The General Practitioner

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EDITOR'S NOTES

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This newsletter will be published six (6) times per year by the Solo and Small Firm Section of the State Bar of Michigan to inform members of the Section activities and other matters of particular interest to general practitioners.

Primer on Medicaid Asset Protection

By James Schuster

There are two components to a successful nursing home Medicaid practice: First, Asset sheltering; Second, Application processing. We will only deal with the first in this article, but in practice the two are inseparable. Allow me to explain.

Application processing is a very labor intensive, time consuming matter that is best handled by well-trained support staff, but it is nonetheless essential to the successful practice. Years ago I tried to have a Medicaid consultation only practice but it proved a disaster. No matter how much I put in writing, invariably when clients got their denial, they blamed it on me saying "we did what you told us." Our response would be along the line of "when we said Medicaid annuity, you told us your financial guy knew what to do. Well he didn't and he didn't call us to ask any questions."

We then tried the retainer basis for clients who filed their own apps. That worked much better but proved to be a mistake since my staff put in more time training the clients on how to handle the application than simply doing it in our office!

We will cover two types of Medicaid asset protection. In Part I we'll look at "pre-need" asset sheltering by way of transfer of assets to an irrevocable trust. This is the sort of planning done when a couple first receives a diagnosis of a long term care condition such as Alzheimer's or Parkinson's Disease. In Part II we'll look at immediate need or "crisis Medicaid planning." This work is done in conjunction with preparing the Medicaid application.

Part I

Pre-need Asset Sheltering

Pre-need planning is driven by a client's fear of losing all savings to the nursing home. In my experience there are two types of client who consider this service. The first is the surviving spouse whose spouse died in a nursing home. This client often lives with a daughter who takes care of their needs. The second is the married couple who have a fresh diagnosis of a long term care condition. For clients with a significant amount of savings and a stable living situation, the main asset protection strategy is the irrevocable trust. It must be created and funded more than five years before applying for Medicaid.

If the client is confident that nursing home placement will not take place within five years then an irrevocable trust to shelter assets may be an ideal vehicle. There are two kinds most commonly used: First, the income only trust, wherein the couple may receive the income but not the principal from the trust. The second is the full irrevocable trust where they have access neither income nor principal. Administration of these trusts is beyond the scope of this article, but it must be noted that there are many issues relating to the creation of these trusts that a client must be advised about. Perhaps the most obvious to the lawyer is that change in the law can make the trust worthless. The second is trust administration. While it is true that these trusts typically allow distribution to children during the clients' lifetime, they must understand that if the Medicaid department sees money going from the trust to the child and then by "loan" to the parent, the trust will fail its protective purpose.

Perhaps the single biggest practical consideration in advising the use of one of these trusts is coming up with a life needs budget. How much can the clients afford to live without access to the assets?

Let's use this example. Joe and Betty Smith are in about pre-need asset sheltering. They are both in their mid-70's and in good health with an active lifestyle. They are in because Alzheimer's seems to run in his family and he has been having some memory issues. He could be in the earliest stages of Alzheimer's disease.

They have $4,000 per month of social security and pension income. It is spent every month on their bills.

Their total net worth is just about one million dollars. Their assets include their home, $350,000; a condo in Florida, $150,000; $300,000 is in Joe's 401k; and about $150,000 in savings

Are They Good Candidates?

Most of their assets can be put into an irrevocable trust, with the exception of Joe's retirement plan. The 401k cannot be put into an asset shelter trust. Funds from the plan can be used, but income tax would need to be paid first. They could easily lose 25% or more of his 401k. However, given that they have other assets and they would rather lose part of their savings as opposed to all, they may yet be good candidates for asset sheltering.

Let's consider the clients' values and goals next. Both clients are firm in their desire to avoid the nursing home unless it is impossible. If Joe develops Alzheimer's Betty plans on taking care of him at home and hiring in-home

help when needed. Common experience shows that for the first years of the disease, a spouse can manage by herself. However as the disease progresses the patient needs more and more attention and spousal burn-out becomes a physical and mental reality. The health of the spouse can deteriorate. At that point the spouse must choose between 24 hour in-home care or placement in an Alzheimer's unit of an "assisted living facility."

If Betty stays true to her position to hire in-home care, seven days a week she will be spending substantial amounts for the care. Let us also assume that at least some of those days she will need an aide in overnight so that she can get sleep. One more debilitating aspect of the disease for a caregiver is the "sun downers syndrome." The patient may be up all night causing the caregiver to suffer harmful sleep loss. Betty might have the aide in every day of the week for eight hours plus three over-nights for an additional 24 hours of coverage. That adds up to 80 hours per week. Currently most agencies charge around $20 per hour, some are higher, some lower. The budget would call for $1,600 per week and a yearly cost of $83,200. Without allowing for inflation or increasing need, she could plan to spend $250,000 in three years. This care could be tax deductible as a medical expense and Joe's 401k would be a good source of funds. At this point they will still have some $250,000 in savings.

The above three year scenario is not guaranteed for any client. Some spouse's seem to be "born nurses" and handle the care single handed until either the patient dies or they break. In the Betty scenario, what will happen after three years? Will she hire more care? Move Joe to an Alzheimer's unit in an assisted living facility where the cost will be over $6,000 per month? How long can she financially avoid the nursing home and Medicaid?

The point to the above should be clear. If a couple wants to avoid the nursing home for a disease like Alzheimer's, they should plan on spending some $300,000. That is money that would not go into an irrevocable trust. Over and above that sum, the other spouse will want emergency money and will want funds under her control for her needs. If Betty would want access to $100,000 then that would leave only $100,000 for the irrevocable trust. That would not likely be worth the expense of legal fees.

While the condo and the home could be put in an irrevocable trust, what will they gain? The home is already protected from Medicaid and, under the current rules, the condo could be protected merely by having it up for sale for a period longer than 90 days at which time it is no longer counted as an asset. However, assuming a worst case scenario, if these properties are placed in the trust, there must be a source of funds for expenses, taxes and maintenance. If none of the Smith's properties are rented that will take additional funds. Perhaps then the $100,000 referenced above would be necessary to put the money in the trust.

In the final review of their situation, we might recommend that the Smiths put their home, condo and an additional $100,000 in an irrevocable trust. They would keep Joe's 401k and an additional $100,000 out of the trust. Whether that would be worth the expense and time spent in creating and managing the trust involves the question of what's the alternative? The alternative is to wait until a nursing home is needed, if it ever is.

Part II

Immediate Need Medicaid Planning

Under the current rules there are many methods to shelter assets. Let's continue with the Smith hypothetical and suppose that Joe had an earlier than expected nursing home entry.

They still have the home and condo and the 401k is down to $100,000. They have an additional $200,000 in savings. In 2017 Betty is allowed to have $120,000 as her resource allowance. It is protected. That means they have a $180,000 spend down plus the $150,000 condo, that makes a total of $330,000. The table below shows wat might they do:

Amount Spent	Asset and Plan of Action
	Home. Its value is $350,000 but is an "excluded" asset. The home should be in Betty's name via a "Lady Bird"deed so that it can go to the children should she die before Joe.
$150,000.00	Put condo up for sale and if it does not sell in 90 days it is not considered an available asset. Since real estate has a range of prices they might price it at the "top of the market" as long as a real estate professional can certify the value. After the application is approved Mrs. Smith could either sell it and keep all the money or let the listing expire.
$25,000.00	Pre-pay for funerals for both plus all burial arrangements.
$10,000.00	Pay for burial plot for daughter and husband.
$25,000.00	Make improvements to home and condo,
$100,000.00	Annuitize the 401k remainder, and
	Obtain probate court order of support awarding wife income from the annuity
$25,000.00	Make short term loan to daughter pursuant by a compliant promissory note.
$10,000.00	Estimated legal fees for some of the services for Medicaid application; probate court action; revised estate planning for Mrs. Smith. .
$345,000.00	Total spent

A review of the table shows that under the current rules it would not be that difficult to protect all of the Smith's assets under the current rules. In this example she spent more than necessary. However in reality she may have to spend even more. The legal fees could be significantly more if Mrs. Smith needed all the services. Also, she may have to pay a nursing home for a month or two at the rate of $8,000 per month.

A note on the above strategies:

Property Listed for Sale

Any property that has been listed for sale for 90 days or more is considered to be an "unavailable" asset and is not "counted." The rule, found in Bridges Eligibility Manual item 400 states that the property must remain for sale and if a reasonable to purchase may not be refused. What if the property is solely in the spouse's name?

Pooled Assets at Application, Separate Assets After

Note that we observed that after Mr. Smith's application is approved Mrs. Smith could either allow the listing to terminate or sell and keep the proceeds. This conclusion is based on a number of Medicaid planning assumptions: 1) Mrs. Smith is her husband's agent under a durable power of attorney that allows her to make gifts to herself. Using this power she transfers the condo to her name alone. 2) Medicaid considers property of both spouses in the application phase but only considers property of the applicant after the application is approved. The separate assets of the spouse are not considered any longer.

Spend Down

Medicaid spend down merely means reducing the total value of "countable" assets. The spending need not be on the nursing home or "necessities." There may be no "spending" at all. During the recession many people did not have to spend anything because the value of their savings went down as the market crashed. " The spending can be on anything for either the applicant, the spouse or the property of either. The qualifier to all spending is that they must receive "fair market value," which means no inflated payments for goods or services from family members. No paying grandson $10,000 to paint the garage or buying daughter's non-running 10 year old clunker for $5,000.

Property Repair, Property Improvements

The applicant or spouse can spend down almost any amount on repairs or improvements. We've had families put in new kitchens and new windows in old houses. They can repair or replace motor vehicles.

Funeral and Burial Expense

It should come as no surprise that Medicaid allows spending on funerals for applicant and spouse. It does surprise many that Medicaid allows the purchase of "burial space" items for children and their spouses. I explain this to clients as a throwback to the day when family cemetery plots were common.

Annuitizing the 401k

In January the rule regarding annuities in IRS regulated tax deferred accounts changed to protect all annuities. As of writing this rule has not been subject to test or interpretation. But, under the prior practice, purchasing an immediate annuity had the effect of transferring an asset into future income. In the above example the $100,000 asset is gone. However, the annuity income creates a new problem.

Medicaid only considers income of the applicant for payment to the nursing home. It does not consider income of the spouse. However, the "community spouse" is allowed income from the applicant/recipient up to a limit of $3,023 including the spouse's income.

For example, if Mr. Smith has an income of $3,000 and his wife $1,000 then she may receive a maximum of $2,023 of income from him to reach the total of $3,023. Most of his remaining income will go to the nursing home. Thus adding more income to him by annuitizing his 401k merely results in more money going to the nursing home each month.

Court Order of Support

Medicaid allows a spouse to obtain an order from the court directing income of the applicant to the community spouse for her/his support. The order must be obtained before the Medicaid application is completed. In this way the wife could capture the additional income the annuity generated.

Medicaid also allows for a court order of support for transfer of assets to the community spouse.

While use of the court order process can eliminate the need for asset spend down, it is true that there is no guarantee a judge will order the desired relief.

Promissory Note

The rules allow an applicant or spouse to make a loan to a person and receive payments in return. The payments are considered income. The note may have no marketable value. In the hypothetical Mrs. Smith loaned $25,000 to her daughter. There would be a promissory note with no marketable value and Mrs. Smith might receive payments of $1,000 per month in return. Interest is optional.

Divestment

Divestment of assets results in a penalty for assets transferred for less than fair market value. The look-back is five years. The divestment rules are complex, e.g. a penalty period only begins to run with the filing of an application; the nursing home may not be otherwise paid; and a divestment can be cured if every dollar or asset is returned. Partial returns do not cancel a penalty period.

Any divestment of assets within the preceding the look back period must be reported and the transaction proof must be submitted. A penalty period of one day will be assessed for each $267.26 ($8,018 per month) of divestment. Amounts over or under will result in penalty periods longer or shorter.

Medicaid Annuity - Promissory Note

If a client has divested assets, and if the client has at least an equal amount of money available then the penalty period may be covered by a short term immediate annuity or promissory note designed to cover the nursing home payment while Medicaid does not. ■

Due Process Protocol Influence On Statutory Claims Employment Arbitration In Michigan

By Lee Hornberger, Arbitrator and Mediator

Introduction

This article reviews the influence of the "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship" (Protocol) (1995) on statutory claims employment arbitration in Michigan. http://naarb.org/protocol.asp

In response to the growth of pre-dispute employment arbitration and at the urging of the National Academy of Arbitrators, the Task Force on Alternative Dispute Resolution in Employment was created. The Task Force consisted of American Bar Association, American Civil Liberties Union, Federal Mediation and Conciliation Service, National Academy of Arbitrators, National Employment Lawyers Association, and Society of Professionals in Dispute Resolution representatives.

On May 9, 1995, the Task Force issued its "Protocol" recommendations. Arnold M Zack, 1994-1995 President of the National Academy of Arbitrators, called the Protocol a "modest undertaking to protect the credibility of labor management arbitration and to provide guidance to NAA arbitrators who might be undertaking such [employment arbitration] work." "The Due Process Protocol: Getting There and Getting Over It," *Beyond the Protocol: The Future of Due Process in Workplace Dispute Resolution*, 2 NAA Conference, Chicago, April 13-14, 2007 (Beyond). *http://www.law.harvard.edu/programs/lwp/people/staffPapers/zack/Protocol%20getting%20there%20and%20over%20it.%20PUblished%20format.pdf*

The Protocol

Statutory Employment Disputes

The Protocol concerns statutory employment dispute arbitration. It provides that such arbitration which is conducted under proper due process safeguards should be encouraged in order to provide expeditious, inexpensive, and fair enforcement of statutory disputes.

Timing of Agreement to Arbitrate

The Protocol did not achieve consensus on the timing of an agreement to arbitrate statutory disputes. The Protocol achieved consensus concerning some procedural due process issues.

Representation by Counsel

The Protocol provides:

1. Employees should have the right to be represented by a representative of their own choosing. This right should be included in the arbitration agreement.
2. Payment for representation should be determined

between the employee and the representative. The employer should reimburse a portion of the employee's attorney fees, especially for lower paid employees. The arbitrator should have authority to provide for fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law or the interests of justice.

Neutral Arbitrator

The Protocol provides that:

1. Arbitrators should have hearing conduct skills, statutory issue knowledge, and familiarity with the workplace and employment environment. Arbitrator rosters should be established on a nondiscriminatory and diverse basis in order to satisfy the parties that their interests and objectives will be respected.
2. Arbitrators whom both parties trust should be selected. The arbitrator must be unbiased. Arbitrators should decline cases if they believe the procedure lacks requisite due process.
3. Upon request of the parties, the designating agency should utilize a procedure such as that of the American Arbitration Association. The selection process could empower the agency to appoint an arbitrator if the striking procedure is unacceptable or unsuccessful.
4. The arbitrator has a duty to disclose any relationship which might reasonably constitute or be perceived as a conflict of interest. The arbitrator should be required to sign an oath affirming the absence of such present or preexisting situations.
5. Arbitrator impartiality is best assured by the parties sharing the arbitrator fees and expenses. If economic conditions do not permit this, the parties should agree on an appropriate split. In the absence of an agreement, the arbitrator should determine the payment allocation.

Discovery

The Protocol provides for access to information and encourages adequate but limited pre-hearing discovery. Employees should have reasonable pre-hearing and hearing access to all information reasonably relevant to their claims. Necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available.

Fair Hearing

The Protocol provides the arbitrator should be bound by applicable agreements, statutes, and procedural rules, including the authority to determine the hearing time and place; permit reasonable discovery; issue subpoenas; decide arbitrability; preserve hearing order and privacy; rule on evidentiary issues; and determine the close of the hearing and procedures for post-hearing submissions. The arbitrator should be empowered to award whatever relief would be available in court.

Written Opinion

The Protocol recommends the arbitrator should issue an award resolving the submitted dispute. The award should contain:

1. A summary of the issues, including types of disputes, damages and other relief requested and awarded,
2. A statement of any other issues resolved, and
3. A statement regarding the disposition of any statutory claims.

The Protocol recommends the arbitrator's award should be final and binding and the scope of review should be limited.

Designating Agencies' Responses To The Protocol

American Arbitration Association

According to the AAA, the Protocol seeks to ensure fairness and encourages arbitration of statutory disputes, provided there are due process safeguards. AAA Employment Arbitration Rules and Mediation Procedures, November 1, 2009 (AAA Rules). *https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased*

The AAA Rules provide for:

1. The right to representation by counsel or other authorized representative. Rule 19.
2. Appointment of neutral arbitrators, party appointed arbitrators, chairperson, disclosure, disqualification of arbitrator, communication with arbitrator, and arbitrator vacancies; and the employer pays the arbitrator's compensation for disputes arising out of an employer-promulgated plan. Rules 12-18, and 44.
3. Reasonable discovery, including discovery of witness information and discovery authority. Rules 8-9.
4. A fair arbitral hearing, including providing for administrative conferences, arbitration management conferences, hearing locale, stenographic record, oath requirements, order of proceedings, evidence require-

ments. and closing of hearing. Rules 7-8, 10-11, 20, 25, 28, 30, and 33.

5. A written award. Rule 39.

National Academy of Arbitrators

The NAA has Guidelines for Standards of Professional Responsibility for Arbitrators in Mandatory Employment Arbitration (2014). http://naarb.org/Guidelines_for_standards.asp The Guidelines are intended to assist arbitrators in deciding whether to accept a case and to fairly conduct a case. The Guidelines provide for:

1. Adequate rights of representation.
2. A fair manner for the selection of a neutral arbitrator. Arbitrator compensation arrangements should be fair.
3. Arbitrator authority to ensure reasonable discovery.
4. A fair hearing. This includes arbitrator remedial authority equal to that provided by statute, and no unfair hearing restrictions.
5. A written award.

Financial Industry Regulatory Authority

Statutory employment claims may be arbitrated only if the parties have agreed to arbitrate them, either before or after the dispute arose. *http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096* If the parties agree to arbitration, the claim will be administered under Rule 13802. FINRA Rules provide for:

1. Right to representation by counsel. Rule 13208.
2. Neutral public arbitrators. Rule 13802.
3. Discovery. Rules 13505-13514.
4. Fair hearing. Rules 13600-13609. This includes any relief that would be available in court. Rule 13802 (e).
5. The Arbitrator must issue an award setting forth a summary of the issues, including the types of disputes, the damages or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claims. Rule 13802(e).

JAMS

JAMS has promulgated its Policy on Employment Arbitration Minimum Standards of Procedural Fairness (JAMS Policy). https://www.jamsadr.com/employment-minimum-standards/ JAMS supports the application of the Protocol and intends that its Employment Arbitration Rules and Procedures be consistent with the Protocol. The JAMS Policy provides for:

1. The right to representation by counsel. Standard No 3. Rule 12.
2. Arbitrator neutrality. Standard No 2. Rule 7.
3. Discovery, including exchange of core information and some depositions. Standard No 4.
4. A fair hearing, including all remedies available in a court, presentation of evidence, hearing location, and mutuality, Standard No's 1, 5, and 6-7. Rules 19, 20, 21, and 22.
5. A written award. Standard No 8. Rule 24.

Initial Court Discussion Of Protocol

Initially the Protocol was cited by some courts in considering arbitration due process issues. Jacquelin Drucker, "The Protocol in Practice: Reflections, Assessments, Issues for Discussion, and Suggested Actions," Beyond. *http://heinonline.org/HOL/LandingPage?handle=hein.journals/emplrght11&div=16&id=&page=* *Hooters v Phillips*, 39 F Supp 2d 582 (D SC 1985), aff'd 173 F3d 933 (4th Cir 1999), alluded to the Protocol. *Rosenberg v Merrill Lynch Pierce Fenner & Smith*, 995 F Supp 190, 208 n 23 (D Mass 1998), aff'd 170 F3d 1 (1st Cir 1999), cited the Protocol.

Cole v Burns Int'l Security Services, 105 F3d 1465, 1490-1491 (1997), cited the Protocol concerning the arbitrator fee payment issue. *Cole* held an arbitration agreement must:

1. Provide for neutral arbitrators,
2. Provide for appropriate discovery,
3. Require a written award,
4. Provide for all relief available in court, and
5. Not require employees to pay either unreasonable costs or any arbitrators' fees as a condition of access to the arbitration tribunal. *Id.* at 1482.

Arbitration Due Process In Michigan Courts

The Michigan Supreme Court had previously reviewed arbitration procedural due process issues in *Renny v Port Huron Hosp*, 427 Mich 415; 398 NW2d 327 (1986). *Renny* held:

> where an employee has expressly consented to submit a complaint to a joint employer-employee grievance board established by the employer with the knowledge that the resulting decision is final and binding, the decision shall be final unless the

> court finds as a matter of law that the procedures used did not comport with elementary fairness. *Id*. at 418.

In *Renny* the employee was not permitted to have counsel present or see the complaint against her. She was not informed of the identity of witnesses testifying at the hearing. She was not present during the testimony or during opening remarks. There were no records or transcripts of the discharge hearing, and the tribunal made no finding. No witnesses could be called without the tribunal's consent. A witness's appearance was voluntary. An employee had no right to cross examine or rebut testimony or to make closing arguments. *Id*. at 423-424.

Renny held elements necessary to fair arbitration proceedings are:

1. Adequate notice to persons who are to be bound by the adjudication;
2. The right to present evidence and arguments and the fair opportunity to rebut evidence and argument by the opposing argument;
3. A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction. situation, or status;
4. A rule specifying the point in the proceeding when a final decision is rendered; and,
5. Other procedural elements as may be necessary to ensure a means to determine the matter in question. ... . *Id*. at 437.

A Court of Appeals Conflicts Panel subsequently reviewed arbitration procedural due process issues in *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118; 596 NW2d 208, lv dn 461 Mich 923 (1999).

Rembert did not cite the Protocol although it cited the AAA National Rules for the Resolution of Employment Disputes. *Id*. at 160 n 32. *Rembert* indicated:

> While our decision upholds the principle of freedom of contract and advances the public policy that strongly favors arbitration, it does so subject to two conditions generally accepted in the common law: that the agreement waives no substantive rights, and that the agreement affords fair procedures. *Id*. at 124.

Rembert noted that *Renny* and *Cole*, as well as leading ADR organizations, "suggest certain baseline fundamentals to ensure fairness in an arbitral process for discrimination claims." *Id*. at 161. *Rembert* held that to satisfy *Renny* and MCR 3.602, the arbitration procedures must provide:

1. Clear notice the employee is waiving the right to adjudicate claims in court and is instead opting for arbitration,
2. The right to representation by counsel,
3. A neutral arbitrator,
4. Reasonable discovery,
5. A fair arbitral hearing, and
6. Written awards containing findings of fact and conclusions of law. *Id*. at 163-165.

Saveski v Tisco Architects, Inc, 261 Mich App 553, 556; 682 NW2d 542 (2004), said the *Rembert* record requirements are more stringent because a court reviewing a civil rights claim must have a means of analyzing whether the arbitrator properly preserved the employee's statutory rights.

There are no other published Michigan cases discussing the *Rembert* due process requirements. *Miller v Miller*, 474 Mich 27; 707 NW2d 341 (2005), held a Michigan Domestic Relations Arbitration Act, MCL 600.5701 *et seq*, arbitration hearing does not have to be a formal hearing if "the parties and the arbitrator" agree it does not have to be. Any possible tension between *Miller* and *Rembert* is probably unimportant in employment arbitration cases since parties are unlikely to agree to an informal hearing.

Michigan Uniform Arbitration Act

The Michigan Uniform Arbitration Act, MCL 691.1681 *et seq*. (effective July 1, 2013), governs an agreement to arbitrate whenever made. MCL 691.1683. A party may be represented by counsel. MCL 691.1696. The arbitrator may award attorney fees if authorized by law or by agreement of the parties. MCL 691.1701. An individual who has a known, direct, and material interest in the outcome of the arbitration or a known, existing, and substantial relationship with a party shall not serve as a neutral arbitrator. MCL 691.1691 and .1692. There are provisions for subpoenas, depositions, and discovery. MCL 691.1697. The arbitrator may award punitive damages or exemplary relief if authorized by law and the evidence justifies the award and may order remedies that the arbitrator considers just and appropriate under the circumstances. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award. MCL 691.1701. An arbitrator shall make a record of the award. MCL 691.1699.

Conclusion

Michigan case law is largely consistent with the Protocol recommendations of right to representation, reasonable

discovery, impartial arbitrators, fair hearing, and written awards. *Rembert* did not adopt the Protocol theory of the employer paying part of the employee's attorney fees, absent statutory requirement. *Miller*'s permission of an informal hearing, if agreed to by the parties and the arbitrator, has not affected the *Rembert* due process rules. The Michigan Uniform Arbitration Act is not inconsistent with the Protocol and codifies some of the Protocol recommendations. ■

About the Author

Lee Hornberger *is an arbitrator and mediator. He was selected to the 2016 Michigan Super Lawyers list. He is a recipient of the George N. Bashara, Jr. Award from the State Bar's Alternative Dispute Resolution Section in recognition of exemplary service. He is Chair-Elect of the State Bar's Alternative Dispute Resolution Section, Editor of* The Michigan Dispute Resolution Journal, *former member of the State Bar's Representative Assembly, Chair of the ADR Committee of the Grand Traverse-Leelanau-Antrim Bar Association, former President of the Grand Traverse-Leelanau-Antrim Bar Association, and former Chair of the Traverse City Human Rights Commission. He is a member of the The National Academy of Distinguished Neutrals and Professional Resolution Experts of Michigan (PREMi), an invitation-only group of Michigan's top mediators. He received his B.A. and J.D. cum laude from The University of Michigan and his LL.M. in Labor Law from Wayne State University. He can be reached at 231-941-0746 and leehornberger@leehornberger.com.*

Announcements

Jim Schuster has been licensed as an attorney since 1978 and has focused his practice in Elder Law since 1996. He is:

- A 20 year member of the National Academy of Elder Law Attorneys;
- Member of the National Academy of Elder Law Attorneys' Council of Advanced
- Practitioners;
- Former Chair of the Elder Law and Advocacy Section of the Michigan State Bar and current section member;
- One of only seventeen Certified Elder Law Attorneys in Michigan. The certification is by the, A.B.A. accredited National Elder Law Foundation
- A member of the American Bar Association;
- Member, Speakers Bureau, Alzheimer's Association

Prior to attending law school Jim Schuster was a social worker for the Department of Social Services (now Department of Human Services). After he passed the bar he worked as a law clerk for United States District Judge Noel P. Fox and as a Judge for the Chippewa Ottawa Conservation Court. He served on the Council of the General Practice Section of the State Bar of Michigan from 1985 to 1997 in all capacities including as Chair of the Section in 1991.

Jim has been a member of the State Bar Elder Law and Advocacy Section since 1996 and served on the Section Council in all capacities, finally being Chair of the Section in 2003 - 2004.

Jim has had articles on Elder Law published in the Michigan Bar Journal, Michigan Lawyers Weekly, the Detroit Legal News and *Laches*, the publication of the Oakland County Bar Association. He has also presented course material for the Institute for Continuing Legal Education.

Jim is involved in the aging network community and is a frequent speaker on Elder Law to professional and support groups.

Jim is Of Counsel to the law firm Cummings, McClorey, Davis & Acho. Jim's association offers a broad array of services to clients including contested court cases, probate court guardian and conservator matters and estate administration services

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The Perils and Privileges of Nunc Pro Tunc Orders

By Howard Yale Lederman

It's time to say hello again to our old buddy, Nunc Pro Tunc! Why? Because many attorneys do not understand what a nunc pro tunc order is and when a court can enter such an order. Many attorneys do not understand a nunc pro tunc order's purposes and limits. Many attorneys turn to nunc pro tunc orders and expect them accomplish aims far beyond their functions and limits.

Nunc Pro Tunc means literally Now For Then in Latin.[1] Nunc pro tunc orders have limited functions. These orders can record the court's oral decisions. These orders can correct court judgment and order clerical errors. These orders can correct court record omissions.[2] These orders are effective as of the court's oral decisions' dates.[3] But nunc pro tunc orders cannot change the court's bench decisions, backdate events, or give rise to new substantive rights.[4] Such orders cannot record events that never happened. Thus, such orders "`cannot be used to rewrite history.'"[5]

Kloian v Cunningham[6] featured an example of a valid confirming nunc pro tunc order. There, on June 20, 2007, the plaintiff sued the defendants for legal malpractice. The defendants moved for summary disposition based on the statute of limitations. The defendants asserted that their representation of the plaintiff had ended on June 3, 2005 based on a June 23, 2005 trial court order permitting the defendants to withdraw effective June 3, 2005. Since the plaintiff did not sue until June 20, 2007, his complaint was not timely. In response, the plaintiff argued that the limitations period ran from the June 23, 2005 order's entry date, not that order's June 3, 2005 effective date. The trial court granted the summary disposition motion. "[T]he trial court explained that the June 23, 2005 order [resulted from] a June 3, 2005 hearing, during which Cunningham requested on the record to withdraw as Kloian's counsel, and the [trial] court granted the request on the record. The trial court found that the June 23, 2005 order was merely the exercise of its authority to enter an order nunc pro tunc to formalize its June 3[, 2005] decision."[7] Accordingly, the trial court found that Defendants' obligations to the plaintiff ended on June 3, 2005, thus triggering the limitations period.

Affirming, the Court held that in granting the defendants summary disposition based on the statute of limitations, the trial court had not erred. The Court adopted the trial court's reasoning. On June 3, 2005, the trial court had decided the attorney withdrawal motion. In entering its June 23, 2005 nunc pro tunc order, the trial court only

formalized its June 3, 2005 decision. Therefore, the nunc pro tunc order was valid.

Gentile v Graybill[8] also illustrated a valid confirming nunc pro tunc order. The plaintiff sued the defendant for divorce. At a December 14, 2007 hearing, the trial court announced its property division decision and "instructed [the] plaintiff's counsel to submit a [proposed] written judgment within seven days [under MCR 2.602(B)(3)]. However, [the] plaintiff's counsel did not submit the proposed judgment until 20 days later, on January 3, 2008."[9]. But on January 4, 2008, the defendant died. Unaware of his client's death, defense counsel signed the proposed divorce judgment that day. "The trial court also approved and entered the judgment later on that same day."[10] Later, the plaintiff moved to set the judgment aside, contending that the trial court had entered it nunc pro tunc improperly. The trial court denied the motion.

Affirming, the Court held that in entering the judgment nunc pro tunc, the trial court had not abused its discretion. The plaintiff knew that [the defendant] was seriously ill and hospitalized."[11] The plaintiff presented her proposed judgment late. If the plaintiff had presented her proposed judgment on time, the trial court could have entered it before the defendant's death. On December 14, 2007, the trial court had decided the property division. The January 4, 2008 nunc pro tunc order confirmed and formalized that decision. As a result, the nunc pro tunc judgment was valid.

People v Peck[12] exemplified a valid corrective nunc pro tunc order. The trial court sentenced the defendant to a maximum 5-year sentence for second degree home invasion. But that crime has a statutory 15-year maximum. The trial court "observed that all [its] notes in the case reflected the 15-year maximum. When the judge five years later amended the sentence to 15 years with a nunc pro tunc order, he characterized his error as `a clerical mistake….'"[13] When the defendant moved for resentencing, the trial court denied the motion, stating that for the defendant's crime, a statute sets the maximum sentence. The Michigan Court of Appeals affirmed.

The Michigan Supreme Court denied leave to appeal. Concurring, Justice Corrigan recognized: "`The entry of a nunc pro tunc order is a proper method to correct a maximum sentence.'"[14]

Essa v Howard[15] shows a nunc pro tunc order's combined confirming and correcting function. The minor plaintiffs sued the defendant for vehicle negligence. After the defendants had failed to respond to the summons and complaint, the court clerk entered default. After the defendant did not respond, the plaintiff moved for default judgment. The trial court granted the motion and entered default judgment. But the trial court never appointed a next friend for the minor plaintiffs. Though the plaintiffs had moved for a next friend's appointment, the trial court never entered an appointment order. But at the hearing on the defendant's motion for reconsideration, "the trial court indicated that it would enter such an order[,] and that the lack of entry was likely a clerical mistake."[16] *Id* at *8. Before the defendant's appeal, the trial court did not enter an appointment order.

While affirming the trial court's motion decisions, the Court remanded to the trial court for entry of a nunc pro tunc appointment order. The Court concluded that in the above situation, a nunc pro tunc order would be valid. Such an order would confirm the trial court's appointment intent decision and correct the lack of a confirming order.

In contrast, *Sarafa v Shiri*[17] illustrates an invalid nunc pro tunc order. On October 15, 2013, the plaintiff sued the defendants for medical malpractice. On the same day, the trial court issued summonses. Under MCR 2.102(D), a summons expires 90 days after its issuance date. Thus, the summonses' expiration date was January 14, 2014. As of January 2, 2014, the plaintiff had not served the summonses and complaint on the defendants. So, the plaintiff moved ex parte "to extend the life of the summons[es], noting that, due to clerical error, service of process on [the] defendants would be difficult before the summons[es] expired on January 14, 2014."[18] Under MCR 2.102(D), the trial court has discretion to extend the summons for up to one year after the complaint's filing date. The trial court granted the plaintiff's motion and extended the summonses for 60 days.

Accordingly, the new summons expiration date was March 17, 2014. But the plaintiff still did not serve the defendants by that date. On March 21, 2014, the trial court dismissed the case without prejudice. But on April 8, 2014, the plaintiff moved ex parte "for a nunc pro tunc order extending the…summons[es] for 120 days beyond the original expiration date and reinstating her action against [the] defendants."[19] On April 10, 2014, the trial court granted the motion. On April 23, 2014, the plaintiff served the defendants. The defendants moved to dismiss the case as time-barred. The trial court denied the motion.

Reversing, the Court held the action time-barred and the nunc pro tunc order invalid. The nunc pro tunc order did not correct a clerical error or omission based on an oral decision. In her first extension request, the plaintiff did not ask for a 120-day extension but only for a 60-day extension. The trial court did not grant a 120-day extension. Not until April 8, 2014, after the 60-day extension had expired, did the plaintiff ask for a 120-day extension.

Therefore, the nunc pro tunc order did not meet such an order's requirements.

Berg v Binder[20] also illustrates an invalid nunc pro tunc order.

The plaintiffs sued numerous defendants, and one defendant, Schwartz Plumbing, cross-claimed against another defendant. The plaintiffs obtained a default judgment against Defendant Finished Carpentry Products. That defendant moved to set the default judgment aside. The trial court denied the motion. On June 22, 2006, the trial court heard a motion to dismiss the cross-claim, but did not rule on it. On January 11, 2007, the trial court entered a nunc pro tunc order dismissing the cross-claim dated back to June 22, 2006. The above defendant appealed the above denial order. The plaintiffs challenged the Court's jurisdiction over the appeal due to lack of a final order.

While ruling that it had jurisdiction over the appeal, the Court also ruled that the nunc pro tunc order was not valid. The Court explained that that the trial court had not ruled that it would dismiss the cross-claim at the June 22, 2006 hearing. As a result, the trial court could not enter a nunc pro tunc order, and the January 11, 2007 order was invalid. It did not confirm any trial court decision or correct any trial court omission.

Patterson v Chrysler Group, LLC n/k/a Fiat Chrysler of America US, LLC,[21] shows a valid nunc pro tunc order's limits. On February 15, 1987, Plaintiff Ardella Patterson married Henry Lee Patterson. On September 27, 1993, they divorced. In the divorce judgment, the trial court granted the plaintiff "one-half of the pension benefits [that] Henry had accrued during his marriage to [the p]laintiff, with full rights of survivorship, and that these benefits [would become] due to [her,] when they became payable to Henry."[22] The trial court also barred Henry "from choosing a pension payment option that would deprive [her] of these benefits."[23] From June 3, 1965 to January 29, 1992, Henry worked for the Chrysler Corporation. On April 1, 1994, he began receiving retirement benefits "in the form of a `Lifetime Annuity Without Surviving Spouse' option."[24] By choosing this option, Henry violated the divorce judgment. That option did not provide the plaintiff with her awarded pension benefits.

On December 14, 1994, the plaintiff forwarded the divorce judgment to the Plan Administrator. On January 18, 1995, a Plan representative responded in writing that the divorce judgment lacked the clerical information that ERISA required "to enable the Plan to qualify it as a `qualified domestic relations order'…, and therefore, the [divorce judgment] could not override ERISA's anti-alienation provision…. Consequently, the Plan denied [the p]laintiff's request for benefits."[25] The Plan sent the plaintiff "a sample qualified domestic relations order **[QDRO]** spelling out the required information."[26]

For the next 13 years, the plaintiff did not communicate with the Plan. On November 23, 2007, Henry died. On January 4, 2008, the plaintiff called the Plan and told it about the divorce judgment and its pension benefits provision. On February 1, 2008, the plaintiff faxed the plan a copy of the divorce judgment. On February 28, 2008, the Plan again denied the plaintiff's benefits request.

From 2008 to 2014, the plaintiff tried to have the Plan qualify the divorce judgment. Each time, the Plan denied benefits. The Plan explained that no survivors' benefits remained. On February 28, 2014, to remedy the divorce judgment's deficiencies, the plaintiff "obtained from the Wayne County Circuit Court a nunc pro tunc order (the Nunc Pro Tunc Order)….correct[ing] the [divorce judgment] by adding the missing `clerical' information" that ERISA required.[27] On March 3, 2014, the plaintiff forwarded the Nunc Pro Tunc Order to the Plan. On June 24, 2014, the Plan again denied benefits. The Plan again explained that no survivors' benefits remained.

On February 12, 2015, the plaintiff sued in Federal Court for recovery of pension benefits. The Plan moved for summary judgment based on the statute of limitations. On February 17, 2016, the District Court granted the motion. The District Court found that the Nunc Pro Tunc Order restarted the limitations period and thus made the plaintiff's claim timely.

Reversing, the Sixth Circuit held that the Nunc Pro Tunc Order did not restart the limitations period and thus did not make the plaintiff's claim timely. After citing the relevant decisions, the Court explained that "when the Wayne County Circuit Court issued the Nunc Pro Tunc Order, it merely articulated the substantive rights already declared in the [divorce judgment] in a form that complied with ERISA. Consequently, the Nunc Pro Tunc Order is treated as if it were the [divorce judgment] but with clerical mistakes corrected. It did not bestow on [the p]laintiff any new, or modify any old, substantive rights. Therefore, neither the Wayne County Circuit Court's issuance, nor the Plan's rejection, of the Nunc Pro Tunc Order could provide [the p]laintiff with a new [claim] or have any effect on the statute of limitations."[28]

So, *Patterson* illustrates a crucial nunc pro tunc order restriction: A nunc pro tunc order cannot override a statute of limitations. Such an order cannot give a party any new substantive rights. Such an order cannot modify any old substantive rights.

The above cases illustrate a nunc pro tunc order's requirements, purposes, and limits. Intelligent use of nunc pro tunc orders can help get cases back on track and thus save all parties and the courts time, money, and effort. Misuse of these orders can prevent effective corrective actions and thus cost all parties money and the courts' time, effort. Remember, our old buddy Nunc Pro Tunc has strict limits. It can only bail you out so far. ■

Endnotes

1 *Glynne v Wilmed Healthcare,* 699 F3d 380, 3__ (CA 4, 2012), quoting *Maksymchuk v Frank,* 987 F2d 1072, 1075 FN2 (CA 4, 1993) (further citation omitted).

2 *Patterson v Chrysler Group, LLC n/k/a Fiat Chrysler of America US, LLC,* ___ F3d ___; 2017 US App Lexis 507 (2017) at *8, *Glynne,* 699 F3d 380, 383-384, *Workers' Compensation Agency Director v MacDonald's Industrial Products, Inc,* 305 Mich App 460, 473 FN32; 853 NW2d 467 (2014), *Sleboede v Sleboede,* 384 Mich 555, 558-559; 184 NW2d 923 (1971).

3 60 CJS Motions and Orders Sec 60 (2012), *Mallory v Ward Baking Co,* 270 Mich 91, 93; 258 NW 414 (1935).

4 *Patterson,* 2017 US App Lexis 507 (2017) at *8, *Sleboede,* 384 Mich 555, 558-559,

5 *Patterson,* 2017 US App Lexis 507 (2017) at *8, quoting *WNJ v Yocom,* 257 F3d 1171, 1172 (CA 10, 2001) & *Central Laborers' Pension, Welfare and Annuity Funds v Griffee,* 198 F3d 642, 644 (CA 7, 1999), *Sleboede,* 384 Mich 555, 559, *Haray v Haray,* 274 Mich 568, 574; 265 NW 466 (1936).

6 *Kloian v Cunningham,* Unpub Opin of the Michigan Court of Appeals, Docket No 286924, 2009 Mich App Lexis 2215; 2009 WL 3401060 (October 15, 2009).

7 *Id* at *6.

8 *Gentile v Graybill,* Unpub Opin of the Michigan Court of Appeals, Docket No 284639, 2009 Mich App Lexis 2139; 2009 WL 3321519 (October 15, 2009).

9 *Id* at *7.

10 *Id.*

11 *Id* at *8.

12 *People v Peck,* 481 Mich 863; 748 NW2d 235 (2008).

13 *Id* at 863.

14 *Id* at 864 (Corrgian, J, concurring), quoting *People v Smith,* 35 Mich App 349, 351-352; 192 NW2d 626 (1971) & citing MCR 6.435(A).

15 *Essa v Howard,* Unpub Opin of the Michigan Court of Appeals, Docket Nos 185022, 210966, 1999 Mich App Lexis 2579; 1999 WL 33433668 (October 29, 1999).

16 *Id* at *8.

17 *Sarafa v Shiri,* Unpub Opin of the Michigan Court of Appeals, Docket No 324636, 2016 Mich App Lexis 1469 (August 2, 2016).

18 *Id* at *3.

19 *Id.*

20 *Berg v Binder,* Unpub Opin of the Michigan Court of Appeals, Docket No 275894, 2008 Mich App Lexis 1230; 2008 WL 2389501 (June 12, 2008).

21 *Patterson v Chrysler Group, LLC n/k/a Fiat Chrysler of America US, LLC* ___ F3d ___; 2017 US App Lexis 507 (2017).

22 *Id* at *1-2.

23 *Id* at *2.

24 *Id.*

25 *Id.*

26 *Id* at *3.

27 *Id* at *4.

28 *Id* at *9.

Mutual Mentorship Program

Thursday, February 2, 2017, 6:30 PM - 8:30 PM,
WMU Cooley Law School, Lansing

There is no charge to attend this event.
Registration Form

Seating is limited. Complimentary food and beverage will be provided.
Please RSVP to Michael A. Gunderson to secure your reservation.

The Solo and Small Firm Section is kicking off its new Mutual Mentorship Program for members of our Section, at a series of events across Michigan, with the inaugural event to be held at Cooley Law School in downtown Lansing.

We all have mentors at different times in our careers, and we all mentor others, in one form or another, even if it's informal counseling for a friend, family member, or colleague.

Here is your chance to become a mentor and mentee at the same time. Improve your bottom line by what you learn, while teaching your counterpart how to help their bottom line. No longer is a mentorship program a one-way street to benefit only the mentee.

Caveat Lawyer

By Maury Klein

Times have been tight and you're wondering how that next month's rent is going to get paid. Suddenly, the phone rings and a new person is calling to ask for an appointment. You seek a brief description of the legal issues involved and are told that the caller would really rather meet you in person before sharing a lot of details over the phone. You make the appointment and shrug. You have dealt with a wide range of subjects. If it's out of your bailiwick, you can always refer it out.

The appointment time is nigh and you are ready to get that new client. You escort her/him back to your office, exchange pleasantries about whether the road conditions and directions were good and the office was easy to find. Then you ask the client to describe the situation.

You are going to meet some if not all of the scenarios at issue here and if you can learn from my mistakes you will be much better off than learning for yourself.

Divorce: A Time for Vengeance.

This client has wasted years with a low-life of a partner who has betrayed

them on a more than one occasion and not had the decency to be won over by the client's selfless acts of forgiveness. This client is certain that you will be engulfed by the fires of righteous indignation and share her certainty that any Court she finds herself before will pillory her spouse while licking its lips at the prospect of inflicting future indignities on this miscreant.

You agree with her that she has been ill-treated and no one deserves to be cheated on but you need her to understand that the Law has the goal of ending a bad marriage without determining who is the wrong-doer.

This client will take the following posture and will never waiver from it:

> "I know that when the Court hears what happened the Judge will understand and make him pay."
>
> "Tell me you can get your fee from my husband."

As attorneys, we deal in logic and argument and like to believe that the superior legal argument should carry the day. We also know that our clients, especially in those in a difficult situation will react emotionally. This difficulty will resolve when and if the client can accept that the lawyer serves best when she/he serves dispassionately and with an eye on achieving the client's goals.

If the client will not or cannot accept the parameters of the attorney-client relationship, then you are entering into a surrogate scenario in which you will never vindicate the waste of her love and you will bear her fury because she was not able to flay the flesh off her former spouse's back. In other words, you could get a grievance because that pent-up hate has to go somewhere.

I had the experience of such a case and went through getting the process of dealing with the woman and receiving handwritten notes with sentences written perpendicular to the other text underlined in different colors. I firmly believe that viewing those notes in all their technicolor splendor came in handy to the Grievance Commission's decision not to pursue her request for investigation.

The Client Whose Legal Matters Encompass Everything

This individual will tell you they have a bankruptcy or other matter which seems simple enough but at every turn, the exposition begins to expand into other areas involving family issues, delving into property which is out-of-state, with issues that are within the purview of more than one Court and have been the subject of decisions which have already been made. Fans of "The Walking Dead" have seen the heroes of that show get into the same predicament when they enter any unfamiliar enclosed setting. The result is not pretty for those characters and will not be pretty for you.

The Seeker of Knowledge

This individual is at first easy to confuse with the client who wishes to be involved and will otherwise be helpful to you and to their case. The Seeker instead will question the progression of everything that is happening. As matters proceed, this client will begin to inundate you with queries such as "What could happen next?" The catch phrase of this client will be "Please help me understand." In a litigation setting, you will be standing and talking with this client for an hour after any given event including hearings, depositions and receipt of a billing. The problem is that it is very hard to identify this type of client before they are retained. If you find yourself waiving or being asked to absorb significant amount of time in phone calls or face-

to-face conversations, you have a Seeker for a client. You will either lose increasing amounts of time or put your foot down as far as billing for this time and likely have the client go elsewhere. Hit the brakes on this 'time suck' sooner rather than later.

The Artful Dodger

This individual is the opposite of the Seeker and expects you to take over the case completely. Such a client's rationale is "Well, you're the lawyer- take care of it." This Client will be ponderously slow when it comes to identifying witnesses, getting information or providing details. Their phone number and address may change repeatedly. You will be sending them requests for communication over and over. You may end up with a dismissal because they don't show up for required Court or deposition dates let alone get back answers to interrogatories. Such clients may identify themselves by asking if you can advance them money or suggest a doctor. In the absence of these warnings, the best way for you to red flag them is to send them home with a questionnaire. If they don't return or go elsewhere, you haven't lost a thing.

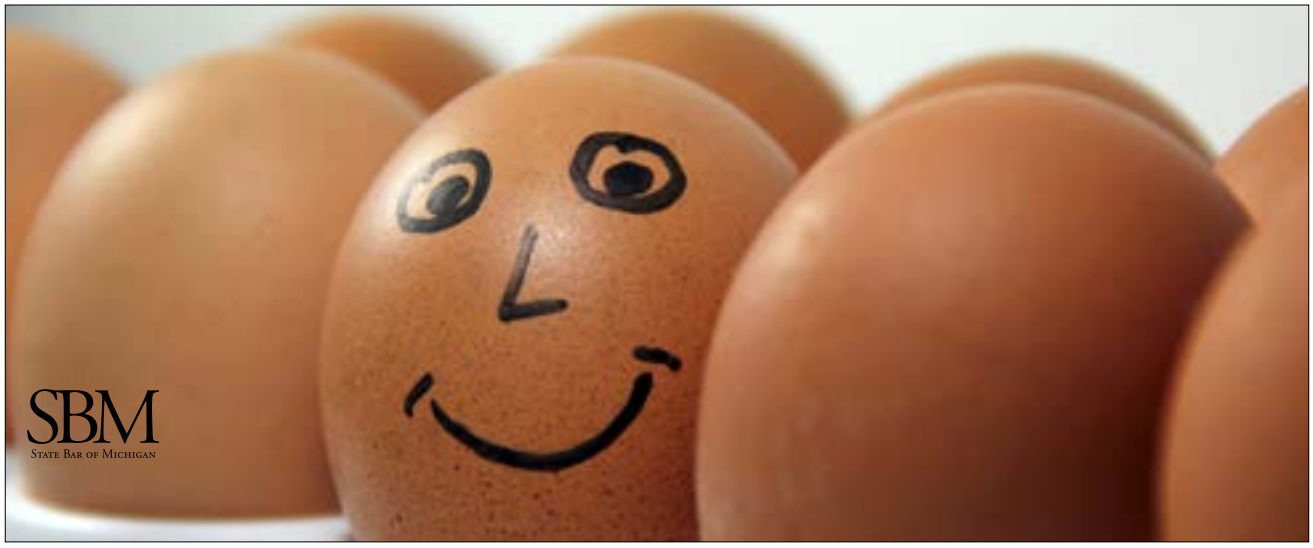
The One Whom the Gods Would Destroy

This Client has everything possible go wrong by virtue of failing to recognize that certain things in life are Res Ipsa Loquitor – the thing itself cries out. The case in point involved a person fighting over guardianship and conservatorship over a parent. The scenario, as ultimately revealed in court, showed that large sums of money were spent each year for in-home care of the parent. The hands on, hired caregiver was allegedly paid something on the order of $50,000 to $60,000 annually. The payments however, were made in cash. The caregiver did not sign any receipts for the cash payments. Nor were any 1099s issued to the caregiver. The caregiver did not declare money on her taxes and claimed to be paid only about a thousand dollars a month. The individual at the helm of this cash-in-a-bag method of compensation – an officer in a bank - was somehow surprised that the judge would not accept these bare assertions carte blanche. Perhaps the lawyer who substituted for me did a better job of putting lipstick on this pig. I counted myself grateful that I only suffered a thousand dollar loss.

The Revolving Door Client

This client has already retained two or more attorneys and you would be the latest in a series. This scenario needs to be scrutinized very carefully. Many attorneys would say the client can't be satisfied and this is the reason for the change. I say if you are very well versed in the practice area called for and you can communicate well with the potential client look at the situation carefully. If you can draw a "flow chart" allowing the client to see what will come down the pike and achieve reasonable results, you may be able to establish a good working relationship. This is also dependent on the client being able/willing to pay you something as you move to build the trust of an attorney-client relationship. If the client can't pay you, you will inevitably start to resent him and he will be pressured by the fact that debt is mounting and lump you in with the other lawyers who took his money before you are in a position to achieve anything tangible. In short, such a relationship is salvageable if you can provide quality results.

As always – Good luck and be careful out there. ■



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