LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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MICHIGAN LEGISLATURE REPEALS RIGHT TO WORK AND REINSTATES PREVAILING WAGE

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In late March, the Michigan legislature made two major changes to Michigan's labor law. On March 24, 2023, Governor Gretchen Whitmer enacted legislation (SB 34) that repeals Michigan so called "right to work" law, which prevents collective bargaining agreements that require covered workers to join or pay dues to the unions that represent them. In addition to repealing "right to work," Governor Whitmer also signed legislation that reinstates Michigan's prevailing wage law that requires union-level pay and benefits for any publicly funded state construction projects.

1.

Michigan's amendment to the Labor Mediation Act, MCL 423.1 et seq ("LMA"), is the first repeal of "right to work" in the nation since 1965 when Indiana lawmakers repealed "right to work" in the Hoosier State. Indiana reinstated "right to work" in 2012.

Prior to this legislation, Michigan and 26 other states prohibited labor agreements that impose mandatory union membership or the payment of dues or service fees as a condition of employment. In 2012, a Republican majority legislature and Governor Rick Snyder enacted Michigan's "right to work" law, Public Act 348 of 2012. For over a decade, Michigan unions have learned to adapt and survive under "right to work." Under "right to work" free riding employees shared the benefits of what their unions were able to accomplish through negotiations without sharing in the cost. The amendment eliminates free riders and could lead to union security clauses that require non-paying employees to pay their fair share for the benefits they gain and enjoy through their union.

The amended law allows private sector employers and the unions who represent their workers to bargain over and include union security clauses in their collective bargaining agreements. Negotiated union security clauses require employees who are covered by a collective bargaining agreement to pay union dues or a service fee to their bargaining representative as a condition of employment. Union security clauses are a mandatory subject of bargaining under the National Labor Relations Act and an employer violates its duty to bargain in good faith under the Act when it refuses to bargain over it. *NLRB v. General Motors Corp.,* 373 U.S. 734 (1963).

Additionally, the amended law provides that local governments "must not prohibit or limit an agreement that requires all bargaining unit employees, as a condition of continued employment, to pay to the labor organization membership dues or service fees." This language prohibits Michigan municipalities from creating ordinances that prohibit union security clauses in labor agreements.

These amendments will likely go into effect in March 2024, which is 91-days after the expected ending of the Michigan legislative session.

As noted by Governor Whitmer this legislation will "restore workers' rights, protect Michiganders on the job, and grow Michigan's middle class."

2.

In addition to repealing "right to work," the Michigan legislature took steps to ensure that skilled, qualified, and ethical contractors work on state funded construction projects when it reinstated Michigan's prevailing wage law.

Michigan's Prevailing Wage Act, MCL 408.551, *et seq* ("PWA") required contractors who worked on state funded construction and maintenance projects to include prevailing wage and benefits provisions in their contracts with the State. MCL 408.552, repealed by 2018 PA 171. Specifically, the PWA required contractors, on state funded projects, to pay wages and benefits at the rate that prevails on projects of a similar character in the relevant locality under collective bargaining agreements.

In 2018, following a voter-initiated petition, the Michigan legislature repealed the PWA, that was originally enacted in 1965. Opponents of the PWA argued that the fifty-three-year-old was outdated and that a repeal of the law would save taxpayer money on public work projects and increase competition for construction projects.

On March 24, 2023, Governor Whitmer signed into legislation PA 10 of 2023 and reinstated the Michigan PWA. The new law reinstates the requirement that contractors on state funded construction projects pay prevailing wages and fringe benefits that the new law also includes enforcement provisions that allows state regulators to hold unscrupulous contractors responsible for violations of the PWA. Violators of the reinstated PWA may be fined up to $5,000 and the state may terminate its contract with the unlawful contractor.

Additionally, the reinstated PWA prohibits employers from retaliating against employees who report or are about to report a violation or suspected violation of the law. Under the new law, employees who believe their employer retaliated against them for

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

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reporting a violation of the PWA may file a complaint with the Michigan Department Labor and Economic Opportunity ("LEO") within 90 days of the retaliatory act. The new law creates establishes a "rebuttable presumption of retaliation if an employee was removed from the project or not provided similar overtime, work hours, or other opportunities available prior to the retaliatory action." If the state determines that retaliation occurred, it is authorized to order reinstatement and backpay.

These pieces of legislation mark a watershed moment in Michigan's labor history and represent a return to Michigan's roots as a state that supports organized labor, working class citizens, and workers' rights. The repeal of "right to work" eliminates free riders and helps level the playing field between organized labor and employers. The reinstatement of the PWA will ensure that major state-funded construction projects are done by responsible contractors who value their employees and their contributions to a growing Michigan. The current legislative session is still young and only time will tell if we can except to see more worker orientated legislation. ■

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For information and publication guidelines, contact *Lawnotes* editor John Adam at jgabrieladam@gmail.com.

EMPLOYEES' RIGHT TO USE EMPLOYER EMAIL FOR UNION COMMUNICATIONS

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The winds of change may be blowing over at the National Labor Relations Board with respect to an issue that impacts both employers and unions. Can an employer implement a rule which restricts employees' ability to utilize the employer's email system for union communications?

The question is perhaps not so settled as many practitioners may have believed. An Advice Memorandum of the NLRB General Counsel issued August 2022, 50 NLRB Advice Mem. Rep. 30, concerning *Crosby's Drugs, Inc.,* Case 09-CA-288304, suggests there may be some shakeups with respect to that question in the near future. That Memorandum recommended issuance of a complaint alleging that an employer who implemented an email policy prohibiting the use of pronouns in an email signature line, directly in response to an employee's engaging in protected concerted activity, and terminated an employee who discussed discrimination and wages in the workplace, violated Section 8(a)(1) of the National Labor Relations Act (NLRA).

Of particular interest is that the General Counsel urges Regions to use *Crosby's Drugs* as a vehicle to overturn *Caesars Entertainment,* 368 NLRB No. 143 (2019) and "request that the Board adopt a standard under which employees have the right to use employer email and other electronic communications systems for nonbusiness purposes, absent a showing by the employer of special circumstances that justify restrictions." Overturning *Caesars Entertainment* would signal a significant change to the current standard on this issue.

The Memorandum issued with respect to *Crosby's Drugs* suggests that the Biden Board may be gearing up to return to the *Purple Communications, Inc.,* 361 NLRB 1050 (2014) rule with respect to union communications via employer email; *Purple Communications* was overturned by *Caesars Entertainment.* The Board found in *Purple Communications* that an employer which gives its employees access to its email system must presumptively permit employees to use that email system for statutorily protected communications during non-work time, only allowing an employer to rebut that presumption by showing special circumstances exist which make restrictions necessary to maintain productivity.

Caesars Entertainment reversed that decision and found that *Purple Communications* constituted a departure from longstanding Board precedent. In *Caesars Entertainment,* the Board adhered to well-established precedent set forth in *Lockheed Martin Skunk Works,* 331 NLRB 852 (2000) and *Register Guard,* 351 NLRB 1110 (2007) providing that, absent discrimination, employees have no statutory right to use an employer's equipment or media, including email, for Section 7 communications. *Caesars Entertainment* contemplated whether an employer violated Section 8(a)(1) of the NLRA by implementing a rule which prohibited employees from using an employer's email system to send "non-business information," to include union communications between employees. In that case, the Board held that employers generally have the right to impose nondiscriminatory restrictions, to include an outright ban, on the use of employer-owned IT systems for non-work purposes, in keeping with *Lockheed Martin Skunk Works* and *Register Guard.*

Now, a return to the *Purple Communications* rule may be on the horizon if the NLRB General Counsel Advice Memorandum concerning *Crosby's Drugs* is any indication. A return to the *Purple Communications* rule would constitute a significant change to protections for employees engaging in Section 7 communications and would substantially impact an employer's ability to restrict use of its email systems. Should the NLRB overturn *Caesars Entertainment,* employees would have a much broader ability to use employer email to engage in protected concerted activities, including to communicate regarding union matters. Further, overruling *Caesars Entertainment* could even have implications for public employees in Michigan and communications protected by Section 9 of the Public Employment Relations Act (PERA) as well.

The Michigan Employment Relations Commission (the Commission) has, including during its examination of this particular issue, often looked to the NLRB for guidance and support in making its own decisions. The Commission has addressed whether an employer may restrict employee use of its email systems for engaging in activity protected by Section 9 on several occasions, and in doing so has included an analysis of both decisions of the Board and advice memoranda from the NLRB General Counsel. In *City of Saginaw,* 23 MPER 106 (2010), the Commission specifically acknowledged that it adopted the NLRB's holding in *Lockheed Martin Skunk Works* in reaching its conclusion in *Oakland County,* 15 MPER 33018 (2001), which sets forth the prevailing rule on this issue for public employees in Michigan.

In adopting *Lockheed Martin Skunk Works'* holding, the Commission did clarify that although an employer has discretion to implement rules restricting use of its email system, an employer may not exercise that discretion in a content-discriminatory manner, such as by allowing non-work-related emails as long as they do not contain union-related information. The Commission's willingness to adopt the Board's analysis and recommendations on similar issues suggests that the impact of a decision to return to the *Purple Communications* rule could reach even public employees in Michigan.

The Commission's current rule concerning restriction on use of an employer's email system as recited in *Oakland County* and *City of Saginaw* predates *Caesars Entertainment,* but is nearly identical to the rule set forth therein by the NLRB nonetheless; an employer may lawfully restrict the use of its email system to work-related purposes, but may not discriminate against communications protected by Section 9 of the PERA. The Commission acknowledged in *Oakland County* that although an employer may prohibit all non-work communications on its email system, to include union communications, once an employer grants even occasional personal use of its email system during work

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hours, the employer may not lawfully exclude union activities as a subject of discussion.

In arriving at its conclusion in *Oakland County,* the Commission saw fit to examine several of the NLRB's on-point decisions. As stated, the Commission relied heavily on the Board's decision in *Lockheed Martin Skunk Works*. Further, the Commission even examined several NLRB General Counsel Advice Memoranda in its Decision and Order, finding them relevant and even assigning them some weight in making a decision in that case.

The Commission's willingness to grant substantial weight to a GC's Memorandum in other cases suggests that even without the NLRB explicitly overturning *Caesars Entertainment,* change could be on the horizon for public employers and their employees in Michigan. Regardless of whether the NLRB does end up making a sweeping change to the state of law by officially overturning *Caesars Entertainment* right now, its intentions may have become clear already. It will certainly be interesting to see whether the current Commission will see fit to expand the rights of employees with respect to the exercise of Section 9 rights via employer email based on the GC's Memorandum; keep an eye on cases that will give the Commission an opportunity to reexamine the issue. ■

— Letter to the Editor —

Bruce A. Miller

Reading John Adam's article in *Lawnotes* about the connection between Chief Justice Charles Evans Hughes and William T. Gossett (Spring 2023) caused me to remember that I was once represented by Mr. Gossett many years ago.

In my fight to overcome an adverse decision of the State Bar's Character and Fitness Committee that deemed me, an anti-Communist socialist, unfit to be a lawyer, I had the good fortune of being represented in my appeal by Mr. Gossett. In the course of our relationship, Mr. Gossett recounted stories about his father-in-law Chief Justice Hughes, such as the time Hughes had lunch in a DC club with an African-American friend, breaking the color bar, and as Governor of New York Hughes supported seating Socialist Party Candidates who had been elected to office. Mr. Gossett said he would never see the day when a Socialist (me) would not be allowed to practice law in Michigan. I have cherished my relationship with him throughout my career. Thank you *Lawnotes* for reminding me.

A PRIMER ON THE PREGNANT WORKERS FAIRNESS ACT

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The legal landscape for pregnant employees has long been unclear and disjointed. While the Pregnancy Discrimination Act ("PDA") of 1978, amending Title VII of the Civil Rights Act of 1964 ("Title VII"), prohibited employment discrimination on the basis of pregnancy, childbirth, or medical conditions related thereto, it did not set forth any statutory requirements that employers provide reasonable accommodations for pregnant employees. 42 U.S.C. §§ 2000e *et. seq*. Accordingly, pregnant employees with work restrictions have had to challenge employer-accommodation practices as discriminatory under the PDA, or, alternatively, make do with the protections afforded under the Americans with Disabilities Act ("ADA"), which requires employers to provide reasonable accommodations to employees with certain conditions related to pregnancy that qualify as a disability, such as gestational diabetes. Yet, many common pregnancy-related conditions are not contemplated by the ADA. This gap in federal law has failed to account for the most common pregnancy-related employment scenarios, such as a typical pregnancy with a temporary need for reasonable accommodation, like a basic lifting restriction, or morning sickness, or in the event of miscarriage.

The long-awaited Pregnant Workers Fairness Act ("PWFA"), which goes into effect on June 27, 2023, seeks to fill the gap in federal protections for pregnant employees. The Congressional purpose of the Act is "[t]o eliminate discrimination and promote women's health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition." H.R. 1065.

Who is covered?

The PWFA applies to employers with 15 or more employees and protects employees or applicants who, with or without reasonable accommodation, can perform the essential functions of their position, with a few exceptions. An employee is protected under the Act, *even if* they cannot perform the essential functions of their position, if their inability to perform is merely temporary or could be performed "in the near future," or if their inability to perform can be reasonably accommodated. This is a notable departure from the ADA, which limits protections to employees who "with or without reasonable accommodation, can perform the essential functions" of the position, without exception. 42 U.S.C.A. § 12111(8).

What protections are provided?

The PWFA specifically prohibits the following:

(1) Denying "reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions," unless the employer can demonstrate that the accommodation would impose an undue hardship on business operations;

(2) Requiring a qualified employee to "accept an accommodation other than any reasonable accommodation arrived at through the interactive process";

(3) Denying "employment opportunities" to a qualified employee because of the employee's need for accommodation;

(4) Requiring a qualified employee to take paid or unpaid

leave if another reasonable accommodation can be provided.

The PWFA likewise has broad anti-retaliation provisions, mirroring those set forth in the ADA, articulating that it is unlawful to:

(1) Take adverse action in the terms, conditions, or privileges of employment because the employee requested or utilized a reasonable accommodation;
(2) Discriminate against an employee for opposing an act or practice unlawful under the Act, "or because employee made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act";
(3) "[C]oerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of such individual having exercised or enjoyed, or on account of such individual having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act."

What defenses are provided?

The Act provides employers with an affirmative defense to claims alleging a failure to accommodate. In order to prevail on the affirmative defense, the employer must demonstrate "good faith efforts, in consultation with the employee[,] . . . to identify and make a reasonable accommodation that would provide such employee with an equally effective opportunity" without causing undue hardship to the employer.

Key Terms Explained

• *Reasonable accommodation.* The PWFA adopts the meaning of "reasonable accommodation" previously set forth in the ADA, which defines the term to include modifications or restructuring of a disabled employee's work environment or position, so they may successfully perform a job. See 42 U.S.C. § 12111(9). The Act requires the Equal Employment Opportunity Commission ("EEOC") to issue applicable regulations within two years of the Act's effective date, which will specifically include examples of reasonable accommodations. Presumably, this list will include light duty assignments, reassignment of heavy lifting duties, work schedule modification, temporary leave, and providing time and space for employees to express milk.

• *Known limitations.* The PWFA defines "known limitations" as a "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee's representative has communicated to the employer" whether or not the condition is a qualifying disability under the ADA. The PWFA, unlike the ADA, does not include an illustrative list of qualifying conditions.

• *Related medical conditions.* The PWFA does not define "related medical conditions," but the same language is used in the PDA. The Sixth Circuit has held that this term extends protections "to the whole range of matters concerning the childbearing process." *Kocak v. Community Health Partners of Ohio, Inc.,* 400 F.3d 466, 469 (6th Cir. 2005) (internal citations omitted). This broad interpretation would logically extend to a variety of scenarios, including morning sickness, sciatica, gestational diabetes, miscarriage, lactation or the need to express breast milk, recovery from abortion, injuries from childbirth, and postpartum depression, among others.

• *Undue hardship.* The PWFA adopts the meaning of "undue hardship" previously set forth in the ADA, which defines the term to mean "an action requiring significant difficulty or expense" in light of the nature of the accommodation, the employer's financial resources, and the impact on the operation of the facility among other factors. See 42 U.S.C. § 12111(10).

• *Interactive process.* The PWFA adopts the meaning of "interactive process" as construed under the ADA, as the ADA does not explicitly define the term. Applicable regulations articulate that, in order to determine an appropriate reasonable accommodation under the ADA, the employer may have to "initiate an informal, interactive process" with the disabled employee. 29 C.F.R. § 1630.2(o)(3). "This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." *Id.*

Interplay with Other Civil Rights Laws

While the PWFA is intended to fill the gap between the PDA and the ADA, there is significant interplay amongst these laws, as well as others. It is conceivable that a plaintiff could have claims under the PDA, ADA, and PWFA, as well as the Family and Medical Leave Act ("FMLA"), the Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"), Michigan's Elliott-Larsen Civil Rights Act ("ELCRA"), and Michigan's Persons with Disabilities Civil Rights Act ("PDCRA").

However, it is clear that the PWFA provides unique rights not previously afforded to pregnant, or recently pregnant, employees, despite the ubiquity of the situations it addresses, and also expands access to rights provided under the above legislation. For example, absent an undue burden to the employer, non-FMLA qualifying pregnant employees are now entitled to temporary medical leave following childbirth, miscarriage, or abortion. Similarly, while the recently enacted PUMP Act requires covered employers to provide employees with reasonable breaks to express milk (and a private space) for one year after a child's birth, the PUMP Act applies to employers with more than 50 employees. The PWFA, with its lower threshold of just 15 employees, reaches the employees not protected by the PUMP Act.

The PWFA likewise provides rights absent from state legislation, which continues to lag behind even the 45-year-old PDA. Whereas the PDA prohibits discrimination on the basis of an employee considering or obtaining an abortion, the ELCRA specifically excludes from its protections employees who have obtained a nontherapeutic abortion. See *Kocak,* 400 F.3d at 470; MCL 37.2202(1)(d). In terms of accommodating pregnant employees, unless the employee has a qualifying disability under the PDCRA, and has provided written notice to their employer within 182 days, an employer does not have an affirmative duty to accommodate an employee, pregnant or otherwise. MCL 37.1101 *et seq.*

Key Takeaways

- The PWFA provides an affirmative right to reasonable accommodations in the workplace for current and formerly pregnant employees in a broad range of pregnancy and childbirth related scenarios, even if the employee cannot temporarily perform the *essential* functions of their position;
- The Act requires employers to engage in an interactive process to determine a reasonable accommodation for covered employees;
- The PWFA prohibits covered employers from requiring a qualifying employee to take leave, whether paid or unpaid, if another reasonable accommodation exists;
- The Act prohibits retaliation for exercising rights under the Act, opposing violations under the Act, or assisting individuals in exercising their rights under the Act. ■

THE LAW QUADRANGLE, THE ADRIAN COURTHOUSE, AND OTHER MICHIGAN TEMPLES OF JUSTICE

Stuart M. Israel

The Law Quadrangle at the University of Michigan is "beautiful and functional" opines the Society of Architectural Historians in *SAH Archipedia*. The Law Quad "recalls the design of the colleges of Oxford and Cambridge and of the Inns of Court in London." And, in my day, it was a short walk from Krazy Jim's Blimpy Burger.

The Law Quad and various "temples of justice"—county courthouses—are included in historian and photographer Jeff Morrison's book of text and hundreds of color photographs, called *Guardians of Michigan—Architectural Sculpture of the Pleasant Peninsulas* (Univ. of Mich. Press 2022).

The Law Quad and eight courthouses are among the architecturally-noteworthy Michigan structures covered by Morrison, along with many other college and university buildings, schools, public and private office buildings, churches, cemeteries, banks, the State Capitol building, the Detroit Zoo, and more.

Morrison's title, of course, alludes to the state motto—*si quaeris peninsulam amoenam circumspice*—if you seek a pleasant peninsula, look about you. If you seek interesting discussion and photos of architecturally-noteworthy designs and sculptures that are part of the Law Quad, county courthouses, and other Michigan structures, look in Morrison's beautifully-produced book.

1. The Law Quadrangle

The William W. Cook Law Quadrangle, on the University of Michigan's Ann Arbor campus, at 625 South State Street, is the site of Michigan's law school. The Law Quad looks exactly like a law school ought to look.

That was the intention of William W. Cook (1858-1930) whose gift funded the Quad buildings: "Believing that the character of the law schools determines the character of the legal profession, I wish to aid in enlarging the scope and improving the standards of the law schools by aiding the one from which I graduated."

The Law Quad was built between 1922 and 1933. Cook closely supervised the design and construction of the Quad until his death in 1930.

The Law Quad has four connected buildings: **(1)** the Lawyers' Club, with common areas, guest rooms for visiting "legal scholars, judges, and attorneys," a dormitory wing, and a dining facility "which resembles a Medieval chapel"; **(2)** the John P. Cook dormitory; **(3)** Hutchins Hall, the classroom building; and **(4)** the Legal Research Building—the law library.

The Law Quad houses more than 200 law students. The Lawyers' Club dormitory wing, completed in 1924, has three "vaulted passages" leading from South University Avenue to "the inner green space of the Quad." The center passage has a "monumental five-story tower." The John P. Cook dormitory building, completed in 1930, named after William Cook's father, is across Tappan Avenue from the Martha Cook Building, a women's dormitory also funded by Cook, completed in 1915, named after his mother, and also included in Morrison's book.

The law library—with "its towers and enormous" perpendicular windows—"resembles an English Gothic cathedral, except that its main entrance is centered on the long side and not at the end as it would be on a cathedral." Mastering *Marbury v. Madison* and figuring out who gets Blackacre in the library's awe-inspiring reading room seemed (almost) to be sanctified undertakings.

The Quad is a collegiate Gothic complex with a large central courtyard crisscrossed with flagstone pathways. The Quad is notable for its "gabled dormers, crocketed and pinnacled buttresses, Byzantine-domed towers, arched windows with tracery, oriel bays, and ornamental chimneys." The buildings are "richly finished" in Massachusetts granite "trimmed with Indiana limestone covered with ivy."

A 1981 addition to the law library was "built entirely underground" so as not to "negatively affect the unified aesthetic impact of the original Quadrangle structures." In 2012, the law school added a new academic building at 701 South State Street and a glass-roofed commons area, a "gathering place" for the law school "community." The new building also is in the collegiate Gothic style, the law school writes, and was "built by specialized masons using antiquated techniques and stone from the same quarry" that supplied stone for the original structures.

The original buildings have roofs "clad with slate," windows "filled with stained glass," and "floors of marble." The buildings are detailed with sculptures, caricatures, and stone-carved words and likenesses of "great jurists" like Blackstone, Coke, Cooley, Grotius, Justinian, Marshall, Solon, Story, and Webster.

These architectural elements and more, made accessible by Morrison's photographs, combine to create what *SAH Archipedia* calls "a dignified setting for a scholarly discipline founded on centuries of precedent."

The descriptions mostly come from Morrison and *SAH Archipedia*, but they took the words right out of my mouth—words like tracery, oriel bays, and crocketed and pinnacled buttresses. I add, based on my lived experience, that a lot of frisbee was played on those flagstone pathways crossing the Quad's inner green space, and that some of that Byzantine stuff influenced professorial presentations in the classrooms.

2. The Law Quad's Sculptures, Carvings, Caricatures, and Other Details

Morrison's text and photographs pay particular attention to architectural details—the sculptures, stone-carvings, caricatures, and other decorative art. The details, displaying Gothic style and 1922-1933 sensibilities, simultaneously reflect the solemn dignity and the unavoidable humor and irony that come with the discipline and practice of law.

One stone-carving photographed by Morrison depicts an "owl over a legal tome, representing the knowledge to be gained from books." The owl's left eye is closed. Morrison writes that some claim the "winking owl is a secret symbol of an underground society of hidden world leaders." But "perhaps," Morrison continues, the owl is "simply warning students to not believe everything they read." Or both.

The variously smiling, frowning, pained, goofy, closed-eyed, wide-eyed, and bemused stone-carved Gothic-style caricature faces on the dormitory building, Morrison writes, are based on Medieval models and "run the gamut of emotions a person may experience as a student at Michigan."

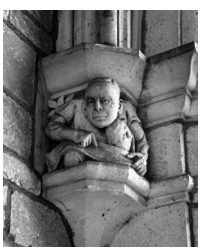
Corbels—decorative supports for carved figures—in the east passageway into the Quad "use a sports motif to represent the seasons"—"football for autumn." Morrison's photograph shows a frowning Gothic-style player hugging a football with both hands, wearing—oblivious to safety—headgear with no face protection.

Other carved Gothic-style caricatures represent grape-stomping and harvesting agricultural workers and three professions employed "to erect the law quad"—a "draftsman," a "surveyor," and an "architect." Another depicts a "barrister," representing the aspirations of the Law Quad's occupants.

The Quad's west passageway has Gothic-style caricature figures representing four legal specialties: "a navigator for maritime law, an engineer for patent law, a soldier for military law, and a physician for medical law."

The "upper reaches" of the "cathedral-like" law library towers display 48 carved state seals. Elsewhere, a "winged hourglass" carving evokes the Latin phrase *tempus fugit*—time flies—which Morrison calls "an unintended but poignant reminder" of Cook and others "so deeply involved in the planning and design of the Law Quad" who died before the project was completed in 1933.

Corbels in the center passageway hold Gothic-style reliefs portraying the first six university presidents, including Harry B. Hutchins, who also had been the law school dean, for whom Hutchins Hall is named, and James B. Angell, whose name is on the majestic Doric-columned Angell Hall, also included in Morrison's book.



Angell Hall, at 435 South State Street, a short distance from the Law Quad, was designed by Albert Kahn and completed in 1924. It has much impressive architectural art of its own, extolling Western civilization and including the university's stone-carved motto—*Artes, Scientia, Veritas*—which Morrison translates as "arts, science, truth."

Not mentioned by Morrison—perhaps beyond his book's scope—are the often-wry law-themed cartoons on the leaded glass windows throughout the first floor of Hutchins Hall. One, titled *Larceny,* depicts a man studying a wall-sign warning "Beware of Pickpockets"—while another man is picking his pocket. Another, titled *Barratry,* depicts a man with a briefcase—a lawyer, no doubt—loitering in front of a wall-sign reading "Hospital—Ambulance."

The cartoons can be seen at repository.law.umich.edu/cartoons/, but are well worth an in-person tour of the classroom building's interior, complimenting your worthwhile tour of the Law Quad's august and amusing exterior. Your tour of the Law Quad will be well-guided by Morrison's informative text and precise photographs that do admirable justice to their architectural subjects.

Morrison footnotes two more-detailed sources, both published by the University of Michigan Press: (1) Kathryn Horste, *The Michigan Law Quadrangle: Architecture and Origins* (1997) and (2) Ilene H. Forsythe, *The Uses of Art: Medieval Metaphor in the Michigan Law Quadrangle* (1993).

3. Michigan Courthouses

Morrison's book also includes county courthouses in Adrian, Alpena, Cassopolis, Gladwin, Hillsdale, Ionia, Midland, and Paw Paw. All are interesting, but the one that most resonated with me was the Lenawee County courthouse on Main Street in Adrian, built in 1885.

I had the (dubious) pleasure of appearing there some decades ago, representing a criminal-defendant who, it seemed, was quite unpopular with the judge which, it seemed, made me quite unpopular with the judge. Our unpopularity with the judge was exacerbated by the Michigan Supreme Court's intercession favorable to my client. On the pleasant side, the outside of the courthouse looked exactly how a stately late-19th-Century courthouse ought to look.

I understand that in the 1980s most court functions moved from the historic courthouse to a newer building across the street. *Tempus fugit.*

I learned from Morrison's book that the Lenawee County courthouse is the fourth of eight "monumental ornate courthouses" designed by Toledo architect Edward O. Fallis, built in Michigan and four other states between 1880 and 1889. Six are still standing. All had multiple entrances and central towers, and all were situated in the center of their own city blocks. The Adrian courthouse's "mark of distinction" is its "beautiful red terra cotta reliefs."

One of those reddish-orange clay-based reliefs, photographed by Morrison, is a "portrait" of the Shawnee leader Tecumseh (c.1768-1813), "namesake" of the Michigan town located about 10 miles from Adrian. Tecumseh—the town—was the first settlement

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THE LAW QUADRANGLE, THE ADRIAN COURTHOUSE, AND OTHER MICHIGAN TEMPLES OF JUSTICE

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in the county, founded in 1824, and the site of the first Lenawee County courthouse.

The Adrian courthouse's central tower—132 feet high—includes a cupola that once was publicly accessible, allowing a view of the distant spires of Tecumseh—the town. The "primary entrance features a three-story tall pavilion with a second-story loggia"—an outdoor gallery—"under a large arch and a hipped roof."

The exterior of the courthouse displays a terra cotta "belt course" of alternating reliefs of the "flaming torch of justice" and the "hand of peace." Elsewhere, a terra cotta relief shows a Roman helmet and the "armaments of war." Another shows a farmer's hat and a rake and other agricultural "tools of peace."

The outside of the Adrian courthouse, Morrison writes, and his photos show, has been "very well maintained since it was built and looks almost brand new." But, Morrison reports, the "inside is a very different story."

"Changing styles, needs, technology, and safety regulations have turned the interior into an unappealing mishmash that barely resembles the glorious chambers that greeted the people of Adrian when this 'temple of justice' opened in 1885." When Morrison was writing his 2022 book, a "plan to restore the interior of the building to its former glory" was underway.

In "Appendix A—Other Structures of Note," Morrison references (and includes one photographed detail for each) the county courthouses in Ann Arbor, Baldwin, Bessemer, Caro, Charlotte, Corunna, Luddington, Menomonee, and Sault Ste. Marie.

Another book, by John Fedynsky—*Michigan's County Courthouses* (Univ. of Mich. Press 2010)—in text and black and white photos—offers brief histories of the courthouses in all 83 Michigan counties and of the various locations of the Michigan Supreme Court, which presently resides in the postmodern, Doric-columned, horseshoe-shaped, domed Hall of Justice in Lansing, displaying its ideals inscribed in stone: Freedom, Equality, Truth, and Justice.

4. Other Noteworthy Legal-Architectural Sites in Michigan

Other noteworthy legal-architectural sites, in my view, are the Marquette County courthouse in the Upper Peninsula and the Theodore J. Levin U.S. Courthouse in Detroit.

The Marquette courthouse is another stately "temple of justice," built in 1902-1904 on a hill, mainly of local red sandstone, in a Neo-Classical Revival/Beaux Arts style, with granite Doric columns and a copper dome.

In the style of its day, the second-floor courtroom has balcony seats for observers to watch the wheels of justice turn slowly but grind exceedingly fine.

My experience in the Marquette courthouse also goes back some decades, to a time just after the mahogany-and-marble-appointed domed courtroom had been restored to its original specifications, freshly painted, and carpeted, as I recall, in gold and dark red.

The (black and white) courtroom scenes in the 1959 movie *Anatomy of A Murder* were filmed in that courtroom. The 1958 best-selling novel, on which the movie was based, was written by "Robert Traver," the *nom de plume* of UP lawyer and Michigan Supreme Court Justice John D. Voelker (1903-1991).

In 1913, the same courtroom saw the libel case brought by Theodore Roosevelt, former Republican president and more recent Bull Moose candidate who campaigned in Michigan before the 1912 election. Roosevelt sued the publisher of Ishpeming's newspaper, who wrote that Roosevelt "not that infrequently" was drunk. During the week-long trial, the publisher admitted that his accusation was "mistaken." Vindicated, Roosevelt asked for "nominal damages." The jury awarded him six cents, the price of a newspaper.

The federal courthouse on Lafayette Boulevard in Detroit, built in Art Moderne/Art Deco style from 1932 to 1934, during "the height of the Great Depression," is on the national register of historic places. The building is included in another book of text and photographs by Jeff Morrison, *Guardians of Detroit—Architectural Sculpture in the Motor City* (Wayne State Univ. Press 2019).

The courthouse's "stern governmental presence" is "somewhat relieved" by eight "elegant friezes" at the building's corners, between the sixth and seventh floors, depicting government workers in action. Morrison includes photographs of three friezes. One panel, representing the post office, was "cast backward," and depicts the Postal Service eagle and seal "facing the wrong way." Close enough for government work, but still impressive.

Notable is the courthouse's singular ornate two-story courtroom—rooms 732-734—designed "to impress all those who entered its confines with the power and glory of justice."

That courtroom "was salvaged from the previous [1897] federal building that occupied the site." The original courtroom was "painstakingly taken apart" and "reconstructed in the present building." It "features walls of solid marble from all around the United States, inset medallions of Mexican onyx, friezes featuring thirty-six unique lion heads topping each wall, and intricately carved wood throughout, including a judge's bench of East Indian mahogany."

The courtroom, reported MLive in 2015, "is filled with elaborate carvings." One decorative image depicts "centurion figures holding two tablets representing the Ten Commandments," symbolizing recorded law passing through generations. Another depicts Deborah, the fourth, and first woman, judge in the Hebrew Bible.

Built with 30 different kinds of marble, the seventh-floor courtroom was called Detroit's "million dollar courtroom"—measured by 1931 standards. Its "Romanesque style" presents a "stark contrast" to the "stripped, neo-classical and modernistic details typical of the other courtrooms" in the building.

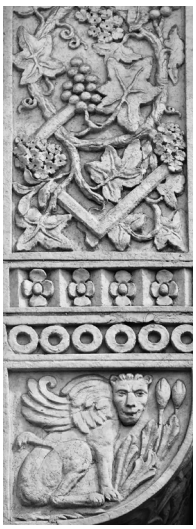
Morrison's 2022 book, in Appendix A, references the federal courthouses in Flint (on Church Street, near Court Street), Kalamazoo, Lansing, and Marquette.

It also references the 1927 Washington Square Building in Royal Oak where I had my law practice for years.

Conclusion

Much of the art decorating the Law Quadrangle and the "temple of justice" courthouses is high above eye level or in obscure places—and easily may be missed in the humdrum rush to class or because of preoccupation with the chaos of motion day or trial. Morrison's text and photographs alert us to the art around us.

Morrison makes the architectural details accessible and demonstrates how the art, with majesty and humor, reminds us of "the power and glory of justice" and that we practice a "scholarly discipline founded on centuries of precedent" and human experience. ■



On William W. Cook

William W. Cook was born in Hillsdale and educated there and in Ann Arbor. Cook's father "made a fortune as a merchant, a railroad contractor, and a land and timber speculator and was very influential in local and state politics," Morrison writes.

After completing law school in 1882, Cook moved from Michigan to New York City, then "the most technologically advanced city in the world." He became a successful corporate lawyer, treatise author, and scholar. He also invested "wisely" and became "quite wealthy."

Cook was a "prescient" philanthropist who recognized that a "public university could not achieve greatness relying solely on taxpayer support." He believed that the "character of the law schools forecasts the future of America." Cook gave life to his convictions in the form of the "beautiful and functional" Law Quadrangle.

But Cook was flawed. Henry R. Grix wrote in his July 2011 *Michigan Bar Journal* review of Margaret A. Leary's book—*Giving It All Away—The Story of William A. Cook and His Michigan Law Quadrangle* (Univ. of Mich. Press 2011)—that Cook was an "enigmatic" and "elusive and contradictory figure."

As Grix reports, Cook displayed "prickliness" in his relations with the law school dean about Law Quad construction priorities. Cook, "briefly and unhappily" married to Ida Olmstead Cook, was "stingy in settling his divorce." Cook subscribed to a less-than-inclusive "pecking order for the world's peoples." He "fiercely" held "prejudiced social views" and "strongly" antisemitic opinions.

Cook's former wife contested his will. She challenged Cook's bequest to the law school, and claimed that their divorce 32 years earlier was invalid. Apparently in "financial distress," Mrs. Cook accepted "a modest lifetime annuity in settlement of her will contest." She years earlier had moved to North Dakota, but "ended up living in Ann Arbor." For a time she lived at the Michigan Union (at 530 South State Street), across from the Law Quad her late husband did not live to see completed.

Mrs. Cook "reportedly wandered the streets of Ann Arbor asking 'whether anyone wanted to know about William Cook's sex life.'" Grix reports that author (and retired Michigan law library director) Leary expressed—tongue in cheek, no doubt—"disappointment that she was unable to learn what Mrs. Cook had to say on the subject."

Should the university remove Cook's name from law school structures based on innuendo about his sex life or because, it seems, Cook was elitist, privileged, prejudiced, antisemitic, and misogynistic?

Does presentism compel the university to bulldoze the Law Quadrangle because its visionary designer and generous benefactor had personal flaws?

I vote no. First, let those without sin bulldoze the first stone. Second, *ars gratia artis*. Third, as the law school itself says, the Law Quad's "beauty and functionality" contribute to the law school's "programmatic success," to "student satisfaction," and to the law school's "ethos of collegiality and accessibility." The Quad, says the law school, "physically as well as metaphorically enhances" the law school's "true living and learning community."

Contrary to Mark Antony (per Shakespeare), like the good, the evil that people do sometimes is "interred with their bones." The "beautiful and functional" Law Quadrangle looks good and does good. Let Cook's legacy be. *Ars longa, vita brevis.*

Stuart M. Israel

40 DO'S AND DONT'S FOR ARBITRATORS AND ADVOCATES

Steven H. Schwartz
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Certain "do's" and don'ts" affect the quality of representation and neutral decision-making in arbitration. Having served as an advocate and arbitrator in both grievance and employment arbitration for decades, I have seen many of the do's and don'ts.

I have identified 40 rules, 20 for arbitrators and 20 for advocates. But these rules are not absolute, there may be a reason not to follow the rule in a given context. Although many of the rules are common sense, but some advocates and arbitrators don't follow these rules.

I expect most advocates have seen others violate these rules, but not themselves! I hope I do not do any of the Don'ts and hope I do the Do's. But if I *do or don't,* let me know.

ARBITRATORS

DONT'S

1. *Don't appear disinterested and – do not fall asleep.* The hearing will probably be held in a small room. The parties will pay close attention to the arbitrator's body language and demeanor. While the dispute may seem minor, it isn't, otherwise, the parties would have resolved it before the hearing.

2. *Don't take on the role of an advocate; don't interject yourself in the examination of a witness.* The arbitrator must be totally neutral. If one side has an inexperienced or inept advocate, the arbitrator's role is not to level the playing field; rather, it is to make sure each side gets an equal opportunity to present its case.

3. *Don't issue a ruling based on an interpretation neither side argued during the hearing or in post-hearing briefs.* An arbitrator coming up with a third interpretation of contract language is providing his/her own brand of industrial justice. Perhaps the parties don't want that interpretation because it is unworkable, or they have rejected it in collective bargaining.

4. *Don't push the parties to settle if they don't want to.* The arbitrator's role is to issue a decision because the parties are unable or willing to settle. While at least one side will walk away unhappy with the result, in time that party will recognize that it had it's "day in court".

5. *Don't rush the hearing if it is moving along at a reasonable pace.* If the hearing is scheduled to run from 10:00 a.m. to 5:00 p.m., the parties are paying for the arbitrator's time and attention for the whole day. If the advocates are moving the case along, they should be allowed to present their full case, as long as they are doing it at a reasonable pace.

6. *Don't take more than thirty days to issue an award, unless an unexpected medical issue prevents you from doing so.* Only important disputes go to a full hearing. Whether the dispute involves a discharge of an employee, or a contract interpretation issue that affects most of the bargaining unit, the parties are entitled to a prompt answer. If the arbitrator cannot render a decision within thirty days, he/she should decline the appointment.

7. *Don't act like you (the arbitrator) are the smartest one in the room.* The arbitrator is the least informed person at the hearing, having never read the contract, and being unaware of the facts or how the parties interact with one another. The purpose of the hearing is to educate the arbitrator, not for the arbitrator to pontificate on how the parties should act.

8. *Don't "split the baby" attempting to keep both sides happy.* This worked for King Solomon to render a proper decision, however, rarely does "baby splitting" appropriately address a disciplinary dispute. If the employee was improperly disciplined, that employee should be given full back pay. If the employee was properly disciplined, "just cause" means that a reasonable penalty should be upheld.

9. *Don't give advice in the award on how the parties should proceed in the future.* The arbitrator's role is to interpret the contract and apply the facts. The arbitrator is not a consultant. The parties will figure out how to implement the outcome of the award.

10. *Don't charge more than two days of study and drafting the award for each day of hearing unless there are extensive exhibits to review.* Arbitrators should only bill for the time they spend on a case, not what they would like to earn. If the arbitrator feels that three or more days for each day of hearing will be required to render a decision, that should be disclosed as early as possible to the advocates, so that an alternative - such as a stipulation of facts or narrowing the exhibits - can be explored.

DO'S

1. *Describe in detail the reasoning behind the award.* Nothing is more unsatisfying for the parties than reading a cursory award, without knowing why it won or lost. The arbitrator's detailed, well-reasoned award increases the likelihood that each party believes the arbitrator considered the matter carefully. It will also give guidance to the parties in the future of how the same type of issue should be handled, whether it is discipline or contract interpretation.

2. *In the award, summarize the arguments made by each party.* As a practical matter, this process helps the arbitrator synthesize the arguments and then apply them to the facts and contract language. Like the previous "Do", the parties are more likely to accept the decision and feel that both sides received a fair hearing.

3. *Disclose to the parties any possible conflict of interest, no matter how seemingly far-fetched it is.* The mantra is "disclose, disclose, disclose". Disclosure greatly reduces the opportunity for a legal appeal of an arbitrator's award. It also underscores the integrity of the process.

4. *Tell the advocates in advance any COVID protocols you intend to follow (masking, setting up the room, distance between participants).* Arbitrators tend to be "seasoned citizens" and thus more likely to be susceptible to serious illness from being infected. Witnesses and advocates may have very different perceptions of the seriousness of COVID and what preventative steps are appropriate precautions. It is likely that reasonable preventative steps can be taken if there is advance notice of what measures are to be employed.

5. *Do ask questions for clarification of factual issues that are unclear to the arbitrator.* While an arbitrator should not interject in the middle of a direct or cross-examination, at appropriate times, it is proper to identify a factual matter that needs clarification. A

well-reasoned decision is grounded on a clear understanding of the facts. The parties are well versed in the contract language and the employer's operations and jargon; the arbitrator is not.

6. *Be consistent in evidentiary rulings; if one side is allowed to testify to its interpretation of the contract, then the other side must be allowed to testify to its interpretation.* The "strike zone" can be large or small, provided it is the same size for both sides. If one witness is allowed to testify about his/her understanding of the contract term, the other side must be allowed to submit opposing testimony – recognizing that it is only that witness' interpretation.

7. *Be flexible in scheduling; if a hearing is rescheduled to another date close in proximity and the hearing is held on the adjourned date, waive the cancellation fee. Cancellation fees drive the parties crazy.* If a hearing is postponed for a short time, and then held on the rescheduled date, there is no justification to charge a cancellation fee.

8. *Allow out of town witnesses, whose testimony is expected to be brief, to testify virtually, through ZOOM or another platform.* While most parties still prefer in-person hearings, if it is inconvenient to bring in a witness who is a long distance from the hearing or whose testimony is brief, virtual testimony can be adequately assessed for credibility.

9. *Pro-rate the per diem charge, rather than a full day if a second day of hearing does not involve considerable travel or a significant amount of time.* Arbitration is supposed to be faster and cheaper than litigation. If less than a full day is needed for the second day of hearing and significant travel time is not involved, the per diem charge should be pro-rated.

10. *Do give the parties as much time as they need to try to settle during the hearing if they request an opportunity to talk.* The arbitrator is typically scheduled to be present for the full day. The parties will be happier with their own settlement rather than receiving an award from the arbitrator. The arbitrator should bring other work to do at the hearing while the parties are discussing settlement.

ADVOCATES

DONT'S

1. *Don't show up late.* Lawyers would not dream of showing up late to court. The same courtesy should be shown to the arbitrator, opposing advocate and witnesses. By being late, the advocate convers the message that he/she is disorganized and does not consider the matter to be important.

2. *Don't ask for an extension to file a brief if you don't really need it.* Extensions delay the resolution of the issue that is important to the parties. Post-hearing briefs and arbitration awards become harder to write the longer the period after the hearing has closed.

3. *Don't claim "facts" in your post-hearing brief that are not supported by evidence on the record.* Nothing undercuts the persuasiveness of an argument by asserting "facts" that were not presented at the hearing. If it was not mentioned at the hearing, it should not be argued in the post-hearing brief.

4. *Don't conduct a direct examination with leading questions, other than introductory, foundational or background information.* Most witnesses are intelligent and articulate. With preparation, they can testify in a coherent manner, with appropriate recollection of facts. Continually asking leading questions significantly reduces the credibility and persuasiveness of the testimony.

5. *Don't be argumentative for the sake of being adversarial.* Making appropriate objections to testimony or exhibits is part of good advocacy. Too many times, advocates simply object to something the other side proposes, without thinking about the consequences of the objection. If it does not impact the outcome of the case, what is the purpose of making an objection?

6. *Don't expect the arbitrator to have read any exhibits prior to the hearing.* Experienced arbitrators do not read exhibits prior to the hearing because a large number of cases settle before the hearing starts. Further, exhibits may have a different meaning or importance if they are placed into context at the hearing through an opening statement and testimony.

7. *Don't waive the opening statement or defer it until later in the hearing.* The opening statement is the first chance for persuasion. It puts future testimony and evidentiary objections in context. If given at the beginning of the hearing, it presents the roadmap for the hearing and counterbalances the opposing party's opening statement. By the time the case gets to the hearing, there should not be any surprises for the other party in the opening statement.

8. *Don't bring a written motion to dismiss the case to the hearing which raises timeliness or some other technical defense.* Arbitration is not litigation in court. The arbitrator is not going to adjourn the hearing or delay its presentation because of a last-minute filing of a motion. Either the motion to dismiss should have been submitted weeks prior to the hearing, or the arbitrator will consider the technical defense when issuing the final award.

9. *Don't contact the arbitrator in an ex parte conversation, or contact the arbitrator directly if a third-party arbitration service is administering the case.* Fairness dictates that communication with the arbitrator only be conducted in the presence of the opposing advocate.

10. *Don't fail to have the cell phone numbers of the arbitrator if a hearing needs to be unexpectedly cancelled due to unavailability of a critical witness or inclement weather.* The arbitrator may be travelling a considerable distance to get to the hearing. The arbitrator would rather receive a phone call at 5:30 a.m. that the hearing is cancelled than travelling through bad weather or for several hours, only to learn the hearing is cancelled when he/she arrives at the hearing location. Given the prominence of COVID and other viruses, last minute cancellations are likely to happen.

DO'S

1. *Use a topic sentence to indicate you are moving onto a different subject in your direct examination.* For example, start with: "Let's talk about what happened when you returned to work. What day did you return to work?". This is a useful tool to signal a change in topic in the examination and therefore should not be considered an improper leading question.

2. *Write at least the Statement of Facts of the post-hearing brief the same week as the hearing.* Particularly, if the advocates have to rely on handwritten notes and not a court reporter's transcript, the writer's memory of the testimony fades significantly each day after the hearing. While a polished product does not have to be done immediately, a more accurate recitation of the testimony will result if the initial draft is made promptly after the hearing.

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40 DO'S AND DONT'S FOR ARBITRATORS AND ADVOCATES

(Continued from page 11)

3. *Agree to taking witnesses out of order unless that prejudices your case.* Particularly if the witness' testimony is short or a delay will result in additional hearing dates, the arbitrator will likely allow a witness to be taken out of order. The possibility of taking a witness out of order should be raised as soon as possible with the opposing advocate.

4. *Be respectful to the opposing advocate.* Labor relations is not litigation. Relationships between the parties and the advocates, good or bad, will continue after the hearing is completed. Both parties will fare better if the advocates act as if the dispute is between the parties, not between them.

5. *On direct examination, present the case in chronological order, if possible.* The arbitrator walks into the room knowing nothing about the case. The easiest way for the arbitrator to synthesize facts is if they are presented in a chronological order.

6. *Pre-mark exhibits with adequate copies prior to the hearing, to avoid wasting time at the beginning of the hearing.* Considerable time can be wasted at the beginning of the hearing, marking documents and verifying that either side has identical exhibits. Exhibits should be marked as "Union No. __" or "Employer No. ____" without putting a number on them in advance.

7. *Remember that at the start of the hearing the arbitrator knows nothing about the employer's operation, the contract, or the nature of the dispute.* Everyone in the hearing knows what the contract says, what the dispute is about and how the organization operates – except the arbitrator. The opening statement and the structure of the presentation should be geared to educate the arbitrator, to be persuasive.

8. *Be cognizant of the cancellation fee; if you are going to try to settle the case, make the cancellation fee cutoff date the unofficial deadline to settle the case, not the morning of the hearing.* The cancellation fee cutoff creates a deadline for the parties to settle. If the case can be settled, do it before the cancellation fee, not at 9:59 a.m. the day of the hearing.

9. *If the case is settled, be clear which side is responsible for telling the arbitrator the case is settled, so that the arbitrator does not incur travel time or expenses to go to the hearing; be clear which side, or both, pays any fees to the arbitrator.* The arbitrator should know in advance not to travel to the hearing because it has settled. That only happens if both parties make an effort to notify the arbitrator and verify that it is settled.

10. *If the case is settled at the hearing, put the key elements of the settlement on the record.* Either a court reporter should make a transcript or, if there is no court reporter, the advocates should make a written outline of the settlement. There will be less likelihood that a settlement will fall apart because both parties did not accept a key term of the settlement when it is reduced to writing.

CONCLUSION

The quality of advocacy and the decision-making process are greatly affected by how the advocates and arbitrator conduct themselves. These principles increase the likelihood that the arbitrator is conducted in a fair, thorough and appropriate manner. ■

WHAT ATTORNEYS MUST DO TO IMPROVE HEALTHSPAN

Dr. Joel Kahn

What is the number 1 cause of death in attorneys? If you guessed heart disease, you are right. In fact, heart disease is the number 1 cause of death for all professions. Yet, there are numerous studies showing heart disease can be largely prevented, and even reversed, if a lifestyle pattern of 8 habits is followed. The 8 habits are called Life's Essential 8 (LE8) by the American Heart Association. What are these LE8 habits attorneys should adopt to have a longer and healthier career?

1. **Eat better.** Aim for an overall healthy eating pattern that includes whole foods, lots of fruits and vegetables, lean protein, nuts, seeds, and cooking in non-tropical oils such as olive and canola.
2. **Be more active.** Adults should get 2 ½ hours of moderate or 75 minutes of vigorous physical activity per week.
3. **Quit tobacco.**
4. **Get healthy sleep.** Most adults need 7-9 hours of sleep each night. Adequate sleep promotes healing, improves brain function, and reduces the risk for chronic diseases.
5. **Manage weight.** Achieving and maintaining a healthy weight has many benefits. Body mass index, a numerical value of your weight in relation to your height, is a useful gauge. Optimal BMI is 25. You can calculate it online or consult a health care professional.
6. **Control cholesterol.** High levels of non-HDL, or "bad," cholesterol can lead to heart disease. Your health care professional can consider non-HDL cholesterol as the preferred number to monitor, rather than total cholesterol, because it can be measured without fasting beforehand and is reliably calculated among all people.
7. **Manage blood sugar.** Most of the food we eat is turned into glucose (or blood sugar) that our bodies use as energy. Over time, high levels of blood sugar can damage your heart, kidneys, eyes and nerves. As part of testing, monitoring hemoglobin A1c can better reflect long-term control in people with diabetes or prediabetes.
8. **Manage blood pressure.** Keeping your blood pressure within acceptable ranges can keep you healthier longer. Levels less than 120/80 mm Hg are optimal. High blood pressure is defined as 130-139 mm Hg systolic pressure (the top number in a reading) or 80-89 mm Hg diastolic pressure (bottom number).

Does it really matter if you strive for Life's Essential 8? A recent research project assessed survival in 23, 000 participants judged by their success at the 8 measures of health. Starting at age 50, the estimated life expectancy at age 50 years was 27 years, 33 years, and 36 years in participants with low (LE8 score <50), moderate (50≤ LE8 score <80), and high (LE8 score ≥80) cardiovascular health, respectively. Equivalently, participants with a high LE8 score had an average 8.9 more years of life expectancy at age 50 years compared with those with a low LE8 score.

Striving for a high LE8 score is imperative to counterbalance the stressful lives that most attorneys lead. On average, 9 years of extended lifespan is up for grabs even if you wait to age 50 to get your lifestyle in order. Imagine the benefits if you were to adopt most or all of the LE8 at age 30 or 40? ■

MICHIGAN REPEALS RIGHT-TO-WORK LAW

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For more than a decade, public- and private-sector workers in Michigan enjoyed the freedom to refrain from or resign membership with labor organizations. Under Michigan's so-called "right-to-work" law, workers could not be compelled to financially support unions through compulsory dues, fees and other charges. Soon that will be no more, at least for some.

On March 24, 2023, the Democrat-controlled Legislature and Governor Gretchen Whitmer enacted 2023 PA 9, repealing Michigan's right-to-work law. The new law repealed statutory language that gave employees the right to refrain from joining or supporting a union. It also added a provision allowing unions to bargain with employers for an agency-fee provision in their collective bargaining agreements. Under the new law, employees are free to opt out of union membership, but dues and fees related to the union's bargaining and representative obligations can again be compulsory where unions and employers agree (at least in the private sector, for now).

The passage of the law raises a host of issues, new and old. The first set deal with the timing and effect of the new law. The new legislation did not receive immediate effect so it will not take effect until 90 days after this legislative session, per Const 1963, art 4, sec 27. As of today, the Legislature is not scheduled to adjourn its regular session until December 2023. Accordingly, the repeal of the right-to-work law is not likely to go into effect until early 2024. In the meantime, some existing contracts may have mandatory dues clauses that are automatically triggered if the law prohibiting mandatory dues is, as has now happened, repealed. For those that do not have "trigger" language, unions may seek to either re-open existing contracts or negotiate successor agreements to those that are due to expire soon. For any new agreement, federal law, 29 U.S.C. § 158(a)(3), requires the union to wait at least thirty days after that agreement becomes effective to enforce the agency fee provision.

Once agency-fee provisions take effect, there may be some lingering uncertainty about what they authorize private-sector unions and employers to do (more on public-sector workplaces below). First, it may seem obvious, but it is worth reiterating: agency fees are not the same as union dues. Although private-sector employers and unions can compel workers to pay a fee to unions as a condition of employment, that is not the same as union membership. *Pattern Makers v. NLRB,* 473 U.S. 95 (1985) makes it unlawful for a union or employer to compel a worker to become or remain a full union member. It is also still unlawful under 29 U.S.C. § 186(c)(4) for a union and employer to enter into an agreement that compels workers to have their fees directly deducted from their wages or to deduct such fees without their authorization.

Second, despite the statutory language, unions are not necessarily entitled to collect agency fees that are equal to the full amount of union dues. *Communication Workers v. Beck,* 487 U.S. 735 (1988) ruled that nonunion members have a right to object to paying an amount equivalent to full union dues and to pay a reduced fee that equals their share of what the union can prove is its costs of collective bargaining. Very often, that fee will be less than the full dues amount. And unions still have a duty to inform nonmembers of their *Beck* rights and to show the math behind their calculation of an agency fee amount.

The new legislation will have far less impact on the public sector. That's because *Janus v. AFSCME,* 138 S. Ct. 2448, 2479 (2018) held that the First Amendment prohibits public employers and unions from imposing agency fee provisions on nonconsenting public-sector workers. Thus, even without the right-to-work legislation, public employees still have a constitutional right to refrain from financially supporting the union. Despite this constitutional hurdle, the Legislature nonetheless enacted zombie legislation, repealing the right-to-work provisions in Michigan's Public Employment Relations Act and making a new provision authorizing agency fees effective if *Janus* is ever reversed or abrogated by the U.S. Supreme Court or constitutional amendment. Because that is unlikely to happen in the foreseeable future, as a practical matter, public employees continue to enjoy the same freedom to work as they did under the right-to-work scheme.

That is not to say that unions have given up trying to compel financial support in other ways. Even before the repeal of the right-to-work legislation, some public sector unions were devising ways to work around *Janus* and the right-to-work legislation, adopting internal union policies that required nonunion members to pay for representation services like grievance handling. *Tech, Profl & Officeworkers Assn of Michigan v Renner,* 335 Mich App 293 (2021), granting lv to appeal, 982 N.W.2d 170 (Mich. 2022) held that such compulsory fees are unlawful under PERA. It did note, however, that the Legislature could amend PERA to expressly authorize fee-for-service policies, notwithstanding any curtailment it may have on the union's duty of fair representation. *Id.* at 316–317.

The Legislature, presumably aware of the *Renner* decision, specifically chose not to include language authorizing compulsory grievance fees for nonmembers. Thus, although the repeal of the right-to-work legislation removed language granting the statutory right to refrain from union support, public employees' constitutional right to refrain remains intact, and the one and only provision relating to financial contribution—agency fees—is inoperable for the indefinite future. Until that happens, or until the Legislature amends PERA to authorize fee-for-service arrangements, public sector unions remain prohibited from exacting any kind of financial support from nonunion members, including for direct representation services. ■

THE MDCR "DIVERSITY, EQUITY AND INCLUSION IMPLICIT BIAS TRAINING SOLUTION" AND THE ENGLISH LANGUAGE

John G. Adam

Winston Churchill urged his 1940 war cabinet to write memos using short words and "crisp paragraphs" without "padding" and "jargon." George Orwell wrote an essay called "Politics and The English Language," warning that "language can corrupt thought." William Zinsser wrote: "We are a society strangling in unnecessary words, circular constructions, pompous frills, and meaningless jargon." Strunk and White advise that good writing should, among other things, "be clear" and "avoid fancy words."

I believe Churchill, Orwell, Zinsser, Strunk and White would not approve the style in the Michigan Department of Civil Rights (MDCR) document titled "Diversity, Equity and Inclusion (DEI) Implicit Bias Training Solution." (https://perma.cc/RNP4-2DNM at p. 8-11).

Michigan now requires "implicit bias" education for healthcare providers. A March 2023 notice from Licensing and Regulatory Affairs (LARA) announces that an Implicit Bias training "requirement" was adopted for all "professions licensed or registered under the Michigan Public Health Code" including doctors, nurses, therapists, chiropractors, acupuncturists, and others (veterinarians excepted). Implicit Bias training is required as a condition for initial licensure and registration as well as for license renewal. (https://perma.cc/9E73-4ND2).

The MDCR training addresses, among other things:

1. how to "experience equitable opportunities";
2. understanding "racialized ideology that impacts us all as well as the intersectionality and multilayer complexity of systems created around socially constructed categories";
3. how to "raise levels of consciousness and cultural competency";
4. "long-term implementation of equitable practices, policies and procedure";
5. "culturally conscious approach";
6. how to "proactively anticipate unintended consequences";
7. how to "operationalizes equity";
8. "multiple tactics for engagement and experiential learning";
9. "how each one of us experience [sic] cultural difference and commonality";
10. "intercultural development continuum";
11. things "personally impeding us from engaging more effectively across cultural differences";
12. "group profile that helps the group understand its ranges of orientation and degree of intercultural competence"; and
13. "proactively embracing diversity, equity and inclusion as a [sic] number one priority."

Clear? Consider the MDCR definition of "implicit bias":

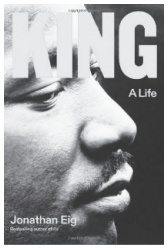
> [It] means an attitude or internalized stereotype that affects an individual's perception, action, or decision making in an unconscious manner and often contributes to unequal treatment of people based on race, ethnicity, nationality, gender, gender identity, sexual orientation, religion, socioeconomic status, age, disability, or other characteristic.

To be sure that this 47-word sentence is not too narrowly applied, the nine enumerated "unequal treatment" factors are followed by the endlessly inclusive "or other characteristic."

At one point, MDCR charged for its Implicit Bias training—$1,400 for a 4-hour in-person class, $1,000 for a "virtual" class. Perhaps displaying lack of confidence in the ability of the training to occupy the attention of trainees, MDCR instructed that during "virtual sessions" participants were "expected to keep cameras on during the presentation."

Such training may be in lawyers' future, too. If so, I hope it is more succinct and precise than the MDCR version. "Somehow it seems to fill my head with ideas—only I don't exactly know what they are," wrote Lewis Carroll. ■

Summer Reading



Jonathn Eig, *King: A Life* (Farrar, Straus and Giroux, 2023).

Louis Armstrong, *Satchmo: My Life in New Orleans* (Da Capo Press, Reissued 1986.)

Laura Kalman, *FDR's Gambit—The Court Packing Fight and the Rise of Legal Liberalism* (Oxford University Press, 2023).

Tom Hutton, *Hitler's Maladies and Their Impact on World War II* (Texas Tech University Press, 2023).

Chun Han Wong, *Party of One: The Rise of Xi Jinping and China's Superpower Future* (Avid Reader Press/Simon & Schuster, 2023).

Yang Jisheng, *Tombstone: The Great Chinese Famine, 1958–1962* (Farrar, Straus and Giroux, 2008).

John G. Adam

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

The good news is there is light at the end of the tunnel.
The bad news is there is no tunnel.

Shimon Peres

As regular readers of this column know, after I hear opening statements in a labor arbitration I take the advocates out in the hall for a chat. I ask if they have talked about settlement. I'm amazed at how often the answer is no.

The most common reason is, "I just got the file." Evidently, there are partners out there who think it is good practice to hand cases over to their young associates the night before an arbitration. Perhaps they believe it builds character. Or perhaps they failed to prepare properly, and they prefer to have the associate take the heat. Or maybe they just don't care. In any case, it's malpractice.

The next most common reason I hear for failing to discuss settlement is: "We have confidence in the strength of our case." That's fine. I wouldn't expect to see you in arbitration if you didn't have confidence in the strength of your case. But the unwillingness to discuss settlement does not signal strength and confidence. It signals pigheadedness.

"We are always willing to talk" is a sound philosophy for an advocate and a good reputation to have. (We are not talking about armed hostage-takers here. If you deal with armed hostage-takers you may not want to have a reputation for being willing to negotiate. You may, *in fact,* be willing, but you would want to keep your willingness secret.)

In the context of labor arbitration, viewing the other side as the enemy is a profound mistake. I'm not saying management and labor are on the same side. They are not. But they are, or should be, in the same universe of discourse. They should cooperate where they can and compete where they must. It's not complicated.

The next excuse I hear for having failed to discuss settlement is: "If I settle this one, it will just encourage them to do it again." Management says, "If I settle this one, the Union will just file more frivolous grievances." The Union says, "If I settle this one, it will only encourage the Employer to violate the CBA more flagrantly and behave more imperiously in the future." Both sides say, "We must police the contract. If we let them get away with this, then next time they will blah blah blah blah blah."

Look, I don't run a company or a union. And I understand the lawyer is often not the one calling the shots. But from where I sit it looks like reasonableness pays. You do a reasonable job in this case, settle if you can, litigate if you must, and the other cases will take care of themselves.

Then there's this story. I had heard a few cases for this union. I did what I do, and we had reached settlement in three or four cases in a row. The Employer, the Grievant, and the Union Rep had all signed off. I was feeling pretty good about it. Then I got a call from the Union President. He asked me to come in and see him. We sat down alone in his conference room, and he told me he didn't want me to settle any more of his cases. Losing was fine. "If we lose, we lose," he said. But no more settlements.

I don't have any of the details. This was a long time ago, and there's no one left to ask. But my sense is this guy had run for president and gotten elected on the platform that the previous union leadership was in bed with the Employer and wouldn't go to the mat for the membership. And, dammit, he would have none of that sniveling on his watch.

It took a while, but eventually the membership figured out the guy was a showboat, this was a particularly expensive and self-defeating strategy, and they kicked him to the curb.

My point is the same as it usually is. Settlement is good. It's a mistake to depend on arbitrators to solve your problems. We don't know what you know. Contracts are imperfect and incomplete. The adversarial system is deeply flawed. Arbitral authority is limited, and our "remedial imagination" is severely constrained. You are in the best position to do what needs to be done.

There is light at the end of the tunnel, but there is no tunnel. You have to dig it. ■

PROPOSED SENATE BILL WOULD REQUIRE MICHIGAN EMPLOYERS TO PREPARE AND DISCLOSE JOB DESCRIPTIONS UPON DEMAND

Marianne J. Grano
Kienbaum Hardy Viviano Pelton & Forrest, P.L.C.

With its newly seated trifecta—Governor, House, and Senate—Michigan Democrats have been busy enacting legislative measures aimed at widening protections for employees. Most notable thus far have been a repeal of Right-To-Work and re-enactment of Michigan's Prevailing Wage Law. But further changes may be coming during the legislative session. Recently, Senator Mallory McMorrow—joined by six other Democratic senators—proposed Senate Bill 142, which would amend the Bullard-Plawecki Act to "require preparation and disclosure of job descriptions and other information regarding certain positions."

There is little to explain the reasoning behind this proposed bill, apart from Senator McMorrow's statement that SB 142 is intended to "increase transparency between employees and employers and protect from potential predatory practices." While this bill, if enacted, would appear to be unique among American states, it is like European-style laws such as the European Union's Written Statement Directive and the United Kingdom's Employment Rights Act.

As written, the proposed Michigan bill will require the creation and maintenance of job descriptions for every job listing:

- A list of the essential duties and responsibilities.
- A description of the skills, training, and effort required to perform the job.
- The working conditions and schedule under which the job is performed.
- Salary information, including the pay scale, if any.

The employer would have to provide this job description to any job applicant "during the recruitment, hiring, or promotion process" and to an "employee upon request." Further, the proposed law would not allow an employer to "apply" a revised job description to an employee "until the employee has been given an opportunity to review and initial the revised job description." It is this provision that is particularly concerning in its ambiguity; a restriction on an employer's ability to "apply" a job description suggests that an employer might violate Bullard-Plawecki by assigning an employee duties not set forth in their existing job description.

For small businesses in particular, this could interfere with an employer's flexibility to assign employees to deal with novel issues that arise in the workplace, if not previously spelled out in a job description. And Bullard-Plawecki provides penalties for non-compliance including actual damages, costs, potential attorney's fees, and an additional $250 fine for willful violations.

That said, the Senate Bill does not purport to limit how broadly duties could be defined—and, in this sense, the risk of the "application" provision might be easily avoided with careful drafting. For instance, if a job description lists as a duty "the performance of all other tasks to be assigned in the sole discretion of management," then presumably novel or unusual job duties could be assigned without risking a violation. In this sense, the bill may be much like so-called "Pay Transparency" laws (enacted in New York and elsewhere) that require the disclosure of salary ranges without mandating how large those ranges may be. As recently reported by Forbes magazine, some employers have taken to listing extremely wide salary ranges that technically comply with the requirement, but disclose little about actual salaries for employees.

Ultimately, whether or not Michigan mandates job descriptions, job descriptions are often helpful tools for protecting an employer from liability in employment-based lawsuits. For instance, a job description containing objective minimum qualifications may create a legitimate, nondiscriminatory reason to deny a job applicant lacking those skills a position.

Job descriptions can also help define essential functions of a job, which may be relevant to claims under the Americans with Disabilities Act. But employers should think carefully about the language used in those job descriptions to avoid the appearance of discriminatory animus. For instance, a job that requires an employee to travel from place to place around a facility might require "movement" rather than "walking," thus covering potential employees who use a wheelchair or other mobility aids.

The bill should provide all employers with a reminder of the issues that may arise if they provide written job descriptions and to re-evaluate those descriptions for potential benefits or risks. ■

WRITER'S BLOCK?

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

EEOC TO EXAMINE BIAS IN ARTIFICIAL INTELLIGENCE TOOLS USED IN HIRING

Michelle C. Ruggirello
Kienbaum Hardy Viviano Pelton & Forrest, P.L.C.

Automation and artificial intelligence are transforming workplaces. It is estimated that nearly every Fortune 500 company—and perhaps three-quarters of all employers—use some form of automated software as part of their hiring processes. But AI and automated software can inherit biases based on their programming. For example, the Washington Post reported recently that an artificial intelligence program trained on billions of images and associated captions on the Internet started to associate the term "homemaker" with images of women, and the term "janitor" with images of people of color.

Given this risk of automated bias creeping into the workplace, the EEOC has expressed its interest in evaluating the interplay between artificial intelligence and discriminatory hiring practices. In 2021, the EEOC launched an agency-wide initiative to ensure that AI, machine learning, and similar software would not lead to hiring and other employment decisions that violate federal civil rights laws. Last year, the EEOC issued technical guidance explaining that the use of algorithmic software in hiring decisions could screen out disabled candidates in violation of the Americans with Disabilities Act.

But now, the EEOC has signaled its intent to put the weight of its enforcement tools behind its AI initiative. In January, the EEOC released its five-year draft Strategic Enforcement Plan (SEP) for 2023-2027, in which it expressed its desire to focus enforcement actions on decisions, practices, or policies by which technology contributes to discrimination, including automatic resume screening software, hiring software, chatbot software for hiring, and video interviewing tools.

The EEOC has also brought its first automated-software discrimination case. In *EEOC v. iTutorGroup Inc.,* pending in the Eastern District of New York, the EEOC claims that the employer's hiring algorithm automatically rejected female applicants over the age of 55, and male applicants over the age of 60. The Complaint alleges that a prospective employee was instantly rejected after inputting her actual birthdate into the application software—but the next day, when reapplying with the same application but putting a birthdate that made her seem younger—was offered an interview. The EEOC claims that over 200 qualified applicants were rejected because of their age.

While the *iTutorGroup* lawsuit alleges that the algorithm in question was intentionally designed to discriminate against older applicants, even inadvertent bias could lead to employer liability under a disparate impact theory. The EEOC's SEP identifies as a subject-matter priority "the use of automated systems, including artificial intelligence or machine learning, to target job advertisements, recruit applicants, or make or assist in hiring decisions where such systems intentionally exclude or *adversely impact* protected groups."

Employers should remain vigilant and take steps to ensure that AI-driven hiring tools do not perpetuate bias or otherwise discriminate against applicants based on protected characteristics. Additionally, employers are encouraged to work with legal counsel and HR professionals to develop best practices for implementing AI-driven tools in their hiring processes.

After reviewing a draft of this article, my colleague and editor Tom Davis asked the most advanced public AI Chatbot (Open AI's Chat GPT-4) what its biggest concern was with using AI to screen job applicants. Its answer, generated in mere seconds, illustrates the point of my article:

> "As an AI language model, I don't possess personal opinions or feelings. However… AI algorithms are trained on historical data, which may contain inherent biases. If these biases are not properly addressed, the AI system may unintentionally discriminate against certain groups of applicants based on factors such as race, gender, age, or disability. This could lead to unfair treatment and perpetuation of existing inequalities in the job market."
>
> And what does Chat GPT-4 think employers should do about it?
>
> "To mitigate these concerns, employers should carefully evaluate and monitor AI-driven hiring tools, taking steps to minimize potential biases, ensure legal compliance, and maintain a human touch in the hiring process. Collaboration with legal counsel, HR professionals, and AI experts can help establish best practices for implementing AI-driven tools while addressing potential issues."
>
> Sound advice. ■

SIXTH CIRCUIT ADOPTS "STRONG LIKELIHOOD" NOTICE STANDARD FOR CERTIFICATION OF FLSA COLLECTIVE ACTIONS

Schuyler Ferguson and Ashley Higginson
Miller, Canfield, Paddock and Stone, P.L.C.

On May 19, 2023, the Sixth Circuit Court of Appeals adopted a completely new standard of notice for certification of collective actions under the Fair Labor and Standards Act of 1938 ("FLSA"). In *Clark v. A&L Homecare and Training Center,* No. 22-3101, 2023 WL 3559657 (6th Cir. May 19, 2023) (Ketheledge, White, and Bush), the court held that "for a district court to facilitate notice of an FLSA suit to other employees, the plaintiffs must show a 'strong likelihood' that those employees are similarly situated to the plaintiffs themselves," akin to the standard required in order to obtain a preliminary injunction. *Id.* at *8.

Employees may sue for violations of the FLSA on "behalf of … themselves and other employees similarly situated." 29 U.S.C. § 216(b). The Supreme Court has held that § 216(b) implies a judicial power, "in appropriate cases," to "facilitate[e] notice" of FLSA suits "to potential plaintiffs." *Hoffman-La Roche v. Sperling,* 493 U.S. 165, 169 (1989). And historically many circuits have utilized a two-step approach, first conditionally certifying a collective action prior to a determination on final certification later in the lawsuit, after the close of discovery.

In *Clark,* the United States District Court for the Southern District of Ohio used the common two-step approach in determining whether the plaintiffs were "similarly situated." In the first "conditional certification" step, the court applied the "fairly lenient" standard, conditionally certifying two of three proposed groups as "collectives" for purposes of receiving notice of the suit. 2023 WL 3559657 at *4. In doing so, the district court noted that the Sixth Circuit had not explicitly addressed the two-step approach and that the Fifth Circuit had recently rejected it, holding "that court-approved notice may be sent only to employees 'who are actually similar to the named plaintiffs,' meaning that the district court must find by a preponderance of the evidence that those employees are similarly situated to the original plaintiffs." *Id.* at *6 (quoting *Swales v. KLLM Transport Services, L.L.C.,* 985 F.3d 430, 434 (5th Cir. 2021)).

On appeal, the Sixth Circuit rejected both the two-step approach historically utilized and the Fifth Circuit's test. Arguing that "[a] district court's determination to facilitate notice in an FLSA suit is analogous to a court's decision whether to grant a preliminary injunction," the *Clark* court instead adopted a new, "strong likelihood" standard, similar to the requirement in preliminary injunction motions that the movant show a strong likelihood of success on the merits. *Id.* at *8.

The impacts of the Court's decision include:

- "[F]or a district court to facilitate notice of an FLSA suit to other employees, the plaintiffs must show a 'strong likelihood' that those employees are similarly situated to the plaintiffs themselves" prior to conditional certification. *Id.*
- That standard "requires a showing greater than the one necessary to create a genuine issue of fact, but less than the one necessary to show a preponderance." *Id.*
- "In applying this standard, district courts should expedite their decision to the extent practicable" by "promptly initiating discovery relevant to the motion, including if necessary by 'court order.'" *Id.* (quoting Fed. R. Civ. P. 26(d)(1)).
- The "strong likelihood" standard also applies to arbitration and limitations defenses. *Id.* at *9-10. ■

— Letter to the Editor —

Lee Hornberger

Lawnotes is a worthwhile publication that provides valuable information to the Labor and Employment Law Section.

One example of this is Stuart M. Israel's "Listing all Counsel On Federal Court Papers - Insanity is Contagious."

In a recent case where I was the arbitrator I issued the following order concerning listing of all counsel on the cover page:

> Some of the advocates are listing the identities of all counsel, with complete contact information, on the first page of every submission. This means in this heavy paper case that the name of the document is on the second page of the document. This is counterproductive. It is requested that this listing of all counsel not occur. See generally Stuart M. Israel, "Listing all Counsel On Federal Court Papers - Insanity is Contagious," *Labor and Employment Lawnotes* (Fall 2022), p. 1.

SCOTUS RULES ON FLSA SALARY BASIS TEST

Rebecca Davies and Blake C. Padget
Butzel Long, PC

Supreme Court Rules Daily-Rate Worker Does Not Satisfy The Salary Basis Test For FLSA Exemption. *Helix Energy Solutions Group, Inc. v. Hewitt,* 598 U.S. ____ (2023), centered on an oil-rig workers claim for unpaid overtime. Helix Energy paid Mr. Hewitt on a daily-rate basis, paying him a set amount per day. Although Mr. Hewitt earned over $200,000 annually, Helix did not pay him overtime. Instead, Helix asserted Mr. Hewitt was a highly compensated "bona fide executive" employee under 29 U.S.C. § 213(a)(1) and 29 CFR § 541.601, which exempts him from the FLSA's overtime requirements. Mr. Hewitt disagreed. That dispute led all the way to the Supreme Court.

The Fair Labor Standards Act ("FLSA") is the federal statute that governs payment of overtime and its exemptions. Under the FLSA, an employee is entitled to overtime unless an exemption applies. Generally speaking, an employee is exempt from receiving overtime if the employee meets three distinct tests: (1) the "salary basis" test, which requires that an employee receive a predetermined and fixed salary that does not vary with the amount of time worked; (2) the "salary level" test, which requires the employee's salary to exceed a specified amount; and (3) the job "duties" test. Additionally, the regulations contain a special rule for highly compensated employees ("HCE") who are paid total annual compensation of $107,432 or more. A highly compensated employee is deemed exempt from overtime under Section 13(a)(1) if: (1) the employee earns total annual compensation of $107,432 or more; (2) the employee's primary duty includes performing office or non-manual work; and (3) the employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

While the HCE rule relaxes the duties test, it does not change the salary basis test. Meaning, regardless of whether the employee earns more or less than $107,432/year, the employee must be paid on a "salary basis." Being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent basis, regardless of the number of hours worked. 29 C.F.R. § 541.602(a). The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. This "salary basis" test was key in *Helix Energy.*

In a 6-3 decision, the Supreme Court ruled that Mr. Hewitt was not exempt under the FLSA because Helix did not pay him on a salary basis. The Court rejected Helix's argument that it satisfied the salary basis test because the employee's guaranteed minimum was above the weekly salary threshold. The Court found that meeting the salary threshold did not mean that the employee was being paid on a salary basis. Justice Elena Kagan stated that in "demanding that an employee receive a fixed amount for a week no matter how many days he has worked, §602(a) embodies the standard meaning of the word 'salary,'" which generally refers to a "steady and predictable stream of pay." The Supreme Court found that by definition, a daily-rate worker is paid for each day they work and no others. Therefore, a daily-rate work is not being paid on a "salary basis" because the employee's compensation changes based on the number of days worked.

Helix Energy is a good reminder that simply because an employee earns over $100,000 does not mean that they are automatically exempt. The employee must be paid on a salary basis (*i.e.,* they are paid the same amount as long as they perform some work in a given week). While *Helix Energy* involved a dispute over the highly compensated employee rule and "bona fide executive" exemption, it is relevant to other exemptions that utilize the salary basis test. ■

MERC NEWS

Sidney McBride, Bureau Director
Bureau of Employment Relations

MERC Case Decisions—Highlights from January 2023 through April 2023

Below are the brief summaries on a few of the Commission case decisions issued since January 2023. For more information, including access to the full case decisions, check the agency's website at *www.michigan.gov/merc* under the MERC Decisions tab.

1. Contract Bar:

Allegan County Road Commission -and- AFSCME Council 25, 22-C-0591-RC, issued January 13, 2023. AFSCME filed an election petition seeking to represent several positions employed by the Employer. The sought after unit was previously represented by another labor organization (SEIU) until that union disclaimed interest in early 2022. At that time of disclaimer, the unit was under an active collective bargaining agreement set to expire on December 31, 2022. The Employer refused to consent to an election citing the petition was filed outside of the open window period and before contract expiration. The Employer also challenged the inclusion of several fore[person] positions it deemed were supervisory and inappropriate for a non-supervisory unit. AFSCME disagreed asserting no contract bar existed once SEIU disclaimed interest, and that all the listed positions were non-supervisory and appropriate based on the unit's longstanding existence. In resolving the dispute, MERC ordered an election concluding the "contract bar" provision under PERA Section 14(1) applies where an unexpired contract is "in effect" at the time a new representation petition is filed. Since the SEIU contract was nullified upon the union's disclaimer, no contract bar existed at the time of AFSCME's petition. To conclude otherwise would render the unit with an unexpired contract and no representative to police its provisions. The Commission also held that the contested positions remain in the unit as there was no evidence of supervisory authority to exclude them.

2. Supplemental ALJ Findings:

Detroit Public Schools Community District -and- LC Bulger, 21-C-0538-CE, issued February 16, 2023. Charging Party asserted that the Employer unlawfully interfered with his exercise of protected concerted activity under PERA Section 10(1)(a) through a series of actions that led to his discharge. The ALJ concluded the charge failed to establish a prima facie case of discrimination under Section 10(1)(c) and recommended dismissal finding no evidence of anti-union animus or that Charging Party's union activities were the cause of his termination. On exceptions, the Commission returned the case to the ALJ for a supplemental determination on the existence of a 10(1)(a) violation as alleged in the charge and not just 10(1)(c) as represented in the ALJ's decision.

3. Duty of Fair Representation:

Superior Township Fire Fighters Union, Local 3292, International Association of Fire Fighters -and- Lee Rudowski, 21-I-1764-CU, issued March 17, 2023. Charging Party was a fire fighter with the Township and member of a bargaining unit represented by the Union. He was discharged for failing to notify the Employer of his arrest, charge and subsequent driving restrictions stemming from a drunk driving incident. The Union filed a grievance challenging the discharge. At the 3rd step of the grievance process and in accordance with the union's grievance protocol, a majority of the Union's members voted not to arbitrate the grievance. Charging Party filed a charge against the Union alleging a breach of the duty of fair representation. The ALJ found Charging Party failed to establish that the Union did not properly represent him on the discharge grievance and the record lacked evidence that the Union acted arbitrarily, discriminatorily or in bad faith. The Commission agreed with the ALJ's findings and dismissed the charge.

4. Concerted Activity:

Detroit Public Schools Community District -and- Nicole Stuckey, Case No. 21-C-0580-CE, issued March 31, 2023 (no exceptions). Charging Party was teacher employed by the District and was a member of the bargaining unit represented by the teachers' union. She was suspended without pay for an incident where she allegedly discussed a student "sickout" with her class. She filed a charge alleging that the District issued the discipline in retaliation for her exercise of protected activity for participating in demonstrations and other activity related to the District's response to the COVID-19 pandemic. The ALJ recommended dismissal finding the charge failed to establish that the discipline was issued in connection with Charging Party's exercise of protected concerted activity. The ALJ reasoned that Charging Party's communications were focused on the well-being of her students rather than the terms and conditions of employment for teachers and other staff.

5. Social Media and Protected Concerted Activity:

Romeo Community Schools and Romeo Education Association, MEA-NEA, 21-I-1799-CE issued on April 28, 2023. The Union represents a bargaining unit of teachers employed by the District. A longtime teacher and local union president posted a commentary in a private Facebook group section accessible only to union members who had been approved to be added to the closed Facebook group. The post criticized an outside parent group that refused to comply with the COVID safety practices in place for attending a recent school board meeting. Several parents complained to the District after learning of the post. Subsequently, the District placed the teacher on paid leave and pursued discharge under the Teacher Tenure Act (TTA) process. While the TTA process was pending, the Union filed this charge asserting the District's actions in response to the social media post violated PERA Section 10 (a-c). Prior to the ALJ hearing, the TTA action was dismissed without economic loss to the teacher/ union president.

As to the instant charge, the ALJ rejected the District's argument that the TTA dismissal rendered the ULP moot. Nonetheless, the ALJ recommended dismissal of the charge finding the Union's assertions did not support of a violation under PERA Section 10. The ALJ also found the social media posts to be "individual" activity rather than on behalf the unit members.

On exceptions, the Commission reversed the ALJ (in part) finding the District's actions in response to the social media post violated PERA Sections 10(1)(a) and 10(1)(c), but not Section 10(1)(b). MERC viewed the member's posts to the private Facebook group as being tantamount to a communication made at union membership meeting or sent directly to union members, and that the subject of the post related to workplace safety conditions. MERC issued a decision that included a cease and desist order.

(Special thanks extended to MERC Staff Attorney Carl Wexel and MERC Departmental Analyst/ Paralegal Ashley Rahrig for their assistance in preparing these case summaries.) ■

MICHIGAN COURT RULINGS ON MEDIATION

Lee Hornberger
Arbitrator and Mediator

I reviewed 28 appellate decisions addressing mediation and settlement agreements since January 2021.

Supreme Court reverses COA concerning oral agreement.

Rieman v Rieman, ___ Mich ___, MSC 164081 (March 10, 2023). In lieu of granting leave to appeal, **Supreme Court reversed that part of COA judgment which found plaintiff's claims barred by statute of frauds.** Alleged oral agreement purports only to address profits from sale proceeds from real estate transactions, as opposed to creating or transferring interest in real estate itself. Case remanded for consideration of whether question of fact exists as to whether parties had post-sale oral agreement. Justices Viviano and Zahra dissented and would have denied leave to appeal, agreeing with COA that statute of frauds barred plaintiff's claim that oral agreement - and not parties' executed written document - reflected true nature of agreement.

Supreme Court Protects Mediation Confidentiality

Tyler v Findling, 508 Mich 364 (2021) is a defamation case arising from statements made by one attorney acting as receiver to another attorney before meeting in person with mediator. Supreme Court held the statements were MCR 2.412(B) (2) "mediation communications" and confidential under MCR 2.412(C). The phrase "mediation communications" is defined broadly to include statements that "occur during the mediation process" and statements that "are made for purposes of … preparing for … a mediation." MCR 2.412(B)(2). The conversation between the two attorneys took place within "plaintiff's room" while parties to mediation were waiting for mediation session to start and were part of "mediation process."

What if this were pre-suit mediation and arguably MCR 2.412 did not apply? "The mediator should include a statement concerning the obligations of confidentiality in a written agreement to mediate." Standard V(A)(2), SCAO, Michigan Standards of Conduct for Mediators (effective February 1, 2013). Tyler is discussed in detail by me in "Michigan Supreme Court Enforces Mediation Confidentiality," *Oakland County Legal News* (12/28/2021).

Published Court of Appeals

COA affirms Circuit Court modification of consent JOD. ***Brendal v Morris,*** ___ Mich App ___, 359226 (January 12, 2023). Courts permitted to modify child support orders when changed circumstances demand, even if child support award negotiated as part of consent JOD. Parties agreed to one-time lump-sum child support payment in consent JOD. Before payment could be made, recipient stopped exercising most of his parenting time. This change of circumstances warranted review of child support award. Circuit Court agreed with this principle but cited other grounds for granting the relief requested. COA affirmed. Transfer requirement clearly was a child support award, and consent JOD provided for equal parenting time of alternating weeks.

COA affirms Circuit Court that no settlement agreement. ***Citizens Ins Co of Am v Livingston Co Rd Comm'n,*** 356294 (September 15, 2022), app lv pdg. This is an insurance coverage dispute case. COA held local government can be bound by settlement agreement entered into by its lawyer if (1) government later ratifies agreement or (2) lawyer had prior special authority to settle claim. Lawyer may bind client to agreement if lawyer had "some precedent special authority" to enter into such settlement on behalf of client, even if client is governmental unit. Lawyer must have specific authority to bind client to agreement. If ongoing discovery related to whether Road Commission's lawyer had authority from Road Commission to settle case on its behalf, then, notwithstanding there was no public meeting ratifying agreement, Road Commission would be bound by settlement agreement. Mediation. Subsequent email negotiations. Attorney-client privilege issue. COA affirmed, ruling that defendant waived attorney-client privilege when defendant argued that its attorney did not have authority to settle.

COA reverses Circuit Court that there was a settlement agreement. ***Dabash v Gayar,*** 358727 (September 15, 2022). Defendants filed motion to enforce purported settlement agreement. Circuit Court granted motion enforcing purported settlement agreement. COA reversed. COA held parties had not reached enforceable agreement. "… bitter impasse … inevitable … lost their appetite … fraught with peril … sue for peace … ." When case involves agreement to settle pending litigation, it must comply with MCR 2.507(G). Because no version of "Settlement Agreement and Release" or "Membership Interest Purchase Agreement" bears Dabish's signature at bottom, neither document enforceable against Dabish. Nothing in e-mail traffic demonstrating that Dabish ever accepted defendants' offer.

Unpublished Court of Appeals

COA reverses Circuit Court not applying consent JOD. ***Fox v Sims,*** 360165 (March 30, 2023). In divorce case, plaintiff appealed Circuit Court JOD. COA held Circuit Court abused discretion by failing to enter signed consent JOD as it was written, and instead altering its terms without a sufficient basis. Circuit Court did not err when it declined to award child support retroactively from time divorce action filed.

COA affirms Circuit Court enforcement of settlement agreement. ***International Union Security Police & Fire Professionals of Am v Maritas,*** 359846 (March 16, 2023). Circuit Court determined that lack of plaintiff's signature on 2013 agreement was not dispositive because 2013 stipulated order was signed by defendant's attorney and order referenced that the parties had entered into settlement agreement. COA held reasonable to conclude stipulated order "logically associated with" settlement agreement and one's signature on order satisfies statute of frauds with respect to agreement.

COA affirms enforcement of settlement agreement. ***McNay v McNay,*** 361186 (March 2, 2023). Plaintiff and defendant married for 24 years before they started divorce action that resulted in mediation, arbitration, and consent JOD. "The following issues will be submitted to arbitration in lieu of a Court trial: Content and language disputes regarding the Judgment of Divorce[;] . . . [and a]ny issues inadvertently left unsolved by the attorneys and their clients at mediation." Arbitrator issued opinion regarding

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JOD. Defendant moved to modify section of JOD. Circuit Court denied defendant's motion. COA affirmed. Ambiguity surrounding how defendant was supposed to pay plaintiff for her interest in marital home was within arbitrator's authority because arbitrator had authority to resolve content and language of disputes in JOD, as well as other issues that had not yet been resolved.

COA affirms Probate Court enforcement of MSA. ***Estate of Terry Broemer,*** 360571 (Feb 9, 2023). S___, N___, and their counsel, as well as D___ and approximately 95 purported heirs represented by attorney C___, attended mediation. MSA reached at mediation and was signed by S___, individually and as mother and next friend of M___, by N___, and by their counsel, as well as by attorney C___ on behalf of purported heirs. Appellant did not appear at **Zoom hearing** regarding her objection to MSA. V___ presented argument on behalf of appellant under purported power of attorney. V___ did not address validity of will in her argument. She challenged appellant's share of estate. Probate Court found V___ engaging in unauthorized practice of law. Court also found objection was untimely. Court found appellant had received notice of mediation, had been advised that she could opt in or could opt out, and had been advised mediation was binding on everyone, even if they chose not to participate. Probate Court entered order denying appellant's objection. COA affirmed.

COA affirms Circuit Court entry of JOD. ***Keessen v Keessen,*** 359074 (Jan 26, 2023). Kim and Jay married in 2004. Marriage dissolved by JOD 2021. Kim appealed JOD, raising issues related to calculation of Jay's income, Circuit Court award of credits to Jay for payments allegedly made during a *status quo* period and division of receivership fees. COA affirmed JOD entry.

COA reviews attorney fee provision in Settlement Agreement. ***Moore v Bush,*** 360555 (Jan 19, 2023). Plaintiff appealed on ground that Circuit Court erred by not enforcing consent judgment's fee shifting provision for defendants' alleged noncompliance with terms of judgment entered after parties settled their dispute regarding boundary and ownership to land. **COA reversed Circuit Court order denying attorney fees and remanded for further proceedings.** Under Michigan law, parties may contract for payment of attorney fees. Contractual provisions for payment of reasonable attorney fees enforceable.

COA affirms Circuit Court enforcing settlement agreement. ***Townsend v Esters,*** 358570 (Jan 19, 2023), lv den ___ Mich ___ (2023). Because plaintiff did not challenge validity of settlement agreement, agreement valid. By enacting settlement agreement, plaintiff voluntarily relinquished right to jury trial.

COA affirms Circuit Court interpretation of consent judgement. ***Foster [Seven Lakes] v Charter Twp of Washington,*** 355650 (April 28, 2022). Enforcement of consent judgment case. COA affirmed Circuit Court ordering Township to enter into cost-sharing agreement with Seven Lakes containing a payback agreement. This case involves settlement without mediation.

COA reverses Circuit Court rejection of consent judgment. ***Stacy v Stacy,*** 353757 (March 17, 2022). Action for separate maintenance through proposed consent judgment. Plaintiff submitted proposed consent judgment to Circuit Court that would transfer 100% of defendant's two pensions to plaintiff. Referee recommended case be dismissed because division of assets reflected in proposed consent judgment was not fair or equitable to defendant. Referee stated that it did not appear parties wanted to be separated but instead only wanted to qualify defendant for Medicaid benefits. Circuit Court effectuated Referee's recommended order. COA reversed Circuit Court. Without making a finding that proposed consent judgment was entered into through fraud, mistake, illegality, or some unconscionability, Circuit Court was not permitted to modify, and deny, proposed consent judgment in order to obtain an equitable result. Because parties essentially entered into a property settlement, Circuit Court erred by not effectuating it. This case involves settlement without mediation.

COA reverses Circuit Court rejection of marriage settlement agreement. ***Rudzinski v Rudzinski,*** 355312 (March 10, 2022). COA reversed Circuit Court's denial of motion to enforce marriage settlement agreement. In October 2015, parties began discussions about ending their marriage. Over the next several months, parties had meetings about dissolving their marriage and dividing their assets. These conversations resulted in marriage settlement agreement, drafted by Dolores, which parties both signed in June 2016. In January 2019, Thomas filed for divorce. Dolores then moved to enforce marital settlement agreement. Following evidentiary hearing, Circuit Court denied Dolores's motion to enforce settlement agreement. Thomas failed to show duress. Thomas conceded that he did not sign under duress. In absence of fraud, duress, mutual mistake, or severe stress, the Circuit Court erred by refusing to enforce settlement agreement. COA stated that agreement was not illusionary or impossible to perform. A party seeking to avoid contract on basis of contract defense such as duress or fraud bears burden of proving that defense. *Morris v Metriyakool,* 418 Mich 423; 344 NW2d 736 (1984). Assuming some ambiguity, the Circuit Court should have tried to ascertain the parties' intent, considering extrinsic evidence if necessary. This case involves settlement without mediation.

COA affirms Circuit Court in legal malpractice case. ***Rufo v Rickard, Denney, Garno & Leichliter,*** 356213 (March 10, 2022). Legal-malpractice case incidentally involving the "pension provision" in an MSA. COA affirmed summary disposition in favor of defendant law firm in this legal malpractice case. Primary issue was whether defendants' alleged breach of their professional duty of care in failing to explain how the consent judgment of divorce distributed the pension resulted in plaintiff receiving a less favorable result than she would have otherwise. "If a party settles a case, the pertinent question can be answered by determining whether a better settlement, or a better result during a trial, could have been obtained but for the attorney's negligence."

COA affirms entry of JOD signed by attorneys. ***Turner v Turner,*** 354495 (February 10, 2022). COA stated negotiation and settlement are part of any civil lawsuit, including domestic relations matters. For negotiations to work, parties must be able to take other side - both party and attorney - at their word. Agreements signed by party or party's attorney are binding. MCR 2.507(G). Parties negotiated consent JOD in person and through series of emails. At close of negotiations, Wife's attorney drafted necessary documents and signed them, along with Husband and his attorney. JOD was contract binding on both parties, despite wife's later disagreement, and Circuit Court properly entered consent JOD.

Party's attorney can bind party to settlement or consent even where party does not give attorney actual authority to do so. Where attorney has "apparent authority" to enter agreement on client's behalf, it would be unjust to opposing party to set it aside. When client hires attorney and holds attorney out as counsel representing client in a matter, client clothes attorney with apparent authority to settle claims connected with matter. Opposing party is generally entitled to enforcement of settlement agreement even if attorney was acting contrary to client's express instructions unless opposing party has reason to believe attorney has no authority to negotiate settlement. Attorney can bind client in this manner. Court and parties in divorce action are bound by settlements that are in writing and signed by parties or their representatives. Injured client's remedy is not against opposing party but against attorney in malpractice. This case involves settlement without mediation.

Post final order motion for mediation. ***Jones v Peake,*** 356436 (January 20, 2022). This was the seventh appeal to COA and arose from litigious and contentious paternity and child support action. Post final order motion for mediation in Paternity Act, MCL 722.711 et seq., case was frivolous. Motion gave no reason for having mediation.

COA affirms MSA interpretation. ***Moriah Inc (Eisenhower Center) v Am Automobile Ins Co,*** 355837 (January 6, 2022). MSA included plaintiff's claims for penalty interest and attorney fees. Defendant waived appellate review of settlement agreement and judgment by signing provision in settlement agreement that stated: "In consideration of Dream Maker's agreement to the terms set forth above, Dream Makers [sic] hereby waives its right to appeal after entry of said Confession of Judgment."

COA reverses enforcement of email exchange settlement agreement. ***Haqqani v Brandes,*** 355308 (October 21, 2021). COA reversed Circuit Court enforcement of email exchange alleged settlement agreement. "Signature: Nothing in this communication is intended to constitute an electronic signature. This email does not establish a contract or engagement."

COA affirms enforcement of MSA. ***Shores Home Owners Ass'n v Wizinsky,*** 353321, 35620 (October 14, 2021), lv den (2022). Settlement agreement was entered into following mediation. All parties represented by counsel at mediation. MSA reduced to writing and signed. Agreement was unambiguous. COA affirmed Circuit Court enforcing agreement.

COA affirms nonenforcement of settlement agreement. ***Jones Lang LaSalle Mi, LLC, v Trident Barrow Mgmt 22, LLC,*** 353367 (June 17, 2021). Although parties apparently agreed to some terms of settlement agreement, they did not reach agreement on scope of release clause. Because parties did not reach meeting of minds over essential terms, there was no enforceable settlement agreement. This was no MSA or "mediation term sheet." In MSA, provide for method to resolve post settlement technical issues.

COA reverses Circuit Court refusal to accelerate. ***CIGL Properties v CM Renovation Services,*** 353595 (May 27, 2021). MSA provided for payment plan with acceleration and attorney fees if payment were missed. Because of "undergoing surgery" party missed one payment. In light of surgery, Circuit Court refused to order acceleration. COA reversed.

Waiver of right to appeal. ***Zyble v Michael Fischer Builders,*** 352681 (May 27, 2021). Defendant appealed circuit court order denying ex parte motion to stay enforcement of judgment in favor of plaintiffs. Plaintiffs cross-appealed portion of order concerning award of attorney fees. COA concluded repairs considered in inspection company's calculation of damages were within scope of settlement agreement, COA affirmed portion of order that denied defendant's motion to stay enforcement of judgment. COA remanded matter to reconsider plaintiffs' motion for attorney fees. Defendant waived appellate review of settlement agreement and judgment by signing provision in settlement agreement that stated: "In consideration of Dream Maker's agreement to the terms set forth above, Dream Makers [sic] hereby waives its right to appeal after entry of said Confession of Judgment."

COA affirms enforcement of settlement agreement. ***Drake v Auto Club Ins Assoc,*** 353942 (May 13, 2021). In no fault case, facilitator issued written Recommendation. Plaintiff accepted and then had change of heart. Circuit Court enforced Recommendation. COA affirmed. Plaintiff admitted both parties accepted Recommendation. Plaintiff argued agreement was unenforceable because of illusory promises, mutual mistake, fraudulent misrepresentation by facilitator, and unconscionability.

COA partially affirms JOD entry incorporating MSA. ***Kohl v Kohl,*** 353686 (May 13, 2021). Defendant argued Circuit Court erred in entering JOD because it did not conform to MSA concerning martial home. COA agreed, in part, and remanded for further proceedings. "The parties have both faithfully and truthfully participated in mediation with their attorneys and have arrived at the following resolution meant to be full and final and binding. It will be incorporated into the [JOD]."

COA reverses default judgment. ***Nalcor v Condom Sense, Inc,*** 351764 (January 21, 2021). Kahn (guarantor) argued good cause to set aside default judgment because his failure to appear at mediation and status conference inadvertent. Kahn claimed his counsel was retained just before mediation and conference and not provided copy of scheduling order. Kahn and his counsel failed to appear at mediation and conference because they were unaware mediation and conference were scheduled. COA held not abuse of discretion for Circuit Court to conclude Kahn failed to establish good cause to set aside default judgment. Lesser showing of good cause required if moving party can demonstrate strong meritorious defense.

COA affirms dismissal for failure to post bond. ***Neff v Chapel Hill Condominium Ass'n,*** 349444, 349976 (January 14, 2021), lv den (2021). Plaintiff argued Circuit Court, by ordering mediation, deprived her of right to jury trial and wrongfully reopened discovery. Plaintiff said Circuit Court order, which required her to post security bond and $4,426 in mediator fees deprived her of right to jury trial. COA held plaintiff wrong. Damages was not the only issue to be decided. Circuit Court denied summary disposition on plaintiff's contract claim, leaving open question of liability. Discovery not reopened only for Chapel Hill and Mixer; court made no discovery order and mediator sought inspection of property only for purposes of conducting mediation. Mediation is form of ADR that all civil cases in Michigan subject to, unless otherwise directed by statute or court rule. MCR 2.410(A). If mediation fails, jury trial available. Mediation failed and court entered security bond in lieu of dismissal. When plaintiff did not post bond, her case was dismissed. Court ordered mediation did not deprive her of right to jury trial. Plaintiff's actions led to imposition of bond and plaintiff's failure to post security ultimately led to dismissal. ■

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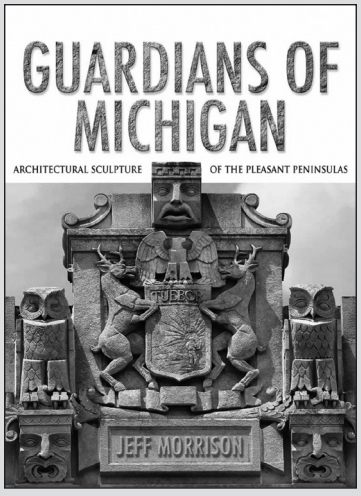

- Stuart Israel conducts a *tour-de-law* of the U-M Law Quad, the Lenawee County courthouse, and other Michigan "temples of justice." Photos are from *Guardians of Michigan—Architectural Sculpture of the Pleasant Peninsulas* (Univ. of Mich. Press 2022), included with the permission of author, photographer, and historian Jeff Morrison.
- MD Joel Kahn offers health advice for juris doctors. Steve Schwartz, while not an MD, offers do-and-don't prescriptions for arbitrators and advocates.
- Ben King addresses the end of "right to work" and the return of "prevailing wage," proving that Michigan elections have consequences.
- Channing Robinson-Holmes offers a primer on the new federal Pregnant Workers Fairness Act.
- To learn how automation and artificial intelligence are transforming work-places and what the EEOC may do about it, read Michelle C. Ruggirello.
- Barry Goldman explains why settlement is good and that viewing your opponent as an enemy is a mistake.
- Rebecca Davies and Blake C. Padget explain SCOTUS' FLSA ruling.
- Lee Hornberger gets you up-to-date on mediation court rulings.
- MERC rulings are reported by Sidney McBride.

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