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CONTENTS

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

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

Issue	Article Deadline
Fall 2022	July 31, 2022
Spring 2023	November 30, 2022
Summer 2023	March 31, 2023
Fall 2023	July 31, 2023

ADVERTISING

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

MISSION STATEMENT

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

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

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

From the Desk of the Chairperson

By John T. Schuring

When I spoke with former Section chairs in advance of my term, everyone shared a common observation—the year goes by quickly. They were right.

This Issue of the Journal

The Spring issue of the *Business Law Journal* marks roughly the halfway point of the Section's fiscal year. The articles for this issue of the Journal have been provided under the guidance of the Section's Commercial Litigation Committee. Thank you to all of the authors who have submitted thoughtful, well-written articles. The Journal remains a great resource for our Section and our State's business lawyers.

Section members and readers of the *Business Law Journal* have been benefitting from Michael Khoury's dedication and expertise for twenty years, as the author of the Journal's "Technology Corner" column. (Perhaps newer members of the Bar and Section will be surprised to learn that we had technology to write about twenty years ago?) This issue of the Journal marks Michael's last "Technology Corner." I know I speak for all of Michigan's business lawyers when I express our gratitude to Michael for his efforts over the years. Standing alone, twenty years' worth of Journal columns would be a significant contribution to our Section and the lawyers it serves. In addition, Michael has served as Section chair and remains active in the Section as chair of the UCC Committee. We are grateful for his dedication to the Section.

Michael has co-authored this edition with Jennifer Dukarski, a shareholder at the Butzel Long firm, who has agreed to assume Michael's role as author of the column going forward. Thank you, Jennifer, for agreeing to do so!

Business Law Institute

Please save the date for the 33rd Annual Business Law Institute to be held on October 7, 2022, at the JW Marriott in Grand Rapids. This will be the first in-person Institute since 2019. We are very excited to conduct the event in person again this year.

For years, the Institute has provided Michigan's business lawyers with timely and high-quality legal education. The educational components will offer something for everyone, whether you are new to the practice or you are a seasoned attorney. Our attendees have come to appreciate the caselaw update and business legislation update provided at the Institute. This year, we expect to have a program on the Corporate Transparency Act, which promises to impact everyone's practice; every business lawyer will need to understand this act. We also anticipate sessions on representation and warranty insurance, tax updates, supply chain issues, and more, all from top-notch speakers.

As good as the educational sessions are, past attendees will tell you that the best part of the Business Law Institute is connecting with your fellow business lawyers. Given the COVID-19 mandated, two-year, in-person hiatus, I expect that the reception, dinner, and networking breaks will be more appreciated and enjoyed than ever.

If you have never attended the Institute, please consider doing so; you will enjoy it and your practice will benefit. Keep an eye on your mailbox and inbox for registration information.

Section Strategic Plan

The activities of the Business Law Section and its Council are guided by the Section's strategic plan. The current plan, adopted in March 2017, articulates the mission and goals of the Section. The plan was adopted with the idea of being revisited and refreshed every five years, and this is its five year anniversary. If you are interested in joining a committee to take on this important project, please let me know.

A link to the Strategic Plan is available here: https://connect.michbar.org/businesslaw/council/council-info.

You Should Be Involved!

As I noted in my letter in the Fall *Business Law Journal*, the goals of your Council's officers center around the theme of outreach. I would like to use this letter to reach out to each and every one of you to consider increasing your involvement in the Business Law Section. For many people—like myself—involvement in Section activities and leadership came about as a result of a personal invitation from an active Section member. If you are active in the Section, you already know how beneficial it is to be involved. Take a moment to encourage someone you know to sign up for BLI, or join a committee. And, if you have ever been curious about how to get involved but didn't know where to start—please accept this as your personal invitation. Contact me and I will make the proper introductions. Whether you are interested in planning section events, furthering outreach to law schools, becoming involved in one of the section's eleven committees on substantive legal areas and issues, or just attending a meeting or two to share your perspective—there is a role for you.

Please contact me at jschuring@dickinsonwright.com or by phone ((616) 336-1023) with any ideas you may have to make the Business Law Section an even more valuable resource for your practice, or to discuss how you might further your involvement with the Section.

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Corporate Transparency Act Update

The Corporate Transparency Act (CTA) is one of the most significant federal laws impacting corporate law and business lawyers that has been enacted in many decades. As a reminder, the CTA was passed by Congress on January 1, 2021, as part of the National Defense Authorization Act for Fiscal Year 2021.[1] The CTA requires the creation of a national database for beneficial ownership information for many business entities. The Financial Crimes Enforcement Network (FinCEN) in the United States Department of Treasury is responsible for developing the regulations that will implement these reporting requirements.

On April 5, 2021, FinCEN issued an Advance Notice of Proposed Rulemaking (ANPRM) to solicit comments regarding the implementation of the beneficial ownership information reporting requirements, and a thirty-day public comment period followed. More recently, FinCEN announced a proposed rule through the issuance of a Notice of Proposed Rulemaking (NPRM) on December 8, 2021.[2] FinCEN sought public comments on the proposed reporting rule, and the comment period ended on February 7, 2022. State-level business registry offices will be required to inform applicants of their filing requirements under the CTA, and thus the Michigan Corporations Division submitted comments in response to both the ANPRM and the NPRM. As of February 10, 2022, there were 248 comments submitted through Regulations.gov.[3] Comments are reviewed after submission before they may be viewed by the public, so it can take some time for comments to be posted after a comment deadline. FinCEN is already planning to engage in two more rulemakings to establish rules for accessing beneficial ownership information and security safeguards as well as rulemaking to revise FinCEN's customer due diligence rule.[4]

For background, the beneficial ownership reporting requirement is "…intended to help prevent and combat money laundering, terrorist financing, tax fraud, and other illicit activity."[5] This collection of information will be used by law enforcement and the intelligence community to "… diminish the ability of malign actors to obfuscate their activities through the use of anonymous shell and front companies."[6] For further background information and an overview of the CTA, see the "Taking Care of Business" column in the Summer 2021 edition of the *Michigan Business Law Journal*.[7]

The proposed rule issued by FinCEN identifies the reporting companies and company applicants who must file a beneficial ownership report with FinCEN, the information that must be reported, and when the report must be submitted.[8] The proposed rule distinguishes between a domestic reporting company and foreign reporting company. Broadly, a domestic reporting company is any entity that is created by the filing of a document with the Secretary of State (or other equivalent office, such as the Michigan Corporations Division) of a jurisdiction within the United States.[9] This would include corporations, limited liability companies, limited partnerships, and limited liability partnerships. A foreign reporting company is an entity formed under the laws of a foreign jurisdiction that is registered to transact business in the United States.[10] The CTA includes twenty-four specific exemptions to the definition of reporting company, and the proposed rule does not provide for additional exemptions.[11] One notable exception applies to what is referred to as "large operating companies,"[12] which are entities that employ more than twenty employees on a full-time basis in the United States, had gross receipts or sales greater than $5 million in the previous year, and have an operating presence at a physical office within the United States.[13] The proposed rule sought to clarify portions of this exemption by defining "an operating presence at a physical office within the United States" as a physical office that is owned or leased by the entity, which cannot be a residence, and cannot be a shared space (except if it is being shared with affiliated entities).[14] Also, FinCEN is relying on the definition of "full-time employee" as determined by Internal Revenue Service regulations, which considers a full-time employee as someone employed an average of at least 30 hours per week or 130 hours per month (with adjustments for non-hourly employees).[15]

Company applicants are also required to file a beneficial ownership report with FinCEN. The proposed rule clarified that for a domestic reporting company, a company applicant is the individual who files the document to form an entity and for a foreign reporting company, the company applicant is the individual who files the document that first registers the entity to transact business in the United States. "The proposed definition of a company applicant would also include any individual who directs or controls the filing of such a document by another person."[16] Business lawyers should be prepared for how this will apply to them when acting as incorporators or organizers for their clients, simply submitting formation or registration documents to the Michigan Corporations Division for their clients, and when their paralegals or assistants submit documents for their clients. Notably, business lawyers may have difficulty with the requirement to submit beneficial ownership reports to FinCEN for company applicants of domestic entities that were formed or registered to transact business in the United States before the effective date of the final regulations. Tracing this information backwards to determine which attorney and/or which staff person submitted the formation or registration document may be quite challenging. On top of that, obtaining the personally identifiable information of these

people—which is needed for the beneficial ownership report—could be equally or more difficult. The proposed rule acknowledges the challenges that long-standing reporting companies will face, such as entities that were formed a century ago, particularly because company applicants may be deceased. In the case that the company applicant died before the reporting company was obligated to obtain identifying information to report to FinCEN, the reporting company must "…report that fact along with whatever identifying information the reporting company actually knows about the company applicant."[17]

In regard to the specific information that must be submitted to FinCEN by reporting companies, the proposed rule requires each reporting company to submit a Taxpayer Identification Number (TIN), such as an Employer Identification Number (EIN). If a reporting company has not been issued a TIN, then a Dun & Bradstreet Data Universal Numbering System (DUNS) number or a Legal Entity Identifier (LEI) must be submitted.[18]

At the heart of the CTA is identifying the beneficial owners of each reporting company. A beneficial owner is defined in the CTA as "an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—(i) exercises substantial control over the entity; or (ii) owns or controls not less than 25 percent of the ownership interests of the entity."[19] The CTA did not define "substantial control," and thus the proposed rule identifies three indicators of substantial control:

> (1) [s]ervice as a senior officer of a reporting company;
>
> (2) authority over the appointment or removal of any senior officer or dominant majority of the board of directors (or similar body) of a reporting company; and
>
> (3) direction, determination, or decision of, or substantial influence over, important matters of a reporting company.[20]

The proposed rule provides a lengthy discussion regarding how FinCEN developed the "substantial control criteria," which may be of interest to business lawyers.

Lastly, the proposed rule establishes the timeframes that reporting companies will have to submit their initial beneficial ownership information reports to FinCEN. The same timeframe applies to both domestic and foreign reporting companies. The proposed rule states that reporting companies formed or registered after the effective date of the final regulation will have 14 calendar days after their formation or registration to file the report with FinCEN.[21] Reporting companies formed or registered prior to the effective date of the final regulation will have one year to file their reports with FinCEN.[22] After the initial report is filed, the proposed rule indicates that any changes will have to be reported within 30 days. If a report contains an inaccuracy, corrections must be filed within 14 days of when the inaccuracy was discovered or should have been discovered.[23] The proposed timeframe could be quite burdensome to reporting companies and company applicants. The comments submitted by the Michigan Corporations Division supported the recommendation of the International Association of Commercial Administrators that advised that a six-month timeframe would be more reasonable. Hopefully, the forthcoming final regulations will take the comments submitted under advisement and make adjustments appropriately.

The CTA is a monumental change in business law and corporate transparency in the United States. FinCEN has not yet announced a date that the final regulations will be issued or when implementation of the CTA will begin. The proposed rule includes details regarding the enforcement and penalties for violating the reporting requirements, which may be of interest to business lawyers.[24] In the very near future, business lawyers will be confronted with the reality of this new law and the practical considerations to manage the logistics of beneficial ownership information reporting.

NOTES

1. Title LXIV of the National Defense Authorization Act (NDAA), H.R. 6395, Public Law 116-283.
2. Financial Crimes Enforcement Network, Beneficial Ownership Information Reporting Requirements (NPRM), 86 Fed. Reg. 69,920 (December 8, 2021).
3. Financial Crimes Enforcement Network, Beneficial Ownership Information Reporting Requirements, FINCEN-2021-0005-0217, https://www.regulations.gov/document/FINCEN-2021-0005-0217.
4. Fact Sheet: Beneficial Ownership Information Reporting Notice of Proposed Rulemaking, https://www.fincen.gov/news/news-releases/fact-sheet-beneficial-ownership-information-reporting-notice-proposed-rulemaking.
5. NPRM at 69,920.
6. *Id.*
7. Alexis Lupo, *Taking Care of Business: An Introduction to the Corporate Transparency Act*, 41 MI Bus LJ 6 (Summer 2021).
8. NPRM at 69,920.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 69,939.
13. NDAA, § 5336(a)(1)(11)(b)(xxi).
14. NPRM at 69,939.
15. *Id.*
16. *Id.* at 69,938.
17. *Id.* at 69,933.
18. *Id.* at 69,932.
19. NDAA, § 5336(a)(3)(A).
20. NPRM at 69,934.
21. *Id.* at 69,941.
22. *Id.*
23. *Id.* at 69,942.
24. *Id.* at 69,944.

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IRS Hiring, Crypto, Filing Nightmares and a Michigan SALT Workaround

The IRS is hiring more economists and statisticians. They are being hired specifically to address abusive tax schemes, such as syndicated conservation easements and certain micro-captive insurance offerings. The announcement was made by the IRS Office of Promoter Investigations. The hiring is described as the basis of a "think tank." The IRS is attempting to study promoter behavior to find future "financial products" that in substance are only designed to extract tax benefits beyond the economic substance of the actual transaction. It is highly recommended that if your clients are presented with a "new and improved" financial offering, a careful analysis be undertaken to ensure the product is not the latest variant of abusive tax shelters.

Speaking of abusive tax shelters, the Office of Promoter Investigations is a new initiative staffed under the IRS Small Business and Self-Employment Division. It is expected that some of the work of the initiative will result in more criminal prosecutions because the IRS has periodically challenged certain tax strategies as illegal including the IRS Annual "Dirty Dozen" list. By publishing lists of certain tax strategies, the IRS is undercutting the good faith argument often presented by taxpayers as a defense to penalties. Please keep in mind, good faith is not a defense to the underlying tax liability of a disallowed tax strategy.

"Seriously delinquent" taxpayers have been unsuccessful in challenging IRC 7345, which allows the IRS to ask the U.S. State Department to deny citizens with delinquent taxes over $50,000 the right to travel outside of the United States. Various courts around the country have upheld the provision, which allows the U.S. Treasury Department to request that the State Department suspend a passport, not reissue an expired passport, or deny the request for a new passport.

Taxpayers can avoid the potential ramifications of the loss of a valid passport by entering into an installment agreement or other payment options. The bottom line—don't ignore IRS collections notices.

Cryptocurrency

What would be a tax column without some mention of cryptocurrency? In a case out of Tennessee, a cryptocurrency investor declined an IRS refund concerning whether tokens acquired by "staking" result in taxable income. Staking is how blockchains verify transactions.

The taxpayer reported income based upon the calculation of the tokens' value at about $8000. The taxpayer filed a refund claim, which was not responded to by the IRS. Thereafter, the taxpayer filed suit seeking a refund. The government offered a refund but would not address the issue for later tax years. The taxpayer is seeking a ruling on the underlying issue. An unusual procedural twist where "yes" is not always yes!

Other news in the cryptocurrency world included the arrest of two alleged hackers that infiltrated the Bitfinex exchange in 2016. At that time, the value of the theft was about $71 million in Bitcoin. Because of how blockchain works, the Bitcoin was essentially still there and hidden in plain sight. Utilizing their ever-evolving detection abilities, the government seized the Bitcoin as part of their investigation. Last year, following a cyberattack on an east coast oil pipeline, an extortion payment was made in cryptocurrency. Much of the payment was retrieved through tracking measures.

Practitioners should note for themselves and their clients that the first question asked on an income tax return is whether the taxpayer has any crypto activity during the prior year. Yes, crypto now gets the same attention, if not more as offshore financial accounts. It is reported that about four percent of IRS-CI investigation is crypto-related. That figure is expected to grow in the coming years.

IRS Voluntary Disclosure Practice

In past columns, I have written about the IRS Voluntary Disclosure Practice. This invaluable program can provide taxpayers, who might otherwise face criminal prosecution, a way to voluntarily disclose information and resolve their tax issues civilly. There are several prerequisites for eligibility including the taxpayer not already under examination or investigation by the IRS.

On February 1, 2022, in IR-2022-23, the IRS published several important updates to this program. In addition to the IRS accepting photocopies, facsimiles, and scans of signatures, the form has an expanded section for reporting virtual currency. The IRS cites that they are taking "into account trends in the type of financial asset (sic) that taxpayers hold." Consult IRS Form 14447 for complete instructions.

Submitting an application for preclearance into the Voluntary Disclosure Practice is a serious matter. The application must be timely, accurate, and complete. Anything less exposes the taxpayer to additional criminal charges and is the worst scenario of all. Experienced criminal tax counsel should be consulted prior to submission.

IRS Backlog Bedevils Filing Season and Other Functions

National Taxpayer Advocate Erin Collins' annual report to Congress confirms what we already knew—the IRS is buried in paper and falling further behind as we go into the filing season. Taxpayers and professionals need to take note.

According to the annual reports, here are some snapshots:

- Five million unprocessed taxpayer correspondence.

- Six million unprocessed individual tax returns.
- Over two million amended tax returns.
- 2.8 million business tax returns.

The delays can have serious consequences, such as the inability to verify filing status for loans or employment purposes, IRS liens and levies being filed because of the payment detail, or payment plan requests are not posted and cause delays in tax refunds.

To minimize this year's delays, consider:

- File and pay taxes electronically;
- If you file by paper, use the United States Postal Service Certified Mailing Return Receipt Request; and
- Properly note all payments by form number, tax period, and social security or employment identification number.

Michigan Tax Update

On December 20, 2021, Michigan joined the growing list of states offering a "workaround" of the cap on itemized deductions for various state and local taxes for federal tax purposes. The workaround is limited to certain types of income.

For shareholders of S Corporations and members of limited liability companies taxed as partnerships, an election can be made to allocate the SALT taxes to the entity and the net income would be reported on their respective shareholder/member tax return.

The election can be made retroactive to the year 2021 but must be made by April 15, 2022 (not the filing deadline of April 18, 2022). There are other important details in the legislature, such as a mandatory two-year election.

An important note, most taxpayers made the required payment by December 31, 2021. For accrual-based taxpayers that may have not been the case. IRS note 2020-75 provides that the IRS may challenge the accrual of the SALT payments. As always, taxpayers should consult their tax advisor for further guidance.

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Online and Social Media Fraud – Not Just for Consumers Anymore

Who can forget the notorious Nigerian Prince? This royal email scam is one of the longest running Internet frauds in which you're offered an opportunity to either invest in a company or to assist in getting a fortune out of a country. You're asked for your bank account and for a small advance to get the ball rolling. Based off the famous "Spanish prisoner" fraud, which started during the French Revolution, these schemes are known as "419 fraud" and remain active dangers. In fact, as of just a few years ago, people were still losing around $700,000 to this exact fraud.

And if foreign royalty isn't your favorite approach, creative hucksters have answered the call. There is the grandparent scam, where a grandparent is contacted by someone pretending to be a relative and asking for financial help to stay out of trouble. There are scams from people purporting to start online romances and then extracting money or using the relationship to obtain personal information as well as money. More and more, online shopping fraud is in the news. Partly because of supply chain problems caused by the pandemic but also because any opportunities are used by fraudsters, fake advertisements and solicitations have blanketed social media as well as advertisements on web pages, ads on free games, and any place the fraudster can get an audience.

This level of fraud hasn't gone unnoticed at the federal level. A recent consumer protection spotlight from the Federal Trade Commission[1] discussed how social media is a "goldmine" for scammers. The report outlined how investment scams, romance scams, online shopping fraud and other issues have permeated social networks. However, online scams, partly as a result of COVID-19, have expanded dramatically over the last two years.

Significantly, businesses are being increasingly targeted as well as consumers. In the business environment, one of the common scams from years past was the business directory scam. A company reporting to represent the publication would confirm that a business wanted to continue the listing and then send an invoice. The invoices would often get processed because they looked legitimate. However, on closer inspection, the company was either not legitimate, never represented the publishing entity, or had a pseudonym-like website that purported to do the advertising for the unsuspecting business. Nonpayment would result in numerous letters, facsimile transmissions, and phone calls. Sometimes people paid these just to be rid of the bother but ignoring the invoice was usually the better option. Social media and the online world have now provided many avenues by which businesses can also be the victims.

Facing Business Scams

The following is a review of some of the activities used by scammers which target business.

Click Here: Phishing Scams

The most common way in which scammers are able to penetrate the networks of businesses for the purposes of either stealing information, implementing a ransomware attack, or just being destructive is through the use of phishing emails. These are emails that look legitimate and ask the user to provide credentials or to log in to a site that looks legitimate using their credentials. The link provided often will download to the user's computer a piece of software that starts tracking their usage and can obtain other legitimate credentials to access the network. The best approach that a business can use is to train users to identify fraudulent emails and implement procedures to try to block these attacks in the first place. Most importantly, each business should encourage users who realize they have been the subject of a scam to report it as quickly as possible. The longer the scammer is embedded in a business' network, the more damage can be done.

Impersonating Leadership: The Business Email Compromise

Companies that conduct business with foreign entities, notably by wire transfers, are often targeted by business email compromise (BEC) scams. Also known as a "man-in-the-middle" attack, the scammers rely on social engineering to trick employees into re-routing significant sums of money. This is often done by impersonating CEO's or those who have the authority to direct funds. Some of the most common types of BEC scams include: the bogus invoice, CEO emails, account compromises, and even attorney impersonation.

Business Needs: Online Shopping

Supply chain disruptions have increased because of COVID, and businesses seeking alternative sources of products and services can fall prey to websites purporting to represent online businesses that really don't exist or which actually copy a legitimate business to try to fool people into thinking they are dealing with the legitimate business. In addition to fake or exaggerated claims about cures and treatments, scams related to nondelivery of medical goods and PPE increased dramatically.[2] Orders can be placed, the funds paid, but the goods are not delivered. This has become more and more common. Many businesses had to face the fact that they were ripped off when personal protective equipment was in short supply and everyone was desperate to find sources that could deliver. The FINCEN COVID advisory also highlighted price gouging and hoarding issues.

Corporate Citizenship: Charity and Other Scams

Consumers are not alone in falling for scams perpetrated across the Internet that purport to seek contributions for worthy causes. Again, COVID has exacerbated the issue that often arises after any natural disaster or incident in which the public's sympathy can be

aroused. Small businesses especially are targeted with bogus invoices, unsolicited goods, and unnecessary services and investment scams.[3]

What Is a Business to Do?

The adage "forewarned is forearmed" really rings true.

- *Don't immediately trust; always verify.* The business should not assume that information about an unknown supplier or vendor or customer is actually true. It's important to perform due diligence about who you are dealing with in transactions. If a deal seems too good to be true because the price is great or because no one can supply what is needed, red flags should go up.
- *Establish protocols for risky transactions.* Rather than losing money in a business email compromise and trying to unwind the transaction, seek to avoid the BEC in the first instance. Assess internal policies for the use of corporate financial accounts. Establish protocols for verifying wire transfers or transactions over a set dollar figure. Refuse to transfer money unless the recipient has been properly vetted.
- *Make sure your tech is up to date.* Whether it's antivirus software or updating your smart phone, business devices must be maintained to minimize risks.
- *Education is key.* Any team is only as good as its weakest link. All team members who may fall victim to a scam should be educated about the risks and the response plan when incidents occur.
- *Prepare to report scams.* When it comes to businesses, it's important to recognize that nobody is immune to these new and sophisticated fraudulent schemes. We need to be prepared to encourage clients to keep screenshots of all communications in a scheme and to be prepared to report the matter to the proper authorities.

Time will tell if catfishing or gossip clickbait becomes the new Nigerian Prince. But if history repeats itself, we will be fighting these hucksters for years to come. But in this fight, we can have the upper hand if we stay vigilant.

NOTES

1. "Social Media a gold mine for scammers in 2021," FTC Consumer Protection Spotlight, January 2022, https://www.ftc.gov/news-events/blogs/data-spotlight/2022/01/social-media-gold-mine-scammers-2021.

2. FINCEN Advisory on Medical Scams Related to the Coronavirus Disease 2019 (COVID-19), https://www.fincen.gov/sites/default/files/advisory/2020-05-8/Advisory%20Medical%20Fraud%20Covid%2019%20FINAL%20508.pdf.

3. "10 Common Scams Targeting Small Businesses," https://www.incorp.com/help-center/business-articles/top-scams-targeting-small-business.

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In this issue, we interview Wayne County Business Court Judge David A. Groner. We will then look back and salute two courts (Macomb County and Kent County Circuit Courts) for the tenth anniversaries of their specialized business dockets, get a refresher on a business court protocol and briefly discuss the amendments to the case evaluation rule, provide an update on new judges in the business courts, remind you of the redesigned business court website, and briefly mention the "Lessons Learned" findings and recommendations.

Wayne County Business Court Judge David A. Groner

Background

Judge Groner was appointed to the Wayne County Circuit Court in 2003 by then-Governor Jennifer Granholm. Judge Groner earned his juris doctor from the University of Detroit Mercy Law School. He went to law school as an evening student while still working full-time for Oakland County Circuit Court Judge James Thorburn. Prior to being appointed to the bench, Judge Groner was a sole practitioner for about 17 years. He focused primarily on criminal defense, probate, and juvenile delinquency and neglect matters.

After being appointed to the bench, Judge Groner served in the Criminal Division for 14 years. In the Criminal Division, Judge Groner spent time in the Arraignment Court, handling pleas and sentences in non-capital cases. For the next four years, he served in the Civil Division, where he handled specialty dockets, such as structured settlements, in addition to the traditional docket. On March 18, 2021, the Michigan Supreme Court announced that it had appointed Judge Groner to the Wayne County Business Court. His term will expire April 1, 2025. One of the reasons Judge Groner was interested in becoming a business court judge was to expand his exposure to more complex litigation. He replaced Judge Lita Masini Popke, who retired and is doing ADR work. His staff includes judicial attorney Scott Taylor and court clerk Marciana Lawrence. Judge Groner is married to former Wayne County Circuit Judge Amy Hathaway, who is retired and handling ADR matters. Chat with Judge Groner for any length of time and you will appreciate his sense of humor.

Experience with the Business Court

Although he has been on the business court bench for less than a year at the time of this writing, Judge Groner already enjoys the business cases and the lawyers. He recognizes business litigators are a "different breed. It's unending what I learn from the lawyers." The quality of lawyers and pleadings is generally very high for the business cases, and business lawyers are intense. Why? "There is a lot at stake in business cases; companies expect to win," notes Judge Groner. Not only do business cases involve money, but they often involve important relationships. The relationships, when they deteriorate, can sometimes result in the need (perceived or actual) for temporary restraining orders and preliminary injunctions. When businesses are involved in litigation, the welfare of their owners and employees is also at stake.

Like most civil cases, few business cases result in trial. The business cases that are tried are typically bench trials. In that vein, Judge Groner mentions that parties can get a trial sooner with a bench trial. Thus, counsel should make sure their clients really want a jury trial, when they could get a quicker trial with a judge.

Discovery

Judge Groner realizes the importance of discovery, particularly in business cases that are often discovery-intensive. Thus, for complex cases with heavy discovery, Judge Groner may order a discovery facilitator. Of course, the discovery facilitator only makes recommendations; Judge Groner makes the final call. One benefit of a discovery facilitator, Judge Groner observes, is that a discovery facilitation can result in settlement discussions.

Mediation; Settlement Conferences

Like many business court judges, Judge Groner typically orders early mediation. He prefers that counsel agree to it, and he will take into consideration counsel's thoughts, concerns, and timing on the matter. The issue for counsel regarding early mediation is typically the amount of discovery needed for an effective mediation. In that regard, Judge Groner is flexible as to the amount of discovery counsel request before going to early mediation.

Judge Groner notes that ADR (particularly mediation) is how many cases get resolved. But he adds, "I'm always here to help." To that end, Judge Groner is willing to convene settlement conferences on request. He recalls that in one case, he presided over a 9½ hour settlement conference that occurred at a private attorney's office (the courthouse was closed that day due to weather). The case settled.

Motions

Judge Groner still grants oral argument on most non-dipositive motions. Hearings on those motions begin at 8:30 a.m. on Fridays. Business court motions start later in the morning. For the most part, hearings occur over Zoom.[1] (Make sure to check Judge Groner's webpage on the court's website for specific information.[2]) All lawyers will appear in the main Zoom "courtroom;" he does not place attorneys in waiting rooms during arguments. Summary disposition motions are scheduled at other times throughout the week.

Judge Groner decides some dispositive motions on the briefs, but he holds hearings on others. Generally, he errs on the side of hearings on dispositive motions. If counsel want a hearing on a summary disposition motion, he is typically open to granting the same. If, during a motion call, counsel needs to be in another court, counsel should send a note to Marciana Lawrence in the Zoom chat box.

As for motions seeking a temporary restraining order ("TRO") or a preliminary injunction, he schedules a hearing as quickly as possible. These

are "top priority." Whether he grants a motion for a TRO or a preliminary injunction or denies it, he will make sure that, "I give the party his or her day in court." If he denies a TRO motion, he will schedule a hearing on the preliminary injunction quickly.

Status of Zoom

Judge Groner agrees with what many judges have stated: "Zoom is here to stay." Or, as Judge Groner remarks, "courtrooms are now Zoom rooms." Although trials and evidentiary hearings may still be done in person going forward, Zoom is efficient for lawyers and their clients—it saves travel and waiting time, and it allows lawyers to appear in multiple courts throughout the state during one morning or one afternoon. That being said, courts and court staff must remain accessible to the public, which they have been with Zoom.

Judge Groner recommends that courts throughout the state have a uniform approach to what kinds of matters are handled by Zoom versus in-person proceedings. This is important because otherwise, if some courts resume in-person proceedings while others remain remote, some attorneys may have to be "in two places at once." Judge Groner has already experienced attorneys trying to have conferences with him via Zoom while waiting for an in-person hearing with a judge in another county. For his part, Judge Groner is a strong advocate of Zoom. Indeed, Michigan courts are "One Court of Justice." Accordingly, having a consistent, statewide policy of court appearances by Zoom is important.

Advice

A veteran of many years on the bench, Judge Groner has seen it all. From that vantage point, he gives practical advice that works for any courtroom. For lawyers who appear in front of him, he wisely recommends litigators "be prepared, be prepared; don't waste my time." As for briefs and oral arguments, he adds, "Know your judge; when you know your judge, less is more. Tell the judge up front what you want. Get to the point." He reiterates, "I read all the motions. If you don't get to the point quickly, you probably have a bad motion." Getting to the point quickly is also important for hearings—other lawyers are waiting, and their time is valuable. Finally, he advises, "Be civil," and don't talk over each other. "Honey gets you more than vinegar. Why not be nice and civil to each other?"

Reflecting back decades, Judge Groner provides yet another piece of advice. It was from Judge Thorburn that Judge Groner learned the importance of punctuality. Being late disrespects other counsel and their clients. He reminds us that "judges are appointed, not anointed." Judge Groner knows what lawyers want: "a judge who will read the papers; provide a good, reasoned opinion; and make a ruling." He endeavors to do just that. In his courtroom, Judge Groner wants "everyone to be comfortable; I want everyone to be treated with respect, to be treated fairly, and to have their day in court."

His parting words of advice? "Remember, this is your job, not your life. It's important work, and hard work, but it's your work, not your life."

Two Courts: Ten Years: Congratulations!

November 1, 2021, marked the tenth anniversary of the opening of the Macomb County Specialized Business Docket. Judge Kathryn A. Viviano and Judge Richard L. Caretti are the business court judges there. February 1, 2022, marked the tenth anniversary of the launch of the Kent County Specialized Business Docket. Judge Christopher P. Yates and Judge Terence J. Ackert serve as business judges there. Congratulations to both courts and to the business court judges.

New Business Court Judges

Judge Michael L. West has been appointed to the St. Clair County Business Court. He replaces Judge Daniel P. Kelly, who retired. On the west side of the state, Judge William C. Marietti has been appointed to the Muskegon County Business Court. He replaces Judge Timothy G. Hicks, who retired.

Administrative Order; New Case Evaluation Rules

Administrative Order 2013-6 deals with implementation of the business courts. It states, in part:

> Courts shall establish specific case management practices for business court matters. These practices should reflect the specialized pretrial requirements for business court cases, and will typically include provisions relating to scheduling conferences, alternative dispute resolution (with an emphasis on mediation scheduled early in the proceeding), discovery cutoff dates, case evaluation, and final settlement conferences.[3]

Since that Administrative Order was issued, the case evaluation rules were amended, effective January 1, 2022. As a result of these amendments, it is likely that even fewer business litigation cases will go to case evaluation in the future. The amendments remove the case evaluation sanctions. Additionally, the amendments permit the parties to waive participation in the case evaluation process entirely so long as the parties stipulate to another form of ADR (such as mediation) approved by the judge. MCR 2.403(A)(1). Mediation, particularly early mediation, along with early and active judicial involvement, will remain key to resolving business court cases.

Business Court Website

The business court website, which is part of the One Court of Justice website, has been redesigned.[4] It remains a "clearinghouse" for business court information in Michigan.

One more thing…

Check out "Michigan Trial Courts: Lessons Learned from the Pandemic of 2021: Findings, Best Practices, and Recommendations."[5]

NOTES

1. This is not an endorsement of a particular videoconferencing platform.

2. https://www.3rdcc.org/judges#/name/8/1.

3. https://www.courts.michigan.gov/49bee1/siteassets/courts/business/2012-36_2013-06-05_ao-2013-6_formatted-ao_business-court-st.pdf.

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5. https://www.courts.michigan.gov/4afc1e/siteassets/covid/lessons-learned/final-report-lessons-learned-findings-best-practices-and-recommendations-111921.pdf.

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The Entire Fairness Doctrine: Why Is It Missing from Michigan Jurisprudence?

By Daniel D. Quick and Zachary L. Pelton

Introduction

Those who manage businesses owe duties to the entity and sometimes to the owners of the business.[1] When corporate decisions or transactions are challenged, varying standards apply. Those challenging the conduct usually carry the burden of proof and must overcome the deferential "business judgment rule." While Michigan's oppression statutes have made challenges much easier, the plaintiff still carries the burden of proof.

Delaware and several other jurisdictions recognize another standard of review: the entire fairness standard. When this standard applies—deemed to be the most exacting standard applicable to governance—not only is the entire transaction evaluated as to fairness, but the entity or those in charge carry the burden of proof. This standard applies when the normal business judgment rule presumption is overcome, primarily in the instance of a decision that is either self-interested or where those making the decision are dominated and controlled by an arguably interested director.

Self-interested transactions make up the large bulk of shareholder litigation, yet no Michigan published opinion since 1976 has applied, or even discussed, the entire fairness doctrine. Part of the reason may be that the shareholder oppression action has come to dominate the world of shareholder litigation; why bother trying to overcome the business judgment rule when you can just sue everyone directly with little chance of an early dispositive motion?[2] The other reason may be that the business judgment rule has gained a reputation as an intimidating and high hurdle to overcome, although in reality, and especially where a transaction is self-interested, courts regularly ignore the doctrine. Lastly, while both the Michigan Business Corporation Act (MBCA) and the Michigan Limited Liability Company Act (MLLCA) include a version of the entire fairness doctrine for self-interested "transactions," the statute does not broadly apply to general corporate decision-making, which is usually under scrutiny in shareholder litigation, and perhaps that has led to the mistaken belief that no standard exists. No matter the reason, the entire fairness doctrine is an important part of corporate law that is due for treatment by Michigan courts.

Michigan's Fiduciary Duty Standard

Directors and officers owe fiduciary duties to the corporation they serve and its shareholders.[3] In Michigan, section 541a of the MBCA requires a director or officer of a corporation to discharge such duties "in good faith," "with the care an ordinarily prudent person in a like position would exercise under the circumstances," and "in a manner he or she reasonably believes to be in the best interest of the corporation."[4] Section 541a also specifies that an officer or director may fulfill the duty of care by relying upon "information, opinions, reports, or statements, including financial statements and other financial data" if such information is prepared by certain identified persons and the officer or director has a reasonable belief that the person providing the information is competent to do so.[5]

There is a presumption under section 541a "that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company."[6] This presumption recognizes a standard of judicial review for decisions by corporate officers and directors that is commonly known as the "business judgment rule." As described by the Michigan Supreme Court, the business judgment rule provides that "[i]n the absence of bad faith or fraud, a court should not substitute its judgment for that of corporate directors," and "[a] court should be most reluctant to interfere with the business judgment and discretion of directors in the conduct of corporate affairs."[7] If the presumption of the

business judgment rule is not overcome in a suit challenging director action, the directors will be deemed to have satisfied the statutory standard of conduct set forth in section 541a.

Presently, the fiduciary duties addressed in the MBCA only apply to officers and directors. However, nondirector/officer shareholders with actual control over a corporation's actions are fiduciaries under the common law. The Michigan Court of Appeals has held that those in control of closely held corporations have "a higher standard of fiduciary responsibility, a standard more akin to partnership law."[8]

The higher standard of fiduciary responsibility for controlling shareholders is reflected in Michigan's shareholder oppression statue, which creates a cause of action against directors or those in control of a corporation for illegal, fraudulent, and willingly unfair and oppressive conduct.[9] A shareholder presenting evidence to establish the elements of a claim under section 489 "necessarily overcomes the business-judgment rule" because the statute "identifies wrongful conduct and provides a remedy for it."[10]

Michigan's Limited Fairness Rule under MCL 450.1545a

Section 545a of the MBCA provides that a conflict of interest transaction "shall not, because of the interest, be enjoined, set aside, or give rise to an award of damages" if the interested party established that the transaction was approved by independent shareholders or directors, or if the "transaction was fair to the corporation at the time entered into."[11] Once a plaintiff shows that a director or officer engaged in an interested transaction, "the interested person must demonstrate that the transaction was validated in one of the ways permitted by statute."[12] Overcoming this burden can serve as a safe harbor for officers and directors accused in engaging in interested transactions by "sanitizing" interested transactions and evaluating them as if they were disinterested. However, the Michigan Legislature amended MCL 450.1545a to clarify that satisfying the elements of MCL 450.1545a(1) does not prevent transactions with interested directors or officers from attack for other defects, such as breach of fiduciary duties or illegality.[13]

The Entire Fairness Standard

Delaware's default standard of review for examining director decision-making is the business judgment rule. However, Delaware common law holds that if the majority of the board stands to receive an incentive adverse to the company, or a conflicted director or stockholder "controls or dominates the board as a whole," the business judgment rule is inapplicable and the director must prove the "entire fairness" of the transaction.[14]

In Delaware, fairness becomes an issue when the presumption of the business judgment rule is defeated.[15] If a party challenging a controlling fiduciary's decision is able to allege and prove that those involved in the decision making process lacked independence, Delaware courts will apply the entire fairness doctrine. Entire fairness analysis is designed to test whether a self-dealing transaction should be given deference or set aside in equity. When facing a question of entire fairness, the burden of proof shifts from the plaintiff to the fiduciary to show that the transaction at issue was entirely fair to the corporation and its stockholders.[16] "Not even an honest belief that the transaction was entirely fair will be sufficient to establish entire fairness. Rather, the transaction itself must be objectively fair, independent of the board's beliefs."[17]

In analyzing a transaction under the entire fairness standard, Delaware courts look at both the substantive or price fairness ("fair price") and the procedural fairness ("fair dealing").[18] In an entire fairness analysis, price "is the paramount consideration because procedural aspects of the deal are circumstantial evidence of whether the price is fair."[19] To demonstrate fair price, it is not necessarily required that the defendant show that the price paid was the highest price that could be obtained.[20] When considering fair price, courts will examine all "economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock."[21] Courts recognize that "[t]he value of a corporation is not a point on a line, but a range of reasonable values."[22] Overcoming the burden of fair price requires a showing "that a reasonable seller, under all of the circumstances, would regard as within a range of fair value; one that such a seller could reasonably accept."[23]

Determining fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the ap-

While Michigan's oppression statutes have made challenges much easier, the plaintiff still carries the burden of proof.

provals of the directors and the stockholders were obtained."[24] Although there are certain categories of negotiating information that controlling fiduciaries are not required to share, in evaluating how a transaction was negotiated, courts will examine whether the controlling fiduciary "disclose[d] fully all the material facts and circumstances surrounding the transaction."[25] Just as a fair process can support a price, an unfair process can taint the price.[26] Factors such as "coercion, the misuse of confidential information, secret conflicts, or fraud" could lead to a decision that a transaction was not entirely fair, regardless of the price that was obtained.[27]

Fair price and fair dealing are not viewed in isolation; there is no bright-line rule on what is entirely fair. The entire fairness test is a "unitary test" rather than a bifurcated analysis.[28] Entire fairness requires courts to strictly scrutinize all aspects of a transaction to ensure fairness. "[F]airness as to one prong will not necessarily sterilize or immunize a defendant from liability."[29] Though, evidence that the transaction occurred as a result of an arm's length bargain is strong evidence that it meets the test of fairness.[30] A determination of the entire fairness of a transaction must be based on the facts as they existed at the time of the transaction rather than subsequent events.[31]

In Delaware, fairness becomes an issue when the presumption of the business judgment rule is defeated.

Although entire fairness creates an onerous standard of review, "[a] determination that a transaction must be subjected to an entire fairness analysis is not an implication of liability."[32] Courts and scholars have observed that "only exceptional entire fairness cases result in meaningful damages awards."[33] Officers and directors may show entire fairness and shift the burden of proof back to the plaintiff by utilizing safeguards in their decision making process such as establishing a special committee of independent and disinterested directors with the ability to approve or reject transactions proposed by the interested party.[34]

The standard of review utilized by the court can drive decisions on motion practice, settlement discussions, and resolution strategy. Under the business judgment rule, corporate fiduciaries are presumed to have acted in good faith and may obtain pretrial dismissal under Rule 12(b)(6) of the Delaware Rules of Civil Procedure (DRCP) absent facts that the business judgment rule does not apply. The entire fairness standard, on the other hand, typically precludes dismissal under Rule 12(b)(6) of the DRCP, because the defendant would need to demonstrate conclusively "that the challenged transaction was entirely fair based solely on the allegations of the complaint and the documents integral to it,"[35] and "[a] determination of whether the defendant has met that burden will normally be impossible by examining only the documents."[36]

The Entire Fairness Standard in Michigan

At first blush, MCL 450.1545a would seem to constitute the statutory adoption of the entire fairness standard. But the statute has limited application in at least two ways. If anything, the statute suggests room for the entire fairness doctrine under Michigan common law.

First, the statute only applies to officers and directors (and the MLLCA analog, MCL 450.4409, only applies to a manager or agent of an LLC). As noted, the oppression statutes can apply to those in charge of an entity and thus can, where applicable, reach shareholders who are not directors or officers. But the point is that MCL 450.1545a does not constitute a broad recognition of a standard once the business judgment rule is overcome.

Second, the statute only applies to "transactions." The statute was adopted from the Model Business Corporation Act, which notes in the commentary that "'transaction' generally connotes negotiations or consensual arrangements between the corporation and another party or parties that concern their respective and differing economic rights or interests—not a unilateral action by the corporation or a director."[37] Why would a statute focus narrowly on "transactions?" The act adopted a "bright line" standard for corporate transactions in order to reward planning—where "the clear and important efficiency gains that result from certainty" outweigh theoretical downsides to bright line tests.[38] Thus, entities may easily structure corporate decision making to avoid application of the entire fairness doctrine.

The narrow purpose of the statute is evident from the language itself, which notes that satisfying the elements of section 545a(1) of the MBCA does not prevent transactions with interested directors or officers from attack for other defects, such as breach of fiduciary duties or illegality.[39] Indeed, the Model Business Act commentary explains:

> Many other kinds of situations can give rise to divergent economic inter-

ests between a director and the corporation. For example, a director's personal financial interests can be affected by a nontransactional policy decision of the board of directors, such as where it decides to establish a divisional headquarters in the director's small hometown. In other situations, simple inaction by a board might work to a director's personal advantage, or a flow of ongoing business relationships between a director and the corporation may, without centering upon any discrete "transaction," raise questions of possible favoritism, unfair dealing, or undue influence. If a director decides to engage in business activity that directly competes with the corporation's own business, the economic interest in that competing activity ordinarily will conflict with the best interests of the corporation and put in issue the breach of the director's duties to the corporation. Basic conflicts and improprieties can also arise out of a director's personal appropriation of corporate assets or improper use of corporate proprietary or inside information.

The circumstances in which such nontransactional conflict situations should be brought to the board of directors or shareholders for clearance, and the legal effect, if any, of such clearance, *are matters for development under the common law* and lie outside the ambit of subchapter F. Although these non transactional situations are not covered by the provisions of subchapter F, *a court may well recognize that the subchapter F procedures provide a useful analogy for dealing with such situations*.[40]

The Delaware courts' application of the entire fairness doctrine exists outside of and in addition to section 144 of the Delaware General Corporation Law, which is similar to MCL 450.1545a. Delaware courts have broadly applied the doctrine to any number of corporate decisions where there is a specter of self-interest.[41] And it is clear that compliance with section 144 of the Delaware act does not eliminate application of the doctrine.[42]

Michigan courts have recognized and applied the entire fairness doctrine. The most recent modern application was in *Fill Bldgs, Inc v Alexander Hamilton Life Ins Co of America*,[43] a 1976 opinion where the Michigan Supreme Court affirmed nullification of a lease found to fail the test. But since then, the standard has only been applied in one unpublished Michigan Court of Appeals opinion.[44] And only one business court trial opinion in the Michigan Supreme Court database even references the doctrine.[45]

Conclusion

Michigan common law addressing fiduciary duties has room for the entire fairness doctrine. The foundation for it exists in Michigan law, and Michigan often looks to Delaware for corporate law developments. The precise parameters of the doctrine will need elucidation, as will its limits. But shareholder rights will be improved by a robust place for entire fairness under Michigan law.

Fair price and fair dealing are not viewed in isolation; there is no bright-line rule on what is entirely fair.

NOTES

1. For simplicity, this article will primarily use the parlance of corporations, but the same concepts apply equally to limited liability companies and they are discussed herein.

2. *See* Daniel D. Quick, *Restoring Balance to the MBCA: Shareholder Oppression and Derivative Actions,* 40 MI Bus LJ 30 (Fall 2020).

3. *Production Finishing Corp v Shields*, 158 Mich App 479, 405 NW2d 171, 174 (1987).

4. MCL 450.1541a(1).

5. MCL 450.1541a(2).

6. *Adelman v Compuware Corp,* No 333209, 2017 WL 6389899, at *10 (Mich Ct App Dec 14, 2017) (Quoting *F5 Capital v Pappas*, 856 F3d 61, 87 (2nd Cir 2017).

7. *In re Butterfield Estate*, 418 Mich 241, 255, 341 NW2d 453 (1983).

8. *Estes v Idea Eng'g & Fabrications, Inc*, 250 Mich App 270, 281, 649 NW2d 84 (2002).

9. MCL 450.1489.

10. *Franks v Franks*, 330 Mich App 69, 101, 944 NW2d 388 (2019).

11. MCL 450.1545a(1).

12. *Nicholl v Torgow*, 330 Mich App 660, 669, 950 NW2d 535 (2019).

13. MCL 450.1545a(4).

14. *Texlon Corp v Meyerson*, 802 A2d 257, 264 (Del 2002).

15. *Tomczak v Morton Thiokol, Inc*, No CIV A. 7861, 1990 WL 42607 at *14 (Del Ch Apr 5, 1990).

16. *Krasner v Moffett*, 826 A2d 277, 287 (Del 2003).

17. *Reis v Hazelett Strip-Casting Corp*, 28 A3d 442, 459 (Del Ch 2011) (quoting *Gesoff v IIC Indus, Inc*, 902 A2d 1130, 1145 (Del Ch 2006)).

18. *Weinberger v UOP, Inc*, 457 A2d 701, 711 (Del 1983).

19. *eBay Domestic Holdings, Inc v Newmark*, 16 A3d 1, 42 n 146 (Del Ch 2010).

20. *See Cinerama, Inc v Technicolor, Inc*, 663 A2d 1156, 1179 (Del 1995).

21. *Weinberger v UOP, Inc*, 457 A2d 701, 711 (Del 1983).

22. *In re Orchard Enters, Inc Stockholder Litig*, 88 A3d 1, 30 (Del Ch 2014).

23. *Cinerama, Inc v Technicolor, Inc*, 663 A2d 1134, 1143 (Del Ch 1994), aff'd, 663 A2d 1156, Fed Sec L Rep (CCH) P 98812 (Del 1995).

24. *Weinberger v UOP, Inc*, 457 A2d 701, 711 (Del 1983).

25. *In re Dole Food Co, Inc Stockholder Litig*, 2015 WL 5052214, *29 (Del Ch 2015).

26. *Bomarko, Inc v International Telecharge, Inc*, 794 A2d 1161, 1183 (Del Ch 1999).

27. *ACP Master, Ltd v Sprint Corp*, 2017 WL 3421142 (Del Ch 2017).

28. *See ACP Master, Ltd v Sprint Corporation*, 2017 WL 3421142 (Del Ch 2017), judgment aff'd, 184 A3d 1291 (Del 2018) (noting the "unitary nature of the entire fairness test").

29. *In re TD Banknorth Shareholders Litig*, 938 A2d 654 (Del Ch 2007).

30. *Cinerama, Inc v Technicolor, Inc.*, 663 A2d 1134, 1141 (Del Ch 1994), aff'd, 663 A2d 1156, Fed Sec L Rep (CCH) P 98812 (Del 1995).

31. *Kennedy v Emerald Coal & Coke Co,* 28 Del Ch 405, 42 A2d 398, 410 (1944).

32. *Basho Technologies Holdco B, LLC v Georgetown Basho Investors, LLC*, 2018 WL 3326693, at *35 (Del Ch 2018), aff'd, 221 A 3d 100 (Del 2019) (quoting *Emerald Partners v Berlin*, 787 A 2d 85, 93 (Del 2001)).

33. *Basho Techs Holdco B, LLC v Georgetown Basho Inv'rs, LLC*, 2018 WL 3326693, at *35 (Del Ch 2018), aff'd, 221 A3d 100 (Del 2019) (citing Dibadj, *Networks of Fairness Review in Corporate Law*, 45 San Diego L Rev 1, 22 (2008) (observing "[w]hile the conventional wisdom might suggest that standards of review are typically outcome determinative, the empirical research suggests the fairness standard is not …" and cataloging cases where defendants prevailed).

34. *Kahn v Tremont Corp*, 694 A2d 422, 429 (Del 1997).

35. *In re Straight Path Commc'ns Inc Consol Stockholder Litig*, 2018 WL 3120804, *19 (Del Ch 2018), certification granted, 2018 WL 3599809 (Del Ch 2018) and judgment aff'd, 206 A3d 260 (Del 2019) (quoting *Hamilton Partners, LP v Highland Capital Mgmt, LP*, 2014 WL 1813340, *12 (Del Ch 2014).

36. *Orman v Cullman*, 794 A2d 5, 21 n 36 (Del Ch 2002).

37. Model Business Corporation Act (2016 revision), p 222.

38. *Id.,* p 221.

39. MCL 450.1545a(4).

40. Model Business Corporation Act (2016 revision), p 223.

41. *See* commentary at Amir N. Licht, *Farewell to Fairness: Towards Retiring Delaware's Entire Fairness Review*, 44 Del J Corp L 1, 7 (2020).

42. *Cumming on behalf of New Senior Inv Grp, Inc v Edens*, No CV 13007-VCS, 2018 WL 992877, at *21 (Del Ch, Feb 20, 2018).

43. 396 Mich 453, 460, 241 NW2d 466, 469 (1976).

44. *Castle v Shoham,* No 337969 (Mich Ct App Aug 7, 2018) (unpublished), 2018 WL 3746550, p *8. There was also discussion of the doctrine by a federal court, which concluded that it would not apply to statutory appraisal rights. *Krieger v Gast*, 179 F Supp 2d 762 (2001).

45. *Alamat v Thomas*, Case No. 21-187142-CB (Oakland County Circuit Court, October 27, 2021)(located at https://www.courts.michigan.gov/4aa7de/siteassets/business-court-opinions/c06-21-187142-cb(10.27.2021).pdf).

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Virtual Hearings and Vanishing Trials: A Modest Proposal for Training New Business Litigators in the Virtual Era

By Douglas L. Toering and Ian Williamson

Introduction

It's June 2022 at the semi-annual associate review, and this discussion occurs.

> Partner: "You're doing an excellent job. Do you have any questions?"
>
> Associate: "Thank you very much. Yes, two questions: I'm a fifth-year associate in the commercial litigation practice group. I've been to court only a few times and I was wondering: Did business litigators really used to go to court regularly in person? And when will I get to try a case?"
>
> Partner: "Well…"

This illustrates a vexing problem. How can new litigation attorneys learn to argue motions effectively when many motions are now decided without a hearing?[1] How can new lawyers learn to try a case, when few civil cases go to verdict?[2] There are no simple answers, but this article will suggest various ways that newer commercial litigation attorneys can receive training in an era of virtual hearings, fewer hearings, and fewer and fewer trials. Overall, the focus needs to remain on training attorneys to argue motions and try cases—both in court and virtually.

Here, we will explore this problem and then propose solutions. Regarding the latter, we will discuss how law firms and corporate legal departments, the bench, and the bar could work together to train new business litigation attorneys in the virtual era. All of this is, of course, in the context of counsel doing what is best for the client.

The Issue: Fewer In-Person Hearings; Fewer Trials

As a result of the Covid-19 pandemic, many (if not most) routine court proceedings now occur by Zoom. This includes status conferences, discovery motions, and other non-dispositive motions. In some cases, evidentiary hearings occur by Zoom. Some bench trials are also occurring by Zoom. Legal proceedings (with the exception of jury trials, some bench trials, and some evidentiary hearings) are likely to continue to occur by videoconferencing after the pandemic.

There is also an increasing tendency in state and federal courts to dismiss cases on the pleadings and an increasing trend to decide motions without a hearing.[3] The result is fewer opportunities for new attorneys to argue motions (whether in court or by Zoom).

This article is not a criticism of the fact that there are fewer trials or that more hearings (and other legal proceedings) are occurring by videoconferencing. There are many reasons for the decline in trials, and that is not the focus of this article. And, of course, the decision whether to proceed to trial is the client's, not the lawyer's. Nor does the fact that fewer cases are being tried or that hearings are conducted virtually (or not at all) mean that judges or their staff aren't working hard. To the contrary, many, if not all, Michigan judges carry huge caseloads. It certainly is not the intent here to add to their heavy workloads.

That few cases go to verdict has been true for years,[4] but legal proceedings by Zoom are primarily a result of the pandemic. Virtual legal proceedings are becoming the rule rather than the exception, and many judges find this preferable, including the Michigan Supreme Court. Under a recent amendment to MCR 2.407(G), "trial courts are required to use remote participation technology (videoconferencing under this rule or telephone conferencing under MCR 2.406) to the greatest extent possible." Indeed, court proceedings by Zoom offer many advantages, primarily efficiency and convenience. Lawyers spend less time traveling and waiting in court, and so do clients.[5] That's a good thing, as time is literally money when it comes to legal services.

But this efficiency carries implications for the development of new attorneys. New attorneys have fewer opportunities to be in court and observe how motions are argued (the good and the bad), how to respond to a judge's questions, and how to modify one's argument depending on the judge's concerns.[6] And if motions are granted or denied without a hearing and with little reasoning, it is often difficult for counsel (or appellate courts) to know why the motion was granted or denied. The fact that business court decisions are posted at the Michigan State Court Administrative Office website[7] mitigates this concern to some degree. But orders resolving many routine motions are not posted there, of course, and even substantive motions may not result in reasoned or posted opinions. Newer attorneys also don't have the in-person contact with attorneys at the courthouse, where they can meet veteran trial lawyers, make connections that will help them advance their careers, and perhaps gain some informal insight into the reasoning behind a given judge's rulings.

Virtual legal proceedings are becoming the rule rather than the exception, and many judges find this preferable, including the Michigan Supreme Court.

At the same time, depositions are occurring virtually. Some mediations are too. So are some arbitrations. All this has the benefit of making attendance by the client, the lawyer, and witnesses easier. But when combined with the pandemic-related cancellation of many state bar and bar association social events, all of this means fewer opportunities for newer attorneys to have direct contact with judges, mediators, arbitrators, and opposing counsel.

Does this mean that nothing can be done to train new attorneys in the era of virtual hearings and vanishing trials? No—but it does mean that new approaches are becoming necessary to train business litigators to argue motions and to try cases, both in person and virtually. In order to succeed, newly minted business litigators must be equally adept in person and through a virtual presence.

Possible Solutions: What Law Firms, the Bar, and the Bench Can Do

Law Firms

Legal proceedings by videoconferencing and fewer trials will continue to be the rule rather the exception. As many judges have said, "Zoom is here to stay." Given this, what can law firms, the bar, and the bench do to provide training to new business litigators? The answer is: "A lot." As mentioned, the training should be for both in-person proceedings and those done virtually.

At the law firm level, law firms (or corporate legal staffs) can better take advantage of the opportunities that already exist to help train their associates. For example, when there are opportunities for partners to go to court for motion hearings or status conferences, consider inviting a newer attorney to accompany the partner. Even if the hearing is by Zoom, consider including the associate. When depositions are scheduled in a case, think about asking the new litigator to prepare for the deposition and attend the deposition with the partner—or, maybe let the associate take the lead on the deposition with the partner second-chairing. The same is true for mediations and arbitrations. Consider asking a newer attorney to attend. This is true whether the hearing, mediation, or arbitration is in person or done virtually. Of course, unless this adds value for the client, the firm will need to "write off" this time as associate development. A contingency fee or other fixed fee case does not pose the same concern about writing off time as an hourly case.

The firm may be doing much of this already, of course. As mentioned, if it is a case that does not justify two attorneys to attend a hearing, deposition, and so forth, then the firm will have to "write off" the time for the new attorney and charge it internally as "associate development"—but the reduced time commitment obtained through virtual practice should justify looking for these opportunities more frequently as in-person opportunities decrease.

Recognizing that virtual legal proceedings are the wave of the future, there are other ways firms can help train new business litigators by leveraging virtual technology. For example, newer attorneys can watch the partner prepare for an oral argument on a summary disposition motion via Zoom without being physically present. Firms can conduct mock trials via Zoom with the new attorney observing a partner conduct direct or cross examination. Then give the associate the opportunity to do the same. Virtual technology also allows for recording of the mock argument or trial for subsequent discussion and critique. The critique would include not only the substance of the argument or examination, but also how the attorney appears on

a screen. This will be an advantage to both new attorneys and experienced litigators alike. Mock trials done virtually also makes finding mock jurors easier.

Firms can also consider establishing their own in-house "business litigation bootcamp." Seasoned trial partners can present 20- or 30-minute segments in regular meetings to demonstrate techniques for direct or cross examination and other trial practice. New attorneys could be given fact patterns for in-house mock trials at their firms. As part of this, they would draft their own opening, direct or cross examination, and closing and then present this to select partners and staff at the firm.

Former New York City Mayor Ed Koch was famous for asking, "How am I doing?" Anyone who appears in court (or for a deposition, mediation, or arbitration) should ask colleagues the same. Part of that will be, "How do I come across on Zoom?" Mannerisms that may present well in a courtroom might not on a screen. Or said differently, just because someone is effective in court doesn't mean that he or she will be equally effective by Zoom. Again, this applies to both veteran trial lawyers and new litigators. In fact, experienced litigators should be open to critique by newer lawyers who may be more familiar with, and more comfortable with, virtual connection and presentation after growing up with applications like FaceTime, Vine, SnapChat, TikTok and others.

As is becoming more common, the authors have a mock courtroom in the office; they have used this for a bench trial by Zoom that occurred over various days in September and October 2020 and for evidentiary hearings and arguments on significant motions. They also use this for mock trials and preparation for oral arguments. With fewer attorneys being in the office full time and virtual proceedings on the rise, firms without significant additional space can consider consolidating a few offices and converting them into a mock courtroom. Even a single spare office can be outfitted with proper lighting and webcams, a podium, reliable Internet, and a large-screen TV to help approximate a courtroom "feel" so that newer attorneys aren't consistently arguing motions from their desks.

Pro bono is another possibility.[8] Firms might ask a new attorney to try a landlord-tenant or a collection case, for example. These cases often do not involve a great deal of time, and they may provide hands-on, in-court trial experience to new attorneys that is increasingly difficult to obtain otherwise.

Also, trial experience need not always come from within the firm. Occasionally, the lawyer who has the client relationship and has worked up the case is, for whatever reason, unable to try the case. Or maybe that lawyer needs additional trial counsel. If litigators make it known to lawyers from other firms that their firm is available to help try cases, whether in person or virtually, opportunities may arise for a partner and a newer business litigator to get into court or to try a case virtually.

Finally, the new business litigation lawyers need to be involved in all of this. For example, a new attorney (with consent of the supervising partner) could be the one to get out the word at the firm and elsewhere that he or she is available to try cases and looking for opportunities to do so.

The Bar

Litigators are, of course, generally familiar with the various trial training seminars done through various bar associations,[9] NITA,[10] and others. These have their place. So do books and articles (the ABA's *Litigation Journal* is excellent.) Can more be done? Yes, especially for newer business litigators.

One possibility is a "business litigation bootcamp." For many years, the State Bar of Michigan's Business Law Section has offered a "Business Bootcamp." This has been well received and has helped to train many new business lawyers.

In a similar vein, the Business Law Section (perhaps in conjunction with the Litigation Section and ICLE) could offer a business litigation bootcamp. This would, of course, focus on substantive and procedural issues involving business litigation. But it would also address specific skills, such as taking and defending depositions; arguing discovery motions; handling more complex matters such as evidentiary hearings and Daubert hearings; mediation; arbitration; and trial practice—both in person and by videoconferencing. Indeed, part of the business litigation bootcamp itself could be done in person and part by videoconferencing.

Also, as part of the business litigation bootcamp, perhaps one or more of the business court judges could make a courtroom open for practice arguing motions, handling evidentiary hearings, and trial prac-

At the law firm level, law firms (or corporate legal staffs) can better take advantage of the opportunities that already exist to help train their associates.

tice (openings, direct examinations, cross examinations, motions for directed verdict or involuntary dismissal, closings, etc.) If the business court judge presided over this, it would be even more realistic. If not, a retired judge or an experienced trial lawyer could sit as the mock business court judge. If this can't be done in person, then perhaps it could be done virtually. The Programs Committee of the Business Law Section could work with the section's Business Courts Committee and Commercial Litigation Committee in establishing this "business litigation bootcamp." Local bar associations may be able to help. Law firms could support these programs either by sponsoring the program or paying for their attorneys to attend.

Another possibility is mentoring.[11] Senior trial lawyers who are semi-retired, recently retired, or who otherwise have extra time could mentor newer attorneys. This may consist of critiquing an oral argument or a mock direct examination. It would be best if this were done in person, but if that can't be arranged, then do it virtually—this allows the mentor to critique what the new attorney has done at a time convenient to the mentor.

Recognizing that virtual legal proceedings are the wave of the future, there are other ways firms can help train new business litigators by leveraging virtual technology.

And with so much litigation being conducted by videoconferencing, bar functions should seriously consider resuming in-person social events during periods when Covid infection rates wane. Many educational events will continue to be done by videoconferencing. That's generally good—it saves travel time and is more convenient, which probably leads to better attendance. But some events should still occur in person. Rubbing shoulders with other counsel, judges, arbitrators, mediators, and so forth is helpful to the professional development of business litigators.

The Bench

Here, we mean primarily trial court judges. As mentioned, trial judges could open their courtrooms for mock hearings or mock trials, either with a trial court judge (a business court judge or another circuit judge) presiding, or with a retired judge or a senior trial lawyer presiding. It would be preferable to do this in person. But if that can't occur, then it could be done by Zoom. Again, judges are very busy and have limited staff, so any such activity would need to recognize these limitations.

As to an appeal, perhaps a courtroom of the Michigan Court of Appeals could be made available for a mock oral argument in a business case. Either a sitting court of appeals judge or an experienced business appellate lawyer could preside.

Other

Don't forget summary jury trials if the case is in the Macomb County Circuit Court (including the Macomb County Business Court.[12]) Again, the decision whether to try or settle is the client's, of course, but a summary jury trial might appeal to certain clients in certain situations.

In another situation, if the parties are unable to resolve a case through mediation but have succeeded in setting outside parameters, the parties might be interested in taking a case to trial subject to an advance "low/high" agreement. Here, the parties agree that no matter what the judge or jury decides, the plaintiff would receive no lower than X and the defendant would pay no more than Y. Assume the low/high is $300,000/$700,000. If the verdict is $200,000, plaintiff gets $300,000. If the verdict is $500,000, plaintiff gets $500,000. If the verdict is $900,000, plaintiff gets $700,000. Knowing that the risk is reduced, both parties may prefer to try the case, thereby creating an opportunity for newer business litigation attorneys to gain key experience while also appropriately advancing the client's goals.

This is not an attempt to create more work for judges and their staff. Rather, it is a reminder that other options may be available for clients who really do want a trial, whether that is in the courtroom or done virtually.

Of course, a trial in the business court is not the only option for a client who does want some kind of a trial. Arbitration may be a possibility. Another example is mediation followed by arbitration. For comprehensive information on a variety of alternative dispute resolution approaches, see *Michigan Judges Guide to ADR* (2015).[13]

Conclusion

This article is far from an exhaustive treatment of this subject, and it is not intended as such. Rather, the authors wish to spark more widespread discussion of the problem—how to train new business litigators in an era of vanishing trials and virtual (or no) hearings or other court appearances—and posit possible solutions. The readers may be able to identify more ways to train new business litigators. We welcome this. Virtual practice is the new reality, and there will not be a full

return to pre-pandemic operating procedures even in a post-pandemic world.

With coordinated efforts by law firms (and corporate legal staffs), the bar, and the bench, we can and should work to assure that newer business lawyers are properly trained in pre-trial proceedings and trials themselves—both in person and virtually—even without access to the routine of in-person motion calls, hearings, and trials that contributed to many of our own development as business litigation attorneys. Where possible, the newer generation of commercial litigation attorneys should help drive this process. They are the ones who stand to benefit the most, as the reality of their experience as litigators will be an increasingly virtual landscape. The bottom line is that law firms and corporate legal staffs, the bar, the bench, and particularly newer attorneys should be creative in looking for ways to give courtroom experience to newer lawyers, both in person and virtually.

NOTES

1. Judges in Michigan state courts use Zoom, so the article will discuss Zoom in that context. This is not a critique of, or a commentary on, any particular video-conferencing platform.

2. The most recent data from SCAO are that under 1 percent of civil cases filed in Michigan circuit courts go to verdict. Recent statistics may be found at: https://www.courts.michigan.gov/4a5431/siteassets/reports/statistics/caseload/2020/statewide.pdf. Trials are becoming "alternate dispute resolution" proceedings. In fact, the American Bar Association's relevant section is its Section of Dispute Resolution.

3. Judges have the right to decide motions without a hearing. MCR 2.119(E)(3).

4. *See, e.g.*, Richard L. Hurford, *What's a Business Litigator to Do—The Vanishing Jury Trial and the Litigotiation Option*, 39 MI Bus LJ 31 (Spring 2019); Douglas L. Toering and Ian M. Williamson, *Business Courts in Michigan: Seven Years and Counting*, 99 Mich BJ 20 (Jan 2020); and Jeffrey Q. Smith and Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?* 101 Judicature 26 (Winter 2017).

5. For more on this issue generally, see Michigan State Court Administrative Office, Lessons Learned Committee, *Michigan Trial Courts: Lessons from the Pandemic of 2020-2021: Findings, Best Practices, and Recommendations* (June 29, 2021) (https://www.courts.michigan.gov/4afc1e/siteassets/covid/lessons-learned/final-report-lessons-learned-findings-best-practices-and-recommendations-111921.pdf); Joseph K. Grekin and Brandi M. Dobbs, *Zooming into the Future*, 42 MI Bus LJ 38 (Spring 2022); *see* Douglas L. Toering and Fatima M. Bolyea, *Touring the Business Courts: An Insight at the State Level*, 41 MI Bus LJ 11 (Fall 2021).

6. While many courts do broadcast proceedings publicly via YouTube or other means, associates at the office or working in home offices are not likely to spend time simply observing arguments in other cases rather than actively working on their own cases and assignments.

7. https://www.courts.michigan.gov/business-court-search/.

8. The State Bar of Michigan recommends the following for pro bono service:

> All active members of the State Bar of Michigan should participate in the direct delivery of pro bono legal services to the poor by annually:
>
> 1. Providing representation without charge to a minimum of three low income individuals; or
> 2. Providing a minimum of thirty hours of representation or services, without charge, to low income individuals or organizations; or
> 3. Providing a minimum of thirty hours of professional services at no fee or at a reduced fee to persons of limited means or to public service or charitable groups or organizations; or
> 4. Contributing a minimum of $300 to not-for-profit programs organized for the purpose of delivering civil legal services to low income individuals or organizations. The minimum recommended contribution level is $500 per year for those lawyers whose income allows a higher contribution.

https://www.michbar.org/programs/atj/voluntarystds. *See also* Gerard V. Mantese, "I don't have time for pro bono," *Michigan Lawyers Weekly* (July 20, 2020), https://manteselaw.com/wp-content/uploads/2021/05/Mantese-Commentary-Gerard-Mantese-Michigan-Lawyers-Weekly.pdf. If the firm does not support pro bono efforts, then the attorney should consider doing this on his or her own time, with consent of the supervising partner.

9. The State Bar of Michigan's Negligence Law Section presents training seminars on a fairly frequent basis.

10. *See also* Robert L. Haig, *Business and Commercial Litigation in Federal Courts,* (5th ed); Federick L. McKnight and Michael H. Ginsberg, *Teaching Litigation Skills,* vol 7, ch 83.

11. The Oakland County Bar Association has a mentoring program and a pro bono mentor match program. https://www.ocba.org/?pg=resources-for-new-lawyers.

12. *See* Administrative Order 2015-1. *See also* https://www.courts.michigan.gov/administration/court-programs/jury-management/summary-jury-trial/.

13. https://www.northernmediation.org/wp-content/uploads/2017/09/MI-Judges-Guide-to-ADR-Practice-Procedure.pdf.

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Pleading and Proving a Trade Secret Case

By Maxwell Goss

Introduction

Once neglected and underdeveloped, trade secret law has come into its own. In a world of high employee mobility and accelerating technological growth, businesses are increasingly turning to trade secret law to protect their assets and vindicate their interests. Trade secret misappropriation has emerged as a powerful, adaptable cause of action that can be employed to protect competitively valuable information of all kinds, including technical information such as software code, chemical formulas, and engineering drawings, and business information such as customer preferences, pricing information, and market research.

A trade secret case requires careful planning and drafting by the plaintiff's counsel, for a number of reasons. The elements of trade secret misappropriation are elaborate and tricky to plead. More often than not, key facts are in the exclusive control of the defendant. The plaintiff must adequately identify the trade secrets at issue—but must also be careful to maintain their confidentiality and avoid unwittingly limiting the scope of the claim for relief. And where preliminary injunctive relief is sought—as it is in many if not most trade secret cases—it is especially important to have one's facts and legal theories nailed down from the outset.

This article addresses challenges facing the trade secret plaintiff at the pleadings stage and beyond, with emphasis on recent developments in federal and state caselaw. More specifically, it examines the rules for identifying relevant trade secrets, including the timing of disclosure and level of specificity required; the standards for showing that information constitutes a trade secret, including independent economic value and reasonable efforts undertaken to protect secrecy; and issues relating to the different types of misappropriation, including acquisition-only theories and the viability of the doctrine of inevitable disclosure. The article concludes with some suggestions for successfully pleading and proving a trade secret case.

Trade Secret Basics

State and Federal Law

Nearly every state, including Michigan, has adopted some version of the Uniform Trade Secrets Act ("UTSA"), a model act designed to bring uniformity to the states' trade secret laws.[1] Michigan's version ("MUTSA") is codified at MCL 445.1901 et seq. In 2016, Congress enacted the Defend Trade Secret Act of 2016 ("DTSA"), codified at 18 USC 1836 et seq. DTSA creates a federal cause of action for trade secret misappropriation, but it does not preempt state trade secret law.[2] The statute is largely modeled after UTSA, while adding certain enhanced remedies and protections.[3] The elements of a trade similar claim are substantially identical under MUTSA and DTSA.[4] Except where otherwise noted, the observations about MUTSA in this article also pertain to DTSA and in some respects will pertain to other states' versions of UTSA by analogy.

Misappropriation Elements

The elements of a claim for trade secret misappropriation are: (1) the plaintiff has protectable trade secrets; and (2) the defendant improperly acquired, disclosed, or used those trade secrets.[5] The simplicity of these elements is deceptive, however, in view of MUTSA's complicated definitions of key terms. The statute defines a "trade secret" as information that both:

(i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[6]

MUTSA defines "misappropriation" as either of the following:

(i) Acquisition of a trade secret of

another by a person who knows or has reason to know that the trade secret was acquired by improper means.

(ii) Disclosure or use of a trade secret of another without express or implied consent by a person who did 1 or more of the following:

(A) Used improper means to acquire knowledge of the trade secret.

(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it, acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use.

(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.[7]

The elements of a trade similar claim are substantially identical under MUTSA and DTSA.

"Improper means," in turn, includes "theft, bribery, misrepresentation, breach, or inducement of a breach of a duty to maintain secrecy or espionage through electronic or any other means."[8]

Identifying the Trade Secrets

Cases frequently involve a tug-of-war over the identification of the trade secrets the plaintiff contends were misappropriated. At the risk of oversimplifying, plaintiffs typically prefer to stick with broad disclosures early in the case and add more specificity only after substantial discovery, whereas defendants typically demand a high degree of specificity from the start. This tension can play out at two distinct junctures: at the pleadings stage and during discovery.

Pleadings

A plaintiff must identify the alleged trade secrets at issue "clearly, unambiguously, and with specificity."[9] But when? Federal courts in Michigan have declared that "such is not necessary at the pleading stage."[10] One opinion has noted that "the Federal Rules of Civil Procedure do not require heightened pleadings for trade secret claims."[11] Of course, there must be some identification of trade secrets in the complaint.[12] Nevertheless, federal courts "are in general agreement that trade secrets need not be disclosed in detail in a complaint for the simple reason that such a requirement would result in public disclosure of the purported trade secrets."[13]

The same point generally seems to apply in Michigan state courts, albeit less clearly. In a Macomb County Circuit Court opinion, Judge John C. Foster explained that "a plaintiff is not required to plead trade secrets with particularity at this early stage of litigation."[14] In support, the opinion cited an Eastern District of Michigan case holding that identification with specificity is not necessary at the pleading stage.[15] For its part, the Michigan Court of Appeals or the Michigan Supreme Court do not appear to have weighed in with a published opinion on whether a complaint must identify trade secrets with particularity. To be sure, a handful of unpublished opinions cite a federal case holding that "[a] party alleging trade secret misappropriation must particularize and identify the purported misappropriated trade secrets with specificity." However, in all but one of those opinions, the citation was made in connection with a motion for summary disposition under MCR 2.116(C)(10), under which a court reviews the evidence and not just the pleadings.[16]

Discovery

The identity of the secrets can often become a point of contention during discovery. The plaintiff may contend that it cannot ascertain the scope of the misappropriation—and cannot identify the relevant secrets—without discovery into matters within the defendant's exclusive control. Courts have observed that informational asymmetries can place the plaintiff in a catch-22 situation:

> Satisfying the requirement of detailed disclosure of the trade secrets without knowledge [of] what the defendant is doing can be very difficult. If the list is too general, it will encompass material that the defendant will be able to show cannot be trade secret. If instead it is too specific, it may miss what the defendant is doing.[17]

On the other hand, the defendant may contend that it should not be saddled with production obligations without an understanding of the precise trade secrets at issue. Courts have expressed concern that allowing discovery before the trade secrets have been

identified may set up a fishing expedition or enable a plaintiff to "mold its cause of action around the discovery it receives."[18]

In a number of courts, while the trade secrets need not be specifically identified in the complaint, the plaintiff must still identify them with reasonable particularity before it can compel discovery from the defendant regarding the secrets. In some jurisdictions—notably, California and Delaware—pre-discovery disclosure is a fixed requirement.[19] In others, courts decide in each instance whether to follow this approach. Indeed, "[t]he divergent rulings from various federal courts on the issue of whether to require prediscovery identification of trade secrets reinforces the idea that rulings on discovery limitations are a case-by-case decision where courts must use their broad discretion based heavily on the distinct circumstances of any particular action."[20]

In the Eastern District of Michigan, courts largely favor pre-discovery identification of trade secrets. In a widely cited opinion, Magistrate Judge Mona K. Majzoub explained that a plaintiff "will normally be required to identify with reasonable particularity the matter which it claims constitutes a trade secret, before it will be allowed (given a proper showing of need) to compel discovery of its adversary's trade secrets."[21] In Michigan state courts, however, litigation tends to be more flexible, and there appears to be no discernable authority addressing pre-discovery identification of trade secrets. Nevertheless, it should be noted that state trial courts are authorized to enter protective orders "for good cause shown" and to control the timing and sequence of discovery "for the convenience of parties and witnesses and in the interests of justice."[22]

Establishing Trade Secrecy

Independent Economic Value

A trade secret plaintiff must not only identify the trade secrets at issue but must plead and prove that they are, in fact, trade secrets. To do so, the plaintiff must first show that the information has economic value, and that it derives that value from being unknown to competitors.[23] As one court put it, "[t]o have independent economic value 'the secret information must afford the owner a competitive advantage by having value to the owner and potential competitors.'"[24]

Competitive value was a critical issue in *Ukrainian Future Credit Union v Seikely*, in which a former credit union employee was accused of wrongfully obtaining credit union documents containing customer loan information, social security numbers, account numbers, and other information.[25] According to the credit union's amended complaint, the information was "highly valuable to it, as confidentiality of the records must remain private pursuant to bank secrecy laws and state and federal civil and criminal statutes."[26] The court found that the credit union had failed to allege that the information had independent economic value because its allegations said nothing about its value to a competitor. "Instead, the Credit Union defines the value of the information based upon the regulatory consequences of disclosure, not based upon its value to some other entity competing for its customers."[27] For this and other reasons, the court dismissed the complaint under Rule 12(b)(6) and denied leave to file a second amended complaint on grounds of futility.[28]

In the Eastern District of Michigan, courts largely favor pre-discovery identification of trade secrets.

Efforts to Maintain Secrecy

To establish that the information at issue constitutes trade secrets, a plaintiff must also plead and prove that the information is the subject of reasonable efforts to maintain its secrecy.[29] Courts have recognized three types of measures a trade secret owner may take to maintain secrecy:

> Such measures generally include either an express agreement between the employer and employee restricting or prohibiting disclosure by the latter to third parties; a disclosure by employer to employee in confidence or with a tacit understanding, inferable from the attendant circumstances, that the information is confidential; or security precautions utilized by the employer to insure that only a limited number of authorized individuals have access to the information.[30]

Determining the reasonableness of protective measures involves a balancing of costs and benefits and will vary from case to case.[31] Accordingly, "except where the evidentiary showing of reasonable efforts could not conceivably support a judgment in favor of the plaintiff, the reasonableness of the efforts is a question for the trier of fact."[32]

A recent unpublished opinion of the Michigan Court of Appeals illustrates the standards for evaluating reasonable efforts at the pleading stage. In *Theisen v Inventive*

Consulting LLC, the plaintiffs—an individual and his wholly-owned limited liability company—alleged in their complaint that the defendants had misappropriated trade secrets contained in a "PowerPoint deck with business plans, executive summaries, cost analysis, and other items used in the development and marketing" of certain IP that was the subject of a contemplated joint venture.[33] The complaint alleged that each page was marked "HIGHLY CONFIDENTIAL PROPERTY OF THE THEISEN GROUP" and that the trade secrets were "known only by [p]laintiffs and limited representatives on a need to know basis."[34] The trial court dismissed the complaint under MCR 2.116(C)(8), finding that it contained no specific allegations of efforts made to maintain secrecy.[35]

A trade secret plaintiff must not only identify the trade secrets at issue but must plead and prove that they are, in fact, trade secrets.

The appeals court reversed the trial court's ruling, holding that the plaintiffs' allegations that they had shared the information at issue with only limited persons and had marked each page of the deck as highly confidential were sufficient.[36] In so ruling, the appeals court made two observations of interest. First, contrary to what the defendants argued, the plaintiffs were not required to secure a nondisclosure agreement, noting that a jury could find that a plaintiff had made reasonable efforts to maintain confidentiality even without such an agreement.[37] Second, the fact that the plaintiffs' operation was a small one—as reflected by the fact that the company was a single-member limited liability company with the individual plaintiff as its sole member—supported the conclusion that their efforts to maintain secrecy were reasonable.[38] This is because, as courts have held, "[t]he precautions that are reasonable for a large commercial organization may be unreasonable for a smaller operation depending on the required cost benefit analysis."[39]

Establishing Misappropriation

A plaintiff must allege that the trade secrets were misappropriated through improper acquisition, disclosure, or use.[40] Fortunately for the plaintiff, MUTSA "sets a relatively low bar for pleading misappropriation."[41] Nevertheless, the elements must be properly pleaded—and proved.

Improper Acquisition

Though most cases focus on improper disclosure or use, it is possible to allege a case based simply on improper acquisition. In a case from the Northern District of California, the plaintiff alleged that the defendant acquired certain resins knowing that they had been created using the plaintiff's trade secrets.[42] Though no allegations of improper disclosure or use were made, the court determined that it had stated a claim for misappropriation through wrongful acquisition of trade secrets.[43] Despite this ruling, it is important to note that an "acquisition-only" theory can create challenges for a plaintiff's damages case because it is often not clear that mere acquisition will result in economic injury to the plaintiff or unjust enrichment of the defendant. In a more recent case from the Northern District of California, the court denied the plaintiff's request for a jury instruction on acquisition-only damages because "the only discernable damages theories preserved by [plaintiff] have been grounded in defendants' alleged use or disclosure of trade secrets."[44]

Inevitable Disclosure

Improper disclosure and use frequently come up in the employment context, where an employee may be accused of disclosing and using the former employer's trade secrets in service of the new employer. Some jurisdictions, elaborating on the Uniform Trade Secret Act's authorization of injunctions as a remedy for "threatened" (as opposed to "actual") misappropriation,[45] have adopted the so-called doctrine of "inevitable disclosure." Under this theory, a plaintiff may obtain relief based on a finding that its former employee will "inevitably" disclose its trade secrets to the person's new employer.[46] The doctrine allows a plaintiff to go forward in the absence of evidence of actual disclosure or use. It is typically invoked to support a preliminary injunction, although it may also be invoked, in jurisdictions that recognize it, to overcome a motion to dismiss.[47]

Where available, the doctrine of inevitable disclosure generally applies in cases in which the employee goes to work for a competitor of the plaintiff, the trade secrets have been clearly specified, the secrets bear directly on the employee's new responsibilities, and the employee has behaved in a duplicitous manner.[48] As to this final point, in *PepsiCo, Inc v Redmond*, the seminal case on inevitable disclosure, the court found that the former employee's "lack of forthrightness" and "out and out lies" prior to departure supported the conclusion that he "could not be trusted to act with the necessary sensitivity and good

faith under the circumstances in which the only practical verification that he was not using plaintiff's secrets would be [his] words to that effect."[49]

Several courts have observed that Michigan has not adopted the doctrine of inevitable disclosure.[50] Nevertheless, while there is no mandatory authority affirmatively applying the doctrine under Michigan law, there are indications that the doctrine may be viable. Many courts have cited *CMI International, Inc v Intermet International Corporation*, in which the court of appeals affirmed the trial court's entry of summary disposition against a plaintiff that had relied on the doctrine of inevitable disclosure.[51] After discussing *PepsiCo*, the court explained:

> Even assuming that the concept of "threatened misappropriation" of trade secrets encompasses a concept of inevitable disclosure, that concept must not compromise the right of employees to change jobs. Accordingly, we hold that for a party to make a claim of threatened misappropriation, whether under a theory of inevitable disclosure or otherwise, the party must establish more than the existence of generalized trade secrets and a competitor's employment of the party's former employee who has knowledge of trade secrets.[52]

The court then pointed out that the plaintiff had offered no evidence of duplicity and had not even identified a specific trade secret that was likely to be disclosed.[53] Concluding that "CMI cannot establish a basis on which to claim inevitable disclosure," the court ruled for the defendant.[54]

A recent unpublished opinion from the Michigan Court of Appeals suggests that the doctrine has not been rejected. In *Gen-Wealth, Inc v Freckman*, the court stated that it had "accepted" the doctrine of inevitable disclosure in *CMI*, with the caveat that a party "must establish more than the existence of generalized trade secrets and a competitor's employment of the party's former employee who has knowledge of trade secrets."[55] However, as in *CMI*, the court found that the facts of the case did not warrant application of the doctrine because "there was no evidence that Freckman's skills as an advisor were limited to his ability to exploit trade secrets."[56]

Perhaps most notably, a 2019 case from the Eastern District of Michigan actually applied the doctrine of inevitable disclosure. In *Radiant Global Logistics, Inc v Fursteneau*, Judge Paul D. Borman separately addressed "actual" and "threatened" misappropriation under MUTSA.[57] The court reviewed the testimony of the defendants at a preliminary injunction hearing—including various denials and implausible assertions regarding the opening of an office for a competitor, the hiring of the former employer's team, and other matters—and concluded that it was "inherently incredible."[58] Though the opinion did not use the phrase "inevitable disclosure," it cited *PepsiCo* with approval and granted the injunction in part because the plaintiff was likely to succeed on the merits of its claim of threatened misappropriation.[59] In the court's words, one defendant's lack of candor "would support a conclusion of his willingness to use the trade secrets in his possession" on behalf of his new employer, and that "[t]he more confidential information [he] possesses, the higher the likelihood that he will use that information on behalf of" the new employer.[60]

Takeaways for Practitioners

These are just some of the issues facing litigants in a misappropriation case. The good news is that courts tend to take a flexible, case-by-case approach to evaluating trade secret claims. But while this flexibility may benefit a plaintiff, it can sometimes make outcomes hard to predict. In light of the issues identified in this article, practitioners should consider the following points:

- The standard for identifying trade secrets in the complaint is not an exacting one. However, when seeking a preliminary injunction, more detail is better. Moreover, once discovery commences, trade secrets will likely need to be identified with reasonable particularity.
- Whether seeking injunctive relief, damages, or both, it is important to set forth the economic value of the trade secrets at issue. This includes showing their actual or potential value to competitors and that their value derives from their secrecy.
- When it comes to trade secrets, courts help those who help themselves. The trade secret owner needs to plead and prove that it used reasonable measures to maintain secrecy, such as confidentiality agreements, limitation of access, or security precau-

Several courts have observed that Michigan has not adopted the doctrine of inevitable disclosure.

tions.

- With the right facts, "inevitable disclosure" should not necessarily be ruled out as a basis for injunctive relief under MUTSA. Among other things, a showing of duplicity or untrustworthiness would be needed for a claim of inevitable disclosure to succeed.
- Circumstantial evidence is often critical in a trade secret case, and courts understand this. Even when relying on circumstantial evidence, be sure to develop as robust a picture as possible to avoid any implication that one's allegations are speculative or conclusory.

Most fundamentally, the plaintiff's attorney should know statutory definitions of "trade secret" and "misappropriation" inside and out. To succeed at the pleading stage and beyond, one must plead and prove that the various components of those multipart definitions are satisfied.

NOTES

1. *See Trade Secrets Act*, Uniform Law Commission, available at https://www.uniformlaws.org/ committees/community-home?CommunityKey=3a2538fb-e030-4e2d-a9e2-90373dc05792 (last accessed Nov. 5, 2021).

2. *See* H. Rep. No. 114-529, at 2-5 (2016).

3. *See id.* at 12 (2016).

4. *E.g., FCA US LLC v Bullock*, 446 F Supp 3d 201, 212 (ED Mich 2020).

5. *Ajuba Int'l, LLV v Saharia*, 871 F Supp 2d 671, 691 (ED Mich 2012) (citation omitted).

6. MCL 445.1902(d); *cf.* 18 USC 1839(3).

7. MCL 445.1902(b); *cf.* USC 1839(5).

8. MCL 445.1902(b); *cf.* USC 1839(6).

9. *Utilase, Inc v Williamson*, Nos. 98-1233, 98-1320, 1999 US App LEXIS 22452, at *6 (6th Cir Sept 10, 1999 (quoting *Shatterproof Glass Corp v Guardian Glass Co*, 322 F Supp 854, 867 (ED Mich 1979)); *see also Dura Global Techs, Inc v Magna Donnelly Corp*, 662 F Supp 2d 855, 859 (ED Mich 2009).

10. *Compuware Corp v IBM*, 259 F Supp 2d 597, 605 (ED Mich 2002); *see also Two Men & a Truck, Int'l, Inc v Cutlip*, No 1:12-cv-34, 2012 US Dist LEXIS 199132, at *15-16 (WD Mich Sept 12, 2012).

11. *Foulk Consulting Servs v Blazemeter, Inc*, No. 20-11446, 2020 US Dist LEXIS 225749, at *12 (ED Mich Nov 16, 2020).

12. *See, e.g., Bioquell, Inc v Feinstein* No 10-2205, 2010 US Dist LEXIS 124077, at *18 (ED Pa Nov 23, 2010) (dismissing trade secret claim where complaint failed to "identify the[] trade secret" and was instead "merely a string of conclusory statements devoid of any factual basis").

13. *Leucadia, Inc v Applied Extrusion Techs, Inc*, 755 F Supp 635, 636 (D Del 1991).

14. *JM Polymers, Inc v Spartan Polymers, LLC*, No 2013-3899-CK, unpub op at 10 (Mich 16th Cir Ct Feb 18, 2014) (citing *Interactive Solutions Group, Inc v Autozone Parts, Inc*, No 11-13182, 2012 US Dist LEXIS 52951, at *8 (ED Mich Apr 16, 2012)).

15. *Id.*

16. *See, e.g., Lowry Holding Co v Geroco Tech Holding Corp*, No 303694, 2012 Mich App LEXIS 1033, at *8 (Mich Ct App May 24, 2012). The one outlier is *Jasper v Bloomfield Village Investor Holding, LLC*, No 337098, 2018 Mich App LEXIS 1097, at *12-13 (Mich Ct App Apr 3, 2018), which affirmed the trial court's denial of leave to file a second amended complaint where "plaintiff failed to identify with particularity what portion of his 103-page business plan constituted the trade secret." That case is unusual in that the plaintiff had already specified a single document that allegedly contained a trade secret but then could not point to the alleged secret. In any event, the holding may be open to question in that it relies on *Dura*, *supra*, at 859 (ED Mich 2009), which was decided on a motion for summary judgment rather than a motion to dismiss.

17. *DeRubeis v Witten Techs, Inc*, 244 FRD 676, 680 (ND Ga 2007) (quoting Lynn H. Pasahow, *Patent and Trade Secret Biotechnology Litigation,* 1993 Biotechnology: Business, Law, and Regulation 37, 52 (ALI-ABA Course Study Materials)); *see also, e.g., Oakwood Labs, LLC v Thanoo*, 999 F3d 892, 907 (3rd Cir 2021) (citing *DeRubeis*, 244 FRD, at 680)).

18. *DeRubeis*, *supra*, at 682.

19. *See* Cal Civ Proc Code 2019.210; *Engelhard Corp v Savin Corp*, 505 A2d 30, 33 (Del Ch 1986).

20. *AcryP Tech, Inc v Lariviere*, No 1:17-cv-534, 2017 US Dist LEXIS 211822, at *22 (SD Ohio Dec 27, 2017).

21. *Dura Global Techs, Inc v Magna Donnelly Corp*, No 07-cv-10945, 2007 US Dist LEXIS 89650, at *6-7 (ED Mich Dec 6, 2007) (internal quotations and citation omitted).

22. MCR 2.302(C), (D).

23. *See* MCL 445.1902(d)(i); *cf.* USC 1839(3)(B).

24. *Giasson Aerospace Sci, Inc v RCO Eng'g, Inc*, 680 F Supp 2d 830, 843 (ED Mich 2010) (quoting *Daimler-Chrysler Servs N Am, LLC v Summit Nat'l, Inc*, 289 Fed Appx 916, 922 (6th Cir 2008)).

25. *Ukrainian Future Credit Union v Seikely*, No 17-cv-11483, 2017 US Dist LEXIS 194165 (ED Mich Nov 27, 2017).

26. *Id.* at *25.

27. *Id.*

28. *Id.* at *27.

29. MCL 445.1902(d)(ii); *cf.* USC 1839(3)(A).

30. *Kubik, Inc v Hull*, 56 Mich App 335, 348, 224 NW2d 80 (1974).

31. *See Niemi v NHK Spring Co*, 543 F3d 294, 300-301 (6th Cir 2008).

32. *Id.* at 303.

33. *Theisen v Inventive Consulting LLC*, Nos 352952, 353990, 2021 US Mich App LEXIS, at *8 (Mich Ct App Aug 12, 2021).

34. *Id.* at *9.

35. *Id.* at *10.

36. *Id.* at *10-11.

37. *Id.* at *10 (citing *Giasson*, *supra*, at 840).

38. *Id.* at *11 (citing *Giasson*, *supra*, at 840).

39. *Giasson*, *supra*, at 840.

40. MCL 445.1902(b); *cf.* USC 1839(5).

41. *Ajuba*, *supra*, at 691 (citations omitted).

42. *ATS Prods v Champion Fiberglass, Inc*, No C-13-02403 SI, 2014 US Dist LEXIS 13886 (ND Cal Feb 3, 2014).

43. *Id.* at *8-9.

44. *Waymo LLC v Uber Techs, Inc*, No C 17-00939 WHA, 2018 US Dist LEXIS 8263, at *15 (ND Cal Jan 18, 2018).

45. MCL 445.1903(1). The DTSA sharply limits the inevitable disclosure doctrine. *See* 18 USC 1836(b)(3)(A)(i)(1).

46. *See PepsiCo, Inc v Redmond*, 54 F3d 1262 (7th Cir 1995).

47. *See, e.g., Milliken & Co v Smith*, No 7:10-cv-00301-JMC, 2011 US Dist LEXIS 27685, at *10 (DSC Mar 6, 2011) ("[T]his court does not doubt that 'inevitable disclosure' could be properly pled as part of a misappropriation claim.").

48. *See Estee Lauder Cos v Batra*, 430 F Supp 2d 158, 176 (SDNY 2006).

49. *PepsiCo*, *supra*, at 1270.

50. *Kelly Servs, Inc v Marzullo*, 591 F Supp 2d 924, 942 (ED Mich 2008); *Stryker Corp v Ridgeway*, 2016 US Dist LEXIS 10636, at *25 (WD Mich Jan 29, 2016); *Erlich Protection Sys v Flint*, 2019 Mich App LEXIS 6952, at *9 (Mich Ct App Nov 7, 2019).

51. *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 649 NW2d 808 (2002).

52. *Id.* at 133-34 (citations omitted).

53. *Id.* at 134.

54. *Id.*

55. *Gen-Wealth, Inc v Freckman*, No 353584, 2021 Mich App LEXIS 3003, at *38 (Mich Ct App May 13, 2021) (quoting *CMI*, *supra*, at 134).

56. *Id.* at *39.

57. *Radiant Global Logistics, Inc v Fursteneau*, 368 F Supp 3d 1112 (ED Mich 2019).

58. *Id.* at 1132.

59. *Id.* at 1133.

60. *Id.* (citation omitted).

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The Psychological Impediments to the Resolution of Business Disputes Are They Crazy? No; Just Human

By Richard L. Hurford and Sarah Mikulich

When preparing for the typical business mediation, experienced counsel will typically evaluate the applicable law; the critical facts; the risks and strengths of the client's case; the risks and strengths of the opposing party's case; the likelihood of success at trial; then, after consultation with the client and often with an expert, an appropriate settlement range. In the hands of objective, competent, and highly experienced counsel, there is an understandable desire simply to cut to the chase and just talk about the money. Why do so many mediations take so long and or result in impasse by what is perceived as "irrational" behavior? More often than not, it is a byproduct of the manner in which the brain's processes are impacted by conflict.[1]

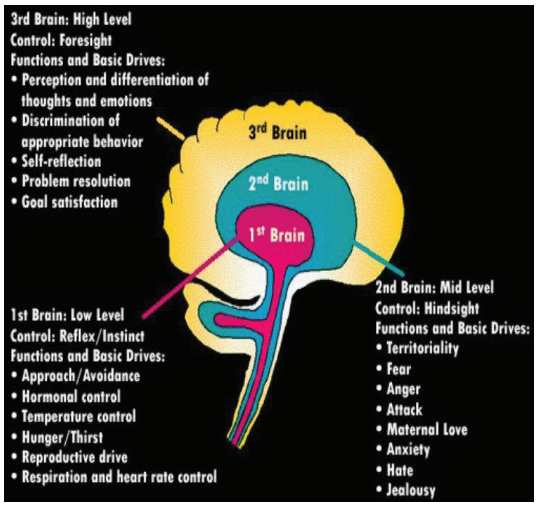
Mediators and professional negotiators have long known:

- Conflict clearly impacts certain human behavior (often in very predictable ways);
- The importance of recognizing all aspects and permutations of human behavior in conflict; and,
- A condition precedent to successful negotiations is developing strategies to address unproductive negotiating behaviors and resistance to change generated by conflict.[2]

The strategies and practices that neutrals and negotiators pursue to meet the psychological behaviors of people in conflict are central to an understanding of the effectiveness of mediation and various negotiation techniques utilized to assist parties in coming to an agreement. While parties and counsel may have a tendency to dismiss the "feel good" or "soft side" of mediation as impediments to the goal of resolving the dispute as *quickly* as possible and become impatient with the processes employed by mediators, "hard" neuroscience" and cognitive behavioral studies of people in conflict underscore the dangers of "getting to the bottom line" prematurely.

Psychological studies and well-established, peer-reviewed research underscore that any number of cognitive reactions can be used in both proactive and reactive ways. Negotiations and mediations require, *inter alia,* the mediator and the attorney to evaluate the reasons a party might be resistant to or apprehensive about the change—why would a party reject or be reluctant to accept a resolution that is eminently reasonable given an objective evaluation of the case? A party's reluctance to resolve a dispute may be driven by one (or a combination) of five distinct motives: 1) fear of change; 2) status quo bias; 3) risk aversion; 4) high uncertainty avoidance; or 5) situational distrust. It is essential to have the emotional intelligence to distinguish the differences as each requires unique approaches and negotiation strategies.

The brain has various centers that control and drive different human activities and thinking. These are included in the "triune brain" (the first brain, or the amygdala; the second brain, or the mid brain; and the third brain, or the frontal cortex).[3]



During dispute resolution endeavors, all of the dynamics of communication, perception, cognition, fear, flight or fight, biases, etc., are grounded on processes in the brain and how the brain deals with conflict and human cognition. Individuals under pres-

sure tend to adopt an adversarial or binary approach to problem solving. The reptilian brain (the amygdala or first brain in the above graphic) with its adrenalin-driven protective flight, fight, or freeze response, evolved to protect our ancestors from physical threats. This is still active and thriving in our brains today and often reacts in predictable ways. While one might question the allegedly irrational positions that parties might take during conflict resolution, it is often more helpful to evaluate whether the opposing party is just being human in predictable ways (rather than irrational) and to develop targeted strategies to minimize the typical psychological impediments to reaching a resolution.

A well-documented predictable attribute of the brain in conflict (related to our fight-or-flight instincts governed by the amygdala or first brain), which we all share to one degree or another, is "*confirmation bias*." Confirmation bias is the natural tendency to search for data that confirms our beliefs, as opposed to looking for data that might challenge those beliefs. Indeed, confirmation bias is one of the brain's natural ways to catalog and remember (obviously in a selective manner) all the information that floods us every day.[4] As observed by Warren Buffet, "What the human being is best at doing is interpreting all new information so that their prior conclusions remain intact."[5] For example, how many times have attorneys and clients during a mediation accused the opposing parties or opposing counsel of suffering from "selective memory" or "refusing to acknowledge" the significance of facts contrary to their legal and factual positions? Rather than believing that one is engaging in dishonest behavior, it most likely reflects the well-known psychological phenomenon that all of us engage in to some degree—confirmation bias.

When the brain is in conflict, confirmation bias is not easily managed. In fact, vociferously arguing the facts and law with someone inclined to extreme confirmation bias may generate the "backfire effect"—people will cling even more strongly to their positions when challenged with opposing evidence. One reason mediators use "reality testing," often in private caucus, is to evaluate the extent of confirmation bias. When it exists, rather than continuing the discussion of who is "right" or "wrong," mediators will use techniques to move on to the far more productive exercise of cortical brainstorming and focus on identifying possible solutions to the conflict.[6]

Other examples of confirmation bias involve the discussions mediators often conduct when asked to convey an offer (particularly if it is the first economic offer or response). Think about all the times you have participated in a mediation when your client's first reaction to an offer was to claim "the other side is not being serious," or is otherwise "not engaging in good faith negotiations." Similarly, how many times have you heard from the mediator that the first reaction by the opposing party or opposing counsel to your first offer was the accusation you are not really interested in settling or are negotiating in bad faith? No better example of confirmation bias is needed—the first offer or demand only too often confirms the bias the opposing party is not prepared to negotiate in good faith. One of the many strategic issues counsel and mediator must contemplate is how to best formulate and rationally justify their first offer or response to minimize the adverse and most predictable impact of confirmation bias. When the mediator inquires, "What is the message you desire to send with this offer? or "How do you think the other side will react to this offer?" consider whether this is a potential red flag that your negotiation position is not particularly strategic and will only give rise to counterproductive confirmation bias that could fail to productively advance the settlement objectives of the client.[7]

"Cognitive dissonance" is at play in virtually all mediations. Studies indicate that we prize harmony between actions and beliefs.[8] Accordingly, when acting contrary to a strong belief, alarm bells go off in the brain, and we feel discomfort or "dissonance." To eliminate this tension, an individual can either abandon the belief (which may be difficult if the belief is firmly held) or change the behavior that causes the dissonance. This means that parties who have already invested substantial time and money litigating with an adversary may find it psychologically difficult to accept the weaknesses of their own case, or the strength of their opponent's position. To avoid the potential cognitive dissonance, they may simply resist any resolution of the dispute.

Litigants can also tend to demonize the other side (particularly true in certain partnership dissolutions) and may often question why they would ever want to come to

Why do so many mediations take so long and or result in impasse by what is perceived as "irrational" behavior? More often than not, it is a byproduct of the manner in which the brain's processes are impacted by conflict.

an agreement with a bunch of liars, crooks, or some other negative characterization. Cognitive dissonance is at play when even reasonable offers for a resolution are quickly rejected.

In this context mediators are also very familiar with the concept of "reactive devaluation."[9] That is, the value of a proposal to resolve a dispute is devalued when presented by the negotiating "adversary" far more than when a neutral party advances the proposal. How many times during a mediation or negotiation have we experienced (either stated or unstated) the perception that "if the other side is offering X, then it must be good for them; and if it is good for them, X must be bad for me." While X might be a most reasonable proposal, reactive devaluation may render that proposal unacceptable. One approach a mediator may take to counteract reactive devaluation may involve an exploration of a party's "checklist" or objectives (other than just monetary) to be accomplished during the course of the mediation. If a party identifies to the mediator several key interests and objectives for the negotiation, both large and small, and the mediator explores with that party proposals that might help achieve those objectives, then a proposal from the other side along the lines desired by that party will not so readily be devalued. It was simply the mediator doing the job of securing the terms that one party wanted. That is why mediators might opt to deal with less complicated non-economic issues first and reach agreement on those before moving on to the more complicated matters. The goals are to minimize reactive devaluation and develop positive negotiation momentum. While it may be "all about the money," there are sound psychological reasons to deal with "small issues" first before moving on to the more problematic aspects of the conflict.

"Cognitive dissonance" is at play in virtually all mediations. Studies indicate that we prize harmony between actions and beliefs.

Behavioral science has also taught mediators the importance of "reframing." Nobel laureate Daniel Kahneman and his partner Amos Tversy published a paper in 1979 regarding "loss aversion," finding that people are more sensitive to loss than to gains. Studies of risk aversion are important for mediators and negotiators because "if loss aversion suppresses the ability to imagine reward, it may have additional effects on one's ability to think creatively about how to meet their desire for reward."[10] Thus reframing the perceived detriments of the change in the status quo to focus on the potential benefits of such change fosters what all mediators and their attorneys search for—cortical creative problem solving. Thus if business partners are in a dispute and "hate working or dealing with each other," one reframing exercise might be to ask: "As I understand your position, one of your objectives may be to minimize or eliminate your dealings with your partner; how do you think that might best be accomplished?" Instead of focusing upon the dislike of the business partner, mediator reframing may foster the search for desirable solutions through cortical thinking and creativity. Or another question may be, "Can you imagine what your life would be like if this dispute were done?"

Two other tools sometimes used by mediators during both joint sessions and private caucuses relate to emotions—allowing parties to "vent" (allowing parties to tell their story in an uninterrupted manner) and "looping" (acknowledging the emotions underlying a party's concerns, which is not to be confused with agreeing with the reasons for the emotions). Neuroscience tells us that when someone is angry, it triggers a biological fight-or-flight response that makes rational choice difficult. As emotions are filters for our perception, the brain's amygdala interprets our emotions to switch our decision-making process between the reptilian instinctual thinking and higher-level cortical thinking. Thus, the mediator develops strategies to assist parties in making the transition to higher-level thinking. During the joint session, and depending upon the circumstances, the mediator may, at some point, summarize the respective positions of the parties, capturing the important points, including their emotional impacts, to underscore the party has been heard. In some instances, the mediator may even be more aggressive than counsel or the clients in summarizing their respective positions (but accurately capture the unstated accusations), which augments the venting of the parties and is also a form of looping. Depending on the circumstances, the technique can help establish: that the mediator "gets it" (i.e., validating the emotion as opposed to agreeing with the reasons for the emotion); that there are two sides to every story; that prolonged arguing about the correctness of each side's story is probably futile; and, a greater appreciation for the other side's position as each client will tend to listen to the other side of the story more

intently and calmly when presented by an even-handed neutral.

While most mediators and their counsel understand that "venting" is important to the mediation process and for the parties to have an uninterrupted time to retell events in detail, neuroscience tells us that one's neurons may actually relive the painful experience associated with the conflict. That is why many mediators will encourage the venting process at the outset of the mediation and discourage a detailed retelling of the events that led to the dispute. Instead, the parties will be encouraged to focus and think cortically about the future and how to shape the future to arrive at a more positive outcome. There is a sound, evidence-based reason (i.e., based upon behavioral studies) that mediators will often state something to the effect: "It is not really my job to determine who was right or wrong; my job is to help you focus on creative solutions to the dispute;" or, "We all agreed the goal of the mediation is not an attempt to determine who might be right or wrong—the objective is to determine if a resolution can be reached." After that, the mediator may proceed to ask: "Do I have your permission at this time to focus on the possible solutions that will meet your needs? My recollection is that your needs were (list the needs previously discussed). Is there anything I missed? What are your thoughts on how we can go about achieving those goals for you?"

Negotiators will use such strategies and others to harness the emotions at mediation to shift one's thinking from the amygdala to the cortex of the brain.

The characteristics of brain function may also explain why mediation is sometimes feared or resisted, and why there may be a great reluctance to engage in joint sessions. During joint sessions, the mediator's ground rules will typically call on the participants to reflectively listen to the opposing party, strive to understand and potentially empathize with the opposing party, and potentially legitimatize the other party's experiences. Joint sessions, when appropriately managed and orchestrated, can effectively minimize the impact of confirmation bias and other impediments to resolution. But if not properly handled, joint sessions can be counterproductive and actually exacerbate the fight-or-flight amygdala paradigm thinking that most parties, including some attorneys, can bring to the litigation. When evaluating the wisdom of a joint session, consider how best to minimize the adverse consequences of the unproductive biases that are a detriment to the negotiation process. Effective joint sessions can be most helpful, and there are a number of strategies the mediator might suggest for an effective joint session (that cannot readily be duplicated in a caucus only context). Yet, when not done well, joint sessions can be most inimical to the negotiation process.

Understanding the brain's impact on conflict resolution does not require a degree in psychology. It does require an appreciation of predictable consequences of the impact of conflict on human behavior, patience, and perseverance. There can be a tendency to become impatient with the processes mediators may employ and to believe insufficient progress is being made during the mediation. Despite this, the mediation process needs to mature over time, and it is not unusual for there to be multiple bargaining rounds in nearly all mediations. While few studies evaluate the number of offers and counteroffers made during the "typical" mediation (a "round" consists of one offer and one response to that offer), the following findings were reported from a review of over 400 mediated employment cases that resulted in a settlement:[11]

Rounds of Bargaining	No. of Cases
1	15
2	31
3	56
4	79
5	66
6	47
7 or more	64

The average number of negotiating rounds in settled cases in this study was 4.6. In another study, the average number of bargaining rounds in settled cases was 4.86 in mediations involving court-ordered medical malpractice claims.[12] As each mediation is unique, the average number of rounds is instructive only to the extent it underscores the significant range of bargaining rounds that may be required for the successful resolution of any dispute. This also underscores perhaps the most common complaint about a mediator—the mediator gave up too quickly.

It does take time and potentially numerous rounds of bargaining to address the various impediments to a resolution that may be

The characteristics of brain function may also explain why mediation is sometimes feared or resisted, and why there may be a great reluctance to engage in joint sessions.

driven more by predictable human behavior. This is often necessary to reach a mutually satisfactory resolution. It does take far more time and effort to come to a resolution than it does to come to an impasse. It takes persistence by the mediator, counsel, and the litigants to deal with not only the legal and factual issues involved in the conflict, but also the predictable psychological behaviors that are at play in virtually all business disputes. Effectively dealing with psychological issues can be just as important as the legal and factual disputes.

NOTES

1. *See, generally*, Daniel Ariely, *Predictably Irrational*, Harper Collins (2008).

2. *See, e.g.*, Dr. Emmanuel Kojo Hopeson (Author), Daniel Dana (Foreword), *Understanding Human Behaviour in Conflict Resolution: An Illustrated Guide* Conflict Resolution / Alternative Dispute Resolution (ADR) Program Kindle Edition (2019), David A. Hoffman and Richard N. Wolman, *The Psychology of Mediation*, 14 Cardozo J. of Conflict Resolution 759 (2016) https://blc.law/wp-content/uploads/2016/12/The-Psychology-of-Mediation.pdf.

3. Neuroscientist Paul D. MacLean, formulated a model of the brain in the 1960s, detailed in his 1990 book, *The Triune Brain in Evolution,* describing the brain in terms of three distinct structures that emerged along the evolutionary path. The so-called reptilian brain was one of the three distinct brain structures MacLean described that emerged along an evolutionary path. In his triune brain model, the basal ganglia (first brain) are referred to as the reptilian or primal brain, as this structure is in control of our innate and automatic self-preserving behavior patterns, which ensure our survival and that of our species. Personal injury lawyers are familiar with the term "reptilian brain" as it has been the basis for the formulation of various litigation tactics that are said to have particular appeal to jurors. *See, e.g.*, *The Reptile Theory: A Game Changing Strategy in Personal Injury Lawsuits* (Feb. 21, 2020) https://www.lexisnexis.com/community/lexis-legal-advantage/b/trends/posts/the-reptile-legal-theory-a-game-changing-strategy-in-personal-injury-lawsuits.

4. Gary Klein, Ph.D., *The Curious Case of Confirmation Bias* (May 2019) https://www.psychologytoday.com/us/blog/seeing-what-others-dont/201905/the-curious-case-confirmation-bias. Confirmation bias was first described by Peter Wason in a 1960 study, P.C. Wason, *On the Failure to Eliminate Hypothesis in a Conceptual Task*, Quarterly Journal of Experimental Psychology 12:129–40 (1960).

Diane Zackariah, *Matter of Fact: Only the Facts We Like Matter*, Human Nature (Oct 2018) https://unknowitall.com/confirmation-bias-psychology/.

5. Confirmation bias is similar to commitment to decision, also known as "escalation of commitment." Escalation of commitment is: "A pattern of behavior in which an individual or group will continue to rationalize and escalate a commitment to a decision even when faced with mounting contrary evidence or increasingly negative outcomes rather than alter their course."

Fred C. Lunenburg, *Escalation of Commitment: Patterns or Retrospective Rationality*, International Journal of Management, Business and Administration, Vol. 13, No. 1 (2010).

6. Cortical brainstorming involves higher level thinking and creativity associated with effective problem solving. *See* Simona Doboli and Vincent Brown, *Understanding Brainstorming and Creativity Through Behavioral Experiments and Neural Models*, https://news.hofstra.edu/2009/04/09/understanding-brainstorming-and-creativity-through-behavioral-experiments-and-neural-models/.

7. Numerous studies and articles underscore the concept of anchoring and the importance of the first offer and response to successful negotiations. *See, e.g.*, Katie Shonk, *What is Anchoring in Negotiation? Learn How to Defuse the Anchoring Bias and Make the Smart First Offers* (May 2020).

8. Corringe Bendersky and Jared Curhan, *Cognitive Dissonance in Negotiation: Free Choice or Justification*, Social Cognition (June 2009).

9. Lee Ross*, Reactive Devaluation in Negotiation and Conflict Resolution, Barriers to Conflict Resolution*, Chapter Two, https://law.stanford.edu/index.php?webauth-document=child-page/370999/doc/slspublic/Reactive%20Devaluation.pdf.

10. Daneil Kahneman and Amos Tversky, "Prospect Theory: An Analysis of Decision under Risk" (pdf), Econometrica (1979). 47 (2): 263–291. CiteSeerX 10.1.1.407.1910. doi:10.2307/1914185. ISSN 0012-9682. JSTOR 1914185.

11. Daniel Klerman & Lisa Klerman, *Inside the Caucus: An Empirical Analysis of Mediation from Within*, J. of Empirical Legal Studies, Volume 12, Issue 4, 686, 695 (Dec 2015).

12. Ralph Peeples, Catherine Harris, and Thomas Metzloff, *Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases*, 2007 J Disp Resol 115 (2007). Available at https://scholarship.law.missouri.edu/jdr/vol2007/iss1/5.

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Zooming into the Future

By Joseph K. Grekin and Brandi M. Dobbs

Introduction

In March 2020, the COVID-19 pandemic formally took hold in the United States and launched the nation into a state of emergency. In addition to the severe health consequences and the concerns it brought, the COVID-19 pandemic also ushered in unprecedented changes to the legal and judicial system as we knew it. On March 15, 2020, the Michigan Supreme Court issued AO 2020-1, which allowed trial courts to implement emergency measures to respond to the COVID-19 pandemic, subject, of course, to "constitutional and statutory limitations." The administrative order detailed nine specific actions that trial courts could take, including adjourning cases, using remote technology, employing electronic filing, closing buildings to the public, and reducing cases being heard and people congregating in and around courtrooms.

After the issuance of AO 2020-1, the Michigan Supreme Court began to issue other administrative orders designed to set guidelines to help trial courts navigate the COVID-19 pandemic safely. Those orders contained provisions that, among other things, limited court activity to only essential functions,[1] tolled deadlines for initiating a case or filing a responsive pleading,[2] and authorized judicial officers to conduct court business and proceedings remotely using two-way interactive videoconferencing technology or other remote participation tools.[3]

With these types of orders and others like them in other jurisdictions, "Zoom Court"[4]—legal proceedings that occur over the video teleconferencing platform Zoom or on similar technology—took over the legal stage. In May 2021, the Michigan Supreme Court announced that Michigan Courts had logged more than three-million hours of Zoom hearings since proceedings moved online in March 2020.[5] The Michigan Supreme Court's online Virtual Courtroom directory, which allows users to search and access livestreamed or recorded court proceedings, had been used nearly 260,000 times during the same time period. Judges, legal practitioners, and individual citizens have been forced to learn and utilize this new remote technology to attend status conferences, argue motions, and even conduct trials (primarily bench trials.)

Nearly two years have passed since the COVID-19 pandemic reshaped and restructured the Michigan Court system. Although the spread of COVID cases in this state has continued, Michigan is far removed from the days of stay-at-home orders and a fully remote society. The question is—what will be the "new normal" in a post-pandemic world for court proceedings? What should it be?

The Current Rule—MCR 2.407(G)

On July 26, 2021, the Michigan Supreme Court issued an order amending various provisions of certain Michigan Court Rules.[6] Among other things, the order amended Michigan Court Rule 2.407 to add subsection (G), which now reads:

> Notwithstanding any other provision in this rule, until further order of the Court, AO No. 2012-7 is suspended and trial courts are required to use remote participation technology (videoconferencing under this rule or telephone conferencing under MCR 2.406) to the greatest extent possible. In doing so, courts must:
>
> (1) Verify that participants are able to proceed remotely, and provide reasonable notice of the time and format of any such hearings for parties, other participants, and the general public in a manner most likely to be readily obtained by those interested in such proceedings.
>
> (2) Allow some participants to participate remotely even if all participants are not able to do so. Judicial officers who wish to participate from a location other than the judge's courtroom shall do so only with the written permission of the court's chief judge. The chief judge shall grant such permission whenever the circumstances warrant, unless the court does not have and is not able to obtain any equipment or licenses necessary for the court to operate remotely.
>
> (3) Ensure that any such proceedings are consistent with a party's Constitutional rights, and allow confidential communication between a party and the party's counsel.

(4) Provide access to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule.

(5) Ensure that the manner in which the proceeding is conducted produces a recording sufficient to enable a transcript to be produced subsequent to the proceeding.

(6) Ensure that any such remote hearings comply with any standards promulgated by the State Court Administrative Office for conducting these types of proceedings.

(7) Waive any fees currently charged to allow parties to participate remotely."

MCR 2.407(G) requires Michigan courts to use remote participation technology "to the greatest extent possible" for the foreseeable future. The supreme court's issuance of this new subsection of MCR 2.407 caused something of a stir in the legal community, leading to committee discussions about whether there is a value to appearing in person in a courtroom, what that value might be, whether it is worth the extra attorney time and cost it requires, and the threat to safety it might pose so long as the pandemic continues.

Michigan is not alone in examining these issues. *Newsweek*[7] and the *ABA Journal*[8] have each published articles noting the advantages remote hearing technology offers, including making hearings more accessible to the press and the public, and reducing unnecessary attorney expenses (the ABA Journal quoted Michigan's own Chief Justice Bridget M. McCormack). The *Wisconsin Examiner* cited to some of the same advantages and observed that Wisconsin courts are, "moving to make virtual court a permanent fixture."[9] An article in the *University of Chicago Law Review* blog urged courts to be wary of cases proceeding remotely until more research is done examining unconscious biases that may be particular to remote proceedings.[10]

While many of those urging that courts use caution before permanently adopting remote technology focus on jury trials and criminal proceedings,[11] there are significant drawbacks to using remote technology to conduct business court hearings as well. Technical difficulties are all too familiar to legal practitioners who have participated in remote legal practice during the last two years—most famously, one attorney was unable to remove a Zoom filter that made him appear in court with an anamorphic cat head superimposed over his human head and was forced to affirmatively assure the court that he was "not a cat."[12] Other drawbacks include concerns about the security and integrity of proceedings. Even with security measures in place, Zoom hearings can be hacked.[13] Practitioners have expressed concerns (at the very least, to these authors) that the judge has less control over the proceedings in a remote setting, as well as concerns related to cell phone use, courtroom behavior, conversations between parties and among participants, and barking dogs in the background.

Moreover, remote proceedings make normal give-and-take during a hearing substantially harder. There are no quick—and often constructive—conversations between attorneys at the podium, and attorneys cannot physically "approach the bench." No settlement conversations can take place in the hallway outside the courtroom. While many of these in-person interactions can be done remotely as well, for example, requesting a break in proceedings and calling opposing counsel, many attorneys find these substitutes to be less effective than "the real thing."

The question is—what will be the "new normal" in a post-pandemic world for court proceedings? What should it be?

A Proposed Modification to MCR 2.407(G)

It seems to these authors that a better balance could be struck—a rule that would permit, for example, five-minute status conferences to continue on Zoom but would also permit attorneys to argue motions and present evidence on issues in person when the attorneys and the judge felt that it was important to do so. One way to afford flexibility to courts and parties would be to change MCR 2.407(G) to take attorney preferences into account. The opening paragraphs of the rule, as these authors imagine them, might read as follows:

Until further order of the Court, AO No. 2012-7 is suspended. Unless a party requests otherwise, trial courts are required to use remote participation technology (videoconferencing under this rule or telephone conferencing under MCR 2.406) to the greatest extent possible.

If all parties agree that a hearing should be held in person, the court should hold the hearing in person unless good cause exists to do otherwise. For purposes of this Rule, good cause includes, but is not limited to, the safety of the

> court and the parties, and the fair and efficient administration of justice.
>
> If one party requests an in-person hearing without the agreement of all other parties, the requesting party must set forth the reasons it believes an in-person hearing is desirable in its request, and the party must file its request at least five days before the hearing. Any party may object at least three days before the hearing to holding the hearing in person. If no party objects to the request, the court shall hold the hearing in person unless good cause exists to do otherwise. If a party objects, the court shall hold the hearing in person only if good cause exists to do so.
>
> When utilizing remote participation technology, courts must (1) ….

This kind of court rule would retain the initial presumption that a matter would be heard remotely, but any party would be entitled to request that a motion or proceeding be held in person—much like any party is entitled to request a trial by jury or given the opportunity to file a reply brief. Other parties could agree to the request that a proceeding be held in person or would be entitled to object to the request. The court would ultimately decide whether to hold the hearing in person or remotely. The burden to show cause would depend on whether the parties unanimously requested that the hearing be held in person, or if there was an objection to doing so.

There may be particulars about the proposed rule that need to be worked out, but the goal is to devise a rule that permits judges and attorneys to determine whether a particular hearing would be remote or in person on a hearing-by-hearing basis, rather than simply being required to use remote technology whenever possible. The flexibility of such a rule would permit courts to use their discretion after input from attorneys—exactly the kind of discretion courts already have in most other scheduling matters.[14]

A Supreme Court Administrative Office form would allow the courts to efficiently administer requests under this type of rule. A party could electronically file the form to request that a hearing be held in person and fill in the reason(s) for the request. A party opposing such a request could use the same form and list any reasons for its opposition. Courts could then grant or deny the request on the same form.

While many of those urging that courts use caution before permanently adopting remote technology focus on jury trials and criminal proceedings, there are significant drawbacks to using remote technology to conduct business court hearings as well.

Courts could decide to hold a hearing remotely or in person for a reason as simple as the convenience of the parties or the court—for example, a party, a witness, or an attorney may not have reliable means to participate remotely, or they might have transportation issues or have to travel a great distance making an in-person hearing difficult. The savings in cost and time of remote hearings to the parties and counsel could also be considered. Courts might also articulate reasons such as concern for the safety of a party, or a belief that an in-person proceeding could be a more accurate indicator of witness credibility and allow the evaluation of body language and other nonverbal indicators. These reasons could be as particularized and varied as the facts and circumstances in the various cases before the courts.

One example where such flexibility would have been useful is a recent case out of the St. Joseph County District Court. A preliminary examination was interrupted when the defendant, who was accused of assault with intent to commit bodily harm, was found to be in the same home as the alleged victim of the assault during the hearing. The assistant prosecuting attorney interrupted the hearing to assert her belief that the defendant and the victim were in the same apartment and to express concern for the safety of the victim. Police were dispatched to the victim's home, where they did indeed find the defendant.[15]

Problems like these, and a myriad of other circumstances, could be solved in advance under a rule that permitted input from attorneys and allowed for discretion from the courts. Attorneys and judges could take into consideration the safety of a potential victim, and many other potential concerns, before a hearing took place.

This is not a proposal to eliminate remote hearings altogether. As noted in several of the articles quoted earlier, there are substantial advantages to holding certain hearings remotely.[16] Remote hearings can often cut down on legal costs while preserving the quality of legal representation, particularly for hearings of short duration, like status and scheduling conferences, or relatively routine motions. Every attorney who has driven an hour to a hearing and then waited for two hours in a crowded courtroom to be heard for ninety seconds on a motion to extend scheduling order dates understands that remote hearings have certain advantages. Remote hearings allow for greater flexibility

in scheduling court proceedings, better attorney productivity and lower client costs, and greater flexibility for attorneys and parties who have life responsibilities like young children or dependent parents.

And we would be remiss to ignore the initial reason that courts began to use remote hearing technology in the first place—the presumption that remote proceedings will help protect the health and safety of attorneys, parties, witnesses, and courthouse personnel. Even as the COVID-19 pandemic wanes, there does not appear to be any indication that COVID-19 will be fully eradicated anytime soon.[17] The flu and pneumonia remain two of the leading causes of death in Michigan.[18] The continued use of remote proceedings would protect individuals from these threats and others as well. At the beginning of the COVID-19 pandemic, one Michigan judge sparked controversy when he sentenced a party to five days in jail for being late to court. The party in question was late because he had been to urgent care with contagious pneumonia and vomited in court repeatedly during the subsequent hearing.[19] The more often remote technology can prevent these types of circumstances from arising, the better.

Despite the advantages that remote technology affords, however, the authors believe that some hearings are better held in person.[20] As a result, in our opinion a mandate that requires courts to use remote technology, "to the greatest extent possible" is not ideal. Judges and attorneys are capable of deciding when a hearing is better held in person, just like they are capable of deciding when a hearing should be scheduled, whether oral argument will be permitted, and how much time is necessary for a particular hearing.

The nation is having the conversation, but the exact mechanics of how courts are planning to balance remote participation and in-person proceedings is still emerging and changing in response to new concerns and circumstances. The landscape is still fluid. Michigan has the opportunity to set a model of practice and to provide an example to other states and court systems on how to effectively balance these concerns and create a system that is convenient, flexible, principled, and that protects the integrity of the courts and the legal system.

The most effective way to accomplish this is the tried and true manner in which the court system has addressed so many issues—relying on the good judgment and discretion of judges and attorneys. While a rule that is reliant on attorneys and judges to make good decisions will not be perfect (far from it), overall we predict that this custom-tailored-suit approach would fit our judicial system far better than the "one size fits all" system currently in place under MCR 2.407(G).

NOTES

1. AO 2020-2.
2. AO 2020-3.
3. AO 2020-6.
4. This article is not a commentary on, or an endorsement of, any particular videoconferencing platform. The reason why Zoom is discussed in this article is because this is the platform Michigan state court judges typically use for videoconferencing.
5. https://www.courts.michigan.gov/news-releases/2021/may/michigan-courts-log-more-than-3-million-hours-of-zoom-hearings/.
6. https://www.courts.michigan.gov/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2020-08_2021-07-26_formattedorder_rescpandemicaos.pdf.
7. https://www.abajournal.com/magazine/article/courts-attempt-to-balance-innovation-with-access-in-remote-proceedings.
8. https://www.newsweek.com/some-lobbying-courts-continue-virtual-access-hearings-after-covid-restrictions-end-1642775.
9. https://wisconsinexaminer.com/2021/05/26/virtual-court-is-here-to-stay/.
10. https://lawreviewblog.uchicago.edu/2020/11/19/zoom-chang/.
11. For example, https://www.law.com/njlawjournal/2021/05/17/zoom-verdict-overturned-was-witness-coached-off-camera-during-remote-hearing/.
12. https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html.
13. For example, on September 11, 2020, a federal court hearing was hacked; computer screens were suddenly filled with photographs of the 9/11 attacks and pornography. https://www.cnn.com/2020/09/14/us/georgia-hearing-zoom-bomb-trnd/index.html. A report by the Surveillance Technology Oversight Program highlights the security risks associated with Zoom, including potential hacking, and notes that "To guard against potential hacking of any digital portion of remote litigation, an independent government watchdog must conduct routine and impartial security audits. There must be contingency plans for malfunctions and system failures, both during virtual proceedings and in the long term." https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f1b23e97ab8874a35236b67/1595614187464/Final+white+paper+pdf.pdf.
14. Michigan courts recognize that a trial court has the inherent power to control the movement of cases on its docket. *Banta v Serban*, 370 Mich 367, 368, 121 NW2d 854 (1963); *see also* MCL 600.611.
15. https://www.usatoday.com/story/news/nation/2021/03/10/michigan-zoom-court-hearing-adjourned-defendant-victim-same-home/6936887002/.
16. *See* endnotes 6, 7, and 8.

17. https://www.nature.com/articles/d41586-021-00396-2 ("'Eradicating this virus right now from the world is a lot like trying to plan the construction of a stepping-stone pathway to the Moon. It's unrealistic,' says Michael Osterholm, an epidemiologist at the University of Minnesota in Minneapolis."); https://www.theatlantic.com/science/archive/2021/08/how-we-live-coronavirus-forever/619783/ ("'The coronavirus is not something we can avoid forever; we have to prepare for the possibility that we will all get exposed one way or another. This is something we're going to have to live with,' says Richard Webby, an infectious-disease researcher at St. Jude.;" https://theconversation.com/is-covid-19-here-to-stay-a-team-of-biologists-explains-what-it-means-for-a-virus-to-become-endemic-168462 ("It's clear that SARS-CoV-2 is very successful at finding new people to infect, and that people can get infected after vaccination. For these reasons, the transmission of this virus is not expected to end.").

18. https://www.cdc.gov/nchs/pressroom/states/michigan/michigan.htm.

19. https://www.freep.com/story/news/local/michigan/oakland/2020/04/02/oakland-county-judge-leo-bowman-jail/5101562002/.

20. As anyone with a school-age child can tell you, it is much easier to get distracted or decline to pay attention to a presentation that is done entirely over Zoom. Presuming that jury trials, for example, are done in person makes it more likely that the jury will pay attention to the proceedings than if the proceedings were done remotely.

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Case Digests

Gavrilides Mgmt Co, LLC v Michigan Ins Co, No 354418, ___ Mich App ___, ___ NW2d ___ (Feb 1, 2022)

Defendant issued a commercial insurance policy to plaintiff restaurant owners. As a consequence of the COVID-19 pandemic and related stay-at-home executive orders, plaintiffs experienced substantial loss of income and submitted a claim for business interruption losses to defendant. Defendant denied the claim. After the denial, plaintiffs filed suit, and the trial court granted defendant's motion for summary disposition. Plaintiffs' appeal followed.

The court of appeals affirmed, ruling that the COVID-19 executive orders did not cause "direct physical loss of or damage to property." The court noted that the word "physical" necessarily requires the loss of or damage to have some manner of tangible and measurable presence to the premises, which plaintiffs failed to show. Further examining the policy, the court stated that the business income loss provision applies "during the 'period of restoration.'" The period of restoration ends when the property is repaired, rebuilt, or replaced or when is reopened in a new permanent location. Because the stay-at-home executive orders applied statewide and no alteration of the premises would have permitted the restaurant to reopen, summary disposition was likewise appropriate under this provision.

Next, the court cited the ordinance or law exclusion in the policy, which states, in relevant part, that defendant will not pay for losses as a result of an ordinance or law "[r]egulating the construction, use or repair of any property …." Because "plaintiffs effectively claim to have suffered losses as a consequence of the closure of their restaurants due to the enforcement of a law[,]" notably the executive orders, this provision precludes the claim. The court also found that plaintiffs did not establish that there was "action of civil authority [prohibiting] access" to the restaurants because the policy required damage to nearby property, and none was alleged. Finally, the policy's "virus exclusion" is not void for vagueness or against public policy, and necessarily applies, as it clearly states that the insurer "will not pay for loss or damage caused by or resulting from any virus … that induces or is capable of inducing physical distress, illness, or disease."

Arabian Motors Grp WLL v Ford Motor Co, 19 F4th 938 (6th Cir Dec 3, 2021)

Ford Motors sought to end its resale agreement with Arabian Motors. The agreement contained an arbitration clause; thus, Ford sought a declaration from the American Arbitration Association that it did not owe Arabian anything under the agreement. Arabian then filed suit against Ford in federal court asserting breach of contract and fraud. It also brought these claims as counterclaims before the arbitrator, but it withdrew them before the tribunal issued its award in Ford's favor. Ford then moved to stay the federal court action to allow the arbitration panel to resolve Arabian's breach of contract and fraud claims. The district court opted to dismiss the action without prejudice rather than to stay the matter.

Ford then appealed the dismissal. The circuit court first determined that the matter was not moot because Arabian withdrew its contractual claims without prejudice and that they were still live in federal court. Next, the circuit court ruled that the district court should have granted Ford's request for a stay. When a federal court faces an arbitrable issue, the Federal Arbitration Act states that the court, "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had …." 9 USC 3. The court noted that this is particularly important because "a dismissal, unlike a stay, permits an objecting party to file an immediate appeal, a district court dismissal order undercuts the pro-arbitration appellate-review provisions of the Act." The court further reasoned that, "[i]t would allow a party normally required to bring an appeal at the end of the action to sidestep the clear policy preference of the Act—that pro-arbitration decisions are not appealable until the confirmation stage of the case—and continue to litigate the issues in federal court and thus disrupt the arbitration." Lastly, the circuit court declined to analyze whether a district court should always enter a stay in the normal course under these set of facts, noting, however, that there may be situations in which a dismissal remains permissible, such as when the dispute is moot or suffers from a pleading or procedural defect.

In re StockX Customer Data Sec Breach Litig, 19 F4th 873 (6th Cir Dec 2, 2021)

Plaintiffs brought suit against StockX for allegedly failing to protect millions of StockX users' personal account information obtained through a cyberattack. The district court granted StockX's motion to dismiss the action and compel arbitration. Plaintiffs appealed arguing that there are issues of fact as to whether plaintiffs agreed to the current terms of services, and that the defenses of infancy and unconscionability render the terms of service and the arbitration agreement, including the delegation provision, invalid and unenforceable.

In a 2-1 decision, the circuit court affirmed. The court found that it must engage in a two-step analysis. The first step is to resolve any challenge that pertains to the formation or existence of the contract containing the delegation provision. If the contract exists, the second step is to determine any remaining enforceability or validity challenges, but only if it would "affect the delegation provision alone" or "the basis of [the] challenge [is] directed specifically to the [delegation provision]." *Rent-A-Center, W, Inc v Jackson*, 561 US 63, 71-72 (2010). The court first found that StockX established mutuality of agreement that contained the delegation provision establishing arbitration. StockX sent an email to all registered users, including plaintiffs,

with revised terms and conditions containing the arbitration clauses. The court also ruled that plaintiffs' infancy argument does not concern the formation or existence of a contract. Citing Michigan law, the court noted that a minor's contract is valid until disaffirmed. Because the infancy defense is a matter of enforceability covered under the delegation provision, it must be decided by the arbitrator, not the court.

Concluding that the contract containing the delegation provision is valid, the court moved to the second step. The court decided that plaintiffs' infancy defense challenges the contract as a whole (as opposed to the validity of the agreement to arbitrate, which is decided by the court). Citing *Rent-A-Center*, the court noted that a "party's mere statement that it is challenging the delegation provision is not enough; courts must look to the substance of the challenge." Here, the court found that plaintiffs failed to specifically direct their challenge to the delegation provision. Lastly, the court found that plaintiffs again failed to explain how their unconscionability arguments affect the delegation provision differently than on other provisions of the contract. Therefore, plaintiffs' infancy defense and unconscionability arguments as applied to the delegation provision must be left to the arbitrator.

Index of Articles

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

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Council Meetings

DATE	TIME	LOCATION
June 9, 2022	3:30 p.m.	Dickinson Wright, Troy