who appear before them: "Be prepared and be punctual." To transactional attorneys, Judge Caretti stresses the need to be specific, avoid ambiguity in drafting, and make sure that the documents reflect the parties' intent and say what the drafting attorney thinks they say. Judge Viviano echoed this sentiment. She added that her job is to enforce the contract as written and the intent of the parties at the time they entered the agreement, so it is important to contemplate issues likely to arise when drafting.

Judge Caretti's greatest satisfaction in presiding over the business court is helping parties resolve their case. He once spent an entire day with parties in an effort to resolve the case. Judge Caretti believes the business courts "are functioning very efficiently." Likewise, Judge Viviano's

greatest satisfaction is helping attorneys find solutions and helping the parties find a role in that process. "I am honored and proud to be a part of it", she said of the business courts.

Unprepared attorneys are Judge Caretti and Judge Viviano's biggest surprise and their pet peeve. Noting that lack of preparation does not happen often, they nevertheless stress the importance of knowing the case, including the briefing and the case law, even if covering for the attorney on the file.

The Genesee County Business Court

The Genesee County Business Court has approximately 50 business cases filed each year. Judge Behm is Genesee's sole business judge and hears all its cases, in addition to her other general civil and criminal cases.

Judge Behm

Judge F. Kay Behm received her juris doctor from the University of Michigan Law School. She then practiced transactional and commercial litigation in private practice. Judge Behm took the bench in 2009 and served on the family court. In 2019, she replaced Judge Judith Fullerton as Genesee County's business court judge. Her docket consists of general civil and criminal cases, with the business cases being a portion of the general civil docket.

Status Conferences

Status conferences are held 30 days from the date of the answer. Currently, Judge Behm's staff holds the status conference over the phone with the attorneys. These conferences generally deal with the amount of time needed for discovery and with other scheduling matters. Going forward, Judge Behm expects to amend this practice given the changes in the discovery court rules and her desire to be more personally involved in early conferences.

Discovery

Judge Behm handles discovery motions just like any other motion call. She is flexible with respect to timing of discovery. She tries to balance between moving the cases quicker, which is one of the purposes of the business courts, with making adjustments to individual cases so that they have realistic deadlines. Judge Behm has found that the attorneys have been generally conscientious about setting realistic deadlines and moving cases along.

Case Evaluation and Mediation

When asked about case evaluation, Judge Behm stated that she likes the idea of mediation/case evaluation with the same attorney and under the case evaluation sanctions rules. She does not find case evaluation to be particularly useful in large files. In those cases, Judge Behm finds that mediation makes more sense.

Judge Behm does not normally order early mediation. She generally leaves this decision to the attorneys. However, Judge Behm often orders mediation if there is no anticipated resolution after the first settlement conference, which is typically scheduled with her approximately 30 days before the first trial date.

Words of Wisdom

Judge Behm's pet peeve is when attorneys do not communicate with the court when they have resolved an issue or have dismissed a case so that she can devote the time she would spend preparing for that case to another case.

Judge Behm advises transactional attorneys to anticipate what will occur in the future, noting that one of the goals in drafting is to avoid court. "Hopefully, if you're a transactional attorney, you will never see me," she says. She also advises transactional attorneys, and litigators who are involved in closing deals, to make sure that definitions and terms are consistent when multiple documents are involved.

Judge Behm advises litigators to always be prepared. She has found the business court attorneys exceptional and notes that attorney preparation has not been a problem so far. One of her biggest surprises since joining the business court has been the sheer volume of paper involved in the business cases. She attributes this to the complexities of the business cases, but also notes that, in her experience, the business court attorneys tend to provide more in writing and are thorough.

Douglas L. Toering of Mantese Honigman, PC, is a past chair of the SBM's Business Law Section, for which he chairs the Commercial Litigation Committee and Business Courts Committee. His practice includes commercial litigation including sharehold litigation and insurance litigation, business transactional matters, healthcare law, and business ADRS

Emily S. Fields is an associate attorney at Mantese Honigman, PC. Her practice includes commercial litigation and sharehold and partnership disputes.

Disclosing the Ins and Outs of Nondisclosure Agreements

One of the most important contracts that an in-house counsel must review is a nondisclosure agreement ("NDA"). NDAs are used in a variety of contexts and transactions, but they are used most commonly in the anticipation of a future contract. The NDA gives the business partners a safe playing field to examine books, records, data, or other information from the other party by allowing each side to provide sensitive, but necessary, information to the other. In the so-called "information economy," these data points can be crucial in deciding whether to proceed with a business deal. Internally, maintaining NDAs with a company's own employees protects valuable business models and proprietary data from poaching by competitors. Nevertheless, NDAs are all too frequently boilerplate and signed off without a proper review.

Very likely, a business is profitable, at least in part, on the proprietary information it protects. Whether that is in the form of more efficient processes, patentable designs, client lists or some other form of data, the security of a company's information is a valuable asset to be protected. Failing to protect information with NDAs can have a cascade effect, breaching legal protections in other areas. For example, one of the basic elements of trade secret protections is that the owner must have taken efforts that are "reasonable under the circumstances to maintain its secrecy."[1] Among other measures, an NDA can be an important factor in demonstrating that a company has taken such steps.

Defining Terms

In drafting or reviewing an NDA, the primary consideration is what is the NDA's purpose. You may consider, who will be providing information; who will be receiving it; or, perhaps, what information will be shared in both directions. If you represent the disclosing party, you will want the data protections to be more robust.

Equally important is how to define the "Confidential Information." Generally speaking, there are two schools of thought on this—"opt-in" or "opt-out." Is information, by default, considered confidential, or do the parties need to agree on what information is confidential and what is not. A good rule of thumb is that opt-in is generally more appropriate in situations where discrete documents are being exchanged, such as a financial statement, an inventory list, a client list or the like.

More commonly, however, the information exchanged will likely be described in general. Thus, defining the types of information that will be held confidential can be paramount. One court examined, with approval, the following definition of "Confidential Information:"

> As used in this Agreement, the term "Confidential Information" shall mean all information whether written or oral, tangible or intangible, of a confidential or proprietary nature concerning the Buyer and its business and operations, including without limitation, information regarding pricing, financial data and projections, business plans and strategies, marketing and sales information, trade secrets, drawings and designs, tax and financial information, information relating to methods of doing business, inventions, ideas, processes, formulas, software, source and object codes, know-how, improvements, discoveries, developments, designs, licenses, prices, costs, suppliers and customers . . . . Invoicing and other pricing materials between Buyer and other entities in which Seller has an interest who are parties to a supply agreement of even date herewith with Buyer (the "Board Suppliers") shall be included within the definition of Confidential Information under this Agreement.[2]

This definition is quite complete in that it both (1) adopts a general description of confidential information ("*all information*…regarding pricing financial data, [etc. .]") and then (2) provides double coverage by listing several specific items of particular concern. A useful tool might be to permit the parties to label documents as "confidential," which will then be treated as confidential, even if it does not meet the specific contractual definition. This permits the business parties to protect information on the fly without having to waste time amending the NDA.

In addition to defining what *is* confidential, NDAs will also frequently have exclusions. These can be just as crucial as defining "Confidential Information." These exclusions are typically for information that is either (1) already publicly available or becomes publicly available or (2) already in recipient's possession or known to the recipient before being disclosed. The extent to which such information should be protected by the NDA will depend on the specifics of the situation.

Finally, a good NDA will discuss whether the information is warrantied as to accuracy and completeness. Disclosing entities will typically want to disclaim any such warranty, but they may agree to a more limited warranty against material information to contrary. In other words, the discloser will not warrant that the information is 100 percent accurate but will promise not to flat-out lie to your face! In many cases, particularly where the recipient will be performing their own due diligence, this is a workable compromise.

Protecting Information

With "Confidential Information" properly defined, the next task is to

determine the extent to which the information may be disclosed, or how the information may be used. Here, there are two considerations, (1) protections against *intentional* disclosures, and, more commonly forgotten, (2) protections against *inadvertent* disclosures.

With regard to intentional disclosure, the most common approach is to provide that the recipient may only use the information for limited purposes; for example, evaluation of the ultimate transaction for the benefit of the disclosing party (commonly in an employment context), or some other limited purpose. In such cases, third-party disclosure should be limited to the recipient, and, perhaps, its professional experts (accountants, attorneys, and the like). Additionally, it is useful to include a provision that allows prompt notice and an opportunity to contest if "Confidential Information" is subpoenaed, the subject of a FOIA request, or similar process.

Protecting against inadvertent disclosure, however, can be more complicated. In the age of hackers and data breaches, this can be an important protection because, even if the opposing side is acting in good faith, if they do not employ data security protocols, disclosed information may, nevertheless, be in jeopardy of disclosure. Here, it is common to see provisions that require "commercially reasonable" or "commercially best" efforts to maintain the integrity of "Confidential Information." It is also common to see a provision that requires efforts that are "not less than" the recipient uses to protect its own information. However, this last is a dangerous proposition—what if the recipient is lackadaisical regarding its own information? Still, it can be a fair standard and appropriate if the recipient is a sophisticated party with proper internal data protection protocols already in place.

When the NDA Terminates

Finally, consider both the length of the term of the NDA and the treatment of information when the NDA ends. By necessity, these are both case-by-case determinations, which will vary with the specifics of the transaction. Consider how long before the information might be considered "stale." In most industries, two-year-old information will not be particularly useful, but it may well be that the information must be protected indefinitely.

A good way to hedge against post-termination disclosures is to provide that, upon termination, all information must be returned, and all copies of the information must be destroyed. Here, many practitioners forget about memoranda or analyses that are based on or incorporate the "Confidential Information." Specifically requiring such documents to be destroyed or turned over can be a useful way to continue to protect "Confidential Information" after the NDA ends.

Finally, the NDA should address legal remedies for a breach. Courts have had a great deal of difficulty in quantifying damages for data breaches generally, so it is common for an NDA to provide for injunctive relief. While liquidated damages clauses in an NDA are rare, they are not unheard of. However, providing for liquidated damages may be somewhat too aggressive particularly if the NDA is in anticipation of an ongoing business relationship. The risk of disclosure may be worth not spoiling the relationship with obvious distrust.

Conclusion—Develop Templates Ahead of Time

Business can move quickly, and the parties will not want to hold up substantive negotiations to pre-negotiate an NDA. Having a solid template that can be adapted in quick situations can be crucial. As data protection becomes increasingly a priority for businesses, proper controls for when data can be disclosed is also increasingly a priority. NDAs can allow businesses to negotiate sensitive deals and relationships without fear that proprietary information will be released into the wild. A good in-house counsel should be able to quickly and carefully review, draft, and negotiate a quality NDA.

NOTES

1. MCL 445.1902(d)(ii).
2. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 885 NW2d 861 (2016). Of course, as with any stock or template language, this should be tailored to the specific situation or transaction.

Jordan Segal is the General Counsel for 814 CRE LLC, a real estate developer headquartered in Troy, Michigan, and is a co-Chair of the Business Law Section's In-House Counsel Committee.

Effective January 1, 2020: Adopted Amendments to the Michigan Court Rules

By Fatima M. Bolyea and Emily S. Fields

Overview

In January 2015, the Michigan Supreme Court encouraged the State Bar of Michigan to identify issues with civil discovery in Michigan and propose solutions to those problems. The State Bar accepted the court's challenge and formed the Civil Discovery Court Rule Review Special Committee ("Committee"). The Committee performed a detailed review of Michigan's civil discovery rules and proposed various changes. The Committee's Final Report and Proposal was completed on April 21, 2018, and was approved by the State Bar of Michigan's Representative Assembly at its April 2018 meeting. The Michigan Supreme Court accepted comments on the proposed changes through March 1, 2019, and held a public hearing on the amendments on May 22, 2019.

By Order dated June 19, 2019, the Michigan Supreme Court published the adopted amendments to Rules 1.105, 2.301, 2.302, 2.305, 2.306, 2.307, 2.309, 2.310, 2.312, 2.313, 2.314, 2.316, 2.401, 2.410, 2.506, 3.201, 3.206, 3.922, 3.973, 3.975, 3.976, 3.977, 5.131 and new Rule 3.229, which will take effect January 1, 2020.

The adopted changes to the Michigan Court Rules ("Rules") reflected in the Supreme Court's June 19, 2019 Order touch on several important discovery issues that litigation attorneys face on a daily basis. Among other things, the adopted changes require mandatory discovery disclosures in most cases, implement a presumptive limit on interrogatories (20 in most cases; 35 in domestic relations cases), and limit depositions to 7 hours each. The amendments also update the Rules to more thoroughly address issues related to electronically stored information ("ESI"), including broadening the definition of ESI, and permitting an ESI discovery conference early in the proceedings. The amended Rules emphasize early identification and resolution of discovery disputes through the use of a discovery plan and discovery mediators.

This article reviews certain of the adopted changes to the Rules and provides context and background from the Committee's Final Report and Proposal as to the reasons for the changes. This article does not cover all the amendments, however, and readers are encouraged to review the Committee's Final Report and Proposal and the full Supreme Court Order.

Rule 1.105. Construction

Rule 1.105 is amended to read: "These rules are to be construed, *administered, and employed by the parties and the court to* secure the just, speedy, and economical…." (Emphasis added to indicate amendments.)

This amendment matches changes to Fed R Civ P 1 and is intended to emphasize that both the court *and* the parties should construe and administer the court rules to secure the just, speedy, and economical determination of every action.[1] The committee suggested this change because it believed that the Rules should be construed and applied to discourage the misuse, over-use, and abuse of procedural tools that ultimately result in delays and increased costs.[2]

Rule 2.301. Availability and Timing of Discovery

Start of Discovery

Amended Rule 2.301 provides that where initial disclosures are required, a party may seek discovery only *after* the party serves its initial disclosures under Rule 2.302(A).[3] If initial disclosures are not required, "a party may seek discovery *after commencement* of the action when authorized by these Rules, by stipulation, or by court order."[4]

Close of Discovery

Rule 2.301(B)(4) is added to the Rules, and provides:

> Unless ordered otherwise, a date for the completion of discovery means the serving party shall initiate the discovery *by a time that provides for a response or appearance*, per these rules, before the completion date. As may be reasonable under the circumstances, or by leave of court, *motions with regard to discovery* may be brought after the date for completion of discovery.[5]

This adopted Rule clarifies the meaning of "completion of discovery." Some courts have construed "completion of discovery" to mean a date by which discovery must be *initiated*, while others have construed the phrase to mean the date by which discovery must be *completed*. This Rule clarifies that discovery must be *completed* in its entirety by the date set by the court. In other words, attorneys must serve discovery requests by a date that provides the opposing party sufficient time to respond within the discovery period.

However, as may be reasonable under the circumstances (or by leave of the court), motions with regard to such discovery may be brought *after* the date for completion of discovery.

The adopted changes to the Michigan Court Rules ("Rules") reflected in the Supreme Court's June 19, 2019 Order touch on several important discovery issues that litigation attorneys face on a daily basis.

Court's Broad Authority

Rule 2.301(C) is added to state plainly what is otherwise implied throughout the Rules—that the court has the authority to control the scope, order, and amount of discovery. In that vein, Rule 2.301(C) empowers the court to "control the scope, order and amount of discovery, consistent with these rules."

As explained in the Committee's Final Report and Proposal, "Judges in particular thought a clear statement in the rules was beneficial if they were expected to increase active case management."[6]

Rule 2.302. Duty to Disclose; General Rules Governing Discovery

Amended Rule 2.302(A) adds a requirement to the Rules for initial disclosures. These initial disclosures include:

> (a) the factual basis of the party's claims and defenses;
>
> (b) the legal theories on which the party's claims and defenses are based, including, if necessary, citations to relevant legal authorities;
>
> (c) the name and, if known, address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses;
>
> (d) a copy—or description—of all documents, ESI, and tangible things that the disclosing party has in its possession, custody, or control, and may use to support its claims or defenses;
>
> (e) a description by category and location of all documents, ESI, and tangible things that are *not* in the disclosing party's possession that the disclosing party may use to support its claims or defenses;
>
> (f) a computation of each category of damages claimed by the disclosing party (the disclosing party must also make available for inspection and copying the documents on which such damages computation is based);
>
> (g) a copy of pertinent portions of any insurance, indemnity, or suretyship agreement under which another person may be liable to satisfy all or part of a possible judgment; and
>
> (h) the anticipated subject areas of expert testimony.[7]

Subrules (c), (d), (f), and (g) are adapted from Fed R Civ P 26(a)(1)(A). The Oakland County Business Court[8] and Macomb County Business Court[9] already require these same disclosures.[10]

Additional Disclosures in No-Fault and Personal Injury Cases

Amended Rule 2.302(A)(2) and (3) provide for additional disclosures in no-fault cases and additional disclosures by claimants for damages for personal injury. Subrules (2) and (3) were adapted in part from the Wayne County Circuit Court's Addendum to Scheduling Order in No-Fault Cases.[11] These subrules are intended to expedite resolution of no-fault cases, which comprise a significant part of trial court dockets.[12]

Timeframe for Initial Disclosures

Amended Rule 2.302(A)(5) sets the timeframe for initial disclosures. The Rule requires a party that has filed a pleading to serve initial disclosures within 14 days following any opposing party's answer to the pleading. MCR 2.302(A)(5)(b)(i). In other words, where there are multiple defendants, the plaintiff's disclosures are due within 14 days of *any* one defendant's answer.[13]

A party answering a pleading must serve initial disclosures "within the later of 14 days after the opposing party's disclosures are due or 28 days after the party files its answer."[14]

These deadlines are intended to allow the defendants to review the plaintiff's disclosures prior to filing their own disclosures. Additionally, these timeframes defer initial disclosures while a pre-answer motion is pending.[15]

Scope of Discovery

Amended Rule 2.302(B)(1) is modified to provide a more precise and narrower definition for the scope of discovery. The amended Rule states:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information. Information within the scope of discovery need not be admissible in evidence to be discoverable.[16]

The Rule narrows the former definition in MCR 2.302(B)(1) from matters "relevant to the *subject matter* involved in the pending action," to "matters that are relevant to any party's *claims or defenses*."[17] This change requires discovery to be judged by reference to the parties' actual claims or defenses.

An important change to Rule 2.302(B)(1) is that *proportionality is a guiding factor* in deciding what discovery is appropriate.[18] The Committee cited the "consideration of weighing burden and expense against likely benefit" as the first and most important factor for the proportionality consideration.[19]

The final sentence of amended Rule 2.302(B)(1) is a key change from the former Rule. Previously, the last sentence of the Rule stated: "It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[20] Amended Rule 2.302(B)(1) instead provides that "[i]nformation within the scope of discovery need not be admissible in evidence to be discoverable." This change addresses the Committee's concern that the former language had been misused to expand the scope of discovery beyond relevance, to argue that discovery of inadmissible evidence is permitted if it *could* lead to the discovery of admissible evidence.[21] The revised Rule clarifies "that, although discovery of inadmissible evidence is permitted, it must still 'be within the scope of all discovery'—meaning that it must be both relevant and proportional."[22]

Trial Preparation and Experts

Amended Rule 2.302(B)(4)(e) clarifies that Rule 2.302(B)(3)(a) protects drafts of interrogatory answers regarding expert testimony required under 2.302(B)(4)(a)(i).

Additionally, pursuant to amended Rule 2.302(B)(4)(f), communications between the party's attorney and any expert witness under subrule (B)(4) are similarly protected by Rule 2.302(B)(3)(a), regardless of the form of the communications. The following, however, are not protected by Rule 2.302(B)(4)(f): communications related to compensation for the expert's study or testimony; communications that identify facts or data that the party's attorney provided and that the expert considered in forming his opinions; and communications that identify assumptions that the party's attorney provided and that expert relied upon.

This amended Rule is intended to clarify that certain communications between counsel and expert witnesses are subject to the work product privilege, "thus eliminating an area of potential conflict and motion practice and making the process of working with experts more efficient."[23]

Supplementing Disclosures and Responses

Amended Rule 2.302(E) alters and revises the former Rule to address supplementation of initial disclosures. The new Rule requires a party who has made a disclosure under Rule 2.302(A), or a response, to supplement the disclosure or response "in a timely manner" upon learning that the disclosure is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing, or as the court orders.[24]

Changes to Discovery Procedure

Amended Rule 2.302(F) permits the court (by order) or the parties (by stipulation) to change the disclosure requirements in amended Rule 2.302(A), to change the limits

Amended Rule 2.302(B)(1) is modified to provide a more precise and narrower definition for the scope of discovery.

on interrogatories in amended Rule 2.309(A)(2), and to modify or waive the other procedures of the discovery Rules "so long as not inconsistent with a court order, but a stipulation may not change scheduling order deadlines without court approval."[25]

Rule 2.305. Discovery Subpoena to a Non-Party

Amended Rule 2.305 is modified to clarify the difference between non-party discovery and party discovery. The Committee found that the previous Rules were confusing as to the different procedural aspects of party discovery versus non-party discovery and the difference between discovery subpoenas and subpoenas for attendance at hearings.[26] A notice of deposition is sufficient for a party. Any subpoena therefore applies only to a non-party. As such, the amended Rule reflects these differences. For example, amended Rule 2.305(A)(1) is revised to provide that "a represented party may issue a subpoena to a *non-party* for a deposition, production or inspection of documents, inspection of tangible things, or entry to land upon court order or after all parties have had a reasonable opportunity to obtain an attorney[.]"[27]

Amended Rule 2.305 is modified to clarify the difference between non-party discovery and party discovery.

The Committee found that the previous Rules were unclear as to when a plaintiff may start issuing third-party subpoenas. The Committee took the view that, "absent extraordinary circumstances (in which case, a motion is appropriate), all parties should be in the case…to eliminate abuse and the potential for repetition[.]"[28]

Next, pursuant to amended Rule 2.305(A)(2), where a subpoena provides that it is solely for producing documents or tangible things for inspection, then the subpoena must specify "whether an inspection is requested or whether the subpoena may be satisfied by delivering a copy of the requested documents… ."[29]

Pursuant to amended Rule 2.305(A)(3), a subpoena shall provide a minimum of 14 days after service of the subpoena (or a shorter time if the court directs) for the requested act.[30] The subpoenaing party may file a motion to compel compliance with the subpoena under Rule 2.313(A). Where a party or the subpoenaed non-party timely moves for an order quashing or modifying the subpoena, the non-party's obligation to respond to the subpoena is stayed until the motion is resolved.[31]

Amended Rule 2.305(A)(6) sets forth certain requirements for issuing a subpoena on a public or private corporation, partnership, association, or governmental agency. It also permits the subpoenaed party to file objections and move for a protective order.

Lastly, amended Rule 2.305(A)(7) provides that "*upon written request* from another party and payment of reasonable copying costs, the subpoenaing party shall provide copies of documents received pursuant to a subpoena."[32]

Rule 2.306. Depositions on Oral Examination of a Party

Amended Rule 2.306 is modified to add that a deposition may not exceed "one day of seven hours."[33] This limit may be changed by stipulation of the parties.[34] Note that the entire seven-hour deposition must be completed in one day.

The Committee considered amending the Rule to include a ten-deposition presumptive limit to the total number of depositions taken under Rules 2.506, 2.306, and 2.307.[35] However, it ultimately determined that certain categories of cases were not well-suited to deposition limits.[36] Additionally, the Committee concluded that abuse of the number of depositions is not widespread, and courts may impose limits as necessary under its general authority to control the course of discovery.[37]

Amended Rule 2.306(B)(3) addresses deposition notices to corporations, partnerships, associations, and governmental agencies. Pursuant to the modified Rule, notice must be served at least 14 days before the deposition. The noticed entity may object or move for a protective order within 10 days of being noticed. The party seeking discovery may proceed on undisputed topics or move to enforce the notice.[38]

Rule 2.309. Interrogatories to Parties

Amended Rule 2.309(A)(2) limits the number of interrogatories that each separately represented party may serve to 20 interrogatories. Further, "[a] discrete subpart of an interrogatory counts as a separate interrogatory."[39] (The Federal Rules impose a 25-interrogatory limit.)

The Committee received significant feedback on the issue of presumptive limits on interrogatories. Some attorneys claimed that interrogatories are inefficient, abused, and

fail to generate meaningful information.[40] Others believed that abuse and inefficiency is a flaw with the particular attorney's approach to discovery, and not the interrogatory as a discovery device itself.[41] Overall, the Committee believed that presumptive limits on interrogatories will create more efficiency, particularly if initial disclosures are taken seriously by the parties.[42] Additionally, parties and the courts should be open to allowing additional interrogatories when appropriate.

The Committee adopted a limit of 35 interrogatories for domestic relations actions in amended Rule 3.201(C).

Rule 2.310. Requests for Production of Documents and Other Things; Entry On Land for Inspection and Other Purposes

Amended Rule 2.310 clarifies that the term "documents" encompasses electronically stored information ("ESI").[43] ESI is defined in amended Rule 2.310 as "electronically stored information, regardless of format, system, or properties."[44]

According to the Committee, a broad definition of ESI is important because of "[t]he wide variety of computer systems currently in use, and the rapidity of technological change, [which counsels] against a limiting or precise definition of ESI. The Rule is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments."[45]

References elsewhere in the Rules to "ESI" should be understood to invoke the expansive definition set forth in amended Rule 2.310.[46] However, references to "documents" that appear in discovery Rules that were *not* amended should be interpreted to include ESI as circumstances warrant.[47]

Rule 2.312. Request for Admission

Amended Rule 2.312 clarifies that the "request must clearly identify in the caption and before each request that it is a Request for Admission."[48] This change is to address the problem of attorneys burying requests to admit in interrogatories or document requests.[49] Burying requests for admission should be avoided given the severe consequences of failing to respond.

Rule 2.313. Failure to Serve Disclosures or to Provide or to Permit Discovery; Sanctions

Amended Rule 2.313(A)(5) is revised to provide that the court may award expenses if disclosure or requested discovery is provided *after* a motion to compel discovery is filed. This amendment is intended to allow the award of expenses where the non-producing party complies with discovery requests only after a motion to compel is filed, even if the court ultimately does not rule on the substance of the motion.[50] However, in order to receive expenses, the moving party must have made a good faith attempt to obtain the disclosure or discovery without court action. Further, the court may decline to award expenses where the opposition to the motion was substantially justified, or other circumstances make an award unjust.

New subrule (A)(6) permits the court to award additional sanctions as are just.

Amended Rule 2.313(C)(1) is a new section setting forth sanctions for failure to provide disclosures as required by Rule 2.302. A party who does not identify a witness or provide the required information is not allowed to use the information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure to provide the disclosure was "substantially justified" or "harmless."[51] In addition to, or instead of, this sanction, the court may (on motion and after giving an opportunity to be heard) order payment of expenses, inform the jury of the party's failure to disclose the information, or other appropriate sanctions.

Amended Rule 2.313(D) rewrites the former Rule (MCR 2.313(E)) regarding failure to preserve electronically stored information. The new version provides for sanctions if ESI is lost because a party failed to take "reasonable steps to preserve it", and if the ESI cannot be restored or replaced through additional discovery.[52] The Rule also provides for more severe sanctions if the court finds "intent to deprive another party of the information's use in the litigation."[53] These sanctions include a presumption that the lost information was unfavorable to the party, a jury instruction directing that the jury may or must presume the information was unfavorable to the party, or dismissal of the action or entry of a default judgment.[54]

Amended Rule 2.313(A)(5) is revised to provide that the court may award expenses if disclosure or requested discovery is provided *after* a motion to compel discovery is filed.

Rule 2.401 Pretrial Procedures; Conferences; Scheduling Orders

Early Scheduling Conference

Amended Rule 2.401(B) expands the issues that the court may address at an early scheduling conference.[55] These issues include, among others: disclosure, discovery, preservation, and claims of privilege of ESI; simplification of the issues; the amount of time necessary for discovery; necessity of amendments to pleadings; timing of initial disclosures under Rule 2.302(A); limitation of the number of expert witnesses, estimated length of trial, and possibility of settlement.[56]

The list of additional issues comes from former Rule 2.401(C) ("Pretrial Conference"), which is deleted and replaced with this new section, and from amended Rule 2.401(H) ("Final Pretrial Conference and Order"). This new structure more clearly delineates between an early scheduling conference and a final pretrial conference.[57]

Discovery Planning

Amended Rule 2.401(C) is new and refers to discovery planning. This Rule provides that upon "court order or written request by another party, the parties must confer among themselves and prepare a proposed discovery plan."[58] Under the Federal Rules of Civil Procedure, a discovery plan is required in most cases. Under these amended Rules, the discovery plan is an available *alternative* to the initial disclosure requirements and discovery limits.[59] The proposed discovery plan must address all disclosure and discovery matters and propose deadlines for completion of disclosure and discovery.[60]

Final Pretrial Conference

Rule 2.401(H)(2) is a new Rule that provides for the scheduling of a final pretrial conference "to facilitate preparation of the action for trial and to formulate a trial plan."[61] At least one lead attorney who will try the case for each party must attend the conference.[62] At the conference, the parties may discuss, and the court may order the parties to prepare, a joint final pretrial order providing for a number of trial issues, including scheduling motions in *limine*, concise statement of the plaintiff's claims and legal theories, concise statement of defendant's defenses and claims, statement of stipulated facts, issues of fact to be litigated, issues of law to be litigated, evidence problems likely to arise at trial, a list of witnesses to be called, a list of exhibits, estimated length of trial, and other potential trial issues.[63]

As the Committee noted, a pre-trial conference is already the practice in many courts.[64] Pre-trial orders and pre-trial conferences "assist parties, counsel, and the court to anticipate issues for trial and avoid ambush or surprise."[65]

Electronically Stored Information Conference

Rule 2.401(J) is a new Rule that provides for an ESI conference, plan, and order.[66] The conference can take place by agreement or by court order where a case is "reasonably likely to include the discovery of ESI".[67] The Rule lists many issues to be considered at the ESI conference, including any issues relating to preservation of discoverable information, including adoption of a preservation plan for potentially relevant ESI; identification of potentially relevant types, categories, and time frames of ESI; disclosure of the manner in which ESI is maintained; implementation of a preservation plan for potentially relevant ESI; the form in which each type of ESI will be produced; the time to produce ESI; and any other related issues.[68]

Rule 2.401(J)(3) requires that attorneys participating in the ESI conference be competent in "matters relating to their clients' technological systems." Accordingly, the Rule permits them to "bring a client representative or outside expert to assist in such discussions."[69]

Within 14 days after the ESI conference, the plaintiff's attorney must file with the court an ESI discovery plan and a statement concerning any issues upon which the parties cannot agree.[70]

Rule 2.411. Mediation

Rule 2.411(H) is a new Rule that provides for mediation of discovery disputes.[71] The Rule permits parties to stipulate, or the court to order the parties, to mediate discovery disputes. The Committee determined that a small number of cases are particularly complex and generate an inordinate number of discovery disputes requiring the court's attention. As such, "[i]n order to best serve the parties and the interests of justice, the services of a discovery mediator may provide enhanced case management without causing undue expense, delay or burden, and without prejudice to a party's right to have all dis-

Rule 2.411(H) is a new Rule that provides for mediation of discovery disputes.[71] The Rule permits parties to stipulate, or the court to order the parties, to mediate discovery disputes.

covery disputes adjudicated by the court."[72] However, the court may not "delegate its judicial authority to the discovery mediator."[73]

It is unclear whether the parties will be required to pay for the discovery mediator, or if there will be volunteer discovery mediators. The Oakland County Circuit Court (General Civil and Business Court) uses volunteer discovery facilitators. However, Rule 2.411(H) states that "all other provisions of this rule shall apply to a discovery mediator."[74] Rule 2.411(D)(2) requires the costs of mediation to be divided between the parties on a pro-rata basis unless otherwise agreed by the parties or ordered by the court.[75] As such, it should be assumed, absent further guidance, that the costs of a discovery mediator will be paid by the parties.

Rule 2.506. Subpoena; Order to Attend

Amended Rule 2.506(A) modifies the previous Rule to require that a request for documents included with a trial subpoena must comply with MCR 2.302(B) (Scope of Discovery) and any scheduling order. This change is intended to clarify that trial subpoenas should not be used to essentially take discovery after the time for discovery has elapsed.[76]

Conclusion

The amendments to the civil discovery Rules are intended to make discovery more efficient, less costly, and further the interests of justice. But they are flexible—parties and courts are permitted, in many instances, to vary the discovery Rules in order to best suit the case at hand. Familiarizing yourself with the new amendments and understanding the Committee's reasons for proposing such changes will help you more efficiently represent your clients and more effectively practice in the courts.

The amendments to the civil discovery Rules are intended to make discovery more efficient, less costly, and further the interests of justice.

NOTES

1. Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 19.
2. *Id.*
3. MCR 2.301(A)(1) (emphasis added).
4. *Id.* (Emphasis added).
5. Amended MCR 2.301(B)(4) (emphasis added).
6. Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 21.
7. Amended MCR 2.302(A)(1)(a)-(h) (emphasis added).
8. The Oakland County Business Court case management protocol can be found here: https://www.oakgov.com/courts/businesscourt/Documents/ocbc-pro-case-management.pdf.
9. The Macomb County Business Court administrative order, along with discovery protocols, can be found here: https://circuitcourt.macombgov.org/sites/default/files/content/government/circuitcourt/pdfs/2013-02SignedLAOinreCreationofSpecializedBusinessCourt.pdf. ; https://circuitcourt.macombgov.org/sites/default/files/content/government/circuitcourt/pdfs/BusinessOrganaizationDisputeProtocol-1-14-14.pdf; https://circuitcourt.macombgov.org/sites/default/files/content/government/circuitcourt/pdfs/Business-Contractualprotocols-1-14-14.pdf.
10. Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 23.
11. The Wayne County Circuit Court's Addendum to Scheduling Order in No-Fault Cases can be found here: https://www.3rdcc.org/Documents/Civil/General//Auto%20Neg%20Addendum%20to%20Scheduling%20Order%5E%5E%5E.pdf.
12. *Id.* at 24.
13. Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 26.
14. MCR 2.302(A)(5)(b)(ii).
15. Id. at 26.
16. Amended MCR 2.302(B)(1).
17. Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 27 (emphasis added).
18. Id.
19. Id. at 28.
20. Original MCR 2.302(B)(1).
21. *Id.*
22. *Id.*
23. Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 29.
24. Amended MCR 2.302(E).
25. Amended MCR 2.302(F).
26. Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 37.
27. Amended MCR 2.305(A)(1) (emphasis added).
28. Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 38.
29. Amended MCR 2.305(A)(2).
30. Amended MCR 2.305(A)(3).
31. Amended MCR 2.305(A)(4).
32. Amended MCR 2.305(A)(7) (emphasis added).
33. Amended MCR 2.306(A)(3).
34. Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 39.
35. *Id.*
36. *Id.*
37. *Id.*
38. Amended MCR 2.306(B)(3).
39. Amended MCR 2.309(A)(2).
40. Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 42.
41. *Id.*
42. *Id.*
43. Amended MCR 2.310(A)(1).
44. Amended MCR 2.310(A)(2).
45. Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 44-5.
46. *Id.*
47. *Id.*
48. Amended MCR 2.312(A).
49. Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 46.
50. Civil Discovery Court Rule Review Special Com-

mittee Final Report and Proposal, p 48.

51. Amended MCR 2.313(C)(1).

52. Amended MCR 2.313(D).

53. Amended MCR 2.313(D)(2).

54. Amended MCR 2.313(D)(2).

55. Amended MCR 2.401(B).

56. *Id.*

57. Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 55.

58. Amended MCR 2.401(C)(1).

59. Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 56.

60. Amended MCR 2.401(C)(2).

61. MCR 2.401(H)(2).

62. *Id.*

63. MCR 2.401(H)(2).

64. Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 59.

65. *Id.*

66. MCR 2.401(J).

67. *Id.*

68. MCR 2.401(J). The Eastern District of Michigan has a model ESI preservation order, which is referenced in the Oakland County Circuit Court case management protocol. The Eastern District model ESI preservation order can be found here: https://www.mied.uscourts.gov/PDFFIles/ModelESIDiscoveryOrderAndRule26f-Checklist.pdf

69. MCR 2.401(J)(3).

70. MCR 2.401(J)(2).

71. MCR 2.410(H).

72. Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 62.

73. Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 62.

74. MCR 2.411(H).

75. MCR 2.411(D)(2).

76. Civil Discovery Court Rule Review Special Committee Final Report and Proposal, p 64.

Fatima M. Bolyea is an associate attorney at Mantese Honigman, PC. She concentrates her practice on commercial litigation and shareholder disputes.

Emily S. Fields is an associate attorney at Mantese Honigman, PC. Her practice includes complex commercial litigation and shareholder and partnership disputes.

The Evolution of Partner Liability Under the Michigan Uniform Partnership Act

By Ryan B. Opel and Loren M. Andrulis[1]

It is no secret that partnerships, even those that may take the step of registering as a limited liability partnership ("LLP" or "registered LLP"), are fast becoming the dinosaurs of business entities. Although not yet extinct, their numbers continue to dwindle as new entity formations are dominated by limited liability companies and corporations. This entity evolution has caused many business lawyers to ponder whether pre-historic partnerships are fit enough to survive.

Until recently, Michigan partnerships were particularly Paleozoic, even by comparison to their brethren in other states. Section 46 of the Michigan Uniform Partnership Act[2] previously shielded partners of registered LLPs from only a fraction of the liabilities shielded by the Michigan Limited Liability Company Act, the Michigan Business Corporation Act, and the LLP portions of partnership laws of 45 other states. Due to this defect alone, business lawyers have seriously considered converting Michigan partnerships into LLCs or corporations or even re-domesticating Michigan partnerships in other states with more modern, partner-friendly partnership laws.

Michigan registered LLPs made up some lost ground on August 1, 2018, however, courtesy of 2018 PA 131.[3] This legislation amended Section 46 of the Michigan Uniform Partnership Act to provide partners of Michigan registered LLPs with a liability shield much more in line with that afforded to members of Michigan LLCs, shareholders of Michigan corporations, and partners of limited liability partnerships in the vast majority of states. While this evolution is perhaps not enough to save the partnership from eventual extinction, it does level the liability playing field in Michigan to an important degree, mitigating the arguments for conversion and re-domestication.

Prior to its amendment, Section 46(1) of the Michigan Uniform Partnership Act provided that:

> Except for a tax obligation of the partnership, a partner of a registered limited liability partnership is not liable directly or indirectly, including by way of indemnification, contribution, assessment, or otherwise, for debts, obligations, and liabilities of or chargeable to the partnership, whether in tort, contract, or otherwise, arising from negligence, wrongful acts, omissions, misconduct, or malpractice committed while the partnership is a registered limited liability partnership and in the course of the partnership business by another partner or an employee, agent, or representative.

Of particular note is the fact that old Section 46 shielded partners from debts, obligations, and liabilities arising from the negligence, wrongful acts, omissions, misconduct, or malpractice *by another partner or employee, agent, or representative of the partnership*. It did not shield partners from debts, obligations, and liabilities *of the partnership itself*.

By contrast, the influential Revised Uniform Partnership Act ("RUPA") drafted by the National Conference of Commissioners on Uniform State Laws has included a full, corporate-style liability shield for limited liability partnerships since 1997:

> A debt, obligation, or other liability of a partnership incurred while the partnership is a limited liability partnership is solely the debt, obligation, or other liability of the limited liability partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the limited liability partnership solely by reason of being or acting as a partner.[4]

RUPA includes an explanatory "Addendum Pertaining to 1997 Amendments" that states:

> The amendments to add LLP provisions to RUPA include a new Section 306(c) providing for a corporate-styled liability shield which protects partners from vicarious personal liability for all

> partnership obligations incurred while a partnership is a limited liability partnership. The complete liability shield comports with the modern trend among the states. . . . The Act does not alter a partner's liability for personal misconduct and does not alter the normal partnership rules regarding a partner's right to indemnification from the partnership . . . . Therefore, the primary effect of the new liability shield is to sever a partner's personal liability to make contributions to the partnership when partnership assets are insufficient to cover its indemnification obligation to a partner who incurs a partnership obligation in the ordinary course of the partnership's business.[5]

Prior to the enactment of 2018 PA 131, 45 states had partnership statutes that already embraced this RUPA-style approach and provided full liability shields for LLP partners, leaving Michigan in a tiny minority with Louisiana,[6] New Hampshire,[7] South Carolina,[8] and West Virginia[9].

Like RUPA, the Michigan Limited Liability Company Act and Michigan Business Corporation Act provide full liability shields for members of Michigan LLCs and shareholders of Michigan corporations. Consider Section 501(4) of the Michigan Limited Liability Company Act, which states:

> (4) Unless otherwise provided by law or in an operating agreement, a person that is a member or manager, or both, of a limited liability company is not liable for the acts, debts, or obligations of the limited liability company.[10]

And consider further Section 317(4) of the Michigan Business Corporation Act, which states:

> (4) Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he or she may become personally liable by reason of his or her own acts or conduct.[11]

Since owner liability is one of the primary factors considered when businesses choose a type of entity, Michigan LLPs were clearly inferior to LLPs in 45 other states and Michigan LLCs and corporations. The responsible lawyer would be unlikely to form a new Michigan LLP and would be likely to consider converting existing Michigan LLPs into LLCs or corporations or even re-domesticating Michigan LLPs in other states with more favorable liability shields for partners.

Since owner liability is one of the primary factors considered when businesses choose a type of entity, Michigan LLPs were clearly inferior to LLPs in 45 other states and Michigan LLCs and corporations.

With the enactment of 2018 PA 131, though, Michigan LLPs have received a long overdue dose of modernization in the area of partner liability. Partners of Michigan LLPs are now afforded the same full liability shield as provided to LLP partners in the vast majority of states, members of Michigan LLCs, and shareholders of Michigan corporations. As amended, Section 46 of the Michigan Uniform Partnership Act now reads, in full:

> Sec. 46. (1) Except as provided in subsections (2) and (5), a debt, obligation, or other liability of a partnership incurred while the partnership is a registered limited liability partnership is solely the debt, obligation, or other liability of the registered limited liability partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the registered limited liability partnership solely by reason of being or acting as a partner. This subsection applies regardless of the dissolution of the registered limited liability partnership.
>
> (2) Subsection (1) does not affect the liability of a partner in a registered limited liability partnership for the partner's own negligence, wrongful acts, omissions, misconduct, or malpractice, or that of any individual who is under the partner's direct supervision and control, that results in a debt, obligation, or other liability of the registered limited liability partnership.
>
> (3) Except as provided in subsection (2), a partner in a registered limited liability partnership is not a proper party to a proceeding by or against the registered limited liability partnership, the object of which is to recover damages or enforce a debt, obligation, or other liability for which a partner is not liable under subsection (1).
>
> (4) The failure of a registered limited liability partnership to observe any applicable formalities relating to the exercise of its powers or management of its business is not a ground for imposing liability on a partner for a debt, obligation, or other liability of the registered limited liability partnership.
>
> (5) Subsection (1) does not affect the personal liability of a partner for a

> debt, obligation, or other liability of the registered limited liability partnership incurred or arising before the effective date of the amendatory act that added this subsection.

Subsection (1) of amended Section 46[12] now closely follows the RUPA approach, providing a full, corporate-style liability shield to partners of registered LLPs in Michigan going forward. The operative language provides that an obligation of a registered LLP is solely that of the partnership itself and that partners of registered LLPs are not, directly or indirectly, personally liable for those partnership obligations solely by reason of being or acting as a partner. According to the official RUPA commentary, this language is intended to protect LLP partners from the liabilities of their partnerships regardless of the nature of the law giving rise to the claim and regardless of the identity of the plaintiff:

> If the complaint seeks to hold a partner vicariously liable for the LLP's obligations, the shield applies. If not, not. Thus, there is no distinction among a claim arising from an LLP's debt to a commercial creditor, a partner's claim that the LLP has failed to return a contribution as required by the partnership agreement, and a claim by a former partner that the LLP has failed to follow through on a buy-out agreement.[13]

Subsection (2) of amended Section 46[14] is largely unchanged from the prior version of Section 46, other than conforming changes. This subsection, together with the phrase "solely by reason of being a partner" from the end of Section 46(1),[15] makes it clear that Michigan's full liability shield does not apply to claims arising from a partner's own direct, as opposed to vicarious, obligations or conduct. For example, if a partner of a registered LLP signs a personal guaranty of the LLP's obligations under a lease or loan, Section 46(1)'s liability shield will not excuse the partner from the guaranty. Similarly, if a partner of a registered LLP engages in negligence or malpractice, the partner will remain fully liable for the partner's own negligence or malpractice, regardless of Section 46(1).

It bears emphasizing that, as explained in the RUPA commentary,[16] Section 46(1)'s full liability shield should specifically override contribution obligations owed by partners to their registered LLPs. However, if partners have agreed to contribution and indemnification obligations running directly to one another, Section 46(1) should not override those obligations since they are individual in nature and not debts, obligations, or liabilities of the partnership. For example, if a partner incurs a partnership-related loss for which a registered LLP is obligated to provide indemnification, but the LLP lacks the resources to perform because of Section 46(1), the partners would not be required to contribute funds to the LLP to enable it to make good on its indemnification obligations. If, however, the partners have agreed in the partnership agreement to directly indemnify one another for partnership-related losses, then the individual partners could be obligated to provide such indemnification notwithstanding Section 46(1).

Subsection (3) of amended Section 46[17] is also largely unchanged from the prior version of Section 46, other than conforming changes. It continues to indicate that LLP partners are not proper parties to proceedings against a registered LLP regarding debts, obligations, and liabilities from which partners are shielded under subsection (1).

Subsection (4) of amended Section 46[18] tracks RUPA 306(d) nearly verbatim,[19] providing that the failure of a partnership to observe corporate-style formalities will not undermine the liability shield created in subsection (1). As explained in the RUPA commentary,[20] while the doctrine of veil piercing should apply to LLPs generally, adherence to corporate formalities should not be a relevant factor in LLP veil piercing claims because partnerships are not subject to the same degree of statutory formalities as apply to corporations.

Finally, subsection (5) of amended Section 46[21] provides a transition rule, indicating that the amendments ushered in by 2018 PA 131 do not affect partner liability for LLP debts, obligations, or liabilities incurred before August 1, 2018.

In conclusion, while 2018 PA 131 will not likely be sufficient to save partnerships from their continuing decline, the amendments to Section 46 of the Michigan Uniform Partnership Act bring an important dose of evolution and modernization in the area of partner liability, affording partners of Michigan registered limited liability partnerships with the same degree of liability protection as is available to other entity types and in other jurisdictions.

With the enactment of 2018 PA 131, though, Michigan LLPs have received a long overdue dose of modernization in the area of partner liability.

NOTES

1. The authors were drafters of the amendments to MCL 449.46 discussed in this article.
2. MCL 449.46.
3. 2018 PA 131.
4. Rev Unif P'ship Act 306 (Unif Law Comm'n 1997, last amended 2013).
5. *Id.*
6. La Stat Ann 9:3431.
7. NH Rev Stat Ann 304-A:15.
8. SC Code Ann 33-41-370.
9. W Va Code 47B-3-6.
10. MCL 450.4501(4).
11. MCL 450.1317(4).
12. MCL 449.46(1).
13. *Id.* at note 4.
14. MCL 449.46(2).
15. MCL 449.46(1).
16. *Id.* at note 4.
17. MCL 449.46(3).
18. MCL 449.46(4).
19. *Id.* at note 4.
20. *Id.*
21. MCL 449.46(5).

Ryan Opel is a Partner at Honigman LLP in Lansing. He is a corporate attorney with experience counseling clients in business and transactional matters, including mergers and acquisitions, private placements, private equity, venture capital, corporate finance, supply chain management, franchising, corporate governance, business formation, and other general corporate matters. He also serves as outside general counsel for a variety of clients.

Loren Andrulis is a Partner at Warner Norcross + Judd LLP in Grand Rapids. He has assisted clients in transactions and strategic planning for more than 25 years, focusing primarily on venture, corporate, securities and real estate matters. A portion of his practice is focused on representing mining companies in transactional matters.

Why Michigan Should Adopt the Revised Uniform Partnership Act

By Donald A. DeLong

Introduction

The Michigan Uniform Partnership Act ("MUPA") was originally adopted in 1917[1] and was based upon the original Uniform Partnership Act ("UPA"), which was drafted and adopted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in 1914. While it has been amended several times over the years, the basic structure of MUPA is based upon UPA. In 1994, NCCUSL unanimously adopted the Uniform Partnership Act (1994) ("RUPA"). RUPA completely changed UPA and its approach to general partnerships and their structure and organization.[2] The purpose of this article is to analyze why Michigan should adopt RUPA as an improvement over MUPA.

This article will not analyze the sections of UPA that deal with limited liability partnerships as these sections were added in 1994[3] and do not suffer from the same deficiencies as the portions of MUPA that deal with general partnerships. The remainder of this article will discuss some of the major benefits of RUPA over MUPA. A complete discussion of all the benefits of RUPA is beyond the scope of this article.

Before launching into this analysis, a brief mention of partnerships as an entity choice is in order. There is no doubt that general partnerships are no longer the entity of choice and deemed an anachronism by many. Nevertheless, partnerships, while certainly not favored, are still used today. First, it should be noted that general partnerships are the default entity of for-profit businesses. When two or more persons engage in business for profit and fail to affirmatively choose an entity, they are deemed to be a partnership.[4] Therefore, there are many "defacto" partnerships. In addition, some law firms and other professional service businesses, investment clubs, and other organizations still choose the partnership form for a variety reasons. As long as there are partnerships operating in the state of Michigan, they deserve to be organized under a statutory structure that itself is not an anachronism.

The Partnership as an Entity

One of the most fundamental changes to UPA made by RUPA, is the clarification that a partnership is an entity separate and distinct from its partners. As NCCUSL points out:

> The law of general partnerships long struggled with the question of whether a partnership is merely an aggregate of its partners or an entity distinct from its partners.
>
> The common law took the aggregate approach….
>
> Under the UPA (1914), a general partnership had both entity and aggregate characteristics, in part because the act's first reporter, who died during the lengthy drafting process, strongly favored the entity approach, while his replacement just as strongly favor the aggregate construct.[5]

This lack of focus is reflected in part II of MUPA. Specifically, section 6 of MUPA refers to a partnership as "an association of two or more persons…."[6], and section 25 of MUPA states that "[a] partner is a co-owner with his partners of specific partnership property holding as a tenant in partnership…."[7] These sections are reflective of the aggregate of partners approach. However, in section 8 of MUPA, it is stated that real property may be acquired in the partnership name and, if so acquired, can only be conveyed in the partnership name.[8] This is but one example of how MUPA straddles the fence between the aggregate and the entity theories.

RUPA resolves this issue with certainty. Section 201 of RUPA states in subsection (a) "[a] partnership is an entity distinct from its partners." Throughout RUPA the entity theory wins out, with some exceptions, making a general partnership more akin to the other types of entities recognized by Michigan. RUPA does not, however, change the fact that general partners remain jointly and severally liable for the debts of the partnership.[9]

You might be asking yourself: why does this matter? There are many reasons for resolving this seemingly semantic problem. Without going into all the nuances, there are two primary issues that should concern the practitioner. The first has to do with the fact that a partnership under the MUPA was dissolved every time a partner dissociated from the partnership. The second, which in some ways is related to the first issue, involves matters of title, both to real estate and personal property. This article will discuss each in the following sections.

Dissolution upon Partner Dissociation

Section 29 of MUPA states:

> The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in carrying on as distinguished from the winding up of the business.[10]

Based upon the above language, a partnership is dissolved every time a partner withdraws from the partnership or assigns his or her entire interest in the management. The partnership continues after dissolution, but only for the purpose of winding up the partnership affairs.[11] However, not every purported assignment of a partnership interest causes a dissolution.

> A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor as against the other partners in the absence of agreement, entitle the assignee…to interfere in the management or administration of the partnership business or affairs…but it entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled….[12]

In short, absent the agreement of all the partners, a partner may convey his or her interest in the partnership, but such a conveyance only entitles the assignee of the interest the right to the profits of the assignor under the terms of the partnership agreement. If the entire interest of a partner is conveyed with the approval of the partners, the partnership is deemed dissolved. These provisions reflect the aggregate theory of partnerships, that is, that partnerships are an association of two or more people, which dissolves when one or more of them leave the organization completely.

There is no doubt that general partnerships are no longer the entity of choice and deemed an anachronism by many. Nevertheless, partnerships, while certainly not favored, are still used today.

The aggregate aspects of MUPA create unnecessary complications. Every time a partner leaves, for whatever reason, the partnership must wind up its affairs and make distributions of its assets to its partners. If the partnership wishes to continue in business, it must start anew. This not only requires new filings with the county clerk (more about this later), but it requires a new partnership agreement, and transfers of title of the property from the "old" partnership to the partners, followed by a transfer of title to the "new" partnership.

RUPA makes clear that the partnership is "an entity distinct from its partners."[13] Section 801 of RUPA reinforces this conclusion. Section 801 specifies the events causing dissolution. There are five events that can cause a partnership to be dissolved, and this list is exhaustive. First, in a partnership at will, any partner may dissolve the partnership at any time "by express will."[14] Second, if the partnership is for a definite term or for a particular undertaking, the partnership may be dissolved by the expiration of the term or a vote of the partners.[15] Third, by the occurrence of an event or circumstance stated in the partnership agreement.[16] Fourth, on application by a partner, by the entry of an order by the appropriate court dissolving the partnership on grounds specified in RUPA.[17] Finally, on application by a transferee by the entry of an order by the appropriate court dissolving the partnership on certain equitable grounds described in RUPA.[18] RUPA provides that a partnership may expel a partner, a partner can sell his or her entire partnership interest, or a partner may withdraw without triggering a dissolution and the associated difficulties.

The durability of a partnership under RUPA does, however, create the risk that a partner may not be able to withdraw from the partnership. Under MUPA, a withdrawing partner created a dissolution that required the partnership distribute its property to the partners. A partner that was withdrawing could force the partnership to discharge its liabilities and pay the surplus in cash to the respective partners.[19] MUPA made sure that partners were not locked into the partnership, using the dissolution mechanism.

RUPA deals with this problem by creating a partnership obligation to buy out the partners who are "locked in."

> If a person is disassociated as a partner without the disassociation result-

> ing in a dissolution and winding up of the partnership business under section 801, the partnership shall cause the person's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b).[20]

In short, RUPA creates a more durable entity without sacrificing the concerns that partners are "locked into" their partnership relationship.

Title to Real Estate

Issues of real estate title arise from the interplay between three sections of MUPA: section 29 and 30, dealing with dissolution, and section 10, which specifically involves real property title issues.

Section 10(1) of MUPA attempts to clarify matters of title to real estate held by partnerships. First it states that if title is conveyed in the partnership name, "any partner may convey title to such property by a conveyance in the partnership name…." However, it goes on to state:

> …but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph 1 of section 9, or unless such property has been conveyed by the grantee or a person claiming through the grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.[21]

Paragraph (1) of section 9 states that every partner is an agent of the partnership

> …and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way of the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.[22]

The Michigan Land Title Standards, 6th edition, follows the above anaylsis. A conveyance by a partnership before dissolution is binding on the partnership if (1) the deed is signed by all of the partners; (2) the deed is executed by less than all the partners, and (A) the partner executing the deed has expressed authority to convey; or (B) the deed "apparently carries on the usual way of the business of the partnership and the grantee does not have knowledge that the executing …partners are not authorized to make the conveyance;" or (3) the transfer is authorized or ratified by all of the other partners.[23]

The determination of who must be involved in conveying real estate of a partnership is even more difficult when there has been a dissolution of the partnership. Michigan Land Title Standard 11.7 describes the partners' authority to convey after a partnership dissolution:

> After dissolution, a conveyance of copartnership real property signed by less than all of the partners is binding upon the partnership if:
>
> (A) the conveyance is appropriate for:
>
> (1) completing a transaction unfinished at dissolution (except if the partnership is dissolved because it is unlawful to carry on its business); or
>
> (2) winding up partnership affairs;….[24]

Because a dissolution is caused every time a partner leaves the partnership, it appears that either all of the partners must execute the conveyance document, or the conveyance must be part of the winding up of the affairs of the partnership.

The above anlaysis is complicated and potentially creates title issues. Determining whether a sale of real estate carries on the usual business of the partnership can be a difficult question in some instances. Also, when questions of title come down to whether the grantee had knowledge of the authority of a partner to execute a deed and convey title, litigation is sure to follow. The case of *Backowski v Solecki*, 112 Mich App 401, 316 NW2d 434 (1982), illustrates the problems presented by these sections of the MUPA.

In *Backoski*, a partnership named H. S. & L. Investment Co. ("HS & L") originally had three partners, Henry Solecki ("Henry"), Lottie Solecki ("Lottie"), and Stephen Backoski ("Backoski"). Lottie's interest in the partnership was transferred to Henry. The business of HS & L was alleged to be the ownership and leasing of warehouse space. Henry executed a quitclaim deed purportedly on behalf of HS & L conveying HS & L's interest in real estate to Billmax Properties ("Billmax"). Backoski sought to recover the property from Billmax citing section 10 of MUPA.[25] A trial ensued. The primary issues at trial were

The durability of a partnership under RUPA does, however, create the risk that a partner may not be able to withdraw from the partnership.

whether the act of selling the warehouse property was binding on HS & L because this was its usual business and whether Billmax had knowledge of the lack of authority of Henry to convey the property to Billmax. *Id* at 404-408. The Michigan Court of Appeals remanded the case to the trial court, because the lower court's opinion did not specifically state the facts and law that led the trial court to its determination that title to the property should remain with Billmax. The Court of Appeals did not make a finding based upon the record because "… the credibility of the witnesses is critical to the outcome." *Id* at 409 [citations omitted].

The *Backowski* case reveals the uncertainty of title transfer when less than all of the partners of a partnership sign the deed of conveyance. The Court of Appeals made clear in this case that the testimony of the witnesses as to the authority of Henry was critical to the ultimate outcome of this case. Whenever questions of title come down to factual determinations that rely upon the testimony of human beings, clarity is sacrificed and title is potentially clouded.

…RUPA makes clear that the departure of a partner does not cause a dissolution… [and] provides a mechanism to provide a more certain outcome…

The lack of clarity is also reflected in a comment to Michigan Land Title Standard 11.7.

> The committee expresses no opinion as to who must consent to a conveyance of co-partnership real property if, before the conveyance, a partner sells his or her partnership interest to a third party (including the partner's rights and partnership property and his or her right to participate in the management and administration of partnership business and affairs), the third party is admitted as a substitute partner in the copartnership, and the business of the partnership is continued without liquidation of the partnership's affairs.

The reason the authors of the Michigan Land Title Standards cannot express an opinion is that according to MUPA,[26] the partnership is dissolved when the relation of partners is changed by any partner ceasing to be associated with the carrying on the business of the partnership. As suggested by the comments to RUPA section 201, under UPA there may even be the requirement of a deed "to convey title from the 'old' partnership to the 'new' partnership every time there is a change among partners."[27]

The above confusion is resolved under RUPA. First, RUPA makes clear that the departure of a partner does not cause a dissolution of the partnership, as described above. In addition, RUPA provides a mechanism to provide a more certain outcome, expecially when less than all of the partners sign the deed. Section 303 of RUPA allows a partnership to deliver to the appropriate authority[28] a statement that

> (2) with respect to any position that exists in or with respect to the partnership, may state the authority, or limitations on the authority, of all persons holding the position to:
>
> (A) sign an instrument transferring real property held in the name of the partnership; or
>
> (B) enter into other transactions on behalf of, or otherwise act for or bind, the partnership; and
>
> (3) may state the authority, or limitations on the authority, of a specific person to:
>
> (A) sign an instrument transferring real property held in the name of the partnership; or
>
> (B) enter into any other transactions on behalf of, or otherwise act for or bind, the partnership.

According to the comments to Section 303, the "most important goal of the statement of authority is to facilitate the transfer of real estate held in the name of the partnership."[29]

In order to eliminate doubt, subsections (f) and (g) of section 303 of RUPA, provide a mechanism by which authority to transfer real property owned by the partnership can appear in the real estate records by a filing with the appropriate register of deeds. Subsection (f) allows a buyer of property who has given value in reliance on the grant without knowledge to the contrary to rely on a statement of authority recorded with the register of deeds. Subsection (g) acts as a shield for the partnership. Subsection (g) states that all persons are deemed to know of a limitation that is contained in a certified copy recorded with the register of deeds. In other words, a buyer of real property from a partnership may rely on the statements contained in a document recorded with the register of deeds, if the buyer has given value and lacks knowledge to the contrary; and the partnership may protect itself from those claiming lack of knowledge by recording the appro-

priate statement. This is a vast improvement over MUPA.

Title to Personal Property

An additional problem with MUPA is that the mechanism for transferring title to personal property is not spelled out. Section 10 of MUPA only applies to real property. Section 8 of MUPA[30] states that a conveyance to the partnership in partnership name conveys complete title to the partnership. Therefore, personal property conveyed to the partnership becomes partnership property, but there is no statutory provision for conveying this property from the partnership. The only manner by which such partnership property could be conveyed by the partnership would be to obtain the signatures of all of the partners.

RUPA solves this problem by making section 302 applicable to both personal and real property. Section 302 is the corrolary to section 10 of MUPA. RUPA fills this gap by statutorally providing that title to personal property is transferred in the same way as real property.

Primacy of Partnership Agreement—Increased Clarity

RUPA makes clear that with a few exceptions, the partners in a partnership may organize the relationship among partners and management structure in any manner that meets the partners' needs. MUPA, on the other hand, is more restrictive. Section 18 of MUPA[31] sets forth rules governing the rights and duties of the partners, "…subject to any agreement between them…." Nowhere in MUPA does it state the provisions that are mandatory or permissive. MUPA also does not define "partnership agreement." The practitioner must read all of MUPA to try to piece to together which provisions cannot be modified in the partnership agreement, and which are the proper subjects of the partnership agreement and may modify the provisions of MUPA.

RUPA specifically states that the terms of the partnership agreement govern, except for a few mandatory provisions.[32] As stated in the Prefatory Note to RUPA, RUPA

> …gives supremacy to the partnership agreement in almost all situations. The Revised Act is, therefore, largely a series of "default rules" that govern relations among partners in situations they have not addressed in a partnership agreement. The primary focus of RUPA is the small, often informal, partnership. Larger partnerships generally have a partnership agreement addressing, and often modifying, many of the provisions of the partnership act.[33]

Sections 102(12), and 105 through 107 of RUPA spell out in detail the function of the partnership agreement. Section 102(12) defines "partnership agreement" as an oral or written agreement "…of all the partners of a partnership concerning the matters described in section 105(a). Sections 105 through 107 of RUPA are critical to understanding the function of the partnership agreement.

Section 105 provides that the partnership agreement serves five functions.

> Subsection (a) establishes the primacy of the partnership agreement in establishing *inter se* relations among the partners and partnership. Subsection (b) recognizes this act as comprising mostly default rules (i.e., gap fillers for issues as to which the partnership agreement provides no rule). Subsection (c) lists a few mandatory provisions of the act. Subsection (d) lists some provisions frequently found in partnership agreements, authorizing some unconditionally and others for so long as "not manifestly unreasonable." Subsection (e) delineates in detail both the meaning of "not manifestly unreasonable" and the information relevant to determining a claim that a provision of a partnership agreement is manifestly unreasonable.[34]

Section 106 deals with the effect of the partnership agreement on the partnership and the persons becoming partners. For example, subsection (b) provides that a person that becomes a partner is deemed to have agreed to the partnership agreement. Section 107 involves the effect of the partnership agreement on third parties. For example, subsection (d) provides that with respect to any filing with the appropriate state authority, if the filing conflicts with the partnership agreement, the partnership agreement prevails as to the partners, but the filing prevails as to third parties. Sections 105 through 107 provide a more detailed framework for structuring the partnership agreement and determining the effect of the agreement on the relations between the partners and between the partnership and third parties. MUPA has no

Nowhere in MUPA does it state the provisions that are mandatory or permissive. MUPA also does not define "partnership agreement."

such provisions leaving these matters open to interpretation.

Partner Obligations to Each Other

For the most part, RUPA follows MUPA with respect to the partner's obligations to each other. However, there is one significant improvement in how a partner may enforce the partner's obligations to another. Under MUPA, the only way a partner could enforce his or her rights was to demand a formal accounting. This result is made clear in *Gilroy v Conway*, 151 Mich App 628, 637, 391 NW2d 419 (1986):

> Neither do we see anything in the Uniform Partnership Act to suggest that an aggrieved partner is entitled to any remedy other than to be made whole economically. The act defines identically the partnership fiduciary duty and the remedy for its breach, i.e., to account….

Under the MUPA it appears that the exclusive remedy for a violation of a partner's obligations to his or her fellow partners is to render an accounting, and then, based upon the accounting to put those wronged partners in the position they would have been but for the breach. The mechanism for making the wronged partner whole is to dissolve the partnership.

Section 401 of RUPA allows a partner to, in essence, bring a derivative action on behalf of the partnership.

> (a) A partnership may maintain an action against a partner for a breach of the partnership agreement, or for a violation of a duty to the partnership, causing harm to the partnership.
>
> (b) A partner may maintain an action against the partnership or another partner, with or without an accounting as to partnership business, to enforce the partner's rights and protect the partner's interests, including rights and interests under the partnership agreement or this [act] or arising independently of the partnership relationship.
>
> (c) A right to an accounting on dissolution and winding up does not revive a claim barred by law.

This section of RUPA opens many different avenues for partners to address the wrongs committed by their partners, and it more closely aligns those remedies with those enjoyed by shareholders of corporations and members of limited liability companies. RUPA's expansion of the remedies available to partners is preferable to the only remedy available under MUPA: that is, accounting and dissolution of the partnership.

For the practitioner, a major drawback of MUPA is the method by which a partnership "registers" or provides public notice of its existence.

Reorganization Transactions

MUPA has no provision authorizing a general partnership to merge or convert into any other type of entity. Because of this shortcoming, if a general partnership wants to merge with, for example, a limited liability company, it must dissolve, distribute its assets to its partners, who must, in turn, contribute those assets to the "new" entity, or alternatively, "sell" its assets to the new entity. Regardless of the method chosen, the inability to merge or convert to another type of entity hobbles the general partnership organized in Michigan.

RUPA has comprehensive provisions allowing partnerships to merge,[35] exchange interests,[36] or convert into any other type of entity.[37] These comprehensive provisions bring general partnerships more in line with limited liability companies and corporations in how they can deal with changes to their organizational structure. For example, RUPA allows a partnership to provide for appraisal rights if the partnership agreement allows the vote of a reorganization by less than all the partners.[38]

These reorganization provisions are a vast improvement allowing general partnerships to engage in most of the reorganization transactions that other entities can participate in, avoiding the need to dissolve the original partnership.

Improved Public Notice and "Filing"

For the practitioner, a major drawback of MUPA is the method by which a partnership "registers" or provides public notice of its existence. MUPA has no provision that provides for such registration or public notice. The method by which a partnership provides public notice of its existence is found in 1913 PA 164, MCL 449.101-449.106, a statutory provision that even predates MUPA. According to MCL 449.101

> No 2 or more persons shall hereafter be engaged in carrying on any business as copartners unless such persons shall first make and file with the county clerk of the county in which such copartnership business is or shall

> be located, a certificate in writing, to be signed by each, and verified by the affidavit of one of the members of said copartnership, setting forth the full name of each and every person composing the said copartnership, and the residence of each, the name and style of the firm, and the length of time for which it is to continue.

The certificate filed with the county clerk must be renewed every five years.[39] Furthermore, every time there is a change in the name, "style," or time of its existence, the partnership must file a new certificate.[40] From a practical standpoint, every time a partner joins or leaves the partnership, a new certificate must be filed. If a new certificate is not filed, "individual members of the firm, as set forth in the certificate on file, shall be held to be the actual members of the firm, and in all respects holden [sic] and liable for any obligation, debt or liability, incurred by the said copartnership."[41]

This method of registering partnerships is antiquated and inefficient. Requiring a partnership to register in every county in which it does business can result in multiple filings. For example, a partnership that owns real estate in more than one county will be required to file a certificate of copartnership in every such county, once every five years. In addition, a new certificate should be filed every time there is a change of partners in order to avoid the previously named partners from being considered liable for all the debts of the partnership. This is an unnecessary administrative burden.

RUPA provides a streamlined method of providing notice of the existence of the partnership and any other matters which the partners deem important. There is no requirement under RUPA that a partnership file a certificate or other document, as required by Michigan law. The filings are permissive. For example, according to section 303 of RUPA, a partnership "may" file a statement of "partnership authority," which statement may set forth the authority, or limitations on authority, of specific partners. There is no requirement that the names of the partners and their residential addresses be listed. In this age of heightened concerns about privacy, the elimination of this requirement is a big step forward.

RUPA also contemplates centralized filing. RUPA states that the above filings will be made with the "secretary of state," which is the department most states appoint to administer their corporations, limited liability companies, and other entities authorized by their laws. In Michigan, the Department of Licensing and Regulatory Affairs (LARA) is responsible for administering all these entities, except partnerships. If RUPA were adopted in Michigan, presumably LARA would become responsible for partnerships and any filings partnerships chose to file. Partnerships would only be required to file in one location as opposed to filing in every county in which they do business. The centralized filing of RUPA would not only make it easier for partnerships, but also for all those third parties who make public searches for information regarding the operation of businesses that happen to operate as partnerships. In short, there is no reason to have two separate governmental agencies, one at the state level and the other at the county level, responsible for administering entities based merely upon the form the entity takes.

Conclusion

MUPA is based upon a 105-year-old model act, and it shows its age. MUPA clings to an aggregate theory of an association of partners rather than the more consistent entity theory. Causing a dissolution every time a partner leaves or joins the partnership no longer makes any sense. RUPA will also help resolve some title issues related to real and personal property by embracing the entity theory. If the appropriate partnership filings are made with LARA, title companies will not be required to obtain the signatures of all the partners or run the risk of relying on the testimony or affidavits of partners who may prove to be wrong in court. Allowing partnerships to engage in reorganization transactions is an improvement especially since there are so many different types of organizations that exist today than existed in 1914. Allowing partners greater latitude to determine the rules that govern the rights and duties of partners to one another also makes sense. Finally, centralized and permissive filing with LARA will eliminate unnecessary multiple and repeated filings at the county level. For these reasons and many others, it is time for Michigan to step into the 21st century and join the 43 states that have adopted RUPA in some form.[42]

RUPA provides a streamlined method of providing notice of the existence of the partnership and any other matters which the partners deem important.

NOTES

1. 1917 PA 72, effective August 10, 1917, and codified in MCL 449.1 et seq.

2. The history of RUPA can be found in the Prefatory Note to "Uniform Partnership Act (1997)" drafted by NCCUSL at its Annual Conference Meeting, July 6-July 12, 2013 (Hereinafter referred to as the "NCCUSL RUPA Report"). NCCUSL adopted amendments to RUPA in 1997 ("1997 RUPA"), 2011 and 2013 ("Harmonized RUPA"). For ease of reference this article will refer to RUPA, as amended by 1997 RUPA and Harmonized RUPA, simply as RUPA, unless reference to the specific amendments is required.

3. 1994 PA 323.

4. MCL 449.6(1), defines a partnership as "an association of 2 or more persons…to carry on as co-owners a business for profit…", and MCL 449.6(2) excludes any "association formed under any other statute of this state…" from the definition of partnership. MCL 449.7 specifies the rules for determining whether a partnership exists.

5. NCCUSL RUPA Report, p 60.

6. MCL 449.6(1).

7. MCL 449.25(1).

8. MCL 449.8(3).

9. Section 306(a) of RUPA

10. MCL 449.29.

11. Section 30 of MUPA, MCL 449.30

12. MCL 449.27(1).

13. Section 201 (a), RUPA.

14. Section 801(1) of RUPA.

15. Section 801(2) of RUPA

16. Section 801(3) of RUPA

17. Section 801(4) of RUPA

18. Section 801(5) of RUPA.

19. MCL 449.38(1).

20. Section 701(a) of RUPA

21. MCL 449.10(1).

22. MCL 449.9(1).

23. Michigan Land Title Standard 11.3 (Sixth Edition through Supplement No. 3)

24. Michigan Land Title Standard 11.7 also describes conveyances where the grantee extended credit to the partnership before dissolution and other circumstances.

25. MCL 449.10.

26. Section 30 of MUPA, MCL 449.30

27. See RUPA section 201 and the comments thereto. This comment cited to the case of Fairway Development Co v. Title Insurance Co., 621 F Supp 120 (ND Ohio 1985), which held that a partnership that resulted after a partner's death did not have standing to enforce title insurance issued to the previous partnership that existed prior to the partner's death.

28. The Harmonizing RUPA allows a partnership to file with the same authority that administers limited liability companies, corporations, limited partnership, and most other entities. In Michigan this would presumably to the Department of Licensing and Regulatory Affairs (LARA).

29. See comment 2 to section 303, page 45 of NCCUSL RUPA Report.

30. MCL 449.8.

31. MCL 449.18.

32. Subsections (c) and (d) of section 105 of RUPA list the mandatory provisions.

33. NCCUSL RUPA Report, p 2.

34. NCCUSL RUPA Report, Comment to section 105, p 28.

35. Sections 1121 to 1126 of RUPA.

36. Sections 1131 to 1136 of RUPA. An interest exchange is akin to a share exchange under the Michigan Business Corporation Act, MCL 450.1702.

37. Sections 1141 to 1146 of RUPA

38. Section 1106 of RUPA.

39. MCL 449.101a and 449.101b.

40. MCL 449.102.

41. *Id.*

42. 43 states have at least adopted the 1994 RUPA. See the Uniform Law Commissions web site, found at https://www.uniformlaws.org/committees/community-home?CommunityKey=52456941-7883-47a5-91b6-d2f086d0bb44.

Donald A. DeLong is a member of Marshall & Melhorn, PLLC, managing its Southfield, Michigan office. He specializes in the areas of business law, taxation, estate planning, probate and trust administration and real estate. He is the co-chair of the LLC & Partnerships Committee of the Business Law Section of the State Bar of Michigan.

You Never Give Me Your Money: Tenancy By the Entireties in Michigan

By Paul R. Hage

Introduction[1]

Both inside and outside of bankruptcy, property held by husband and wife as tenants by the entireties creates difficult issues for litigants and courts. A tenancy by the entirety is a type of concurrent ownership that is unique to married persons. The classic basis for the tenancy by entireties was the somewhat antiquated concept that the husband and wife are but one person in the law. Because the husband and wife are deemed to be one person, neither spouse acting alone can alienate or encumber an interest in entireties property. Thus, such property is exempt from execution under a judgment entered against only one spouse. However, if both spouses are jointly obligated to a creditor, then that creditor may reach entireties property in accordance with applicable state law.

The purpose of this article is to discuss the history of tenancy by the entireties in Michigan, to outline the current caselaw regarding the types of property that fall within the scope of the entireties protection, and to provide a general overview regarding how entireties property is treated in bankruptcy.

Entireties Property Under the Common Law

Tenancy by the entireties was not originally created by statute in Michigan. Rather, it was formed at common law. *See United States v Craft,* 535 US 274, 280-81 (2002) (tracing the roots of tenancy by the entireties to English common law). At common law, the entireties protection in Michigan applied solely to real property. *See Sanford v Bertrau,* 204 Mich 244, 251, 169 NW 880 (1918). In 1936, the Michigan Supreme Court described the common law tenancy by the entirety as follows:

> It is well settled under the law of this state that one tenant by the entirety has no interest separable from that of the other, has nothing to convey or mortgage or to which he alone can attach a lien. Neither can encumber real estate held as tenants by the entirety without the consent of the other. Each is vested with an entire title and, as against the one who attempts alone to convey or encumber such real estate, the other has an absolute title.

Long v Earle, 277 Mich 505, 517, 269 NW 577 (1936) (collecting cases). At common law, a tenancy by the entirety was created only when property was transferred directly to a husband and wife after marriage. *See Budwit v Herr,* 339 Mich 265, 272, 63 NW2d 841 (1954). In fact, the creation of a tenancy by the entirety traditionally required a written instrument of conveyance that created unities of time, title, interest, possession, and person (marriage of husband and wife). *Id.* at 278.

It has been consistently held in Michigan that entireties ownership protects property from creditors of only one of the married spouses. Indeed, as far back as 1918, the Michigan Supreme Court stated, "It has been repeatedly held in this State that where a judgment is recovered against one of two tenants by the entireties no lien can attach to the interest of one." *Sanford v Bertrau,* 204 Mich at 252. The Sixth Circuit Court of Appeals affirmed this conclusion in *Cole v Cardoza,* 441 F2d 1337 (6th Cir 1971), stating:

> In Michigan tenants by the entirety hold under a single title. Neither spouse has the power without the concurrence of the other to alienate the estate or any interest therein, and neither the land nor the rents and profits therefrom are subject to levy or execution for the sole debts of the husband.

Id. at 1343.

In 1984, the Michigan Court of Appeals provided a more fulsome description of the creditor protection afforded by tenancy by entireties, stating:

> In Michigan real property law, tenancies by the entireties enjoy an ancient and hoary tradition. The usual and durable method for husband and wife to hold real estate has been as tenants

> by the entireties. The classic basis for a tenancy by the entireties was the concept that the husband and wife are but one person in the law. In a true tenancy by the entireties, each spouse is considered to own the whole and, therefore is entitled to the enjoyment of the entirety and to survivorship. *When real property is so held as tenants by the entireties, neither spouse acting alone can alienate or encumber to a third person an interest in the fee of lands so held. Neither the husband nor the wife has an individual, separate interest in entireties property, and neither has an interest in such property which may be conveyed, encumbered or alienated without the consent of the other.*

Rogers v Rogers, 136 Mich App 125, 134, 356 NW2d 288 (1984) (citations omitted) (emphasis added); *see also Liberty State Bank & Trust v Grosslight (In the Matter of Grosslight),* 757 F2d 773, 775 (6th Cir 1985) ("Neither husband nor wife acting alone can alienate any interest in the property, nor can the creditors of one levy upon the property; but their joint creditors can reach entireties property."); *Walters v Leech,* 279 Mich App 707, 711, 761 NW2d 143 (2008) ("As a general proposition under the common law, property that is held as a tenancy by the entirety is not liable for the individual debts of either party.").

Tenancy by the entireties was not originally created by statute in Michigan. Rather, it was formed at common law.

In 2004, the Michigan legislature codified the creditor protection afforded to entireties property with respect to judgment liens in MCL 600.6023a. That statute provides, "Property … held jointly by a husband and wife as a tenancy by the entirety is exempt from execution under a judgment entered against only 1 spouse." MCL 600.6023a; *see also Ellman v Popular Fin Servs, LLC (In re Etter),* 2009 WL 270068 at *5 (ED Mich 2009) (MCL 600.6023a "prevents the creditors of one spouse from executing on real property held as tenants by the entireties with the debtor's spouse.").

Types of Entireties Property

In addition to the common law, there are now three general categories of property that are carved out by statute in Michigan as constituting protected entireties property: (i) real property, (ii) membership interests in limited liabilities companies, and (iii) certain evidences of indebtedness. Each of these categories is discussed below.

Real Property

Under Michigan law, real property owned jointly by husband and wife is entireties property, and, thus, a judgment lien does not attach to such property unless the judgment is entered against both the husband and wife. *See* MCL 600.2807(1) ("A judgment lien does not attach to an interest in real property owned as tenants by the entirety unless the underlying judgment is entered against both the husband and wife."). Because no reference is made in the statute to the five unities required at common law, it would appear that such unities are no longer required in Michigan for real property to obtain the protection afforded to entireties property.

Courts have noted that MCL 600.2807(1) is a codification of the common law rule that "property held as a tenancy by the entireties is not liable for the individual debts of either party. *Comer v. Roosen Varchetti & Olivier, PLLC,* 2018 WL 5719793 (ED Mich Nov 1, 2018); *see also In re Guzior,* 347 BR 237, 242-43 (Bankr ED Mich 2006) (stating that MCL 600.2807(1) "appears to be a codification of Michigan's strong common law of protecting a tenancy by the entirety interest from the claims of the individual creditors of a husband or wife."). As the Michigan Court of Appeals recently explained:

> [our] longstanding common law provides that, when a deed is conveyed to a husband and wife, the property is held as a tenancy by the entirety. In a tenancy by the entirety, the husband and wife are considered one person in the law. They cannot take the property in halves. Rather, the property is seised by the entirety. The consequence is that neither the husband nor the wife can dispose of the property without the assent of the other and the whole property must remain to the survivor. As a general proposition under the common law, property that is held as a tenancy by the entirety is not liable for the individual debts of either party. Our Legislature codified this proposition with respect to judgment liens in MCL 600.2807.

Walters v Leech, 279 Mich App at 711; *see also Knapp v Vulpina, LLC,* 2019 WL 1301750 (Mich Ct App Mar 21, 2019) (unpublished) ("real property that is 'held jointly by a husband and wife as a tenancy by the entirety is exempt from execution under a judgment entered against only 1 spouse'"); *Licavoli v*

Licavoli, 292 Mich App 450, 455, 807 NW2d 914 (2011) ("even the broad discretion afforded the court to make dispositional rulings is circumscribed by the clear legislative mandate to protect property held as a tenancy by the entirety from lien attachments unless the underlying debt is the debt of both husband and wife.").

Personal Property

Historically, Michigan courts rejected any argument that personal property fell within the scope of common law entireties protections. Indeed, in *Ludwig v Brunner,* 203 Mich 556, 559, 169 NW 890 (1918), the Michigan Supreme Court unequivocally expressed the opinion that "joint tenancy in personal property with its right of survivorship does not exist." Similarly, the Michigan Supreme Court stated in *Scholten v Scholten,* 238 Mich 679, 683, 214 NW 320 (1927) that an estate by entireties "may not be created in personal property."

Evidences of Indebtedness

Nevertheless, the Michigan legislature enacted MCL 557.151 in 1927, which protects as entireties property certain so-called evidences of indebtedness. The current version of that statute provides:

> All bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidences of indebtedness hereafter made payable to persons who are husband and wife, or made payable to them as endorsees or assignees, or otherwise, shall be held by such husband and wife in joint tenancy unless otherwise therein expressly provided, in the same manner and subject to the same restrictions, consequences and conditions as are incident to the ownership of real estate held jointly by husband and wife under the laws of this state, with full right of ownership by survivorship in case of the death of either.

MCL 557.151.

There is a substantial amount of caselaw interpreting MCL 557.151. Published opinions usually focus on whether a particular asset falls within the scope of the statute. In some cases, the analysis is relatively easy as the asset at issue falls squarely within the statute. For example, in *DeYoung v Mesler,* 373 Mich 499, 130 NW2d 38 (1964), judgment creditors of the husband sought to reach a debenture issued to the husband and his wife. The Michigan Supreme Court rejected the creditors' claim, holding that MCL 557.151 expressly provides that spouses hold a debenture by the entirety unless an intent to do otherwise is affirmatively expressed. Similarly, in *Kuklish v Wohleben,* 349 Mich 24, 84 NW2d 535 (1957), the Michigan Supreme Court held that promissory notes payable to husband and wife constitute entireties property. And in *Theisen v Theisen,* 27 Mich App 356, 183 NW2d 373 (1970), the Michigan Court of Appeals held that a check made payable to a husband and wife creates an entireties interest.

Unfortunately, none of the above-referenced cases touched upon the breadth of the statute or the scope of the phrase "other evidences of indebtedness." As such, assets not expressly identified in MCL 557.151, which arguably constitute "evidences of indebtedness," present a far more difficult issue.

In *Hiller v Olmstead*, 54 F2d 5 (6th Cir 1931), the Sixth Circuit Court of Appeals rejected plaintiff's argument that "evidence of indebtedness" included a fire insurance policy held by both husband and wife, either before or after the insurance company's liability was established. In that opinion, the court ruled:

> Not only would the happening of an event which created contract liability not convert such contract into an "evidence of indebtedness" if it had not such character before, thus changing its very nature, but it is manifest that the words "evidence of indebtedness", as used in the statute, refer only to instruments of the same general nature as bonds, mortgages, notes, and debentures with which they are associated.

Id. at 7.

Similarly, in *Jahn v Regan,* 584 F Supp 399 (ED Mich 1984), the court held that a tax refund or overpayment for a jointly filed tax return could not reasonably be characterized as an evidence of indebtedness within the scope of the statute. That court reasoned:

> The refund plaintiffs are pursuing is not a document of indebtedness of the government. It is not even a negotiable instrument made payable to them. Therefore, plaintiffs' joint tax overpayment is not within MCL § 557.151 and not held by them as tenants by the entireties.

Id. at 410.

Historically, Michigan courts rejected any argument that personal property fell within the scope of common law entireties protections.

Brokerage Accounts

Although there was initially some uncertainty with respect to the issue of whether brokerage accounts owned by spouses fall within the scope of "evidences of indebtedness," it appears that the caselaw is now clear that brokerage accounts are, in fact, protected. *See e.g., Oster v Clarkson State Bank (In re Oster),* 474 Fed Appx 422, 2012 WL 987612 (6th Cir Mar 26, 2012) (noting that Michigan made it "explicitly clear that brokerage accounts … were within § 557.151's ambit") (referencing *Zavradinos v JTRB, Inc,* 2007 WL 2404612 (Mich Ct App Aug 23, 2007)).

Interestingly, in *Shapiro v Nicoloff (In re Nicoloff),* No 01-CV-71591-DT (ED Mich Sept 25, 2001) (unpublished), the court held that a brokerage account fell within the scope of MCL 557.151. The court reasoned that the account was protected because any distribution was expressly required to be payable to both husband and wife. It is unclear whether the court would have reached a different conclusion if distributions from the account were not so limited.

There has been much debate over the years regarding whether MCL 557.151 applies to joint bank accounts.

Joint Bank Accounts

There has been much debate over the years regarding whether MCL 557.151 applies to joint bank accounts. Since the enactment of MCL 557.151, most courts have focused on the question of whether the bank account is payable to both or only one of the spouses in determining whether an account falls within the scope of MCL 557.15.[2] For example, in *American Nat'l Bank & Trust Co of Michigan v Modderman,* 37 Mich App 639, 195 NW2d 342 (1972), the Michigan Court of Appeals held that bank deposits are not included in the phrase "other evidences of indebtedness" and, even if they were, the account was not exempt because the deposits were expressly payable to either of the spouses. Finding that the entireties exception did not apply, the court further declared that not only were the deposits in the husband and wife's joint account subject to garnishment, but the judgment creditor had the right to overcome the presumption that each of the parties contributed one-half of the funds. *Id.* at 642.

Similarly, in *Murphy v Michigan Trust Co (In re Farmers' & Merchants' Bank of Grand Rapids),* 221 Mich 243, 244, 190 NW 698 (1922), the Michigan Supreme Court held that a joint bank account did not constitute entireties property because the account was designated as "payable to James E. Murphy and Gertrude Murphy, either or the survivor." The court reasoned, "The words 'payable to either' do not square with the idea of a tenancy by entireties but do pointedly relate to a joint tenancy." *Id.* at 245–246. Thus, the husband's half portion was severable for the purpose of meeting the creditors' demands. *See also McMahon v Holland,* 260 Mich 246, 244 NW 462 (1932) (funds in a joint savings account were not protected from garnishment because the accounts were made payable to the husband or the wife).

Conversely, in *Old Woodward Housing, LLC v The Greenhouse Leasing Co,* No 2:15-cv-13778-AC-RSW (ED Mich July 7, 2017) (unpublished), the United States District Court for the Eastern District of Michigan held that joint bank accounts owned by husband and wife do fall within the scope of MCL 557.151. In that case, judgment creditors sought to garnish various bank accounts held by the judgment debtor. One such account was a joint checking account with the debtor's wife at Wells Fargo. The court granted the debtor's motion to dissolve the writ of garnishment as to that account, concluding that such account constituted entireties property. The court reasoned:

> As to garnishments of bank accounts in Michigan, see § 11.11, *Handling the Collection Case in Michigan*, I.C.L.E., 5th ed. (2016):
>
> > Creditors of a joint tenant can reach the debtor's interest in a bank account. There is a rebuttable presumption that joint bank account tenants are equal contributors and owners, and a garnishment order of one co-owner's assets applies only to his or her half of the funds. The nondebtor tenant can rebut the presumption by intervening in the action in a timely fashion. However, keep in mind that property held by spouses as tenants by the entirety is not subject to garnishment, MCL 600.6023a, and that under MCL 557.151, accounts owned by spouses are presumed held in an estate by the entireties "unless an intent to do otherwise is affirmatively expressed."
>
> *While the precedent lacks consistency, the Court is convinced from a review of the authorities that a joint bank account held by spouses, and payable to each, is held in the entireties absent contrary evidence.* M.C.L. § 557.151 (stating "evidences of indebtedness ... made payable to

> persons who are husband and wife ... shall be held by such husband and wife in joint tenancy unless otherwise therein expressly provided"). *There is none here. Further, a bank account held in the entireties is not subject to garnishment for the debt of one spouse.* See M.C.L. § 600.6023a ("Property described in ... MCL § 557.151 ... held jointly by a husband and wife as a tenancy by the entirety is exempt from execution under a judgment entered against only 1 spouse."). The joint Wells Fargo account of [the defendant] and his wife is not garnishable.

Id. at *2 (emphasis added) (internal citations omitted).

LLC Membership Interests

Finally, in 2002 the Michigan legislature enacted MCL 450.4504(1), which provides entireties protection for membership interests[3] in limited liability companies:

> A membership interest is personal property and may be held in any manner in which personal property may be held. A husband and wife may hold a membership interest in joint tenancy in the same manner and subject to the same restrictions, consequences, and conditions that apply to the ownership of real estate held jointly by a husband and wife under the laws of this state, with full right of ownership by survivorship in case of the death of either.

MCL 450.4504(1). To date, there is no published caselaw analyzing the entireties protection afforded to membership interests owned by husband and wife by MCL 450.4504(1).

No Requisite Language for Creating Entireties Property

Great deference is given to parties who seek to create an entireties estate. Indeed, courts generally presume that eligible property transferred to husband and wife is entireties property unless a contrary intent is clearly and expressly stated. For example, in *Hoyt v Winstanley*, 221 Mich 515, 191 NW 213 (1922), the Michigan Supreme Court considered whether a conveyance to husband and wife "as joint tenants" created a joint tenancy or a tenancy by the entireties. It held that the "as joint tenants" language was sufficient, reasoning:

> In view of the fact that estates by entirety are a modified form of joint tenancy, that the terms are sometimes used interchangeably, and that our statute treats them as a species of joint tenancy, it is my judgment that the words 'as joint tenants,' coupled with husband and wife in a conveyance to husband and wife, are not sufficient to indicate that an estate in joint tenancy was intended to be conveyed. *To create an estate in joint tenancy in a conveyance to a husband and wife, the words used must be sufficiently clear to negative the common-law presumption that an estate by entirety was intended. Estates in joint tenancy are not favored. Since the enactment of our statutes, all presumptions are against them.*

Id. at 519-520 (emphasis added). More recently, in *DeYoung v Mesler,* 373 Mich 499, 130 NW2d 38 (1964) the Michigan Supreme Court affirmed that a presumption exists in Michigan that property owned jointly by spouses is held as tenants by the entirety, stating, "In Michigan, the common-law rule that a conveyance to husband and wife creates a tenancy by the entirety has persisted except in respect to conveyances explicitly indicating that some other kind of tenancy is intended." *Id.* at 504.

Consistent with *Hoyt* and *Mesler,* the consensus view is that:

> A tenancy by the entirety may be created by a deed conveying property to a husband and wife 'jointly,' by a deed conveying property to a husband and wife as 'joint tenants,' or by a deed conveying property to a husband and wife 'jointly and not as tenants in common.'

Thomas v Dutkavich, 290 Mich App 393, 406, 803 NW2d 352 (2010). Indeed, recent opinions suggest that "The only way to overcome the presumption in favor of tenancies by the entirety is to use the words 'not as tenants by the entirety' when such is the intent of the conveyance." *See Zavradinos v JTRB, Inc,* 482 Mich 858, 866, 753 NW2d 60 (2008); *Lewiston v Kohut (In re Lewiston),* 539 BR 154, 158-59 (ED Mich. 2015) ("[T]here is a common law presumption—as well as a statutory presumption—that a conveyance of an estate to husband and wife creates a tenancy by entirety. To overcome this presumption requires express language to the contrary").[4]

Great deference is given to parties who seek to create an entireties estate.

The *Craft* Exception

There is one notable exception to the asset protection provided under state law with

respect to entireties property. In 2002, the United States Supreme Court held in *United States v Craft,* 535 US 274 (2002) that the federal tax lien statute trumps state law entireties protections.

In *Craft*, the debtor had failed to pay federal taxes for a period of several years, and, after his tax liabilities were assessed against him, the Internal Revenue Service filed a lien in accordance with 26 USC 6321 against his interest in property held jointly with his wife by the entireties under Michigan law. After notice of the lien was filed, the debtor and his wife executed a quitclaim deed purporting to transfer the husband's interest in the property to his wife for one dollar. When the wife attempted to sell the property a few years later, a title search revealed the recorded lien. The IRS agreed to release the lien and allow the sale with the stipulation that half of the net proceeds be held in escrow pending a determination of the government's interest in the property. Ultimately, the supreme court had to decide whether the federal tax lien could attach to the debtor's interest in entireties property.

The *Craft* court recognized that the federal tax lien statute provided for the attachment of a lien to all of the debtor's "property and rights to property." *Id.* at 277. The court also noted that the language of 26 USC 6321 had been interpreted as "broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have." *Id.* at 283. Looking at Michigan law, the court found that each spouse has substantial property rights with respect to entireties property, including the right to use the property, to receive income produced by it, and to exclude others from it.

Noting the supremacy of federal law over state law, the court held that federal tax liens may be imposed against entireties property pursuant to 26 USC 6321. In articulating its holding, the court reasoned:

> We therefore conclude that respondent's husband's interest in the entireties property constituted "property" or "rights to property" for the purposes of the federal tax lien statute. We recognize that Michigan makes a different choice with respect to state law creditors: "Land held by husband and wife as tenants by entirety is not subject to levy under execution on judgment rendered against either husband or wife alone." *Sanford v. Bertrau*, 204 Mich. 244, 247, 169 N.W. 880, 881 (1918). But that by no means dictates our choice. The interpretation of 26 U.S.C. § 6321 is a federal question, and in answering that question we are in no way bound by state courts' answers to similar questions involving state law. As we elsewhere have held, "exempt status under state law does not bind the federal collector." *Drye v. United States,* 528 U.S. at 59, 120 S.Ct. 474.

Id. at 288.

Subsequent to the court's ruling in *Craft,* there was a great deal of concern (and some interesting, lengthy published opinions) suggesting that the holding and rationale significantly changed the law of entireties as it had come to be known in Michigan. *See e.g., In re Spears,* 308 BR 793 (Bankr WD Mich 2004) (relying on *Craft* to hold that a bankruptcy filing by one spouse severs the entireties estate), *rev'd in Spears v Boyd (In re Spears),* 313 BR 212, 217 (WD Mich 2004). To the contrary, it appears that *Craft* has largely been limited to its facts (*i.e.* cases involving federal tax liens). *See e.g., Walters v Leech,* 279 Mich App 707, 716, 761 NW2d 143 (2008).

Although there has been some uncertainty over the years, it appears that bankruptcy courts have now arrived at a general consensus as to the basic principles for treating entireties property in bankruptcy.

Tenancy by the Entireties in Bankruptcy

Although there has been some uncertainty over the years, it appears that bankruptcy courts have now arrived at a general consensus as to the basic principles for treating entireties property in bankruptcy. Those basic principles include the following.

Entireties Property is Property of the Estate that a Debtor Can Exempt

"It is now established law that [section 541(a)] brings entireties property in the bankruptcy estate." *In re Basch,* 341 BR 615, 618 (Bankr WD Mich 2006); *see also In re Arango,* 992 F2d 611, 613 (6th Cir 1993) (acknowledging that in order for one spouse to exempt her interest in entireties property, it must first be property of the estate); *In the Matter of Grosslight,* 757 F2d 773, 775 (6th Cir. 2004) ("[i]t is now established law that [§541(a)(1)] brings entireties property into the bankruptcy estate."). The filing of a bankruptcy petition by one spouse does not sever a tenancy by entirety. *In re Basch,* 341 BR at 618 (citing *In re Spears,* 313 BR 212, 217 (WD Mich 2004) ("there is no practical reason for altering the longstanding practice of this and other entireties jurisdictions of treating the entireties estate as a

single, undivided, but exemptible, part of the bankruptcy estate....")).

Although entireties property comes into the bankruptcy estate by operation of section 541 of the Bankruptcy Code,[5] the statute allows a debtor to exempt such property from the estate such that it is retained by the debtor rather than being liquidated by a trustee. *See* 11 USC 542(a) (exempt property need not be turned over to the trustee). More specifically, section 522(b) defines what property interests can be exempted in bankruptcy, and permits debtors to choose between two sets of exemptions provided by the Bankruptcy Code, provided that both spouses in a joint case make the same election. The debtors can elect to exempt either:

(i) property that is listed as exempt in the Bankruptcy Code itself (*i.e.* the "federal exemptions" set forth in section 522(d)), 11 USC 522(b)(2);[6] or

(ii) any property that is exempt under nonbankruptcy federal law or state or local law that applies on the date of the filing of the petition, including "any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law." 11 USC 522(b)(3)(A) and (B).

Thus, if a debtor selects the state exemptions,[7] the debtor may claim as exempt any property "held as entireties property under applicable state law."[8] Additionally, Michigan is one of a handful of states that has expressly designated entireties property as exempt in its state law bankruptcy exemption statute. *See* MCL 600.5451(1)(n) (providing that a debtor in bankruptcy can exempt entireties property "except that this exemption does not apply with regard to a claim based on a joint debt of the husband and wife.").

Entireties Exemption is Determined on the Petition Date

A debtor's exemption rights in bankruptcy are determined as of the date of the bankruptcy filing. *See Lasich v Estate of AN Wickstrom (In re Wickstrom),* 113 BR 339, 342 (Bankr WD Mich 1990) ("exemption rights in bankruptcy are determinable as of the date of the bankruptcy filing"). As such, a debtor will not lose the entireties exemption as a result of the passing of his or her spouse post-petition. *See e.g., In re Hamacher,* 535 BR 180, 182 (Bankr ED Mich 2015) (court held that debtor was entitled to claim entireties exemption notwithstanding post-petition death of spouse, noting that section 522(b)(3) references property held by the entireties "immediately before the commencement of the case"); *In re Alderton,* 179 BR 63, 65-66 (Bankr ED Mich 1995) (entireties exemption survived notwithstanding postpetition passing of spouse); *In re Oberlies,* 94 BR 916 (Bankr ED Mich 1988) (despite post-petition change in circumstances, the entireties exemption continued because it was fixed on the petition date).

Exemptions Must Be Timely Objected To

A debtor has an affirmative duty to list the property that he or she claims as exempt on the schedules at the beginning of the case. *See* 11 USC 522(l); Fed R Bank P 4003(a). A party in interest,[9] "may file an objection to the list of property claimed as exempt only within 30 days after the meeting of creditors held under § 341(a) is concluded, or within 30 days after any amendment to the list or supplement schedules is filed, whichever is later." Fed R Bankr P 4003(b)(1) (setting forth procedural requirements for objecting to exemptions). The objecting party has the burden of proof to show that exemptions are not proper. Fed R Bankr P 4003(c); *see also In re Stanley,* 494 BR 287, 289 (Bankr ED Mich 2013) ("Trustee has the burden of proving by a preponderance that an exemption is improper.").

As noted, in Michigan and elsewhere, entireties property is generally not exempt from the claims of joint creditors. Thus, "to the extent of joint debt, a claim of entireties exemption should be disallowed." *In re Strausbough,* 426 BR 243, 247 (Bankr ED Mich 2010). It is important to note, however, that the trustee or a creditor must file such an objection to the entireties exemption within the 30-day period set forth in Bankruptcy Rule 4003(b). If the trustee or a creditor fails to timely file an objection, the debtor will receive the benefit of the claimed exemption regardless of whether or not the exemption was legally proper. *See Taylor v Freeland & Kronz,* 503 US 638 (1992) (procedural requirements for objecting to exemptions were strictly enforced even though the debtor claimed an exemption in assets for which she had no colorable right to ex-

As noted, in Michigan and elsewhere, entireties property is generally not exempt from the claims of joint creditors.

empt); *see also Rogers v Laurain (In re Laurain),* 113 F3d 595 (6th Cir 1997) (describing 30-day objection deadline as "jurisdictional"); *In re Page,* 240 BR 548, 551 (Bankr WD Mich 1999) (overruling untimely objection to claimed entireties exemption and holding that 30-day period commences at the conclusion of the "first" first meeting of creditors). The only exception to this general rule is set forth in Bankruptcy Rule 4003(b)(2), which provides that a trustee who alleges that the debtor "fraudulently asserted the claim of exemption" may object "at any time prior to one year after the closing of the case." *See Moyer v Rosich (In re Rosich),* 582 BR 694 (Bankr WD Mich 2018) (characterizing the caselaw interpreting Bankruptcy Rule 4003(b)(2) as "scant").

The proper procedure, therefore, is to timely file an objection to the claim of exemptions if there are joint creditors in the bankruptcy case. If the objection is filed by a joint creditor, the objection may be combined with a proof of claim. If the joint claim is allowed, the creditor can either seek stay relief such that it can proceed against entireties property in state court or, alternatively, allow the trustee to administer the property to satisfy joint claims. *See In the Matter of Grosslight,* 757 F2d 773, 777 (6th Cir 2004) (discussing procedures for objecting to exemptions).

A trustee must satisfy all four statutory requirements in order to sell entireties property, and such a sale must be commenced by the filing of an adversary proceeding with notice provided to the non-debtor spouse.

A Trustee Can Administer Entireties Property to Satisfy Joint Claims

Finally, while entireties property in bankruptcy "remains fully exempt from the claims of individual creditors under all circumstances," *In re Raynard,* 354 BR 834, 839 (6th Cir 2006),[10] if a party in interest successfully objects to an entireties exemption, a trustee in bankruptcy can administer entireties property to the extent of any joint claims. *See In the Matter of Grosslight,* 757 F2d 773, 776 (6th Cir 2004) ("The debtor's interest in that portion of entireties property reachable by joint creditors therefore is not exempt."); *In re Trickett,* 14 BR 85, 90 (Bankr WD Mich 1981) ("[T]his court will exercise its jurisdiction over the entireties property and administer the entireties property for the equal benefit of all joint creditors."); *In re Strausbough,* 426 BR 243, 247 (Bankr ED Mich 2010) ("a bankruptcy estate's interest in entireties property is in whatever equity is available in the entireties property that can be liquidated for the benefit of the joint creditors of the debtor and the non-filing spouse").[11]

The process for administering such property is set forth in section 363(h), which provides that, notwithstanding the protection provided in section 522(b), a trustee in bankruptcy may obtain authority to sell entireties property, including a non-debtor spouse's interest, without the non-debtor spouse's consent. Section 363(h) provides, in pertinent part:

> (h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest … and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—
>
> (1) partition in kind of such property among the estate and such co-owners is impracticable;
>
> (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;
>
> (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and
>
> (4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

11 USC 363(h).[12] A trustee must satisfy all four statutory requirements in order to sell entireties property, and such a sale must be commenced by the filing of an adversary proceeding with notice provided to the non-debtor spouse. *See* Fed R Bankr P 7001(3). In addition to the aforementioned requirements, courts have noted that the existence of joint creditors is a prerequisite to any sale under section 363(h).[13] *See In re Harlin,* 325 BR 184, 189 (Bankr ED Mich 2005) (stating "As a general rule, courts have been very reluctant to apply [section] 363(h) to allow the sale of entireties property owned by the debtor, and a non-debtor spouse.").

Subsection (i) of section 363 provides a level of protection for the non-debtor spouse with respect to a sale under section 363(h), providing that the non-debtor spouse is effectively given a right of first refusal to purchase the property at issue at the price at which such sale is to be consummated:

> (i) Before the consummation of a sale of property [under section 363(h)], the debtor's spouse … may purchase such property at the price at which such sale is to be consummated.

11 USC 363(i).

Regarding the proceeds from the sale of entireties property, section 363(j) provides:

> (j) After a sale of property [under section 363(h)], the trustee shall distribute to the debtor's spouse … and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse … and of the estate.

11 USC 363(j). In short, if the trustee sells entireties property pursuant to section 363(h), the statute requires that the non-filing spouse be compensated for his or her interest.

Since both spouses hold an indivisible interest in entireties property, the question often arises as to how the sale proceeds should be distributed. Shortly after the enactment of the Bankruptcy Code, Judge David Nims from the United States Bankruptcy Court for the Western District of Michigan issued an opinion in *In re Trickett* wherein he set forth a waterfall detailing how proceeds from a section 363(h) sale should be distributed. *See In re Trickett,* 14 BR at 91.

The *Trickett* court noted that, under Michigan law, when a tenancy by the entireties is severed, the spouses are generally each entitled to a one-half interest to the property as tenants in common. *Id.* at 90; *see also In the Matter of Ignasiak,* 22 BR 828, 830 (Bankr ED Mich 1982) (discussing non-bankruptcy scenarios where an entireties estate is severed). As such, the court held, one-half of the net sale proceeds (after payment of lienholders and taxes) should be disbursed to the non-debtor spouse before the payment of any claims in the debtor's bankruptcy. *Id.* at 91; *see also In re Blair,* 151 BR 849, 851-52 (Bankr SD Ohio 1992), *aff'd,* 33 F3d 54 (Table) (6th Cir 1994) (adopting the *Trickett* waterfall).

As to the remaining half of the sale proceeds, the *Trickett* court held that, after deduction of the homestead exemption, the trustee could pay his or her fees and expenses related to the sale and the administration of the joint claims, including attorney, appraiser, accountant, and realtor fees. *In re Trickett,* 14 BR at 91.[14] Thereafter, only that portion of the remaining sale proceeds in the amount of the joint claims could be administered by the trustee. All other surplus proceeds must be returned to the debtor due to their exempt nature.

The *Trickett* waterfall, whereby fees and expenses incurred by the trustee related to the section 363(h) sale of entireties property and the administration of joint claims could be paid out of the sale proceeds, was the law in Michigan for 35 years. Recently, however, *Trickett* was arguably reversed, in part, by the Sixth Circuit Court of Appeals in *Holley v Corcoran (In re Holley),* 661 Fed Appx 391 (6th Cir Oct 25, 2016), an unpublished opinion which failed to even mention *Trickett.*

In *In re Holley,* the Sixth Circuit held that the United States Bankruptcy Court for the Eastern District of Michigan erred in permitting the trustee to pay her sale-related administrative expenses from the sale proceeds of the debtors' entireties property. The Sixth Circuit ruled that Michigan's tenancy by the entireties exception protected the entire value of the entireties property, excluding only amounts due to joint creditors.

In *In re Holley,* a husband and wife each filed separate chapter 7 bankruptcy cases that were jointly administered. The trustee sought to sell the debtors' residence, which constituted entireties property. Because both spouses were debtors, section 363(h) was not triggered. After the debtors initially objected to the sale, they reached an agreement with the trustee to sell to a buyer selected by the debtors at a reduced price, who had separately agreed to lease the property back to them. After the conclusion of the sale and payment in full of the joint creditors, the trustee filed her final report proposing to pay sale-related administrative expenses totaling $97,734.32 from the remaining sale proceeds. The debtors objected, contending that the sale proceeds could not be used to pay administrative expenses because they were exempt under Michigan entireties law. The bankruptcy court denied the debtors' objections to the final report. Noting that the debtors had consented to the sale by the trustee, the court held "that the Debtors 'realized the full benefit of their allowed exemption under Michigan law' and that sales proceeds could be used towards administrative expenses." The district court affirmed in *Holley v Corcoran (In re Holley),* 2015 WL 9245284 (ED Mich Dec 18, 2015).

On appeal, the Sixth Circuit vacated the bankruptcy court's orders to the extent they permitted payment of the trustee's adminis-

Michigan is one of only a handful of states that still recognizes tenancy by the entireties, and it is certainly debatable whether the doctrine remains necessary or appropriate in the 21st century.

trative expenses. Relying on *Law v Siegel,* 571 US 415 (2014), the court held that the bankruptcy court "could not lawfully award any of the exempt [p]roperty's equity to pay the [t]rustee's fees." *In re Holley,* 661 Fed Appx at 396 (citing *Law v Siegel*). Section 522(k), the court stated, "prohibits a bankruptcy court from charging exempt property for administrative expenses …, even where a debtor has engaged in misconduct." *Id.*[15] The court reasoned, "The plain text of the law protected the Property-sale proceeds, minus the payouts to satisfy joint creditors' claims, from invasion by the Trustee to pay administrative expenses." *Id.* The court concluded by stating that the bankruptcy court "could not lawfully award any of the exempt Property's equity to pay the Trustee's fees" and remanded the case to the bankruptcy court. *Id.* at 396-97.

Following the guidance provided by the Sixth Circuit, the bankruptcy court ordered the trustee to pay all proceeds from the sale of the property, after payment of joint creditors, to the debtors. The ultimate calculation of the payout was appealed, and the matter once again ended up in front of the district court. *See Corcoran v Holley (In re Holley),* 594 BR 872 (ED Mich 2018). In its order affirming the bankruptcy court, the district court succinctly stated:

> Thus, the Sixth Circuit gave a clear formula to the bankruptcy court: (The cash proceeds from the Property's liquidation) – (the sum due to joint creditors) = (Debtor's exempt sum).

Id. at 878. "Cash proceeds," the court noted, did not include fees and expenses incurred by the trustee in selling the property or administering joint claims. On this point, the district court stated in a footnote that:

> the Sixth Circuit described the first amount as *proceeds*, which are "the value of land, goods, or investments when converted into money; the amount of money received from a sale." The Court did not use the term *net proceeds,* which is the amount received in a transaction minus the costs of the transactions (such as expenses and commissions).

Id. at 878. n. 2 (emphasis in original) (internal citations omitted). In other words, the district court affirmed that there is no ability for *any* administrative expenses, including expenses of the trustee associated with the sale transaction itself, to be paid from the sale of exempt entireties property.

This appears to be a significant departure from *In re Trickett,* where the bankruptcy court clearly contemplated in the section 363(h) sale context that administrative expenses incurred by the trustee in selling entireties property and administering joint claims could be paid out of the proceeds of the sale. In light of the Sixth Circuit's opinion in *In re Holley,* however, it would appear that such costs can no longer be charged against proceeds from exempt entireties property.[16]

Conclusion

A number of complicated legal issues arise as a result of Michigan's common law and statutory tenancy by the entireties. This article only touches on a few of such issues. Although some of the issues have been resolved, many others remain unresolved, and the law in this area is still developing.

Michigan is one of only a handful of states that still recognizes tenancy by the entireties, and it is certainly debatable whether the doctrine remains necessary or appropriate in the 21st century. Nevertheless, as one court noted, the doctrine represents "a political choice of the state legislature to maintain a system of property ownership which, at least arguably, contributes to family stability…." *In re Spears,* 313 BR 212, 216 (WD Mich 2004). Since the doctrine of tenancy by the entireties appears to be here to stay, practitioners need to understand how it works, both inside and outside of bankruptcy. One thing is clear, it continues to be a powerful tool that married individuals can utilize to protect certain types of assets.

NOTES

1. This paper was originally prepared for a panel presentation at the Western District of Michigan Federal Bar Association Bankruptcy Section Seminar in July 2019.

2. In Michigan, the holders of a joint bank account are joint tenants with the right of survivorship. MCL 487.703. MCL 487.714 provides the following: "Deposits in a statutory joint account shall be subject to the rights of creditors of the persons designated in the statutory joint account contract as owners of the funds to the extent of the ownership…."

3. An additional layer of protection is afforded to limited liability company membership interests since a judgment creditor of the owner of a membership interest can only obtain a charging order with respect to the beneficial interest in the membership interest (*i.e.* the income stream) and not the membership interest itself. *See* MCL 450.4507.

4. In *In re Leviston,* 539 BR 154, 159 (ED Mich 2016), the court held that the creation of a trust and the transferring of assets to the trust where the husband

and wife were both named as beneficiaries and trustees of the trust did not create a tenancy by the entireties as "a living trust is a distinct legal 'entity,' distinguishable from tenancy by the entirety."

5. The Bankruptcy Code is set forth in 11 USC 101 *et seq*. Specific sections of the Bankruptcy Code are identified as "section __." Similarly, specific sections of the Federal Rules of Bankruptcy Procedure are identified as "Bankruptcy Rule __."

6. Section 522(b)(2) provides that states can prohibit their citizens from choosing the exemptions set forth in section 522(d). According to a leading treatise, the following states currently prohibit their domiciliaries from electing the federal exemptions contained in section 522(d): Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia and Wyoming. *See* 4 Collier on Bankruptcy (16th Ed. Rev.), ¶ 522.01, p. 522-14 (2016). Michigan has not chosen to "opt-out" to prohibit a debtor from electing the so-called federal exemptions under section 522(d). *See Raynard v Rogers (In re Raynard),* 354 BR 834, 838 (BAP 6th Cir 2006).

7. Where the debtor chooses the federal exemptions, the entireties property goes into the bankruptcy estate and never comes back out. The federal exemption in § 522(d) includes a homestead exemption but no exemption for the entireties.

8. The debtor's ability to exempt entireties property under section 522(b)(3)(B) is determined by the law of the state where the entireties property is located and not by the exemption law of the domiciliary state. *See* 4 Collier on Bankruptcy, ¶ 522.10[3] at p. 522-86.

9. In *In re Guzior,* 347 BR 237 (Bankr ED Mich 2006), the bankruptcy court rejected the debtor's argument that only joint creditors have standing to object to an entireties exemption and held that a trustee in bankruptcy is a party in interest who is permitted to object.

10. In *In re Raynard*, 354 BR 834 (BAP 6th Cir 2006), the Bankruptcy Appellate Panel for the Sixth Circuit reversed the bankruptcy court and held that because property held as tenants by the entirety was exempt from claims of individual creditors under state law, but not exempt from claims of joint creditors, a chapter 13 plan which treated individual creditors more favorably than joint creditors passed the best interest of creditors test.

11. In *In re Strausbaugh,* 426 BR 243 (Bankr ED Mich 2010), the bankruptcy court held that a chapter 13 debtor, acting alone, can avoid an out of the money junior mortgage lien on entireties property owned with its non-debtor spouse under section 506(d).

12. It has been suggested that "The most difficult condition for a trustee to establish is that 'the benefit of the estate of the sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners." *In re Harlin,* 325 BR 184, 190-91 (Bankr ED Mich 2009) (holding that it was "impossible" for the trustee to meet the third requirement where the joint debts were minimal and the property that the trustee proposed to sell was a marital residence).

13. In order to determine whether joint creditors exist such that entireties property can be administered under section 363(h), trustees frequently send out a so-called *"Trickett* notice" whereby all joint creditors are requested to file a proof of claim for their joint debt by a date certain. The notice also contemplates that the debtor and other parties in interest will thereafter have a period of time to object to the joint claim.

14. According to *In re Trickett,* the proceeds from a section 363(h) sale should be distributed as follows:

(a) Lienholders including taxes on the property.

(b) Expenses and cost of sale, not including any compensation of the trustee. 11 USC 363(j).

(c) Debtor's spouse, unless waived.

(d) Expenses of administration only for administration on "joint claims" to include:

(1) Trustee's fees based on handling of debtors interest only.

(2) Attorney for trustee fees, if necessary.

(3) Appraisers fees, if necessary.

(4) Accountant fees, if necessary.

(5) Realtor fees, if necessary.

(6) Reasonable attorneys fees and costs to Plaintiffs in this proceeding.

(7) Other expenses as necessary.

(e) Joint claims.

(f) Surplus to debtor.

In re Trickett, 14 BR at 91.

15. Section 522(k) provides, subject to exceptions not relevant here: "Property that the debtor exempts under this section is not liable for payment of any administrative expense…." 11 USC 522(k).

16. In cases where only one spouse is a debtor, and section 363(h) is triggered, the express language of the Bankruptcy Code authorizes the trustee to pay "the costs and expenses" of the sale from the gross sale proceeds. That express language should mandate a different result than that contemplated in *In re Holley*. But no such express language exists with respect to fees and expenses incurred by the trustee that are unrelated to the sale (such as fees and expenses related to administering joint claims). Thus, *In re Holley* would continue to govern with respect to such expenses.

Paul R. Hage is a partner in the Southfield office of Jaffe Raitt Heuer & Weiss, PC. He is the Chair of the Insolvency and Reorganization Practice Group. Paul is Co-Vice Chair of the Debtor-Creditor Committee for the Business Law Section of the State Bar of Michigan.

Case Digests

Prime Rate Premium Fin Corp, Inc v Larson, 930 F3d 759 (6th Cir 2019)

Defendant Karen Larson and her late husband Keith Larson ran an insurance agency, Larson's Insurance Solutions Agency. Plaintiff Prime Rate Premium Finance Corporation loaned money to businesses to pay their insurance premiums. In 2013, the Larsons' insurance agency sent Prime Rate 14 agreements to get financing for several businesses. The agreement outlined that: Prime Rate would pay the agency's total premiums that the insured business owed its insurance company under a year-long policy, the agency would disburse the funds to the insurance company, and the insured business would repay Prime Rate in monthly installments. Soon after the agreements were reached, Prime Rate determined that the agreements were fraudulent and the insured businesses refused to pay Prime Rate. The insured businesses claimed that the agency had forged the insureds' names and failed to disburse the loaned funds to the insurance company. A Michigan regulator investigated the fraudulent actions by the Larsons' and cancelled their insurance license.

Before Prime Rate could serve defendants, they filed for bankruptcy, which immediately stayed the case. The bankruptcy was soon after dismissed. After the dismissal, there were many failed attempts of service because the Larsons' were intentionally evading it. The court eventually found that service was effectuated and ordered the Larsons' to pay $2,000. The defendants then had many issues maintaining representation. Eventually after 2 years of retention of attorneys and withdrawals of attorneys, defendants decided to proceed pro se and filed for bankruptcy, which was again dismissed. Keith Larson eventually passed away. After a few more years of requested continuances by Larson, the district court ordered that no more continuances would be granted. Larson proceeded to file a last-minute motion with a doctor's note claiming an injury, that did not match the letterhead, and she did not show up for the trial the next day. The district court denied Larson's motion and granted Prime Rate a default judgment with an award of $964,530.48. Larson appealed, claiming that the denial of a continuance and entry of a default judgment abused the court's discretion.

The court of appeals found that the district court's denial of a continuance fell firmly within its scheduling discretion, especially when litigation had dragged on for over 4 years and six trial dates. Additionally, the court found that the district court did not abuse discretion when it ordered a default judgment against Larson because: 1) Larson acted in bad faith, 2) Prime Rate was prejudged; 3) the court provided adequate warnings; and 4) less drastic sanctions had already been attempted to ensure compliance and failed.

Channel View East Condo Ass'n, Inc v Ferguson, No 344149 (Mich Ct App July 2, 2019) (Unpublished)

Plaintiff's articles of incorporation were executed in January 2001 and the first board of directors were elected in April of 2001. The articles did not provide for a term for the first board of directors, but it stated that the directors will be elected pursuant to the bylaws. The bylaws stated that the electing of the board of directors is to take place during member/co-owner meetings. Further provided in the bylaws, the first meeting of members was to take place "no later than 120 days after legal and equitable title to 75% of the condominium units have been conveyed to non-developer co-owners' which would have been around July 2003. However, no such meeting was ever called.

In 2005, plaintiff informed defendant that he was in violation of the bylaws for failing to complete construction on his house within 12 months. Plaintiff scheduled a hearing and defendant failed to appear. Plaintiff started imposing monthly fines on defendant until the building was complete. In October 2016, Plaintiff initiated a lawsuit to seek foreclosure and sale of defendant's property and moved for summary disposition under MCR 2.116(C)(10). Defendant argued the suit should be dismissed under MCR 2.116(C)(5) because plaintiff lacked the legal capacity to sue as it never held any membership meetings to elect a valid board of directors. The trial court agreed and dismissed plaintiff's claims.

The court of appeals found that nothing in the documents state that the board's powers would be divested in the event that the first meeting did not occur. Additionally, the rule allowing directors of a board to carry over their terms in the absence of an annual meeting was implicitly adopted in the Nonprofit Corporation Act. Specifically, under MCL 450.2402, the "failure to hold the annual meeting at the designated time," "on a date designated in the bylaws," "does not affect otherwise valid corporation acts." Most importantly, MCL 450.2402 permits a board of directors to carry over their terms when an annual meeting does not take place. The trial court's order is reversed and remanded for further proceedings.

Power Invs, LLC v SL EC, LLC, 927 F3d 914 (6th Cir 2019)

Michael Becker, a Missouri resident, through the corporation, SL EC, LLC, wished to purchase a power plant in St. Louis. In order to complete the purchase, SL EC secured financing from Power Investments, incorporated in Nevada and has one member (Mason Miller) who lives in Lexington, Kentucky. After negotiations, Becker ultimately signed a purchase agreement with another Missouri entity, Ashley Energy, for the plant but the sale fell apart at closing. Power investment bought out Becker's controlling interest in Ashley Energy and followed through on the power plant deal.

After determining Becker had not been completely honest with Power Investments, they filed the suit in state

court in Kentucky for fraudulent misrepresentation and unjust enrichment. Becker removed the Kentucky case to federal court based on diversity jurisdiction and then motioned to dismiss it for lack of personal jurisdiction. The motion to dismiss was granted and Power Investments appealed.

To exercise jurisdiction over an out-of-state individual, the federal court must satisfy the long-arm statute. There are also two types of personal jurisdiction against a defendant, general and specific. General jurisdiction requires defendant's generic connections to the state, i.e. it regularly does business there or resides there. Specific jurisdiction requires focus to be on the affiliation between the forum and the underlying issue.

In this case, though Becker never entered Kentucky, he initiated the relationship with a Kentucky resident (Miller), he communicated with him extensively, and accepted a buy out of the power plant. Becker's alleged misrepresentations in these communications constituted the core of Miller's fraud claims. This satisfied the specific jurisdiction over the defendant. Additionally, the causes of action arises from Becker's communications into Kentucky and it is reasonable to hold him to account in the state where his fraud occurred.

The court of appeals reversed the district court's dismissal of the case for lack of personal jurisdiction and remand.

Index of Articles

(vol 30 and succeeding issues)*

**For cumulative index from volume 16, go to http://connect.michbar.org/businesslaw/newsletter.*

ICLE Resources for Business Lawyers

Books

Michigan Business Torts, Second Edition

Edited by Edward H. Pappas, Thomas G. McNeill, and Daniel D. Quick

Learn to quickly answer questions about any business tort; draft confidentiality agreements and employee policies to avoid problems before they arise; obtain results without litigation through effective demand letters loaded with substantive arguments; and prepare the best complaint, answer, discovery request, or brief in support of summary disposition with black letter statements of law.

Print Book: $149.00 **Online Book/0-4 Lawyers:** $189.00
Online Book/5-29 Lawyers: $299.00 ***Product #: 2003555640***

Michigan Real Property Law, Third Edition

By John G. Cameron, Jr.

This book is cited in more than 180 federal and state court opinions. It is the most authoritative, practical, and comprehensive source for real property law in Michigan. With this book, you will have answers to every real property law question asked; in-depth coverage of property cases and statutes, from the earliest law to the latest developments; expert analysis of the law by one of Michigan's leading real property experts; and a comprehensive starting point for research on any real property law issue.

Print Book: $199.00

Product #: 2004557120

Seminars

Business Entity Update 2019

Presented by Michael S. Melfi, Douglas L. Toering, and James L. Carey

Cosponsored by the Business Law Section of the State Bar of Michigan. Stay ahead of the current trends in business entity law. Position your business clients to seek additional funding or investments. Identify and manage minority shareholder oppression issues and seek appropriate remedies when necessary. Draft to avoid or mitigate disputes and mandate the involvement of decision makers in dispute resolution.

On-Demand Seminar **Now Available!**
General fee: $95 ***Seminar #: 2019CT1126***
Section Members: $85
ICLE Partners: Free **New Lawyers:** $45

Liquor Licenses 101

Presented by Michael Cole, Sara Weber, and Max H. Matthies

Cosponsored by the Business Section of the State Bar of Michigan. Guiding your client through the liquor licesing process can seem daunting. Get best practice tips from a practitioner and the Michigan Liquor Control Commission (MLCC) licensing director.

On-Demand Seminar **Now Available!**
General fee: $95 ***Seminar #: 2019CT1193***
Section Members: $85
ICLE Partners: Free **New Lawyers:** $45

cosponsored by

The State Bar of Michigan

The University of Michigan Law School

Wayne State University Law School

Western Michigan University Cooley Law School

University of Detroit Mercy School of Law

Michigan State University College of Law

The education provider of the State Bar of Michigan

1020 Greene Street
Ann Arbor, MI
48109-1444

Phone
Toll-Free (877) 229-4350
or (734) 764-0533

Fax
Toll-Free (877) 229-4351
or (734) 763-2412

www.icle.org
(877) 229-4350

Notes

SUBSCRIPTION INFORMATION

Any member of the State Bar of Michigan may become a member of the Section and receive the *Michigan Business Law Journal* by sending a membership request and annual dues of $35 to the Business Law Section, State Bar of Michigan, 306 Townsend Street, Lansing, Michigan 48933-2012.

Any person who is not eligible to become a member of the State Bar of Michigan, and any institution, may obtain an annual subscription to the *Michigan Business Law Journal* by sending a request and a $35 annual fee to the Business Law Section, State Bar of Michigan, 306 Townsend Street, Lansing, Michigan 48933-2012.

CHANGING YOUR ADDRESS?

Changes in address may be sent to:

Membership Services Department
State Bar of Michigan
306 Townsend Street
Lansing, Michigan 48933-2012

The State Bar maintains the mailing list for the *Michigan Business Law Journal*, all Section newsletters, as well as the *Michigan Bar Journal*. As soon as you inform the State Bar of your new address, Bar personnel will amend the mailing list, and you will continue to receive your copies of the *Michigan Business Law Journal* and all other State Bar publications and announcements without interruption.

CITATION FORM

The *Michigan Business Law Journal* should be cited as MI Bus LJ.

DISCLAIMER

The opinions expressed herein are those of the authors and do not necessarily reflect those of the Business Law Section.

SBM
State Bar of Michigan

PRSRT STD
U.S. POSTAGE
PAID
SAGINAW, MI
PERMIT NO. 269

BUSINESS LAW SECTION
State Bar of Michigan
306 Townsend Street
Lansing, Michigan 48933-2012

Brendan J. Cahill
Publications Director

Published in cooperation with
The Institute of Continuing
Legal Education
Kanika S. Ferency
Staff Lawyer
Christine Mathews
Copy and Production Editor

SECTION CALENDAR

Council Meetings

DATE	TIME	LOCATION
October 4, 2019*	12:00 p.m.	Grand Rapids, MI
December 7, 2019	10:00 a.m.	Bloomfield Hills, MI

*Annual Meeting