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.

ABA Tech Show—The Lawyers' Toy Store

By Tanisha M. Davis

It was a bit like being in a toy store. Except instead of video games and Barbie dolls, there was practice management software, portable scanners, and mobile applications that give us "on-the-go" lawyers that big firm, staff-of-ten office feel.

The ABA Tech Show is one of the few conferences most solo and small firm lawyers dare not miss. With over 2,000 attendees from all over the country, this year's conference did not disappoint in its delivery of the most innovative forms of technology to improve how we practice law and manage our firms. As chair of the Solo & Small Firm Section, I know one of the most difficult struggles our members encounter is how to manage our offices more effectively and efficiently so we can spend more time actually practicing law.

My trip to the 2017 ABA Tech Show in Chicago is an annual event that showcases the most cutting-edge legal technology in the industry. While there were more exciting legal finds than I have room to share, I will highlight some of the most unique gems of all the displays, the great contenders, and some great eye-catchers to look out for as they are moving onto the legal scene.

Top Eye Catchers

CosmoLex

Since practice management software has hit the legal scene, it has gone from thin to robust in a matter of years. CosmoLex is the "fat cat" of practice management, a cloud-based software that incorporates almost everything with one login. Billing, business accounting, batch invoices and reminder notices, and even client portals. One of the biggest highlights of CosmLex when up against other practice management software, is there is no need for QuickBooks, and accounting is almost automatic. CosmoLex put a lot into the billing component of the software. Check printing, tracking of third-party lien claims, and the one I love is the reconciliation with the trust account, a feature my current management software is missing. The program is able to connect with your banking institutions for you to manage bank transactions in an instant, and to create seamless accounting reports to manage our money.

LEAP Mobile

For the multitude of lawyers who are on the go, there's LEAP Mobile—he type of mobile app that we wish for as a comprehensive platform that's like having our office in our hand, while on the go. How often are we toting coffee in one hand, a briefcase in the other and a cell phone glued to an ear trying to manage a client and a case? LEAP Mobile allows you to access all your matters from your iphone. What was most impressive for me was the ability to call a client directly from the app and record time simultaneously! This prevents you from losing valuable billable hours after spending 30 minutes on a call, only to forget to record the time. LEAP also uses voice recognition to create emails, can turn documents into PDF files and has a reputation for being extremely secure.

Currently, LEAP Mobile is only available on iPhones, so the devoted Android user would lose out on this. It's a great starter app that serves a real purpose for the lawyer on the go, but catering only to iphone users means it loses a large part of its target market.

SpeechAir

When it came down to dictation devices, SpeechAir landed at the top of my list. There's probably not a single solo practitioner or small firm whose business turns mobile with warning and preparation. SpeechAir was just the type of device that allows for work to continue while being on the move. There was nothing else like it at the Tech Show.

The device, which comes in two versions—the PSP 1100 and the PSP 1200, only differ in that this smart voice recorder, which ran around $650 to $1,000, was a bit pricey, but it seemed to be worth the cost. It has a sleek design that looks almost like a smartphone, and comes equipped with three microphones and recordings can be encrypted for security of information. It comes with a SpeechLive transcription service that can transcribe recordings for you, or it can be easily sent to an assistant to manage the creation of documents.

SpeechAir's Wi-Fi function capabilities make dictating from anywhere easy, and include an easy-to-use camera for snapping pictures for use in documents, and even a bar code scanner. SpeechAir operates off an Android operating system.

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WALZ

I couldn't help but think about how much money I spend in certified mail. Getting a handle on the cost of certified mailings has turned into quite the challenge, and extremely time consuming with almost daily trips to the post office to make sure postage was accurate. And then there was WALZ—this unique and cost-effective way to send certified mail. So many forms of communication are mandated by many levels of federal and state agencies, making certified mailing a popular, but often cumbersome and expensive process. WALZ is like the gold standard in verifiable print and mail services. The software application has patented forms and envelopes that eliminate unmanageable writing-out of certified mailings. The software generates mailings in seconds, and tracks the full cycle of delivery and return. "We have been driving efficiency since 1982 with a full range of mailers, envelopes and desktop software, and our clients have chosen WALZ automation for over 300 million transactions," says Maisha Jones, manager of the document service.

WordPress

Although I heard it a time or two, I didn't believe that you could really create your own website or blog with WordPress. I am not tech-savvy, know nothing of coding, and could barely understand a few web design acronyms and lingo. I thought this would be as disastrous as my trying to instruct on patent law. But it was really that easy! WordPress makes it easy for every solo and small firm to have some type of functional website. With so many themes and backgrounds to choose from, the most daunting task of web building for the practitioner is creating the content. WordPress has many built-in pieces for web design that even incorporate your own logos, pictures and buttons. And with the click of a button, your web page is published and floating across the Internet like it took thousands of dollars to design!

vTestify

Remember the days when we wished we did not have to drive to attend that deposition or needed a cost-effective way to secure testimony from a party or witness without driving clear across country? vTestify has made remote testimony an instant reality. vTestify is that one advancement in technology that we hoped for when no such thing existed. Can I attend, conduct or participate in a deposition remotely? vTestify allows for easy setup tools from a computer to organize a deposition online, video record, and invite attendees online for real-time watching or listening. There is also no need for court reporters because vTestify will record, transcribe and make available for purchase the digital testimony transcripts. For a fraction of the cost, and no more travel costs or court reporters, vTestify seems to be a hot commodity grabbing a lot of attention. It has been accepted into the inaugural accelerator of the Duke Law Tech Lab—an incubator program dedicated to helping to fund and support new forms of technology that will change the way the legal community does business. vTestify was one of only a few that fit the bill.

Fujitsu Scanners

The Fujitsu scanner products were some of the best. They ranged from big to small, but the personal scanners appeared to be the best bargain for the solo practitioner. Designed like small handheld magic wands, the ScanSnap is equipped as a USB portable, and completely wireless. All the scanners have black-and-white as well as color scanning, one-touch PDF creation, letter and legal size scanning auto rotation, one-year warranties, and are PC and Mac compatible.

LawPay

There is no need for bulky credit card equipment when there's LawPay. LawPay is the powerhouse financial end that stands behind most of your practice management systems. Its highlight is its credit card processing mechanism that boasts as one of the most secure of any in the running and easy access for clients to pay fees. It allows for online payments to be synced with your system for accurate billing. One of its standout features is QuickBill, which enables attorneys to e-mail invoices or payment requests. That email is equipped with a link to your payment system where entry and payment can be made quick and easy. It can track earned and unearned fees and protects IOLTA accounts from misuse, and can even process recurring payments and refunds. LawPay is available as a mobile app that comes with a credit card swiper for taking payments on the go. ■

Michigan Supreme Court Decisions in 2016 about Arbitration

By Lee Hornberger, Arbitrator and Mediator

The Michigan Supreme Court issued three decisions in 2016 about arbitration. Two of those decisions, *Altobelli v Hartmann*[1] and *Beck v Park West Galleries, Inc,*[2] concerned the scope of the agreement to arbitrate. The third decision, *Ronnisch Construction Group, Inc v Lofts on the Nine, LLC*,[3] concerned attorney fees in a construction lien arbitration case.

In *Altobelli* the Supreme Court ruled that plaintiff's tort claims against the individual principals of a law firm fell within the scope of an agreement to arbitrate that required arbitration for any dispute between the firm and a former principal. The plaintiff, a former principal of the firm, challenged actions that the individual defendants had performed in their capacities as agents carrying out the business of the firm. The plaintiff was attempting to bypass the agreement to arbitrate by suing the individual principals in a court proceeding rather than the law firm in an arbitration proceeding. The Supreme Court ruled that this was a dispute between the firm and a former principal that fell within the scope of the agreement to arbitrate and was subject to arbitration. The Supreme Court reversed those portions of the Court of Appeals opinion[4] which had held the matter was not subject to arbitration. *Altobelli* instructs us that the wording of the agreement to arbitrate is vitally important and, regardless of how much work goes into the drafting of the agreement to arbitrate, there is the risk of unintended consequences.

Beck partially reversing the Court of Appeals[5] considered whether an arbitration clause contained in invoices for artwork purchases applied to disputes arising from prior artwork purchases when the invoices for the prior purchases did not refer to arbitration. The Supreme Court held that the arbitration clause contained in the later invoices cannot be applied to disputes arising from prior sales with invoices that did not contain the arbitration clause. The Supreme Court reversed that part of the Court of Appeals judgment that extended the arbitration clause to the parties' prior transactions that did not refer to arbitration.

In *Beck*, the Supreme Court specifically recognized the policy favoring arbitration of disputes arising under collective bargaining agreements but said this does not mean arbitration arising under an agreement to arbitrate between parties outside of the collective bargaining context applies to any dispute arising out of any aspect of their relationship.[6]

Beck is another lesson that the wording of the agreement to arbitrate is crucial and must be given very important consideration.

Altobelli and *Beck are consistent with prior Supreme Court decisions* about the importance of the provisions of the agreement to arbitrate. [7]

The Supreme Court ruled in *Ronnisch Construction Group, Inc* (Justices Viviano, Markman, McCormack, and Bernstein), a construction lien and attorney fee case**,** that the plaintiff can seek attorney fees under MCL 570.1118(2), of the Construction Lien Act (CLA), where the plaintiff received a favorable arbitration award on a related breach of contract claim but did not obtain a judgment on its construction lien claim. The arbitrator did not address the attorney fee claim but reserved that issue for the Circuit Court. According to the Supreme Court, the Circuit Court may award attorney fees to the plaintiff because the plaintiff was a lien claimant who prevailed in an action to enforce a construction lien through foreclosure. This opinion affirmed the Court of Appeals.[8]

Justices Young, Zahara, and Larsen dissented. They said the legislature communicated that recovery of CLA attorney fees is authorized only to parties who prevail on a construction lien. The CLA attorney fees provision only allows a court to award fees to a lien claimant who is a prevailing party. Because the plaintiff did not meet the definition of a CLA lien claimant, and because it voluntarily extinguished its lien claim before the circuit court could have so determined, the plaintiff was not entitled to attorney fees.

Ronnisch Construction Group, Inc teaches us that (1) a lienee can be subject to CLA attorney fees in an arbitration proceeding, and, (2) according to three dissenting justices, there might be a risk in accepting payment after the award but before confirmation. ■

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Endnotes

1 499 Mich 284 (2016).

2 499 Mich 40 (2016).

3 499 Mich 544 (2016).

4 *Altobelli v Hartmann*, 307 Mich App 612 (2014).

5 *Beck v Park West Galleries, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 3, 2015, Docket No 319463.

6 See generally *Kaleva-Norman-Dickson Sch Dist No 6 v Kaleva-Norman-Dickson Sch Teachers' Ass'n*, 393 Mich 583 (1975).

7 The following pre-2016 Supreme Court decisions highlight the importance of the wording of the agreement to arbitrate.

Wireless Toyz Franchise, LLC v Clear Choice Commc'n, Inc, 493 Mich 933 (2013), in lieu of granting leave to appeal, reversed the Court of Appeals, for the reasons stated in the Court of Appeals dissent, Docket No 303619 (May 31, 2012), and reinstated the Circuit Court order confirming the arbitration award. The Court of Appeals dissent, approved by the Supreme Court, said the stipulated order to arbitrate intended that the arbitration would include claims beyond those already pending in the case because the stipulated order allowed further discovery, gave the arbitrator powers of the Circuit Court, and the award would represent a full and final resolution of the matter. This meant, according to the Supreme Court, that claims not pending at the time the order to arbitrate was entered were not outside the scope of the arbitrator's powers.

In Hall v Stark Reagan, PC, 493 Mich 903 (2012), a four-to-three majority decision of the Supreme Court reversed that part of the Court of Appeals decision, 294 Mich App 88 (2012), which had held the matter was not subject to arbitration. The Supreme Court reinstated the circuit court order ordering arbitration concerning the motives of the defendant shareholders in invoking the separation provisions of the Shareholders' Agreement. According to the Supreme Court majority, this, including allegations of violations of Civil Rights Act, MCL 37.2101 *et seq*, was a "dispute regarding interpretation or enforcement of . . . parties' rights or obligations" under the Shareholders' Agreement, and was subject to arbitration pursuant to Agreement. The dissents said the Shareholders Agreement provided only for arbitration of violations of the Agreement, not for allegations of discrimination under the Civil Rights Act.

Gates v USA Jet Airlines, Inc, 482 Mich 1005 (2008), vacated an arbitration award and remanded the case to the Circuit Court because one of the parties submitted to the arbitration panel an *ex parte* submission in violation of the arbitration rules. *Gates* is an example of how the agreement to arbitrate can control what, if any, *ex parte* communications with the arbitrator are permitted.

8 *Ronnisch Construction Group, Inc v Lofts on the Nine, LLC,* 306 Mich App 203 (2014).

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Just General Reading

By Howard Yale Lederman

While researching for a brief, motion, response, or something else, or even in general reading, you might stumble on something unexpected. At first, you might find it irrelevant or not on point. But as you continue, or even after you almost finish, that unexpected finding might become useful or even decisive. Last week, this happened to me.

About a month ago, an individual came into my office, like many others, looking for free legal services. Until about a year and a half ago, he was doing ok, but then he had lost his job and fallen on hard times. He was trying to renegotiate his mortgage loan to reduce his monthly payments. When he tried to get me to give him free legal services, I said no, but after discussing his employment prospects and other income-producing prospects, I decided to take a chance. I negotiated a retainer agreement with him, and retained him as a client. Many of you have probably done the same at one time. In looking through his documents, I noticed that in his small commercial case, he had been representing himself. He had not done badly. He had won a few motions and lost a few. But in going through the orders, I noticed an order awarding his opponent, who had counsel, attorney fees. I then noticed a motion for show cause order based on my new client's failure to pay these attorney fees. His inability to do so was obvious. His fear that the judge might jail him for his inability to pay was also obvious.

My first order of business was to respond to the motion for show cause order. As I had time to do so, I started researching. But everything I found emphasized the duty to obey court orders, the court's right to hold individuals like my client in contempt, the civil-criminal contempt difference, and the court's right to sanction such individuals in many ways, including imprisonment. In keeping my client out of jail, or even in writing a credible response, I was getting nowhere.

Then, I remembered that in recent years, the ACLU had been campaigning against imprisonment for debt, and I remembered that I had read an article on the subject. Not practicing in domestic relations or other areas where parties are often unable to pay court-ordered payments, I never needed to use the article or even refer to it. But in my situation, the article could be crucial. I did not remember where I had found it before. Thanks to Google and LexisNexis, I found it. The article was Kary Moss's July 2010 article on imprisonment for debt in Michigan.[1]

I reread the article. It focused on indigent criminal defendants unable to pay fines, reimburse the state for jail costs, pay probation costs, and the like. But the article included this sentence: "Today, in Michigan, it is possible to be thrown in prison for debts accrued through child support, alimony, driver's responsibility fees, or other reasons. Thus, the term 'debtor's prison' has been revived…."[2] In this day and age, with so much income inequality, with so many people unable to pay court-ordered payments, jail should be the rare exception. As Kary Moss recognizes, it is not. Therefore, as in nineteenth-century England, my client might go to prison for debt.

The article mentioned an indigent domestic relations case defendant unable to pay her increased child support. A light bulb came on. My client was similar to that indigent defendant. Like him, my client was facing a contempt citation and imprisonment due to inability to pay attorney fees. Therefore, he was facing modern debtors' prison.

I started looking for cases where Michigan appellate courts had addressed indigent domestic relations defendants unable to pay all or part of their child support and facing civil contempt citations. I found a small number of such cases. Then, I found the *Sword* factors. When the respondent asserts the inability-to-pay defense, courts use multiple factors to evaluate and decide whether said defense should prevail:

1. Employment history, including reasons for any termination of employment
2. Education and skills
3. Work opportunities available
4. Diligence employed in trying to find work
5. Defendant's personal history, including present marital status and present means of support
6. Assets, real and personal, and any transfer of assets to another
7. Efforts made to modify the decree if it is considered excessive under the circumstances

8. Health and physical ability to obtain gainful employment
9. Availability for work (exact periods of any hospitalization, jail time, imprisonment)
10. Location(s) of defendant since decree and reason(s) for move(s), if there has been any change of addressThe court can also evaluate other relevant factors.[3]

After reading these factors, my first response was that they were a massive invasion of privacy. Wealthier people, able to pay child support, attorney fees, or any other court-ordered amounts do not suffer this massive invasion of privacy. The indigent and nearly indigent, however, do.

My next response was to see how other Michigan courts were applying these factors. I found that they were applying them to evaluate and decide whether to impute income to show-cause respondents. In these situations, show-cause petitioners tried to impute income to those unable to pay child support or other court-ordered payments.[4] Except for one respondent who won a remand, the respondents lost their cases. But I felt that I could distinguish these cases.

The whole idea of imputed income rests on the old, wrong assumption and attitude that if you are poor, something is wrong with you. You should be earning the imputed income. Why aren't you? You are not diligent. You are lazy. You don't want to work. Some *Sword* factors arise from this assumption and attitude. One *Sword* factor arises from another old, wrong assumption and attitude that if you are not paying, you must be hiding your means to pay from the court.

Nevertheless, with the *Sword* factors analysis, I can write a credible brief. I have contacted my client and discussed the *Sword* factors with him. I have prepared an affidavit with his responses. We have a chance. But without remembering that article from long ago, I would never have gotten to this point. So, next time you read something appearing not on point or irrelevant to what you are doing or just good general legal reading, keep it in the back of your mind. Type that something into your computer. One day, it could be on point or even crucial to your client's position. ■

Endnotes

1 Kary L. Moss, *General: Debtors' Prison In Michigan: The ACLU Takes Up the Cause,* 89 Mich B J 40 (July 2010).

2 Moss, *supra,* p 40.

3 *Sword v Sword,* 399 Mich 367, 377; 249 NW2d 88 (1976), *overruled in part on other grounds Mead v Batchlor,* 435 Mich 480, 506; 460 NW2d 493 (1990).

4 *Ghidotti v Barber,* 459 Mich 189, 191-192; 586 NW2d 883 (1998), *Shepherd v Shepherd,* Unpub Opin of the Court of Appeals, Docket No 255358, 2004 Mich App Lexis 3620; 2004 WL 2997562 (December 28, 2004) *2-3, *Rohloff v Rohloff,* 161 Mich App 766, 770; 411 NW2d 484 (1987), *lv den* 429 Mich 869; 413 NW2d 678 (1987), *Wells v Wells,* 144 Mich App 722, 733; 375 NW2d 800 (1985).

Probate Update

By Maury Klein

The Wayne County Probate Court has decided to change the manner by which attorneys file their paperwork and as of now, attorneys should go to the back of Room 1307. There will be two clerks present to receive paperwork and set matters for hearing. Note that there will not be any review or double check of your work. It was not mentioned whether such matters as calculation of inventory fees would take place.

In any event, there will be no system in place to verify whether your pleadings are complete or lacking so the burden is on the attorney involved to be certain his/her work passes muster. There is little worse than being surprised on the day of hearing, especially with your client there.

I recently received a notice directed to those representing clients involved in mental health proceedings (which I do not actually do) informing me that the Mental Health Code—specifically Kevin's Law—has made deferrals unavailable in the matter of assisted outpatient treatments.

If you have a case in which PC 201 is in operation and box 3 d and box 8 b are checked, this is the assisted outpatient treatment, and deferral is not an option.

Otherwise, the petition is considered to seek hospitalization and deferral remains an option.

Those practicing in this area should avail themselves of any materials explaining more fully the import of Kevin's Law which I understand are found on probate court websites.

This article has been edited. To read in its entirety, email the Editor.