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From the Chair

by Jill M. Wheaton

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In this Issue

The Appellate Practice Section has been busy since our new term began in September. As you likely know, legislation has passed that has changed the Court of Claims so that it is now part of the Michigan Court of Appeals. A working group of the section council is reviewing these changes to determine if additional rule changes regarding appeals from Court of Claims' decisions are necessary, and we are hopeful that this change will not cause further delays in other matters pending in the Court of Appeals. In addition, we are working with the Clerk's office of the Michigan Supreme Court as it prepares to implement electronic filing in that Court, something I know many practitioners are looking forward to and which should roll out this Spring. Finally, along with a number of other sections, we are closely monitoring proposed legislation that would make State Bar membership voluntary.

While all of that has been going on, Section members have once again written useful articles for the Journal. Howard Lederman contributes another entry in his Appellate Standard of Review series. Of course, in appellate practice, it is all about the standard of review, and familiarity with the various standards is necessary for all appellate practitioners. Michael Cook writes about the Sixth Circuit Court of Appeal's *In re: Refrigerator Compressors Antitrust Litigation* decision, which sets important precedent regarding when there is or is not an appealable order in consolidated multi-district litigation. And, of course, our normal, excellent regular columns are also included. If you would like to contribute an article for an upcoming edition of the Journal, please contact me, or any Journal editor, as we welcome new authors.

Please enjoy the Journal, and I hope to see you at one of our meetings.

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Appellate Review Standard

By Howard Lederman

As I said in our Abuse of Discretion review standard series, to almost all Michigan litigators, the review standard applying to a lower court decision does matter. The more deferential the review standard to the lower court decision, the more likely the appellate court will uphold that decision. In addressing most appellate issues, Michigan appellate courts use one standard per issue. But for certain issues, they use two standards. This article focuses on these situations.

Michigan civil and criminal law features three main review standards: De novo, abuse of discretion, and clearly erroneous. De novo review is the least deferential to the lower court decision. In de novo review, the appellate court reviews the lower court's legal conclusions and its application of the law to the facts anew without any deference to these conclusions. Clearly erroneous review applies mainly to lower court factual findings. This standard is extremely deferential.

As we have seen, the abuse of discretion standard combines expansive and restrictive features. The new Michigan abuse of discretion standard is the principled range of outcomes standard, originating from *People v Babcock:* [1]

"Therefore, the appropriate standard of review must be one that is more deferential than de novo, but less deferential than the *Spalding* abuse of discretion standard . . . an abuse of discretion standard recognizes that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome."[2] "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion[,] and, thus," the appellate court should "defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes." [3] This standard extends to civil and criminal cases.[4]

An error of law is also an abuse of discretion.[5] Certain situations trigger use of two review standards, sometimes combined, sometimes distinct. Certain evidentiary issues illustrate situations, where Michigan appellate courts use two distinct review standards. The basic review standard for trial court decisions to admit or exclude evidence is abuse of discretion.[6] But these decisions "often involve preliminary questions of law" subject to "de novo" review.[7] The main preliminary question of law is "whether a rule of evidence or statute [or constitutional provision]" bars admission of the evidence.[8] Indeed, if determining whether the trial court abused its discretion requires interpreting a constitutional or statutory provision or a rule of evidence, a question of law arises. The key word is "interpreting." This situation triggers de novo review. After resolution of the interpretation issue, principled range of outcomes abuse of discretion review of the trial court's evidentiary decision follows. But if determining whether the trial court abused its discretion requires merely applying a constitutional or statutory provision or a rule of evidence, no question of law arises. Principled range of outcomes abuse of discretion review proceeds as usual.

People v Layher[9] illustrates this two-step review involving a preliminary question of law arising from the need to interpret the rules of evidence on relevancy and a related common-law decision. There, the complainant, Defendant Layher's 15-year-old niece, claimed that Layher had sexually abused her three times. She told another uncle's romantic partner of the incidents, who reported what she heard to the authorities. The State charged the defendant with criminal sexual conduct. Defense counsel sent

his investigator, Robert Ganger, to investigate the case. He interviewed the complainant and her aunt, Ms. Walton. The complainant was then living with her aunt. Based on his three visits, Ganger became the leading defense witness.

At trial, the complainant's and Ganger's testimony conflicted. The prosecution "sought to introduce the fact that Mr. Ganger had been tried and acquitted…of criminal sexual conduct involving a child under . . . age . . . thirteen."[10] The prosecution argued that, on cross-examination, this evidence was relevant to show Ganger's bias toward the defendant. The trial court agreed and admitted the evidence as relevant to show Ganger's bias for the defendant. The trial court explained:

"`This is cross-examination. The Prosecutor is entitled to elicit information to support any claim that she may have that he's biased . . . She . . . argue[s] that[,] as a result of him being accused and acquitted of a crime[,] which he claims he did not do of a very similar nature, that he is therefore biased in the Defendant's favor and presumably would color his testimony to help the Defendant, another person who he may believe would also be wrongly accused of the same crime.'"[11]

The jury convicted the defendant of one count of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct. The trial court entered judgment on the jury verdict. The Michigan Court of Appeals affirmed.

Affirming, the Michigan Supreme Court held that, in admitting evidence of Ganger's arrest, charge, and acquittal into evidence to show his bias, the trial court had not abused its discretion. After reiterating the abuse of discretion review standard for trial court decisions admitting or excluding evidence, the Court also reiterated that, when these decisions "involve preliminary questions of law[,] such as whether a rule of evidence or statute precludes admissibility, our review is de novo."[12] The Court had to interpret the Michigan Rules of Evidence on relevant evidence, MRE 401 and MRE 402. The Court recognized that these rules did not provide for admission of all relevant evidence; the US Constitution, the Michigan Constitution, the Michigan Rules of Evidence, and other Michigan Supreme Court-adopted rules can bar relevant evidence. [13]

Based on a US Supreme Court decision confronting similar bias evidence, *US v Abel,*[14] the Court concluded that the bias evidence was relevant. But in *People v Falkner,*[15] the Court had barred examination of a witness's arrests and charges not leading to convictions. The Court assumed that *Falkner* was the functional equivalent of a Michigan Supreme Court-adopted rule. The Court had never "addressed whether *Falkner* precludes the use of evidence of a prior arrest or charge without conviction[,] where offered [to show] witness bias." [16] So, the Court had to resolve the conflict between the broad relevant evidence rules and *Falkner.* To do so, the Court interpreted MRE 401 and 402 indirectly and *Falkner* directly.

The Court resolved the conflict by restricting *Falkner.* The Court held that *Falkner* did not extend to examination of a witness's arrests and charges not leading to convictions, if the examination's purpose was to show the witness's bias. The Court explained that *Falkner* had not addressed "the well-established authority holding that cross-examination of a witness regarding bias is 'always relevant.'"[17] Since "*Falkner's* holding did not exclude impeachment regarding a witness'[s] bias," the Court limited *Falkner's* holding and held it inapplicable to evidence of such bias.[18] Thus, the Court held that evidence of a witness's prior arrests and charges not leading to convictions is admissible to show bias, subject to one condition: Under MRE 403, if the danger of unfair prejudice substantially outweighs the evidence's probative value on bias.

Then, the Court analyzed whether, in determining under MRE 403 that the danger of unfair prejudice did not substantially outweigh the probative value of Ganger's arrest and charge not leading to his conviction, the trial court had abused its discretion. The Court did not need to interpret MRE 403. The Court only needed to apply it. Thus, the regular abuse of discretion standard, whether the trial court's decision admitting the evidence was within the principled range of outcomes, applied. The Court concluded that, under MRE 403, since the danger of unfair prejudice did not substantially outweigh the probative value of Ganger's arrest and charge not leading to his conviction, in admitting this evidence, the trial court had not abused its discretion.

US v Samet[19] likewise illustrates an appellate court's two-step de novo and regular abuse of discretion review. There, the grand jury indicted Defendants Samet and Hollender for RICO violations, mail fraud, wire fraud, and other crimes. The government claimed that they had been running a criminal enterprise engaging "in a host of fraudulent schemes and money laundering."[20]At trial, the government introduced multitudes of documents. To identify the defendants' handwriting and signatures on these documents, the government called US Postal Inspector Patricia Thornton as a leading witness. Over a three-year period, she had, except for five months of that period, "spent eighty percent of her time…on the case." [21] She testified that, during that period, she had become familiar with Defendant Hollender's "handwriting, by viewing documents such as his passport, driver's license, post-arrest documents, and a check register for an account in his name."[22] She testified not as a handwriting expert, but as a layperson. Based on her acquired familiarity from her investigation with Hollender's handwriting, she testified that some handwriting and signature samples were Hollender's.

Thornton further testified that, during the above three-year period, she had become familiar with Defendant Samet's handwriting, by viewing the same kinds of documents. She again testified not as a handwriting expert, but as a layperson. Based on her acquired familiarity from her investigation with Samet's handwriting, she testified that some handwriting and signature samples were Samet's.

On cross-examination, Thornton's testimony regarding Hollender held up. But her testimony on Samet almost fell

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apart. Both defendants moved under FRE 701 and FRE 901(b)(2) [both Federal Rules read the same as their Michigan counterparts] to strike her testimony. While granting the motion on Samet, the district court denied it on Hollender. Based on a First Circuit decision, *US v Scott,*[23] whose facts resembled the instant case facts, the district court held that "lay opinion testimony offered to authenticate handwriting must [meet] both Rule 701 and Rule 901(b)(2) [requirements]." [24] In so holding, the district court interpreted the Federal Rules. Under these rules, the district court found that, under FRE 901(b)(2), Thornton had not become familiar with Hollender's handwriting for litigation purposes, and that, under FRE 701, her testimony was not similar to an expert's and did not violate that rule. Thus, the district court held her testimony admissible regarding Hollender.

Affirming, the Second Circuit held the same. Like the Michigan Supreme Court, the Second Circuit and other federal circuits review district court interpretations of the Rules of Evidence as preliminary questions of law de novo.[25] The Court reviewed the district court's FRE interpretation de novo. The Court agreed with the district court's reliance on *Scott.* The Court agreed that, to be admissible, lay witness testimony authenticating another person's handwriting must meet both FRE 701 and FRE 901(b)(2) requirements. Then, the Court reviewed the district court's decision to admit Thornton's testimony authenticating Hollender's handwriting and signatures for regular abuse of discretion. Rather than interpreting the rules during this second stage, the Court merely applied them. The Court concluded that in determining her testimony on Hollender met both rules' requirements and was thus admissible. The district court had not abused its discretion.

People v Barrett [26] exemplifies the two-step review process, with the interpretation step involving the MRE as a whole. There, "[o]n May 17, 2004, Suzanne Bartel, [the] defendant's long-time, live-in girlfriend, pounded on her neighbor's door, and said that [the] defendant was chasing her with an axe and asked to use their phone. She was hysterical and crying. Her hysteria continued[,] as she reported to the 911 operator that [the] defendant had kicked the door in, beaten her, tried to strangle her, and brandished a hatchet. At one point, the 911 operator advised her to calm down and gain control of her breathing. Bartel informed the 911 operator that [the] defendant had told her never to call the police[,] or he would kill her."[27]

"When the first responding officer arrived, Bartel similarly told him that [the] defendant had punched a hole in the bedroom door, pinned her to the bed, and began hitting her face; shortly afterward, [the] defendant had picked up a hatchet, grabbed her around the neck, raised the hatchet, and said he was going to kill her. The officer observed that Bartel was so agitated that she could not sit down[,] and that . . . Bartel had been crying. When he and other officers searched Bartel's house, they found the hatchet in the house and a 12-inch hole in one of the doors. The officers observed marks on Bartel's shoulders and one arm and a cut on the inside of her mouth."[28]

The state charged the defendant with domestic assault (second offense) and felonious assault. At the preliminary examination, Bartel refused to testify. Under MRE 803(2), the prosecution moved for admission of Bartel's statements "to the 911 operator," a neighbor, "and the [first responding] police officer."[29] The defense countered that, under *People v Burton,*[30] the prosecution had to establish evidence of the startling event independent of the event itself, before the trial court could admit the statement under the excited utterance hearsay exception. The district court magistrate ruled for the defense and, based on *Burton,* he excluded the statements and dismissed the charges. Based on *Burton,* the circuit court affirmed. The Michigan Court of Appeals affirmed based on its lack of authority to overrule or modify *Burton.*

The Michigan Supreme Court reversed, overruled *Burton,* and held that the proponent no longer needed to establish startling-event evidence independent of the event itself for the excited utterance statement, under MRE 803(3), to be admissible. In dicta, the Court recognized that, since independent evidence confirmed the startling event's or condition's existence, resolving the issue of whether the statement alone could provide evidence of the startling event's or condition's existence was unnecessary. Then, the Court interpreted the MRE as a whole. The Court noted that the *Burton* Court had relied on the *Rogers v Saginaw-Bay Railroad Co,*[31] holding that the proponent could not use a decedent's statement to establish its own spontaneity, because the trial court had not yet admitted the statement into evidence. Since *Rogers* preceded MRE 104(a), and MRE 104(a) superseded *Rogers,* the Court's adoption of MRE 104(a) signified the Court's rejection of *Rogers'* holding and reasoning. Thus, the Court interpreted the MRE as a whole to override *Rogers* and *Burton.* In relying on *Rogers* 11 years after MRE 104(a)'s adoption, the *Burton* Court erred.

As a result, the Court held that the proponent could use the statement itself to establish the startling event's or condition's existence. Further, in not interpreting MRE 104(a) to encompass the excited utterance itself, the *Burton* Court erred. In contrast, the *Barrett* Court interpreted MRE 104(a) to encompass the excited utterance itself. Accordingly, the *Barrett* Court held that, in excluding the excited utterance from consideration of whether the startling event or condition was present, the lower courts had abused their discretion and erred as a matter of law.

The above cases show how some trial court evidentiary decisions can lead to less deferential de novo review of these decisions. Sometimes, the trial court will state that it is interpreting a rule of evidence, statutory provision, or constitutional provision. But sometimes, the trial court will not. When the trial court does not do so, the question arises: Is the trial court doing so de facto? If the trial court is interpreting an above rule or provision, or if the answer to the question is at least an arguable yes, define, advocate, and apply the above two-step review process. If the trial court is not interpreting an above rule or provision, or if the answer to the question is a clear no, define and apply regular principled range of outcomes abuse of discretion.

About the Author

Since 1984, ***Howard Yale Lederman*** *has been appellate attorney. Since the Appellate Practice Section's 1996 founding, he has been a section member. Since 2006, he has been an Antitrust, Franchising, and Trade Regulation Section officer. He practices mainly appellate, commercial, and employment litigation with Norman Yatooma & Associates. Several Michigan publications have published his appellate, commercial, and employment law articles, including ICLE's appellate handbook, the* Michigan Bar Journal*, the* Antitrust, Franchising, and Trade Regulation E-Newsletter*,* Attorney at Law*, and the* Appellate Practice Journal.

Endnotes

1 *People v Babcock,* 469 Mich 247, 269; 666 NW2d 231 (2003).

2 *Babcock,* 469 Mich 247, 269 (citations omitted).

3 *Babcock,* 469 Mich 247, 269, citing *Conoco, Inc v J M Huber Corp,* 289 F3d 819, 826 (CA Fed 2002) ("`Under an abuse of discretion review, a range of reasonable outcomes would survive review.'"), *US v Penny,* 60 F3d 1257, 1265 (CA 7, 1995), *cert den* 516 US 1121; 116 S Ct 931; 133 L Ed 2d 858 (1996) ("`a court does not abuse its discretion[,] when its decision `is within the range of options from which one would expect a reasonable trial judge to select'") (citation omitted).

4 *Maldanado v Ford Motor Co,* 476 Mich 372, 388; 719 NW2d 809 (2006), *cert den* 549 US 1206; 127 S Ct 1261; 167 L Ed 2d 76 (2007), *Woodard v Custer,* 476 Mich 545, 557; 719 NW2d 842 (2006), *Saffian,* 477 Mich 8, 9 (civil cases), *People v Buie,* 491 Mich 294, 320; 817 NW2d 33 (2012), *People v Lario-Munoz,* 483 Mich 1130; 767 NW2d 442 (2009) (non-sentencing criminal cases), *Babcock,* 469 Mich 247, 269.

5 *Michigan Department of Transportation v Haggerty Corridor Partners Limited Partnership,* 473 Mich 124, 138; 700 NW2d 380 (2005), *People v Katt,* 462 Mich 272, 278; 662 NW2d 12 (2003), *Arath IV, Inc v Kent County Drain Commissioner,* 296 Mich App 214, 220; 818 NW2d 478 (2012), *lv den* 493 Mich 871; 821 NW2d 670 (2012).

6 *Eg, People v Duncan,* ___ Mich ___, ___; ___ NW2d ___; 2013 Mich Lexis 1132 (2013) *11, *People v Layher,* 464 Mich 756, 761; 631 NW2d 281 (2001), *People v Lukity,* 460 Mich 484, 488; 596 NW2d 607 (1998).

7 *Eg, Duncan,* 2013 Mich Lexis 1132 (2013) at *11, *Layher,* 461 Mich 756, 761, *Lukity,* 460 Mich 484, 488.

8 *Eg, Duncan,* 2013 Mich Lexis 1132 (2013) at *11, *Layher,* 461 Mich 756, 761.

9 *Layher,* 464 Mich 756.

10 *Id.* at 760.

11 *Id.* at 764.

12 *Id.* at 761.

13 MRE 402.

14 *US v Abel,* 469 US 45, 51-52; 105 S Ct 465; 83 L Ed 2d 450 (1984).

15 *People v Falkner,* 389 Mich 682, 695; 209 NW2d 193 (1973).

16 *Layher,* 464 Mich 756, 766.

17 *Id.* at 767, 768, quoting *People v Mac Cullough,* 281 Mich 15, 26; 274 NW 693 (1937), *Hayes v Coleman,* 338 Mich 371, 381; 61 NW2d 634 (1953), *Wilson v Stillwell,* 411 Mich 587, 599; 309 NW2d 898 (1981), *Davis v Alaska,* 415 US 308, 316; 94 S Ct 1105; 39 L Ed 2d 347 (1974), & 3A Wigmore, *Evidence* (Chadbourn Rev Ed) §940.

18 *Layher,* 464 Mich 756, 767.

19 *US v Samet,* 466 F3d 251 (CA 2, 2006).

20 *Id.* at 252.

21 *Id.* at 253.

22 *Id.*

23 *US v Scott,* 270 F3d 30 (CA 1, 2001).

24 *Samet,* 466 F3d 251, 254.

25 *Id., Hathaway v Coughlin,* 99 F3d 50, 55 (CA 2, 1996), *US v Gewin,* 374 US App DC 74; 471 F3d 197, 201 (2006), *Gray v Genlyte Group, Inc,* 289 F3d 128, 139 (CA 1, 2002), *cert den* 537 US 1001; 123 S Ct 485; 154 L Ed 2d 397 (2003), *Olsen v Correiro,* 189 F3d 52, 58 (CA 1, 1999), *US v Sposito,* 106 F3d 1042, 1046 (CA 1, 1997), *US v Medina-Estrada,* 81 F3d 981, 986 (CA 10, 1996).

26 *People v Barrett,* 480 Mich 125; 747 NW2d 797 (2008).

27 *Id.* at 128.

28 *Id.* at 128-129.

29 *Id.* at 129.

30 *People v Burton,* 433 Mich 268; 445 Mich 133 (1989).

31 *Rogers v Saginaw Bay Railroad Co,* 187 Mich 490, 494-495; 153 NW 784 (1915).

State Tax Appellate Matters: Similar But Different

By Marla Schwaller Carew

If any readers of this article have been in the Michigan Court of Appeals recently, patiently waiting for oral argument with one ear towards the other matters scheduled around them, they may have encountered that rare beast, the state tax appellate matter. Outnumbered by other types of cases (in this writer's periodic appellate experiences, by insurance, contract, criminal, and employment matters, to name a few) and highly technical in an unfamiliar manner (motor fuel and tobacco products tax??), these cases represent serious dollars and rights to the parties involved. In a relatively short article, I would like to highlight some of the procedural and substantive issues that make tax cases "similar but different" and also draw attention to some new and proposed structural changes that may impact tax trial and appellate strategy in the future.

The Michigan Tax Case: Background

Unlike civil commercial cases, which may derive from a mix of statutory and common law, in general, tax cases brought under Michigan law come through two avenues, property tax cases, such as valuation appeals, classification appeals, uncapping and personal residence exemption (PRE) administered under the General Property Tax Act, MCL 211.1 *et seq* (the "GPTA"), and income, sales, use, withholding and ancillary (i.e., motor fuel, tobacco and tobacco products and severance of oil and gas) taxes administered under the Revenue Act, MCL 205.1 *et seq* (the "Revenue Act"). Each of the GPTA and Revenue Act imposes procedural and appellate rules – for both the initial appeal from a property tax assessment or Department of Treasury non-property tax final assessment - that dictate the course of tax cases and allow petitioners to weigh and make certain strategic choices.

For example, under the GPTA, the Michigan Tax Tribunal (the "Tax Tribunal") has original and exclusive jurisdiction over a variety of property tax matters. MCL 205.731. However, after the Michigan Supreme Court clarified the issue in *Midland Cogeneration Venture Limited Partnership v Naftaly*, 489 Mich 83; 803 NW2d 674 (2011), appeals from State Tax Commission property classifications (for example, real or personal classification), may be made only to county circuit courts. Appeals from final assessments of income, sales, use and withholding tax may be brought in either the Tax Tribunal or Court of Claims, with no option for appeal in a circuit court. A party filing an initial assessment or classification appeal in any of these venues may appeal by right to the Court of Appeals, under the familiar Michigan Rules of Court.

A taxpayer challenging a real or personal property tax and valuation assessment must appeal to the Tax Tribunal by either May 31 or July 31 of the calendar year under appeal, pursuant to MCL 205.735a(6). A taxpayer aggrieved by a non-property tax assessment, decision or order of the Department of Treasury ("Treasury") may appeal to the Tax Tribunal within 35 days, or the Court of Claims within 90 days, after the assessment, decision or order. MCL 205.22(l). Failure to make a timely appeal closes the assessment to further appeal. MCLA 205.22(4), (5). Appellate attorneys should check the date of the assessment, decision or order under appeal closely. The Tax Tribunal is very firm in dismissing cases for lack of jurisdiction when appeals are made outside of the 35 day window, or appeals are made timely, but lack critical information or service of process to required parties, and arguments to the Court of Appeals to the effect that a Treasury assessment was not received by the petitioner on time do not generally prevail unless the taxpayer petitioner can attack Treasury's mail log or present other evidence. See, *Grimm v Department of Treasury*, 291 MichApp 140 810 NW2d 65 (2010); *Elian 2 Corp. v. Department of Treasury*, Docket Number 304353, Court of Appeals of Michigan, July 24, 2012 (unpublished).

However, if a petitioner could demonstrate that Treasury mailed a final assessment to the wrong address, dismissal can be reversed upon appeal. *Geldhof Enterprises v Dep't of Treasury*, Docket Number 313142, Court of Appeals of Michigan, December 10, 2013 (unpublished). Notices to be appealed must describe the type of tax, the amount of liability and the tax periods with specificity, before relief for a petitioner filing after the 35 day window has passed is possible. *Winget v Dep't of Treasury*, MTT Docket No. 319852 (issued April 4, 2007)

The Tax Tribunal is an administrative body currently housed under the State of Michigan Administrative Hearing System. Mich Exec Order No 2011-4. It consists of

seven members, appointed by the Governor and, under the Tax Tribunal Act, MCL 205.701 *et seq*, these members must be lawyers, appraisers, accountants and assessors. In other words, Tribunal members tend to have prior familiarity with state and local tax matters, though overwhelmingly real and personal property valuation and assessment. Cases begin in the Tax Tribunal with the filing of a petition, permit time for discovery and pre-trial settlement and, if not settled before hearing with a Tribunal Member, will afford the parties an opportunity to be heard and present witnesses and evidence in a formal hearing setting. The Member assigned to a case and hearing will issue a written opinion and order to the parties that may be appealed to the Michigan Court of Appeals as of right under MCL 205.753(1).

The Michigan Tax Tribunal has its own Rules, found on the Tribunal website, that govern filings, fees, motion and hearing practice and other matters. However, when the Tax Tribunal Rules do not specifically address an issue, the Michigan Rules of Court control. The Tax Tribunal Rules provide for procedures and evidentiary practices and standards (at least for Entire Tribunal matters, where higher dollar value property tax appeals and other types of state tax appeals will reside), that are very similar to those found in the Michigan Court Rules (but not the formal MCR rules).

The Court of Claims was created as a function of the circuit court for the thirtieth judicial circuit in the Court of Claims Act, MCL 600.6401 *et seq* but per PA 164 of 2013, as of November 12, 2013 the Court of Claims was designated to the Michigan Court of Appeals. Four Court of Appeals judges, the Hon. Michael J. Talbot, Hon. Pat M. Donofrio, Hon. Deborah A. Servitto and Hon. Amy Ronayne Krause, were assigned to the Court of Claims by the Michigan Supreme Court, with the delegation of Court of Claims chief judge duties to Hon. Michael J. Talbot for a term ending May 1, 2015. Currently, as with the prior Court of Claims judges drawn from the Ingham County Circuit Court, petitioners taking a tax matter to the Court of Claims may assume that they will receive a judge deeply familiar with state court procedure and rules of evidence, but *not* primarily focused on tax cases and tax law. Appeals to the Court of Claims must be made within 90 days after the final assessment, decision or order appealed and the taxpayer in question must have paid all tax, penalty and interest. MCL 205.22(1),(2).

Practice in the Court of Claims follows the Michigan Court Rules and Rules of Evidence. There is no right to a jury trial. Disputes not resolved by pre-hearing settlement at the Court of Claims will eventually be heard and decided by the assigned Court of Claims judge, who will issue an opinion and order that may be appealed as of right to the Michigan Court of Appeals under MCR 7.203(A)(1). The minutiae of contending with the Court of Appeals providing both Court of Claims judges, and later appellate review, will be the subject of much future observation and development.

Understandably, the different amounts of time in which to appeal, different levels of procedural and evidentiary formality and familiarity with tax law and appeals, combined with the different prepayment requirements in the Tax Tribunal and Court of Claims, drive many taxpayer decisions regarding choices of litigation forum. On the one hand, practitioners who are able to choose (e.g., not those with property valuation or classification appeals who may turn only to the Tax Tribunal) weigh the Tax Tribunal's shorter filing window and lack of formal Michigan Court Rules evidentiary and procedural requirements against the lack of requirement that the tax in dispute be prepaid before filing suit in the Court of Claims (countered by the Court of Claims' judicial expertise in various fields, not specifically state tax).

On the other hand, the Court of Claims continues to offer formal court and evidentiary rules and a longer 90 day window for filing appeals offset by the requirement that the petitioner be able to pay disputed tax, penalties and interest in full and sue for a refund. However, as of mid-November 2013, any accumulated experience with, and predictability gained from time with the Ingham County Circuit Court judges who previously served the Court of Claims is no longer relevant for choice of forum decision-making.

To further complicate things, as discussed at the end of this article, the Court of Claims' "pay to play" requirement of prepayment before suit has been unpopular with the tax practitioner community for years. As of 2014, efforts remain active to both reform the state's tax court and tax appeals system (involving both Treasury and practitioners weighing in with comments) and also, either as part of tax court reform or alone, eliminate the distortions introduced by "pay to play." It is simply too soon to tell how and where things will go with tax suit and appeals in February 2014.

Special Circumstances and Appellate Review

As state tax law derives from a narrow range of state tax statutes, rather than broader common law doctrines, certain statutory hurdles to petitioner success are present of which civil and commercial practitioners may not be aware. These may both limit petitioner success at trial and also hinder meaningful progress on appeal.

First, for matters such as sales and use tax matters under the Revenue Act, a statutory presumption exists that Department of Treasury assessments are correct unless proven incorrect by the petitioner. MCL 205.68(4) and 205.104a(4). In fact-dense cases, for example disputing the accuracy of a large business's multi-transaction use tax assessment by Treasury, where the petitioner admits that it has "some" use tax liability, but

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believes that Treasury auditors may have used flawed audit sampling methodology and over-counted taxable transactions, overcoming this presumption may create a large amount of work for both petitioner and trier of fact. In such a case, when a Treasury assessment is deemed accurate at the Tax Tribunal, it may prove very difficult for a petitioner to craft a convincing argument on appeal, due to the narrow appellate standard of review (discussed below).

Second, an increasingly difficult and frequent type of controversy, that of officer liability for unpaid sales, use or withholding taxes, is derivative, meaning that the individual officer or "responsible person" held liable by Treasury for unpaid taxes is saddled with the underlying business's conduct under audit. For example, assume that Treasury pursues a failing corporation for unpaid sales or use tax and unfiled tax returns. The distressed business and its distracted or inattentive remaining officers, directors or employees fail to contest proposed and final audit determinations, and liability to Treasury becomes fixed, final and un-appealable 90 days after Treasury issues a Final Assessment under MCL 205.22(5). At this time, Treasury may locate former officers, directors or others and hold them personally responsible for payment of the businesses' unpaid tax, pursuant to MCL 205.27a(5).

In essence, the distressed company has a default assessment against it, and so do its responsible officers. Woe to the former officer who is deemed liable by Treasury after an assessment becomes final – he or she cannot attack the original Treasury assessment against the company easily, and often may only argue non-assessment points such as his or her lack of responsibility (or even involvement and presence during the time under audit) or failure to receive timely notice of assessment. The presumption of assessment accuracy, derivative nature of officer liability, and the narrow standard of review on appeal for Tax Tribunal cases make these cases very, very hard for petitioners to win at the Court of Appeals. For an example of arguments re officer non-involvement raised in a case with a final and un-appealable tax assessment, see *Dovitz v Department of Treasury*, Docket 314059, Court of Appeals of Michigan, November 26, 2013 (unpublished).

Third and last, civil and criminal appellate practitioners are used to repeatedly encountering the most common standards for review under appeal – clear error, *de novo* and abuse of discretion. However, the Court of Appeals' ability to review decisions of the Tax Tribunal is very limited under the Michigan Constitution. Article 6, Section 28 of the Constitution provides that "[i]n the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation."

While, generally, the petitioner in a Tax Tribunal case has the burden to establish the true value of property, MCL 205.737(3), the Tax Tribunal has a duty to make an independent determination of true cash value. *Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 409; 576 NW2d 667 (1998). The Tax Tribunal may not automatically accept the valuation on the tax rolls, but has an overall duty to determine the most accurate valuation under the individual circumstances of a case. *Meadowlanes Ltd Dividend Housing Assn'n v City of Holland*, 437 Mich 473, 485-486, 502; 473 NW2d 636 (1991). The standard of appellate review and Tribunal's duty to make an independent determination give Tribunal members great latitude to craft valuations and issue orders and opinions that may withstand appellate review. Furthermore, many Tax Tribunal determinations of property value that are appealed to the Court of Appeals may be subject to two different standards of appellate review – fraud, error of law or adoption of wrong principles in addition to *de novo* review, in case of additional issues of statutory interpretation. For an example, see *Klooster v City of Charlevoix*, 488 Mich 289; 795 NW2d 578 (2011).

So Much for Predictability, and Thoughts For the Future

For as long as this writer has been in practice, state tax attorneys have been able to look at a potential non-property tax matter and work with their clients to make certain strategic choices for forum and venue. Pay only undisputed tax and file fast (within 35 days) in the Tax Tribunal or pay in full and file on a longer timeline (90 days) for a refund in the Court of Claims? Those decisions were typically driven by the client's finances – not every petitioner can afford to pay a new assessment in full and sue for a refund (waiting several years for appeals to be concluded) – or timing (if a client calls on day 38, the Tax Tribunal option has expired), but also with a dash of prior experience and predictability of approach and attitude of each forum and its judges or members. With the Court of Claims now housed under and administered by the Court of Appeals, the "new normal" of suits brought to the Court of Claims is so new that predictability is not yet possible.

An even more radical change in the Michigan state tax court and appeal landscape is possible post-2014 as well. As noted above, the "pay to play" requirement for prepayment of tax, penalty and interest for filing suit in the Court of

Claims has long been unpopular with the tax practitioner community on the grounds that it limits access to justice for taxpayers unable to prepay and sue for a refund. The State Bar of Michigan Taxation Section has spoken on the subject of state tax court reform and elimination of "pay to play" at several junctures from 2009 to the present.

As of early 2014, proposals to streamline processes at the Michigan Tax Tribunal and Court of Claims, or simply replace both with a Michigan Tax Court, are being actively discussed in Lansing, with practitioner and industry input to Senator Bruce Caswell's Tax Appeals Workgroup. With the Governor's office, Treasury, the Tax Tribunal, members of the legislature and private practitioners actively discussing the best and most effective ways to improve the Michigan state tax appeal path, it is too early at the time of this article's writing to predict the future. Practitioners working only periodically on tax matters would be wise to watch where court or appeal reform is headed and become educated on whatever the "new, new normal" will be.

About the Author

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Things That Go Bump in the Appellate Practitioner's Night:

In re: Refrigerant Compressors Antitrust Litigation and final order issues in consolidated multi-district cases

By Michael Cook

Jurisdictional issues terrorize the appellate practitioner. Perhaps none more than those concerning the finality of a lower court judgment and the potential that we will be told, "You're too late."

The Sixth Circuit's decision in *In re Refrigerant Compressors Antitrust Litigation*, 731 F.3d 586 (6th Cir. Sept. 25, 2013) involved the less earth-shattering result in which the Court effectively said, "You're too early." But it raises some interesting practice notes and questions that should place appellate practitioners on alert for the dreaded "too late" result.

Refrigerant Compressors involved several antitrust cases that were consolidated by the multi-district litigation panel. In multi-district consolidations, the cases are transferred only for pretrial proceedings, and they return to their original districts for trial, assuming they haven't all been settled or dismissed. The Court explained that after the cases were consolidated, the plaintiffs filed a "consolidated amended complaint," which isn't unusual and typically helps streamline consolidated multi-district cases. The defendants filed a motion to dismiss, and the district court entered an order that effectively dismissed all of the claims pleaded in some of the separate complaints, but not all of the claims in the consolidated complaint. That raised the thorny finality issue that the Sixth Circuit addressed whether an order that did not dismiss all of the claims in the consolidated complaint, but did dismiss all of the claims raised in some of the separate complaints, was final as to the plaintiffs that filed those separate complaints?

The consolidated complaint was the source of the jurisdictional problem. In the Sixth Circuit, when several cases filed in the same district are consolidated, and the plaintiffs file an amended complaint encompassing all claims, they effectively merge their claims and the cases lose their "separateness." *Refrigerant Compressors* was only different because the cases were originally filed in different districts. That was a distinction without a difference, for the Sixth Circuit. The Court held that the consolidated amended complaint merged the plaintiffs' claims. The result was that the order dismissing some of the claims was not final, and the plaintiffs were told that they had to wait to appeal.

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Things that Go Bump
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The Sixth Circuit was writing on a blank slate. No other court has addressed this issue. Its ruling is not illogical, and its reasoning isn't difficult to follow. It is, as the Court said, "easy to administer," since it simply applies the same rule that applies in all other cases when claims are consolidated in a single complaint.

But the Sixth Circuit's decision raises an important practice pointer for trial counsel in consolidated multi-district cases. The Court explained that plaintiffs often file a "master complaint" in consolidated multi-district cases to avoid submerging the transferee district court in paper. It's an administrative convenience that seizes upon the very purpose of multi-district consolidation. A master complaint, said the Court, is purely administrative in nature and allows each individual complaint to retain its separate legal existence.

The issue in *Refrigerant Compressors* was created because the parties went a step further. They treated the master complaint as the operative pleading. It was served on the defendants, used to set a deadline for the defendants to answer, and was the subject of the motion to dismiss. Because plaintiffs are often vague in whether they intend their filing to be an administrative summary or an operative pleading, the Court counseled that they could avoid confusion by using terms like "administrative complaint" for the former and "consolidated complaint" for the latter.

The Sixth Circuit's opinion also leaves open some important appellate issues. And those are the issues that should raise eyebrows and might cause some sleepless nights. The Sixth Circuit acknowledged a circuit split on whether and when cases retained their separate identities after consolidation. It also acknowledged that its decision to treat the cases as merged under the consolidated complaint was not permanent. That is, "when the pretrial phase ends and the cases not yet terminated return to their originating courts for trial, the plaintiffs' actions resume their separate identities." Broadly stated, the question that follows is, "what then?"

Generally, a party must file a notice of appeal within 30 days of the final judgment or order that it is appealing. For those plaintiffs whose claims were disposed of with an order in the consolidated proceedings, the time for filing the notice to appeal that order will usually have long-since passed—that will be the case for the appellants in *Refrigerant Compressors*. From what order do they claim an appeal when their case resumes its separate identity? The stale order dismissing their claims seems to be a poor choice due to the 30-day deadline. Is the order transferring the case back to its original district the final order? If so, does the appeal go to the circuit for the transferor or transferee district? *Refrigerant Compressors* didn't reach these issues.

Also, what happens when a case returns to a circuit that would have treated each case as retaining its separate identity throughout the consolidated proceedings? (E.g., the First Circuit). In those circuits, there will be some force behind the argument that the order dismissing all of the plaintiffs' claims in the consolidated proceedings was final. The plaintiff would inform the original circuit that he could not appeal the earlier order because the Sixth Circuit's rules treated his complaint as temporarily merged. Must the original circuit defer to the Sixth Circuit's rules and treat the case as having been merged while it was away? Hopefully, if the prospect of not deferring would bar the appeal, cooler heads would prevail, and the courts would find a way to allow the appellant to pursue his appeal. But there is no guarantee. And this is why *Refrigerant Compressors* will cause some appellate practitioner, somewhere, to lose a night (or maybe a week) of sleep.

About the Author

Michael Cook *is an associate in the appellate practice group at Collins Einhorn Farrell P.C. He focuses his practice on state and federal court appeals and dispositive motion practice in civil litigation matters, including professional liability, contractual indemnity, business torts, and general liability cases. Before joining Collins Einhorn, Mike was a law clerk for Michigan Supreme Court Chief Justice Robert P. Young, Jr.*

Book Review: *Appellate Practice Compendium*

An Insider's Guide to Appeals in Every (Yes, Every) Federal and State Appellate Court

By Phillip J. DeRosier

For anyone faced with handling an appeal in another jurisdiction, the American Bar Association's *Appellate Practice Compendium* is truly a must-have. Jointly authored by a veritable who's who of state and federal appellate lawyers, the "Compendium" provides the ultimate insider's look into the appellate rules and procedures of every federal and state appellate court.

What makes the "Compendium" especially useful is that it is organized for quick reference. It has separate chapters devoted to each federal and state jurisdiction, beginning with the federal courts of appeals and followed by the state appellate courts, which are listed in alphabetical order (and include the state's highest court as well as intermediate appellate courts, if any). The "Compendium" even provides an explanation of the organization and structure of each state's appellate court system.

The "Compendium's" chapters contain topic headings covering everything from "commencing the appeal" to "motions," "brief contents," "appendices," and "oral argument" (including advice that in Montana, the Supreme Court only grants oral argument in "approximately 20 cases each year"). In Florida, for example, a motion for an extension of time to file a brief must include "a certification that the opposing counsel has been consulted and an indication whether the parties consent or object." A brief filed in the Georgia Court of Appeals must contain three parts: a concise statement of the proceedings below; an "enumeration of errors" (with each enumeration addressing only a single error); and an argument section that follows the order of the enumeration of errors. In addition to bread-and-butter matters concerning the content and format of briefs, etc., the "Compendium" also addresses such discrete topics as "amicus curiae practice," "motions for rehearing," and "interlocutory review."

Even better, each chapter of the "Compendium" begins with a list of "Top Tips for Out-of-State Practitioners," which is especially helpful in avoiding the most common pitfalls. Filing a brief in the Alaska Supreme Court? You'll need to have your brief and excerpts of record reviewed by the court clerk's office for compliance with format rules *before* they are printed, bound, and served. In the Eighth Circuit, always ask for oral argument, as "some members of the Eighth Circuit take the failure to do so as a signal that the appeal lacks merit." In Hawai'i, attorneys are cautioned that many appeals are "dismissed as premature or late based on arcane interpretations of what constitutes a 'final judgment or order.'" In South Dakota, briefs are commonly rejected for "failure to cite the three or four most relevant cases under each issue in the statement of issues (do not cite more than four)."

The "[C]ompendium" is also a useful tool for practice right here in Michigan and the Sixth Circuit. The Michigan chapter is co-authored by Michigan's former Solicitor General, John Bursch (who recently returned to Warner Norcross & Judd), along with Warner Norcross & Judd's Gaëtan Gerville-Réache. The Sixth Circuit chapter is by Plunkett Cooney's Mary Massaron Ross and Hilary Ballentine. Even for those with experience practicing in the Sixth Circuit, Michigan Supreme Court, and Michigan Court of Appeals, the "Compendium" is filled with important reminders. In the Sixth Circuit, 14-day briefing extensions are routinely granted, but a motion for an extension must contain a "well-grounded explanation for why the time is needed." Have a question about a pending Sixth Circuit appeal? Your case manager is an invaluable resource. In the Michigan Court of Appeals, "[i]ssues not presented in the 'Statement of Questions Involved' are waived." And in the Michigan Supreme Court, attorneys are advised to "always file a brief in opposition to an application for leave to appeal," as the Supreme Court "enters a peremptory order on the application" in approximately 10 percent of cases.

In a nutshell, the "Compendium" contains a wealth of detailed information on local appellate rules and practices that will serve you well no matter where your appeal may take you.

About the Author

Phillip J. DeRosier *is a member of Dickinson Wright PLLC, where he practices primarily in the area of state and federal civil appeals. Before joining Dickinson Wright, he served as a law clerk for Michigan Supreme Court Chief Justice Robert P. Young, Jr.*

Cases Pending Before the Supreme Court After Grant of Oral Argument on Application

by Linda M. Garbarino

This is an ongoing column which provides a list of cases pending before the Supreme Court by order directing oral argument on application. The descriptions are intended for informational purposes only and cannot and do not replace the need to review the cases.

***Acorn Investment Co v Michigan Basic Property Ins Assoc*, SC 146452, COA 306361**

Insurance/Civil Procedure: Whether judgment issued pursuant to an appraisal panel's award, under MCL 500.2833, amounts to a verdict entitling the plaintiff to case evaluation sanctions under MCR 2.403(O)(2)(c).

***Addison Twp v Barnhart*, SC 145144, COA 301294**

Zoning: Whether the Court of Appeals erred in *Addison Twp v Barnhart*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 2008 (Docket No. 272942) (*Barnhart I*), when it held that, "to the extent that there was testimony to suggest that defendant's operation of a shooting range was for business or commercial purposes, MCL 691.1542a(2)(c) does not provide freedom from compliance with local zoning controls."

***Badeen v Par, Inc*, SC 147150; COA 302878**

Collection Law: Whether defendant forwarding companies engage in "soliciting a claim for collection" and therefore are collection agencies as defined by MCL 339.901(b).

***Huddleston v Trinity Health Michigan*, SC 146041, COA 303401**

Medical Malpractice: Whether the plaintiff suffered a compensable injury; whether the Court of Appeals misapplied *Sutter v Biggs*, 377 Mich 80 (1966); and whether the Court of Appeals decision is contrary to *Henry v Dow Chemical Co*, 473 Mich 63 (2005).

***People v Garrison*, SC 146626, COA 307102**

Criminal: Whether a victims' travel expenses were properly included in the amount of restitution that the defendant was ordered to pay, MCL 780.766 and MCL 769.1a.

***People v Taylor*, SC 145491, COA 295275**

Criminal: Whether the trial court's jury instructions expanded the definition of "contiguous" beyond the reasonable scope of MCL 324.30301(1)(m)(i) and Michigan Admin Code, R 281.921(1)(b)(ii), and, if so, whether that expansion constitutes an unforeseeable judicial enlargement of a criminal statute that deprived the defendant of due process.

***Porter v Hill*, SC 147333, COA 306562**

Family Law: Whether the parents of a man whose parental rights to his minor children were terminated prior to his death have standing to seek grandparenting time with the children under the Child Custody Act, MCL 722.21 *et seq*., and whether the term "natural parent" in MCL 722.22(d) and (g) is the equivalent of "legal parent" or "biological parent."

***Rambin v Allstate Ins, Co*, SC 146256, COA 305422**

No Fault: Whether the plaintiff took the motorcycle on which he was injured "unlawfully" within the meaning of MCL 500.3113(a), and specifically, whether "taken unlawfully" under MCL 500.3113(a) requires the "person . . . using [the] motor vehicle or motorcycle" to know that such use has not been authorized by the vehicle or motorcycle owner, see MCL 750.414, and, if so, whether the Court of Appeals erred in concluding that plaintiff lacked such knowledge as a matter of law given the circumstantial evidence presented in this case.

***Sholberg v Truman*, SC 146725, COA 307308**

Negligence: Whether, and under what circumstances, a property owner who is not in possession of the property and does not participate in the conduct creating an alleged nuisance may be liable for the alleged nuisance.

***Yono v Dept of Transportation*, SC 146603, COA 308968**

Governmental Immunity: Whether the parallel parking area where the defendant fell is in the improved portion of the highway designed for vehicular travel within the meaning of MCL 691.1402(1).

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Stu's Tech Talk

by Stuart G. Friedman

Slowing Down the Duty to "Promptly Repay" Client Funds to Deal with the Problems of Counterfeit Check Scams

Every day I get emails from potential "clients "in Japan, Sweden, South Africa, and countries across the globe who want my assistance collecting debts, helping make their delinquent spouse who is in breach of their collaborative law participation agreement financial obligations,[1] to help with real estate transactions, and the "requests" have recently expanded to mergers and acquisitions. We all get these emails, and they are obviously from online scammers trying to steal from our client trust accounts.[2] I use the word "obviously" with some trepidation because many of these scammers are highly sophisticated and continuously refine their techniques to make their requests seem more plausible and more difficult to detect. Virtually all bar associations in the United States, Canada, Australia, and England have posted warnings to attorneys of this problem.

Most variations of the scam are based on the fact that the banking industry is very slow to discover a counterfeit check. Spammers counterfeit cashier's checks falsely bearing the account numbers of an account which is likely to have a great deal of money in it such as a mortgage escrow account. Because there are sufficient funds to pay the check, the fake check clears. Only weeks later is the forgery detected.[3] Additionally, these scammers have developed techniques to slow the processing of the counterfeit checks down, often by weeks.[4]

The scammer then quickly gets the lawyer to issue payment to them which quickly disappears. By the time the forgery is detected and the payment is reversed, the lawyer is left holding the bag.[5] The spams are getting more sophisticated, and the spammers are frequently impersonating lawyers from other states or jurisdictions to carry out their trade.[6] For example, they have been known to resurrect the web presence of a defunct law firm or clone the firm's website with new information inserted.[7] They pay the firm with a counterfeit check drawn on another firm's IOLTA account.[8]

Obviously, the first line of defense is to carefully scrutinize the inbound transaction and to create a series of policies that make the firm unattractive to the firm, such as making it clear that funds will be held for verification or when there is a request for them to be wired offshore. People also need to learn that they should not accept a cashier's check in a place where they would refuse an ordinary check. Cashier's checks provide no protection against forgery whatsoever. Attorneys also must resist emotional demands for immediate repayment of funds. The Canadian legal malpractice insurer LawPro has an excellent fact sheet that I suggest all lawyers printout and share with their staff.[9]

While most of these fraudulent schemes take place by email, this is changing.[10] In one case that was recently described on a criminal defense listserv, the scammer approached a criminal defense attorney personally. He made an

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Five Tips to Help Spot a Fake Check

There is no definitive guide to spotting a counterfeit document. These suggestions will help:

1. Compare the check number printed in the right corner with the check number in the MICR line at the bottom of the check to see if they match;
2. Check the checking routing number to make sure that the bank name printed on the check matches the routing number. You can verify the number at http://www.fededirectory.frb.org/search.cfm.
3. Look up the phone number of the bank or issuing party online and call them to confirm the check. For law firm, get the number from the state or provincial licensing authority. Don't trust the number printed on the check. It is often answered by the scammer.
4. Look carefully to see that items which should be embossed (e.g. a check writing machine) are embossed rather than digitally printed. Confirm that the watermarks and security printing on the back of the check are in order. This security measure, however, is the least helpful as modern counterfeiters are purchasing commercial check paper from the commercial vendors.
5. Verify the FedEx account belongs to the appropriate shippers. Scammers love to use stolen Federal Express Accounts.

Stu's Tech Talk
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appointment, paid for representation with a money market check in his name (counterfeit of course), and told the lawyer he was about to be charged and needed the lawyer to be on standby. He even had some supporting paperwork which looked routine enough. Three weeks later, the client called and fired the lawyer and demanded his money back. The lawyer and client got into a fight about the validity of a non-refundability clause which delayed any payments to the point that the lawyer discovered that the check was counterfeit, but a lawyer proceeding using ordinary business practices would have been fleeced. Additionally, increasingly the scammers are approaching the lawyer claiming to be referred by trusted referral sources.[11] While identification documents are easily obtained, [12] I would also recommend verifying client identities even though it may be perceived as being rude. The Law Society of Upper Canada imposes such a duty on Ontario attorneys, and I recommend following their standards in this regard.[13]

The lawyer must also be able to withstand emotional pleas from the client for immediate repayment of these funds. "Never be in a rush to disburse funds from a trust account, especially if the client is pushing."[14] As emotionally difficult as it may be to hear about imminent foreclosure, need to avoid bankruptcy, or emergency surgery, the attorney must be aware that the scammers have the best stories concerning the immediate need for these funds. And, lawyers must resist the threat of a bar grievance. The rules do not require immediate repayment of funds. It states that the lawyer has a duty to pay the funds promptly and cautions that where there are competing claims for the funds, the lawyer may be negligent in failing to conduct basic investigation. In my opinion, as long as the lawyer exercises due diligence, he or she will be acting within the confines of the ethics rules.

A lawyer also needs to remember that, if the check is fraudulent, the law firm may be the only one held responsible for the repayment of these funds. Banks and insurance companies have regularly avoided financial responsibility in this arena. This is the case,, even when the lawyer requests bank assistance in verifying the funds. The bank's contract shifts the burden of responsibility to the lawyer/customer.[15]

In one case, the lawyer was held responsible for $280,000 where she unknowingly deposited a counterfeit cashier's check in her IOLTA account. She warned the bank that she had some concerns about the check. She told the bank personnel that she was not familiar with the parties to the check and would be wiring the money when the bank had assured her that the check had cleared. The bank gave her incorrect assurances that the funds had cleared. The lawyer then wired the money to her detriment.[16]

In preparing for this article, I've read dozens of cases of people swindled by counterfeit cashier's checks or postal money orders. In many of these cases, I've read of people asserting that the bank gave them incorrect advice. In most of the cases, these are unresolved factual questions. The take away from this is that a lawyer should not rely on oral assurances and should confirm these statements in writing. While there is no guarantee that this will shift the responsibility to the bank, it would certainly make it a tougher case for the bank to resist.

Additionally, many insurance policies don't protect the lawyer who is the victim of this scam.[17] Insurers have been particularly aggressive in their arguments to deny coverage in this area. For example, in one case, the insurer argued that the law firm's deductible per client wasn't satisfied because the firm had 51 individual's money in its IOLTA account and that the $25,000 deductible should apply separately as to each victim/client.[18]

This places the lawyer in a double bind. He orshe is out the money, and his or her IOLTA account may be frozen, and checks may bounce on the same which will trigger a State Bar inquiry.[19] Our ethics rules make us "sitting ducks" and only encourage the scammers. For example, the Los Angeles County Bar Association gives this advice:[20]

> A client gives attorney Evans checks against future charges pursuant to a retainer agreement. Evans deposits these sums into his client trust account, as required by Rule of Professional Conduct 4-100(A).
>
> Subsequently, the client substitutes Evans out of the matter and brings in a second attorney. Funds for work that Evans had not yet performed remain in the trust account. But Evans does not promptly return those funds to the client.
>
> * * *
>
> Best Practice Tip: Immediately refund unearned sums from the client trust account at the conclusion of the representation, absent special circumstances.

Had the attorney followed this advice, he could have easily seriously hurt his remaining clients. Our duty to promptly pay money to clients and to not retain client funds can easily be argued to mean that we cannot ethically hold funds 60 days to confirm their bona fides of the checks. The classic advice has to be adjusted to deal with the flaws in the American banking system.

I believe that a lawyer should insert a clause in contracts for services that I would call an "incubator clause" which al-

Sample "Incubator Clause"

Lawyer's right to investigate/delay payment of moneys. The lawyer reserves the right to delay disbursement of funds where it is necessary to investigate competing claims for funds, where it appears the funds have not been subject to final collection by the bank (and have only been provisionally cleared) where the lawyer believes that there is a reasonable possibility of a chargeback or other reversal of the transaction, or where it is otherwise necessary to fulfill the lawyer's ethical responsibility to this client, third parties, or other clients. The amount of the delay may vary from case-to-case. The decision concerning when and for how long the delay belongs to the lawyer.

lows the attorney to hold back payment for up to 60 days. A sample clause appears in the inset to this article. *This clause is thus far untested.* I believe it will be upheld, but cannot guarantee it.

The source of these obligations derive from the duty of the lawyer to promptly return unearned client funds.[21] Most of the cases involving this rule have involved angles of commingling and there appears to be very few cases which actually define "prompt." A lawyer also has a duty to safeguard the funds of other clients.[22] Since an IOLTA is a pooled account, if one "client's" contribution is non-existent, any payment from the funds would necessarily deplete another client's contribution. A lawyer's good-faith decision to keep money in an IOLTA account "is not reviewable by a disciplinary body."[23]

Unfortunately, most cases interpreting this phrase arise with attorneys who have commingled funds, not responded to client inquiries, or have otherwise acted in a way that makes their motives retaining the funds questionable. The Law Society of the United Kingdom imposes a similar obligation on its solicitors. (Barristers are regulated by a different authority). It explains the obligation as follows:[24]

> [Y]ou are required to return client money to your clients promptly - that is, as *soon as there is no longer any proper reason to retain those funds.* Payments received after you have already accounted to the client, for example by way of a refund, must also be paid to the client promptly. Your obligation to return funds which rightfully belong to a client extends to all balances, regardless of how small the sum might be.
>
> If funds are to be retained, rule 14(4) states that you must inform your client promptly in writing and provide details of the amount held at the end of the matter and the reason for retention. Further to this, you must inform your client in writing at least once every twelve months of the amount of client money still held and the reason for retention, for as long as you continue to hold that money. For more information see the Law Society practice note on holding client funds.

Similarly, the North Carolina State Bar Foundation tells lawyers that they should not pay out funds until they are actually finally collected rather than simply cleared otherwise provisionally released.[25] This distinction was also drawn by an Illinois Court of Appeals Court which found the law firm (rather than the bank) was the negligent party disbursing funds on a counterfeit cashier's check when it disbursed it at the time of provisional clearing of the check rather than "final collection." "The UCC provides a comprehensive remedy for check processing which places the risk of loss on the depositor until final collection."[26]

It would seem that a lawyer/solicitor could retain funds for this contingency, but it would be important to document the basis for the retention. In order to do so, it is important that the lawyer act diligently. A lawyer should acknowledge the client's request, provide a prompt accounting for funds, and determine whether there is any practical way of expediting the bona fides of the check.

Another basis for justifying the lawyer's decision to delay the repayment would be the lawyer's duty where there are conflicting claims for the money in issue.[27] While an attorney is investigating, opinions have recognized that the appropriate method is to leave the funds in trust.[28] Additionally, as Linda Rexer (Executive Director of the Michigan Bar Foundation) has noted: "A lawyer runs afoul of MRPC 1.15 by permitting payment of a settlement check directly to the client because third parties are permitted to assert an interest in the funds."[29] Where there is a realistic possibility that a counterfeit check or a fraudulent deposit is in play, allowing the funds to remain in the IOLTA account to allow the matter to be resolved would appear both reasonable and prudent.

The purpose of the rule is to protect clients from the danger of lawyer comingling of money and to protect against the appearance of impropriety. As the Texas Court of Civil Appeals has noted:[30]

> [The rule] recognizes that an attorney will be entrusted with the client's moneys in the course of handling his affairs. It guards against the dangers of commingling; the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in loss of the clients' funds. . . . It calls for a reasonable manner of handling the clients' funds; it is a simple directive as to the manner of handling, rather than a misappropria-

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> tion, which is another matter; it avoids the appearance of impropriety, and assures that there will be no loss of the clients' funds despite 'good intentions.' To comply with it, all that is required is good office management."

Through careful, professional, and well documented responses, a lawyer is preserving this duty.

A lawyer really needs to know that in many cases, he or she will need to hold money for up to 60 days. People may wonder how I arrived at such a long period of time. Account holders have up to 30 days from the receipt of their banking statement to promptly notify the bank of any errors or discrepancies in their account.[31] If they do not do so, they are responsible for the forgery. [32] If the forged check is charged against the bankholder's account in the beginning of the month, it can take up to thirty days before the have notice of the forgery and then they have 30 days in which to protest the forgery.

Obviously, the decision of when to issue the check involves professional judgment, but I believe that law firms need to jettison the traditional notion that they should *immediately* disburse these funds. Care and diligence need to be exercised to protect not only the rights of the given client, but all clients of the firm.

About the Author

Stuart Friedman *is a criminal appellate attorney and a frequent speaker on technology issues.*

Endnotes

1 A collaborative law agreement results from an alternative divorce process where the individual's lawyers work together to achieve a mutually advantageous settlement rather than engaging in contested litigation." See http://en.wikipedia.org/wiki/Collaborative_law (last visited February 11, 2014).

2 The various scams are collected at: http://avoidaclaim.com/confirmed-frauds/collaborative-family-law-agreement-fraud/ (last visited February 11, 2014). The site is maintained by a Canadian legal malpractice carrier. Counsel should be alert to possible legal distinctions between our two systems.

3 http://www.azflse.org/azflse/iolta/iolta_scam_news.cfm (last visited February 11, 2014).

4 T. Roth, "Pish in a Barrel: Lawyers Netted by Email Scam," *The Strategist*, February 2010, available at http://blogs.findlaw.com/strategist/2010/02/phish-in-a-barrel-lawyers-netted-by-email-scam.html (last visited February 16, 2014) (noting that "the scammers in that case worked the bank system, causing a delay in processing the original cashier's check by changing the nine-digit number at the bottom of the check so that the money was wired to a different bank than the one named").

5 *Fifth Third Bank v. Hirsch*, 10 C 5484, 2011 WL 5403600 (N.D. Ill. Nov. 8, 2011) (upholding bank's right to reimbursement from lawyer/victim of this scam. The lawyer was cheated out of $298,500).

6 H. Hierschbiel, *Scammers Take Aim at Lawyers: How to Avoid Being the Next Victim*, Or. State Bar Bull (May 2010) available at https://www.osbar.org/publications/bulletin/10may/bar-counsel.html (last visited February 11, 2014). See also *Stark & Knoll Co., L.P.A. v. ProAssurance Cas. Co.*, 12 CV 2669, 2013 WL 1411229 (N.D. Ohio Apr. 8, 2013) (spammer impersonating an Idaho lawyer and providing $296,000 counterfeit cashier's check).

7 *Id.*

8 For tips about how to stop your IOLTA account from being the next victim of this scam, see *Scam Update*: New Ways they Can Get Your Money, Or. Prof. Liability Fund (January 2013) available at http://www.osbplf.org/docs/inbrief/Scam%20Update%201%202013%20In%20Brief.pdf (last visited February 14, 2014).

Among the tips they recommend is not to include your account number on your deposit stamp, review the bank's policy about customer responsibility for fraudulent checks drawn on their accounts (some banks place the responsibility on the customer), do not write IOLTA checks to unknown individuals who are due money (use a method like electronic payment).

9 It is available at: http://www.practicepro.ca/practice/pdf/FraudInfoSheet.pdf (last visited February 16, 2014).

10 *Id.* (Oregon bar notes that "local thieves" taking a cue from the email scam have been setting up fake appointments with lawyers and plying this scam across the desk with the lawyer).

11 Molly McDough, "Bad-Check Schemes Targeting Lawyers are 'Increasingly Sophisticated'," ABA Journal (February 25, 2010) available at http://www.abajournal.com/news/article/bad_check_schemes_targeting_lawyers_are_increasingly_sophisticated/ (last visited February 17, 2014).

12 Ashley Halsey, "Latest Counterfeit IDs are so Good they're Dangerous," *Washington Post*, July 130, 2011, available at http://www.washingtonpost.com/local/latest-counterfeit-ids-are-so-good-theyre-dangerous/2011/07/12/gIQA55yAkI_story.html (last visited February 17, 2014) (describing Chinese online counterfeit ID vendors selling counterfeit driver's for most US states with nearly perfect duplication of all security features including holograms, laser etching, black light printing, and scannable magnetic strips and bar codes).

13 "Client Identification Requirements for Lawyers," Law Society of Upper Canada, available at http://www.lsuc.on.ca/

WorkArea/DownloadAsset.aspx?id=2147491091 (last visited February 17, 2014).

14 *Id.*

15 See, e.g *Milavetz, Gallop & Milavetz, P.A. v. Wells Fargo Bank, N.A.*, CIV. 12-0875 MJD/JJG, 2012 WL 4058065 (D. Minn. Aug. 22, 2012) *report and recommendation adopted,* CIV. 12-0875 MJD/JJG, 2012 WL 4056715 (D. Minn. Sept. 14, 2012) (law firm called and requested bank's assistance in determining whether the funds had cleared. The bank held itself out as as "leading the fight to protect your accounts from fraudulent transactions with tools such as Image Positive Pay and Payee Validation for both deposited and teller cashed checks." Notwithstanding this, the lawfirm was held accountable for $400,000. Lawyers litigating this issue may be able to distinguish this case on the temporal sequence of events, but the case illustrates that the banks will not be of much assistance to a lawyer with a questionable check. S*ee, also Denkewalter & Associates, Ltd. v. Cole Taylor Bank*, 10 CV 4899, 2011 WL 3164460 (N.D. Ill. July 27, 2011) (after the $150,000 IOLTA check paid to the lawyer was determined to be counterfeit, bank charged back against the lawyer's IOLTA account wiping out that account and impounded his general account for the deficiency).;*Attorneys Liab. Prot. Soc'y, Inc. v. Whittington Law Associates, PLLC*, 11-CV-563-JL, 2013 WL 3289055 (D.N.H. June 28, 2013) (lawyer's professional liability policy didn't cover lawyer for $150,000 loss due to depositing counterfeit cashier's check in the firm IOLTA account and wiring funds to foreign bank); *Dixon, Laukitis, & Downing, P.C. v. Busey Bank*, 2013 IL App (3d) 120832, 993 N.E.2d 580 (2013) (law firm, not bank, was responsible for $350,000 counterfeit cashier's check). *But see Nardella Chong, P.A. v. Medmarc Cas. Ins. Co.*, 642 F.3d 941 (11th Cir. 2011) (error and omission policy *did* cover this where lawyer innocently deposited $180,000 counterfeit cashier's check in her account and wired the money to China); *Stark & Knoll Co., L.P.A. v. ProAssurance Cas. Co.*, 12 CV 2669, 2013 WL 1411229 (N.D. Ohio Apr. 8, 2013) (law firm/victim narrowly escaping insurer's summary disposition motion on one of its three theories).

16 *First Fin. Bank, N.A. v. Citibank, N.A.*, 1:11-CV-226-WTL-DML, 2012 WL 3597121 (S.D. Ind. July 27, 2012)

17 *See, e.g. Owens, Schine & Nicola, P.C. v. Travelers Cas. & Sur. Co. of Am.*, CV095024601, 2010 WL 4226958 (Conn. Super. Ct. Sept. 20, 2010) (law firm denied coverage for $197,000 that was lost as a result of this scam). *See also Bradford & Bradford, P.A. v. Attorneys Liab. Prot. Soc., Inc.*, 0:09-CV-02981-CMC, 2010 WL 4225907 (D.S.C. Oct. 20, 2010) (same for $385,000).

18 *Stark & Knoll Co., L.P.A. v. ProAssurance Cas. Co.*, 12 CV 2669, 2013 WL 1411229 (N.D. Ohio Apr. 8, 2013)

19 *See, e.g. Alkow v. State Bar,* 38 Cal. 2d 257, 264 (1952).

20 http://www.lacba.org/showpage.cfm?pageid=11713 (last visited February 14, 2014).

21 The ethics rule provides:

"(b) A lawyer shall:

(1) promptly notify the client or third person when funds or property in which a client or third person has an interest is received;

(2) preserve complete records of such account funds and other property for a period of five years after termination of the representation; and

(3) promptly pay or deliver any funds or other property that the client or third person is entitled to receive, except as stated in this *rule or otherwise permitted by law or by agreement with the client or third person*, and, upon request by the client or third person, promptly render a full accounting regarding such property."

MRPC 1.15 (emphasis added).

22 *See, e.g. Amsler v. American Home Assurance Co.*, 348 So. 2d 68 (Fla. Dist. Ct. App. 4th Dist. 1977).

23 MRPC 1.15(j).

24 https://www.lawsociety.org.uk/advice/practice-notes/unclaimed-client-funds/ (last visited February 14, 2014)(emphasis added).

25 http://www.ncbar.com/email%20scam.asp (last visited February 11, 2013) ("Be sure to wire only "collected funds" from your trust account. Wired funds are very hard to recover if a check is returned as counterfeit.") I believe that the North Carolina Bar oversimplifies the equation, because a collected transaction can be reversed within 30 days of when the accountholder discovers the counterfeit check. As discussed at the end of the article, I believe that sixty days is the better number not "collection."

26 *Dixon, Laukitis, & Downing, P.C. v. Busey Bank*, 2013 IL App (3d) 120832, 993 N.E.2d 580, 583 (2013).

27 MRPC 1.15(c) provides:

When two or more persons (one of whom may be the lawyer) claim interest in the property, it shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

28 *See, e.g.* Tex. Bar. Op. 391 (1978).

29 Linda Rexer, *Establishing IOLTA and non-IOLTA Trust Accounts*, p. 2 (2009) available at http://www.michbar.org/pmrc/articles/0000145.pdf (last visited February 14, 2013).

30 *Archer v. State*, 548 S.W.2d 71 (Tex.Civ.App. 1977).

31 http://www.helpwithmybank.gov/get-answers/bank-accounts/forgery-and-fraud/faq-banking-fraud-03.html (Office of the Comptroller General).

32 *See, e.g. Hardex-Steubenville Corp. v. W. Pennsylvania Nat. Bank*, 446 Pa. 446, 450, 285 A.2d 874, 877 (1971); *Interstate Hosiery Mills v. First Nat. Bank*, 139 Pa. Super. 181, 191, 11 A.2d 537, 542 (1940) ("the bank was entitled to prompt notice to protect itself from the consequences of a forgery already"); *Marx v. Whitney Nat. Bank*, 713 So. 2d 1142, 1147, No. 97-3213 (La. 7/8/98).

Recommended Reading for the Appellate Lawyer

By Mary Massaron Ross

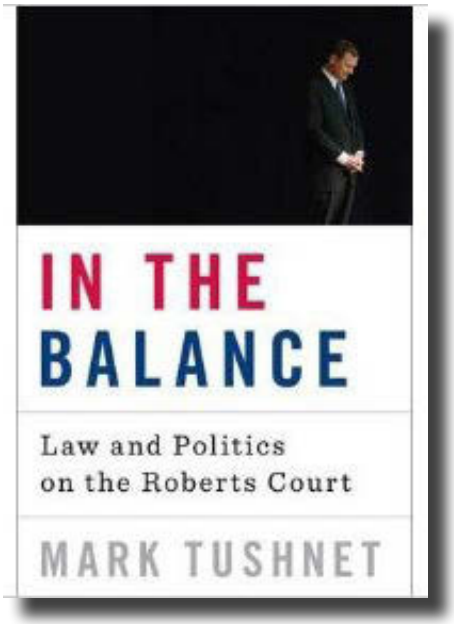
In the Balance: Law and Politics on the Roberts Court

Mark Tushnet
(W.W. Norton & Company 2013)

During his confirmation hearing, Chief Justice Roberts used the analogy that a judge or justice is an umpire whose job it is to "make sure everybody plays by the rules". Justice Kagan "took on Roberts's 'umpire' metaphor, saying that while 'apt,' it also 'does have its limits.'" In Justice Kagan's view, the metaphor could be misleading if understood to mean "that law is a kind of robotic enterprise, that there's a kind of automatic quality to it…." Mark Tushnet's thought-provoking and insightful analysis of the Roberts Court focuses on these two figures, their intellectual force as leaders of opposite wings of the current court, and the occasional tension between them. Tushnet contends that a "close balance" exists on the Roberts Court because of a fairly even division between the Democratic/liberal and Republican/conservative nominees, and a "competition between Roberts and Kagan for intellectual leadership of the Court, as each forcefully articulates differing views about the balance between law and politics."

Tushnet's analysis of their approach and some of the key decisions is fascinating. Anyone who practices before the United States Supreme Court should read it. Tushnet spends some time discussing how Chief Justice Roberts got to the Court, and his background as an appellate lawyer at Hogan & Hartson, the short list of potential Chief Justices, and why Roberts ended up with the nomination. He mentions some of the others who had been under consideration, including Maureen Mahoney, Miguel Estrada, and Harriet Meiers, the initial nominee whose name was later withdrawn when Republican opposition threatened too great a political cost. Tushnet also offers insight into the internal vetting process for potential nominees to the Court, the kind of background and network of supporters that is likely to be most helpful, and the stumbling blocks that can derail a nomination.

According to Tushnet, the first and second terms during which Roberts led the Court reflected his initial emphasis on narrow decisions that could command a strong majority – or even unanimity. Tushnet reviews a number of these decisions including some addressing abortion, campaign finance, the Eleventh Amendment in the context of an ADA case, and military recruiting rules on university campuses.



But the most useful portion of the book is Tushnet's dissection of the decisions, and the manner in which members of the Court approached the issues. The book sets forth a lengthy history of how the arguments challenging the Affordable Care Act developed and gained strength, and how the Court dealt with them. Tushnet speculates that Chief Justice Roberts changed his position and ultimately concluded that the tax power could be used to upheld the law because he hadn't really thought through the tax issue until fairly late in the process.

In discussing Chief Justice Roberts decision, Tushnet points to two distinct "traditions of conservative thought about judicial restraint." The judicial restraint tradition, an older one, focuses on the notion that "judges should exercise self-restraint so that legislatures could give their constituents the policies the constituents wanted." An aspect of this tradition is the doctrine urging avoidance of constitutional questions if possible. Roberts relied on this older tradition in his opinion in the Affordable Care Act litigation.

The second strain of conservativism defines "restraint as holding the judges' own impulses in check." This newer approach urges that the "way to avoid that [judicial policy-making based on the judge's own preferences] is to look for some objective sources for constitutional interpretation." According to Tushnet, "Chief Justice Roberts invoked both traditions of judicial restraint in the first paragraphs of his opinion in the ACA case." Tushnet views Roberts as having "absorbed the rhetoric of judicial restraint as meaning leaving things to democratic majorities" during the Reagan years. The difference between Roberts and the other conservatives on the Court can be traced to the weight that Roberts gave to the importance of judges avoiding constitutional problems.

And Tushnet points to other decisions that Chief Justice Roberts also resolved on this same ground of conservatism.

Tushnet has chapters on gun rights, business issues, the First Amendment, and campaign finance. If you are briefing and arguing cases headed for the Supreme Court, or simply want to better understand the dynamics and approach of members of the current Court, this book is for you.

Never Eat Alone: And Other Secrets to Success, One Relationship at a Time

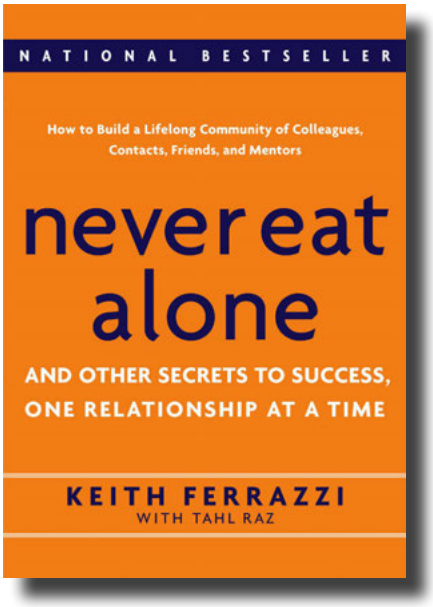
Keith Ferrazzi with Tahl Raz
(Doubleday 2005)

In today's legal marketplace, unless you are working in-house or for a government law office, marketing is the order of the day. And, even if you are not searching for new legal business, your ability to make and keep strong relationships will have a lot to do with how successful you are in accomplishing whatever you set out to do as a professional. So I am always on the lookout for books that offer tips on how to do that better. And this is one such book.

The author begins with a chapter on his own background and how he learned as a caddy at a local golf club of the importance of professional relationships. He realized that those in the professional heights "found one another jobs, invested time and money in one another's ideas, and they made sure their kids got help getting into the best schools, got the right internships, and ultimately got the best jobs." When he got into Harvard Business School, he realized that he lacked this network. But he decided he would create his own. The book sets forth how he accomplished this. And a part of what he did was to learn from great connectors, such as Bill Clinton and Katherine Graham, how to do it.

The book includes discussions of the specific skills needed for this. And they are concrete and practical. One chapter offers guidance about preparation for meetings, what kinds of things to research, where to look for the information, and how to build on existing networks. A second chapter offers advice on how to identify the people who can help you accomplish your mission. Keeping an organized database of people within your network is something most of us don't do regularly, I suspect. But the author explains how he listed those important to his mission and those he wanted to get to know, and how he follows up regularly with his network.

A third chapter offers advice on the cold call, which starts with "strategies that ensure every call I make is a warm one." These strategies include researching to find connections to those you want to "cold call" and then using those connections to make your overture a warm one. The author offers rules for approaching these calls including mentioning a reference, stating your value, saying a lot in only a few words, and offering a compromise in any negotiation to help build a relationship. The author's concrete suggestions include ideas for managing a gatekeeper artfully, so that you can gain access to the person you are trying to reach.



Other chapters focus on how to keep in touch with your network, how to save time by including several people at the same dinner, throwing parties, or setting up meetings (for cocktails or a meal) in connection with other business, and joining people you know well with those you are just getting to know. One pointer the author included was to share your passions. He correctly points out that shared interests are vitally important to building a relationship – and so you can benefit by inviting someone to a special event involving your passion, whether it's the theater, a concert, a trip to the gym, or a dinner party in your home. But these contacts are only part of the process. The author insists that once you meet someone new, you need to follow up. Otherwise, the effort may be lost. And he offers many suggestions for doing so, including sending an email, clipping relevant articles or news items.

Lots of books out there offer guidance on marketing and networking. But few make it sound as much fun as this one. And few offer as many specific suggestions that you can adapt to your own situation. So if you want to expand your professional network, I would recommend this book.

About the Author

Mary *currently serves as President of DRI - The Voice of the Defense Bar. She is a fellow in the American Academy of Appellate Lawyers, and has served as chair of DRI's Appellate Advocacy Committee, the Appellate Practice Section of the State Bar of Michigan, the ABA Council of Appellate Lawyers (CAL), a division of the Appellate Judges Conference, and the ABA TIPS Appellate Advocacy Committee. She serves as co-chair of the Michigan Appellate Bench Bar Conference Foundation, an organization of Michigan appellate judges and lawyers.*

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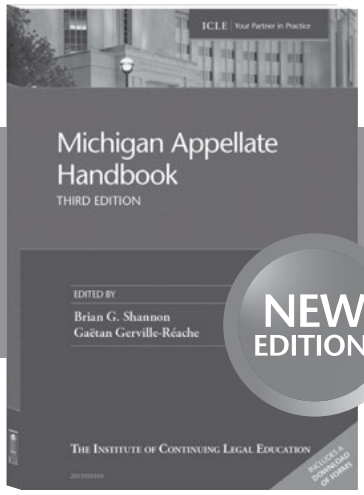

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Shannon's Soapbox

By Brian Shannon

Ready for a riddle? What was recreated at the age of 29 by 20 appellate lawyers, is always changing to stay current, but never changes its underlying principles? The answer, as I know at least 20 of us already know, is a **SHAMELESS ADVERTISEMENT** for ICLE's new *Michigan Appellate Handbook, Third Edition*, which went live online on January 31, 2014, and will be out in paperback form by the time you see this.

Gone is the old blue three-ring binder that the veterans among us used to consult before we became veterans. For most of us, that old binder has been gathering dust for years, since even geezer lawyers have had to venture into cyberspace, where all the young lawyers are already in their element. That's where the *Michigan Appellate Handbook, Second Edition*, remained current and relevant. Still, the *Second Edition* was a straightforward updating of the *First Edition*—new paint and wallpaper in the same set of rooms, with the exception of some added rooms that I'll get to in a minute.

The *Third Edition* is more like a tear-down and rebuild. An all-star cast of appellate specialists labored throughout 2013 to give ICLE's flagship book on appeals a thorough overhaul. It has been restructured and rewritten at a time when efiling is beginning to predominate, when the court rules are supplemented with important internal operating procedures, when courts have web sites, when research is usually done with a computer rather than a library, and when new legislation has a growing impact on the judicial branch.

Carl Gromek, John Lydick, and Nancy Bosh wrote the *First Edition*, which ICLE published in 1985. It was a tremendous accomplishment, filling a new need for a comprehensive and practical reference work in a burgeoning specialty. The Michigan Court Rules had just replaced the General Court Rules of 1963. The court of appeals was growing like a weed, fueled by an increasing caseload. More and more lawyers wanted to be experts in appellate practice and procedure. Lawyers were finding themselves in need of practical advice and a frame of reference. For many, the *Michigan Appellate Handbook* was the answer.

Nancy Bosh updated the *First Edition* just seven years later, in 1992. William Fahey added a chapter on administrative appeals. In 2005, Anthony Patti and Howard Yale Lederman added a chapter on appellate standards of review, with a detailed issue-by-issue chart, including supporting citations. This was the year the book began its online existence.

In 2011, Gaëtan Gerville-Réache rewrote the chapter on circuit court appeals in light of the Supreme Court's adoption that year of an entirely new subchapter 7.100. The same new rules made it necessary to update the administrative appeals chapter, and Gaëtan teamed up with Bill to do that.

2011 also was the year when Mary Hiniker, ICLE's associate director at the time—she has since retired—asked Gaëtan and me if we would help restructure the book from the ground up and help select authors for the new chapters. Neither of us had been responsible for one of ICLE's handbooks before. Not really knowing what we were agreeing to, we said yes. We had meetings and discussions with Mary and with Rebekah Page-Gourley, ICLE's legal editor for the *Handbook* since 2008. After a leisurely year of thinking about the chapters we needed and the sequence that made sense to us and who we might ask to write them, the pace picked up briskly last year. Everyone who was asked to write said "yes." Deadlines were set. Off we went.

Here's who wrote:

Geoffrey M. Brown
John J. Bursch
Phillip J. DeRosier
William K. Fahey
Stuart G. Friedman
Gaetan Gerville-Reache
Hon. Elizabeth L. Gleicher
Mark Granzotto
Howard Yale Lederman
Mary Massaron Ross
Nicole L. Mazzocco
Sandra Schultz Mengel
Matthew T. Nelson
Anthony P. Patti
James W. Rose
Brian G. Shannon
Noreen L. Slank
Michael F. Smith
Jill M. Wheaton
Beth A. Wittmann

A distinguished slate of authors, I think you'll agree. To be sure, the Appellate Practice Section easily could yield up

Continued on next page

Shannon's Soapbox
Continued from page 21

another, completely different slate of authors who would have been equal to the task. Those of you who have headed up other ICLE projects know that ultimately the writers are selected by ICLE, after collaborative discussion of availability, likely willingness, and other factors. Our list of candidates was lengthy, but no one turned us down so we didn't get to use the whole list.

The *Third Edition* has 17 chapters, only some of which correspond closely to chapters in the *Second Edition*. Some are mostly new and some are entirely new. This may not mean much to those of you who think of the *Handbook* only as an online answer source, like Google. I suppose the chapter layout is not of much interest to someone focused solely on finding the answer to a well-formulated online query. Certainly the book is designed to yield up quick answers, links to forms, etc. Still, ICLE, Gaëtan and I spent a lot of time thinking about the structure of the book, so I hope you'll bear with me while I write about what we intended.

The *Second Edition* started off with a chapter on circuit court appeals, then nine chapters on the court of appeals, seven chapters on the supreme court, and finally the more recent chapters on administrative agency appeals and standards of review. This led to repetition. An appellate brief in any court is likely governed, directly or indirectly, by MCR 7.212. The circuit court appeal rules are now modeled on the court of appeals rules, with variations. A motion is pretty much a motion, wherever it is filed, perhaps with slightly different chrome trim. The *Third Edition* tries to cover topics roughly in the order the practitioner is likely to encounter them:

> Chapter 1 is new and mine, basically things to think about at the outset of any appeal, including whether to appeal at all.
>
> Chapter 2 is Noreen and Geoff on things to do *before* the appeal, a topic touched on here and there in the *Second Edition*, but not as thoroughly.
>
> Chapter 3 is Sandy explaining the organization and operation of the court of appeals, an updating of chapter 2 in the previous edition.
>
> Chapter 4 is Jim on appeals of right in the court of appeals, including a detailed discussion of the final order rule, as well as claiming the appeal, the record, and cross-appeals.
>
> Chapter 5 is Anthony and Howard on standards of review, which was added as chapter 18 near the end of the *Second Edition*, but felt better placed near the front of the book.

Chapter 6 is Phil on interlocutory and other discretionary review in the court of appeals, formerly dealt with cursorily in a subpart of a subsection of one chapter.

Chapter 7 is Gaëtan on expediting review in any appellate court, at any stage of the appeal, a topic touched on here and there in the previous edition.

Chapter 8 is Jill on motion practice in any appellate court—the basics, the common types, and differences among the courts; old chapter 5 was also motion practice, but only in the court of appeals.

Chapter 9 is Matthew and Nicole on briefs in any appellate court, an improved version of old chapter 6—what's required, what's desired, and tactical tips.

Chapter 10 is Mike on amicus briefs, a new chapter—why, when, and how to file them in the supreme court and court of appeals.

Chapter 11 is Judge Gleicher and Mark on oral argument in the court of appeals, a more thorough reworking of old chapter 7, offering views from both the speaker and the audience.

Chapter 12 is Beth on decisions and post-decision practice in the court of appeals, topics covered in chapters 8 and 9 of the *Second Edition*.

In Chapter 13, the first of two chapters specific to the supreme court, John explains how to seek and oppose leave to appeal, and the strategies to consider on both sides.

Chapter 14 is Mary on supreme court calendar cases and how to brief and argue them, as well as things to think about when you learn the court has granted leave to appeal in your case.

Chapter 15 is Gaëtan again, this time with an updated version of his 2011 rewrite of the old chapter on circuit court appeals.

Chapter 16 is Gaëtan and Bill with an updated version of their 2011 revision of the old chapter on administrative appeals.

Chapter 17 is Stu on special considerations in criminal appeals, a new chapter that elaborates on points formerly discussed here and there, if at all.

I think it's pretty good. If you buy the paperback, I'll autograph it for you on request. (I had to say that because I have a bet with someone whether anyone will ask.)

As is true for other ICLE publications, all these writers, with the assistance of ICLE staff—meaning Rebekah—will be continually updating the online version as events require. The paperback will be updated and published periodically. If you are an ICLE Premium Partner, you already have access. If you are not, ICLE would love to hear from you.

The print edition of the handbook is $145, and the on-line edition is available at a range of prices depending on firm size. Call ICLE at 877-229-4350 with any questions or to order, or visit *www.icle.org/books/MAH*.

About the Author

Brian Shannon *has practice with Jaffe Raitt Heuer & Weiss for 40 years, concentrating in appeals for the last 35 years. He is co-founder of the Appellate Practice Section and served as its first chair in 1995-1996. He has been a planner and moderator for the Michigan Appellate Bench-Bar Conference Foundation since 1995. Most recently, he is the co-editor and chapter author of the* Michigan Appellate Handbook, Third Edition *(ICLE 2014), which he unblushingly promotes in this Soapbox.*

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Brought to you by the Good Deeds Committee of the Appellate Practice Section

Ronald McDonald House of Detroit
3911 Beaubien, Detroit, MI 48201
Thursday May 22, 2014 at 6 pm

The Ronald McDonald House provides a home-away-from-home for families whose children are receiving medical treatment at the Children's Hospital of Detroit. Families are charged just $10/day for a room that sleeps up to four members of the family. Some families stay for only days while others with children who are critically ill may stay at the RMH for months.

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- Volunteers will serve dinner to the families staying at the RMH on **Thu. May 22, 2014 at 6 pm**
- Volunteers will work together to develop a menu and each volunteer will prepare a homemade dish. The costs for meal preparation are incurred on each volunteer.
- Dishes can be made on-site at the RMH kitchen, or pre-made, whichever you prefer.
- Dinner time is at 6 pm, so volunteers should arrive with plenty of time to prepare and to set-up (at least by 5:30 pm).
- The families serve themselves buffet-style and volunteers are encouraged to sit, eat and chat with the families.
- To learn more, you can read about APS's experience serving families at the RMH in 2012: *http://www.michbar.org/alawyerhelps Istories-ronaldmcdonald 9-12.cfm*

Please email Marilena David-Martin at *mdavid@sado.org* no later than May 15th if you are interested in volunteering for this event or if you have any questions.

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