GTLA BAR association
Grand Traverse-Leelanau-Antrim Bar Association

WINTER 2010

Blue Ocean Legal Services

Enrico Schaeffer

I am a firm believer in the idea that there is no such thing as a truly "down" economy. Underlying every recession is a creative destruction that replaces the old with the new, stagnation with innovation. While firms typically cut technology costs in a down economy, I believe that technology enhances a firm's ability to weather the storm and emerge stronger and more efficient. Investing in new technology and leveraging the old can aid in this emergence and can bolster a firm's marketing, efficiency, and customer satisfaction.

Technology may change, but marketing never does. Legal marketing has always been about getting accurate information about your area of expertise to those who request it, and technology has only increased the means of achieving this goal. Marketing technology provides immediate access to and information on the effectiveness of your marketing campaigns. By collecting and measuring marketing meta-data, we are able to immediately determine what efforts are and are not "making it rain." Immediate access to this information allows us to cease ineffective campaigns and increase our spending on effective campaigns. Where the river is constricted, redirecting flow to more productive uses is paramount.

But constricted rivers are a byproduct of old business models. We take Nintendo's "Blue Ocean" approach to legal services. While others compete as sharks in the bloodied and competitive "Red Ocean," where competition is fierce, sales and customers are finite, and the product is traditional, we leverage technology to create markets where there otherwise were none. Just as technology allowed Nintendo to put a Wii controller in the hands of grandma and grandpa, technology allows us to connect with untapped and emerging markets outside of the bloodied waters of traditional local markets. And it allows us to clearly define, analyze, and target those markets to maximize the return on our marketing investments.

Investing in technology increases marketing efficiency, but it also increases office and attorney efficiency. Our paperless office not only uses less space (resulting in a smaller mortgage), but it redirects the time that otherwise would have been spent filing and looking for paper documents to other, more lucrative and worthwhile, pursuits. Our electronic billing practices save time and money as well. Our ability to integrate pre-existing off-the-shelf credit card billing

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applications into our web payment systems results in happier clients and faster payments. And while not a technological solution, our flat-fee billing increases attorney efficiency. The productivity of attorneys is increased when the incentive to draw out hours has been eliminated. Clients understand the project's deliverables at the outset, and they appreciate knowing the full extent of their investment before initiating the project.

At the end of the day, the best way to survive a recession is to acquire and maintain repeat customers, and technology increases the likelihood of this goal. Our extranet gives us a direct connection to our audience—our clients. It allows clients to view their case files as their projects progress, which encourages transparency, accuracy, and communication. Technology has also increased the sophistication of clients. Clients increasingly seek out our legal services on the web because they have clearly defined legal needs. Clients now have access to Google, Wikipedia, and other information sources and, as such, they understand the value of legal services. Lawyers can no longer hide behind information asymmetry as the linchpin of their business model. Customers appreciate the transparency that technology provides because it necessitates honesty, and they are more likely to return for future services if your firm implements transparency measures.

In sum, investing in new technology and leveraging the old can help you weather the storm, but it can also help you emerge as a more stable and successful business. Technology can increase your ability to market, your efficiency, and your customer satisfaction. These, in turn, will result in higher profit margins, more value for the client, and, most importantly, repeat customers. In the end, it is those that use the tough times to create new norms that will emerge successfully, and technology can play a significant role in the creation of those new norms.

Enrico Schaefer, Esq. is Founder/Partner of Traverse Legal, PLC and practices internet, domain and trademark, class action and mass tort law on a global basis.

Checklist for Filing a Claim of Appeal from the Circuit Court to the Michigan Court of Appeals in a Civil Action

Maurice Borden

Your client has just received an adverse result in circuit court, either a summary disposition order or verdict/ judgment for the opposing party. Disappointed with the outcome, your client asks you what options are available. After reviewing the options for further judicial review in circuit court, you conclude that your client's best chance for relief from the judgment or order is to file an appeal to the Court of Appeals.

In many cases, the most stressful part of the appeal process for appellant's counsel takes place in the 21 day period after the final order has been entered. The purpose of this article is to provide a brief overview of the steps generally required to timely file an appeal as of right to the Michigan Court of Appeals in a civil action.

A claim of appeal in most civil actions must be "filed" with the Court of Appeals within 21 days after entry of the "final order". The time requirement is jurisdictional. A "final order" is a judgment or order which determines all of the claims against all of the parties.

Within 21 days after entry of the final order, the appellant must file the following items with the Clerk in order to vest the Court of Appeals with jurisdiction:

- A claim of appeal.
- A check for the filing fee in the amount of $375.00.

The following additional items must be filed with the claim of appeal:

- A copy of the final order or judgment appealed from.
- A copy of the court reporter's certificate or a statement by the attorney that the transcript has been ordered, or that there is no record to be transcribed.
- Proof that a copy of the brief was served on all other parties to the appeal, along with a copy of the proof of service.
- A copy of the circuit court register of actions.
- A completed jurisdictional checklist form.
- Any bond required by statute.

The above items may be filed with any of the Court of Appeals Clerks' district offices which are located in Lansing, Grand Rapids, Detroit and Troy. A word of caution is in order. "Filing" means receipt and acceptance by the Clerk for entry. Any pleading or document filed with the Court which has a time limitation must be received by the Clerk by the due date.

Also within 21 days after entry of the final order, the appellant is required to file the following items with the circuit court from which the appeal is taken:

- A copy of the claim of appeal.
- A check for the statutory fee in the amount of $25.00.
- Any bond required by law.
- A copy of the court reporter's certificate described above.

The record on appeal consists of the circuit court record, including exhibits, and the transcript. In some appeals, like an appeal from a summary disposition order, only the transcript of the hearing on the summary disposition motion is needed. The parties may stipulate that less than the entire transcript be filed. The appellant may also file a motion in circuit court for an order to include less than the entire transcript. The motion must be filed within 21 days after entry of the final order.

It is important to ensure that all exhibits considered by the trial judge relating to the order appealed have been filed with the circuit court. Each party possessing any exhibits that were offered in evidence is required to file them in circuit court within 21 days after the claim of appeal has been filed.

Next, within 28 days after entry of the final order, the appellant must file two copies of a docketing statement. Failure to timely file a docketing statement could result in dismissal of the claim of appeal.

It is recommended that the docketing statement be completed and filed along with the claim of appeal when you are thinking about the issues in the case and the applicable standard of review.

Once you have completed and filed the above documents and fees, you can focus your efforts on writing a convincing appeal brief. Timely filing a claim of appeal which complies with the applicable court rules may initially appear to be a challenge. While there are some potential procedural traps, with a little planning and attention to detail, you can perfect your client's appeal with minimal

stress. In addition to the court rules, the Michigan Court of Appeals Internal Operating Procedures are a great source of information regarding the procedural requirements and the Court Clerk's processing of the appeal.

[1] This article does not address the court rule requirements for a claim of appeal from an order terminating parental rights which differ from other civil appeals. It should be noted that, like criminal appeals, the time limits for filing in child custody appeals are shorter than those which apply to other civil actions.

[2] MCR 7.204(A)(1)

[3] MCR 7.202(6)(a)

[4] A form can be found on the Michigan Court of Appeals website at http://coa.courts.mi.gov/resources/forms.htm.

[5] A jurisdictional checklist form can be obtained on the Court's website at http://coa.courts.mi.gov/resources/forms.htm.

[6] MCR 7.204(C). In most cases, no bond is required to file a claim of appeal. While a bond may not be required to file a claim of appeal, a bond may be necessary in order to stay execution of the judgment appealed from. See MCR 7.209.

[7] MCR 7.202(4)

[8] MCR 7.204(E)

[9] MCR 7.210(A)

[10] MCR 7.210(B)(1)

[11] MCR 7.210(C)

[12] MCR 7.204(H). The docketing statement form is available on the Court's website at http://coa.courts.mi.gov/resources/forms.htm.

[13] MCR 7.204(H)(4)

Maurice "Mike" Borden is a member of the law firm of Sondee, Racine & Doren, PLC, in Traverse City. He concentrates his practice on civil litigation, with civil appellate practice as an area of specialization. He has successfully represented clients in the Michigan Court of Appeals, Michigan Supreme Court and the United States Sixth Circuit Court of Appeals. You can reach him at mborden@sondeeracine.com.

Heard in the Halls

James C. Baker, Smith & Johnson, Attorneys, P.C., and his wife, Julie, welcomed their newest daughter, Maryn Jane, to their family on December 14. Maryn joins Jim and Julie, their twins, and their dog, Sarge, to their Kingsley home.

Attorneys **Mark P. Bickel** and **Todd W. Millar** of Smith Haughey Rice & Roegge were recently named "local litigation stars" in *Benchmark Litigation 2010*. *Benchmark* is a national publication that describes itself as "the definitive guide to America's leading business litigation firms and attorneys" and relies on evaluation of recent case successes, personal interviews, and client referrals to make its selections.

Aaron K. Bowron was profiled in the December 2009 edition of the *Traverse City Business News* and recommended as a "Great Candidate" in an article showcasing local nonprofit organizations in need of board members.

Barbara Budros has left the 13th Circuit Court to pursue other interests and is now providing private mediation services. She can be reached at 590-8521.

Chris Bzdok co-authored the article, "Michigan's Clean Energy Legislation: Charging toward a New Energy Future" in the October 2009 *Michigan Bar Journal.*

Kristen A. Campbell has been named to the board of directors of the Professional Tennis Registry Foundation. The Foundation is the world's largest organization of tennis teachers and coaches with members in 122 countries.

The law firm Traverse Legal, PLC in Traverse City, Michigan announces the addition of its newest associate attorney **John A. Di Giacomo**. Mr. Di Giacomo graduated cum laude with his Juris Doctorate from Michigan State University College of Law in May 2009. He was sworn in before the Honorable Thomas G. Power of the Grand Traverse County Circuit Court on November 9, 2009 in Traverse City. His primary practice areas include Internet Law, Intellectual Property, and Corporate Services. Mr. Di Giacomo's undergraduate education includes a Bachelor of Science in Philosophy and Criminology from Central Michigan University.

Attorney **Ryann S. Embury** recently joined the legal team at Dingeman, Dancer and Christopherson, PLC. He

relocated to Michigan after practicing in Arizona at a large civil law firm.

A native of Calgary, Alberta, Canada, Embury graduated with a B.A. in political science from the University of Calgary and received his law degree from Michigan State University. His areas of practice include personal injury and wrongful death, premises liability and commercial and business litigation.

Embury is a member of the State Bar of Arizona, U.S. District Court for the District of Arizona and the U.S. Court of Appeals for the Ninth Circuit. He is also admitted to the U.S. District Court for the Western District of Michigan. Mr. Embury is also a member of the American Bar Association and the Maricopa County Bar Association.

Lee Hornberger's article, "Recent Developments in Michigan Arbitration, Case Evaluation, and Mediation Law" was published in the Fall 2009 edition of *Labor and Employment Lawnotes.*

Smith Haughey Rice & Roegge is pleased to announce that **Joanna C. Kloet** has joined the firm's Traverse City office where she will practice in the areas of commercial litigation, criminal defense, and immigration law.

Before joining Smith Haughey, Joanna was hired at the United States Department of Justice through the Attorney General's Honors Program. While there, she served as the sole judicial law clerk for the six federal immigration judges in the 10th Circuit. Prior to working for the federal government, Joanna spent a year as a research attorney at the Michigan Court of Appeals in Lansing.

Joanna received a B.A. from the University of Michigan in Ann Arbor and a J.D., summa cum laude, from Michigan State University College of Law, where she was an associate editor of the Law Review and the recipient of the Jurisprudence Achievement Award in Contracts and in Will Drafting.

Joanna is admitted to practice in Michigan and Colorado. She is a member of the State Bar of Michigan, the Criminal Defense Attorneys of Michigan, the American Immigration Lawyers Association, and Traverse City Young

Professionals.

GTLA Bar Association Executive Director **Jill Porter** and members **Lea Ann Sterling** and **Richard Figura** were recently interviewed by the *Leelanau Enterprise* and quoted in the subsequent October 8, 2009 article, "Who Says Leelanau is Full of Lawyers?"

Joshua Sheffer announces the opening of his new law firm—Sheffer Law PLLC— to provide services to local attorneys. Sheffer Law provides freelance legal services, including research, writing and drafting, helping lawyers provide clients with quality representation.

Sheffer graduated cum laude from Notre Dame Law School in 2001 and has practiced primarily general civil litigation in both Chicago and Traverse City. Joshua has extensive experience drafting litigation documents, including appellate documents to all levels of Michigan and federal courts. Joshua has also drafted countless transactional documents from corporate formation (both profit and non-profit) to estate planning documents.

He can be contacted at Sheffer Law PLLC, P.O. Box 126, Lake Ann, MI 49650 or by phone/fax at (231) 668-9319 or email to joshua@jshefferlaw.com.

Patrick J. Wilson, Of Counsel, Smith Haughey Rice & Roegge was this year's recipient of the GTLA Bar Association's Madeleine Thomas Award and was also recently named one of *Traverse City Business News'* "7 over 70."

Women Lawyers Association

A Committee of the Grand Traverse, Leelanau & Antrim Bar Association

Women Lawyers Association meetings are held on the second Tuesday of each month. Locations are sent out via email before the meeting. Everyone is welcome to attend. We encourage anyone interested in increasing their involvement to discuss joining the executive committee.

The Women Lawyers Association held their annual holiday dinner at Stella on December 10, 2009. Despite the snowy weather, it was well-attended and enjoyed by all.

The WLA welcomes a new secretary, Sara Mason. She will be replacing Maura Brennan. Thanks to Maura for her hard work.

The next regular event will be spa night in March or April.

The WLA is a supportive, non-competitive group providing networking and social opportunities, resource-sharing and guidance for all legal professionals. For more information, contact WLA president Deborah Rysso at (231) 933-5207 or drysso@rizzolawonline.com

Women Lawyers Association Hosts Panel Discussion on Collaborative Law

The Women Lawyers are hosting a one hour panel discussion for the local bar who want to learn more about specifics of collaborative divorce practice or collaborative practice in general. Members of Up North Collaborative Divorce Professionals will present and answer questions from 12-1pm in the Multi Purpose Room at 86th District Court on **February 10.** Pizza and soda will be provided. Watch the bar association's weekly e-newsletter for more information.

Managing the Small and Solo Law Firm: Overview of the Elements

Ursula Rozanski

On Tuesday, January 19th, the GTLA Bar Association will be hosting a half-day Rozanski and Associates, Inc. seminar entitled "Managing the Small and Solo Law Firm: Overview of the Elements." This seminar provides information, details, workflow steps, examples, checklists and other valuable resources that cover the 10 key areas of a law firm that are crucial to marketing and managing a successful law practice as a business. The following article provides a brief introduction to the 10 key areas that will be discussed in this informative seminar.

Managing a law firm successfully requires attention to both the professional aspects and the business aspects of the firm. It's important to provide the best professional legal services to the client and continue to build the firm's experience base credentials and reputation.

It's also equally important to manage the firm's business "model", so that the firm can experience well-invested, fairly predictable and profitable growth. What elements might a good business "model" contain? The following 10 point model provides a good template for developing a business management (and workflow) strategy, or assessing an existing one for any gaps. Each of the 10 key areas lists some (but not all) of the activities that would be a part of that key area of the model:

(1) Business Planning And Management – enabling dynamic strategic and tactical planning to set, track and manage the targets for success and measure them on some scheduled frequency, identifying funding sources and ongoing funding strategies, very clearly defining and prioritizing the focus (primary and secondary) of the firm "branding" the firm, defining the firm's core competencies, core values, culture, mission, vision, developing a detailed business plan for potential investors, establishing strategic and targeted affiliations that enrich the firm's law focus and competencies, identifying the firm's specific product and service offerings to prospects and clients with features and benefits clearly identified in their language, identifying target audiences and how best to reach them, network with them and communicate with them.

(2) Financial Operations Management – assessing and "registering" the firm's business entity type and identifying the tax implications, fiscal year, fiscal budget and specific allocations and investments, financial infrastructure, tools evaluation and selection, developing profitability tracking, management, and forecasting strategies, developing credit and collections strategies that result in getting paid on time, pricing the firm's services using "value" pricing or rate driven pricing strategies, developing key targeted affiliations with the related revenue sharing strategies.

(3) Risk Management – assessing and identifying the steps required to mitigate the firm's risks and liabilities, assessing how much liability, estimating how much coverage is enough, managing liability and risk on an ongoing basis, assessing professional liability considerations, employee risk considerations, personal risk considerations, multiple policy coverage synchronization strategies.

(4) Information Technology Management – investing in and selecting technology software and tools, repurposing existing technology to optimize the investment, establishing an Internet presence as a marketing investment, developing high-impact website content, purchasing software licensing and technical support, purchasing the right software solutions and equipment, purchasing training, installation services, purchasing a laptop.

(5) Office Space Management – assessing a facility buy or lease situation, considering the residential office, selecting and configuring office equipment, considering amenities, location, signage, how much space do you really need, guidelines for sharing office space, outsourcing office services.

(6) Marketing Planning And Management – "branding" the firm and the firm's focus, developing the firm's 12 month marketing budget, developing the firm's 12 month marketing plan, identifying key association memberships for networking purposes, developing the firm's marketing messages, designing and developing marketing collateral, assessing how much to invest in a website, differentiating your firm from the competition, networking, developing media networks, developing prospecting strategies and sources, developing referral strategies.

(7) Client Relationship Management – managing and tracking the effectiveness of strategies for attracting new clients, develop strategies for managing existing client relationships, rules of engagement with the client – initial, ongoing, termination.

(8) Case Management – strategies for selecting tools and solutions for ease of access, timely reporting, and increased productivity.

(9) Time And Billing Management – developing up-front and effective strategies for getting paid, strategies for managing chronically late clients, evaluating software productivity tools and solutions, managing time against cost and the relevance of productivity tools in that decision making process, assessing the profitability of "value" pricing versus hourly rates, developing "value" pricing models, developing service pricing strategies, evaluating profitability, developing service budgets for specific services.

(10) Professional Education / Enrichment – strategies for budgeting and effectively investing in professional improvement, tying professional development into the firm's strategic plan and its "brand" strategies, supporting the firm's core competencies, ancillary licensing, how to plan for and budget for professional growth and enrichment.

Ursula Rozanski is Managing Principal/President of Rozanski & Associates, Inc., a Michigan-based management consulting and resources provision firm for small to medium enterprises (www.rozanskiandassoc.com), and in particular professional services firms. The company was established in 1995 and incorporated in 2001. Ursula can be reached via email at urozanski @rozanskiandassoc.com, or by phone at 989-225-2570.

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Michigan Appellate Digest (1980-1987)

If interested, contact Barb at 946-5441.

Your Young Lawyers Association

Corey J. Wiggins, YLA Chairman

As chairman of the Young Lawyers Association, I want to thank all of those who participated in the Toys for Tots toy drive sponsored by the Young Lawyers Association. Your generosity helped make a very merry Christmas for a lot of children in our area. Your generosity did not stop with your gift; for each gift donated by you, Fox Grand Traverse donated $5.00 to the Toys for Tots program. In addition to the toys and games donated, we helped raise an additional $150.00 to help meet the demand placed on Toys for Tots this holiday season. Just imagine the smiles on the faces of the children you helped this year.

Our giving spirit should not end with the holidays however. As you will recall in my last article I stated that I would like to see the Young Lawyers Association become more involved in community projects; Toys for Tots was just the beginning. In response to my last article, I received a call for volunteers at the Third Level Crisis Center. Third Level is a non-profit agency that has been providing crisis services and counseling for over 35 years. Services are provided 24 hours a day, seven days a week and are totally free regardless of the ability to pay. As some of you are aware, Third Level holds a legal aid clinic every Tuesday night beginning at 7:30 p.m. Third Level is in need of volunteers to help at the legal aid clinic. Currently volunteers are scheduled for two Tuesdays per year, but the goal is to have enough volunteers so that each volunteer only needs to serve one night per year. While demand on your time is low (a couple of hours each night volunteered), the benefit bestowed on those less fortunate cannot be calculated. Those interested in volunteering or learning more about Third Level should contact Ruth Anderson at (231) 929-9700 or Chris Drabbant at (231) 922-4802. Information is also available at www.thirdlevel.org.

The Young Lawyers continue to host its monthly Bar Night on the first Thursday of each month beginning at 5:30 p.m. This event is open to all members of the Grand Traverse-Leelanau-Antrim Bar Association and is held at a different venue each month. Each month members will receive an e-mail announcing the location.

Finally, I want to take this opportunity to wish each of you a happy and prosperous new year, and hope your holidays were everything you wished. As always, if you have any questions or comments please do not hesitate to contact me at (231) 946-8630 or at coreyjwiggins@aol.com.

A Review of Recent Michigan Arbitration, Case Evaluation and Mediation Case Law

Lee Hornberger

I. INTRODUCTION

This article reviews recent Michigan Supreme Court and Courts of Appeal cases concerning arbitration, case evaluation, and mediation.

II. ARBITRATION

A. Supreme Court Decisions

1. Supreme Court Upholds Labor Arbitration Award Concerning Take-Home Vehicle

City of Kentwood v Police Officers Labor Council, 483 Mich 1116 (2009). The Supreme Court denied Plaintiff City's application for leave to appeal the October 28, 2008, Court of Appeals' judgment because the Supreme Court was not persuaded that the questions presented should be reviewed by the Court. This denial resulted in affirmation of the Court of Appeals' reversal of the Circuit Court's vacation of a labor arbitration decision.

The Arbitrator granted the grievance and held that the Grievant was to be assigned a take-home vehicle. The Arbitrator determined there was a past practice of assigning take-home vehicles and, therefore, the burden was on Plaintiff employer to prove that it had repudiated this practice without objection by Defendant labor organization. The Arbitrator stated that the "past practice became a distinct and binding working condition that could not be altered without the mutual consent of the parties where the collective bargaining agreement is silent on the assignment of take-home vehicles." The Arbitrator held that the policy manual provision was only valid "to the extent that it was consistent with the collective bargaining agreement, including established practices." The Arbitrator concluded that the Police Chief's decision not to assign a take-home vehicle was inconsistent with the past practice of assigning take-home vehicles.

Justice Markman dissented, with Justice Corrigan joining, indicating that he would reinstate the Circuit Court's order vacating the arbitration decision. The dissent stated that although the collective bargaining agreement does not refer to take-home vehicles in any way, and department policy accords the Police Chief discretion in assigning such vehicles.

The dissent said, in part:

"I am cognizant of the broad authority vested in the arbitrator under the CBA when disputes arise, but I am also cognizant that such authority is not boundless. If the collective bargaining process, public or private, is going to work effectively, faithful regard must be given to contracts and agreements. The people of Kentwood, through their elected representatives, have chosen to cede a part of their administrative control over public employees from their elected city council to the arbitrator. Where, however, they have clearly not ceded such authority, as here, the regular processes of local self-government must be permitted to prevail."

B. Published Court of Appeals Decisions

1. Defendant's Motion To Vacate DRAA Arbitration Award Not Timely Filed

Vyletel-Rivard v Rivard, __ Mich App __ (2009). Defendant challenged the trial court's order denying his motion to vacate the arbitration award concerning tort damages in a Domestic Relations Arbitration Act (DRAA), MCL 600.5070, et seq, case. The Court of Appeals affirmed the Circuit Court's denial because the Court concluded that Defendant's motion to vacate was not timely filed.

On March 28, 2008, Defendant, pursuant to MCL 600.509(2), filed a motion to vacate "the arbitration awards" of November 13, 2007, and December 7, 2007, as to tort damages. A party has twenty-one days to file motion to vacate in domestic relations case. MCR 3.602 (J)(2).

The lesson of this case is that counsel should think very carefully before filing a second round of reconsideration motions rather than filing a notice of appeal. See generally *Moody v Pepsi-Cola Metro Bottling Co*, 915 F2d 201 (6th Cir 1990).

2. Six-Year Limitation Period For Action to Vacate Labor Arbitration Award

City of Ann Arbor v AFSCME Local 369, 284 Mich App 126 (2009). In this public employer labor arbitration case, the Court of Appeals indicated that there is no statute or court rule providing a limitations period specifically for actions seeking to vacate labor arbitration awards arising from collective bargaining agreements.

According to the Court of Appeals, actions to vacate arbitration awards are more akin to actions to enforce arbitration awards than to actions for unfair representation. An action to vacate a labor arbitration award is subject to

a six-year limitations period.

The Court of Appeals further pointed out that as long as the Arbitrator is even arguably construing or applying the contract and acting within the scope of his or her authority, a court may not overturn the decision even if convinced that the Arbitrator committed a serious error.

Previously *Rowry v University of Michigan*, 441 Mich 1(1992), had held that a plaintiff ordinarily has six years to seek enforcement of a labor arbitration award and recognized that in certain cases this time period may be substantially diminished if a plaintiff's arbitration award grants equitable relief and a delay in its enforcement is shown to prejudice the defendant in a way that evokes laches to bar the plaintiff's claim.

3. Domestic Relations Arbitration Award Upheld

Washington v Washington, 283 Mich App 667 (2009). In this Domestic Relations Arbitration case, the Court of Appeals stated that a reviewing court may not review the Arbitrator's findings of fact concerning division of marital property.

The Court stated: "as the United States Court of Appeals for the Sixth Circuit declared, "[a] court's review of an arbitration award 'is one of the narrowest standards of judicial review in all of American jurisprudence.'" See generally *Way Bakery v Truck Drivers Local No 164*, 363 F3d 590, 593 (CA 6, 2004), quoting *Tenn Valley Auth v Tenn Valley Trades & Labor Council*, 184 F3d 510, 514 (CA 6, 1999)."

C. Unpublished Court of Appeals Decisions

1. DRAA Arbitrator May Consider Timely Reconsideration Motion

Comsidine v Comsidine, unpublished opinion of the Court of Appeals, issued December 15, 2009 (Docket No 283298). Defendant filed a motion in Circuit Court to enforce the DRAA amended arbitration award. Plaintiff filed a motion to vacate or modify the award. The Circuit Court granted Defendant's motion to enforce and denied Plaintiff's motion. On appeal, Plaintiff argued that the Arbitrator exceeded the Arbitrator's authority and committed errors of law. The Court of Appeals affirmed the Circuit Court decision.

The Court of Appeals held that the Arbitrator had authority to consider a timely motion for reconsideration. MCL 600.5078(3). It was further held the reconsideration award was timely even though it was issued more than 21 days after the filing of the motion for reconsideration. *Id*.

2. Objections to Domestic Relations Arbitration Award Waived

Vulaj v Vulaj, unpublished opinion of the Court of Appeals, issued November 19, 2009 (Docket No 286334). The Court of Appeals held that Plaintiff had waived the ability to argue that the Arbitrator failed to comply with the Domestic Relations Arbitration Act, MCL 600.5070, et seq. In light of Plaintiff's statement that he was not objecting to the entry of the judgment proposed by Plaintiff, the Circuit Court, after receiving testimony from the parties, signed the judgment of divorce. Plaintiff argued on appeal that the Arbitrator violated the DRAA which requires transcription of the hearing during which child support and parenting time are addressed. MCL 600.5077(2).

3. Labor Arbitration Retained Jurisdiction Supplemental Award Partially Vacated

Police Officers Ass'n of Mich v Leelanau County, unpublished opinion of the Court of Appeals, issued November 10, 2009 (Docket No 285132). In this case, the Court of Appeals partially vacated and partially confirmed a labor arbitration award.

The Arbitrator ruled that there was not just cause to terminate a Sheriff's Department Deputy. The Arbitrator required a psychological fitness for duty examination; and retained jurisdiction to resolve any issues concerning implementation of the award. The Circuit Court refused to vacate the reinstatement order, but the Circuit Court held the Arbitrator exceeded his authority by retaining jurisdiction providing for a fitness for duty examination. The Court of Appeals basically affirmed the Circuit Court decision.

Concerning arbitral retention of jurisdiction, Article 6(E)(1)(a) of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the: Federal Mediation and Conciliation Service, National Academy of Arbitrators [and] American Arbitration Association states:

"Unless otherwise prohibited by agreement of the parties or applicable law, an arbitrator may retain remedial jurisdiction without seeking the parties' agreement. If the parties disagree over whether remedial jurisdiction should be retained, an arbitrator may retain such jurisdiction in the award over the objection of a party and subsequently address any remedial issues that may arise." See generally Elkouri and Elkouri, *How Arbitration Works*, 6th Ed, Ruben Editor (BNA 2003), at pp 333-337.

See generally *CUNA Mut Ins Soc'y v Office & Prof'l Employees*, 443 F3d 556 (7th Cir 2006); and *Sterling China Co v Allied Workers*, 357 F3d 546 (6th Cir 2004).

In addition, concerning retention of jurisdiction, Elkouri and Elkouri, *How Arbitration Works*, 6th Ed, Ruben Editor (BNA 2003), p 1219, indicates:

"The modern view is that the award of interest is within the inherent power of an arbitrator, and in fashioning a 'make-whole' remedy it appears that a growing number of arbitrators are willing to exercise the discretion to award interest where appropriate." See generally *St Joseph County, Mich, Mental Health Facility*, 86 LA 683 (Girolamo, 1985); City of Westland, Mich, 86 LA 305 (Howlett, 1985).

The Court of Appeals did not discuss the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes or other authority concerning the Arbitrator retaining jurisdiction.

4. Refusal To Vacate FINRA Arbitration Award And Sanctions Granted

Healey v Spoelstra, unpublished opinion of the Court of Appeals, issued October 22, 2009 (Docket No's 281686 and 288223). In this case, the Court of Appeals refused to vacate a FINRA arbitration award. The arbitration awards were for $617,822 in damages and $75,766.67 for sanctions. The Circuit Court refused to vacate the awards because Plaintiffs' complaint was untimely under MCR 3.602(J)(2) in that it was filed more than 21 days after the award was delivered to plaintiffs and that there were no legal grounds to vacate the award.

In addition, the Court of Appeals affirmed the Circuit Court's ruling that Plaintiffs' grounds for moving to vacate the arbitration award were frivolous and in granting sanctions to Defendant under MCL 600.2591.

One lesson from this case includes filing jurisdictional documents such as notices of appeal by the earliest interpretation of when they might be due, rather than the latest interpretation. Another lesson from this case is that on occasion the appellate court sanctions the party appealing from a run of the mill arbitration award.

5. Labor Arbitration Award Involving Lay-Off Return Vacated

City of Frankfort v Police Officers Ass'n of Mich, unpublished opinion of the Court of Appeals, issued September 15, 2009 (Docket No 286523). This case arose out of the City hiring a new employee for a position rather than recalling an employee from prior layoff. The issue before the Arbitrator was whether or not the previously laid off employee had recall rights in light of new collective bargaining agreement language.

In a two (Meter and Murray) to one (Beckering) decision, the Court of Appeals vacated a labor arbitration award and remanded the matter to the Arbitrator. The dissent indicated that, if the arbitrator erred in his analysis, the Arbitrator, in making the analysis, was interpreting the provisions of the collective bargaining agreement.

The majority cited but distinguished *Michigan Family Resources, Inc v Serv Employees Int'l Union*, 475 F3d 752 (6th Cir 2007)(en banc). Michigan Family Resources, Inc, *id*, is the leading Sixth Circuit case on the standard for reviewing labor arbitration awards. In *Michigan Family Resources, Inc*, *id*, the Union appealed the District Court's decision vacating an arbitration award. The Sixth Circuit reversed and directed the District Court to enter an order enforcing the award because, according to the Sixth Circuit, the arbitrator was "acting within the scope of his authority," the company had not accused the arbitrator with fraud or dishonesty in making the award, the arbitrator was "arguably construing ... the contract" when he awarded union employees a cost of-living increase, and the company had shown no more than that the arbitrator made an error, perhaps even a "serious error," in interpreting the collective bargaining agreement. *United Paperworkers Int'l Union, AFL-CIO v Misco*, 484 US 29, 38–39 (1987).

The Sixth Circuit in *Michigan Family Resources*, *id*, indicated that the following questions should be looked at in deciding whether to vacate a labor arbitration award. Did the arbitrator act:

"outside [the arbitrator's] authority" by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in resolving legal or factual disputes in the case, was the arbitrator "arguably construing or applying the contract"?

According to the Sixth Circuit, as long as the Arbitrator does not offend any of these requirements, the request for judicial intervention should be denied even though the Arbitrator made "serious," "improvident" or "silly" errors in resolving the merits of the dispute.

The Sixth Circuit in *Michigan Family Resources*, *id*, further indicated that an Arbitrator does not exceed the Arbi-

trator's authority every time the Arbitrator makes an interpretive error. The Arbitrator exceeds that authority only when the collective bargaining agreement does not commit the dispute to arbitration.

The lesson from the *City of Frankfort*, *id*, case is that on occasion a Michigan appellate court might not give the same deference to a labor arbitration award as a Federal court would under *Michigan Family Resources, Inc*, *id*.

6. Evaluation Notification Labor Arbitration Award Vacated

Northville Education Ass'n v Northville Public Schools, unpublished opinion of the Court of Appeals, issued August 20, 2009 (Docket No 287076). The Court of Appeals vacated a labor arbitration award and remanded the matter to the Arbitrator.

The collective bargaining agreement required that a teacher be given prior notification of eligibility to opt for goal based evaluation. Because the teacher was on maternity leave at the time such notification would have been given, the School District did not give the notification. The teacher was subsequently given a less favorable and less flexible evaluation method and ultimately an individual improvement plan. The teacher grieved arguing that she should have received notification of the more favorable goal based evaluation. Although the Arbitrator held that the grievance was timely, the Arbitrator denied the grievance. According to the Arbitrator, the teacher knew about the goal based evaluation option because of her prior participation in it, and by not requesting it again, she was "estoppel" from complaining about the technical non-notification.

The Circuit Court had found that the Arbitrator had added a term to the contract and therefore exceeded his authority, and furthermore estoppel was inapplicable because the terms of the collective bargaining agreement did not permit such equitable considerations of "estoppel."

It is interesting that this is a case where the labor organization, not the employer, was the party brining the action to vacate the arbitration award.

III. CASE EVALUATION

A. Supreme Court Decisions

1. *Smith v Khouri* Attorney Fee Ruling Applies In FOIA Cases

Coblentz v City of Novi, ___ Mich ___ (2009). In this Freedom of Information Act, MCL 231, et seq, case, the Supreme Court held that the factors for determining attorney fees in a FOIA case are the same as those outlined in the case evaluation attorney fee case of *Smith v Khouri*, 481 Mich 519 (2008).

In *Smith*, *id*, a dental malpractice case, the Supreme Court in a four (Taylor, Young, Corrigan, and Markman) to three (Cavanaugh, Weaver, and Kelly) decision had reviewed a Circuit Court's award of "reasonable" attorney fees as part of case evaluation sanctions under MCR 2.403(O). The Supreme Court held that the Circuit Court should begin the process of calculating a reasonable attorney fee by determining the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence.

2. Case Evaluation Attorney Fee Amount Determination

Juarez v Holbrook, 483 Mich 970 (2009). The majority denied the application for leave to appeal in this case evaluation attorney fee.

The dissent of Justices Markman, Corrigan, and Young would have vacated that part of the Court of Appeals judgment that held that the Circuit Court properly determined the amount of attorney fees as case evaluation sanctions. Defendant was entitled to such sanctions because the jury verdict was well below the case evaluation award that all parties had rejected. One day later, the Supreme Court issued *Smith v Khouri*, 481 Mich 519 (2008), in which the Supreme Court clarified the process of calculating case evaluation attorney fees: According to the dissent, the Circuit Court should begin the process of calculating a reasonable attorney fee by determining under MRPC 1.5(a)(3) , i.e., the reasonable hourly or daily rate customarily charged in the locality for similar legal services.

It is interesting that with the change of one seat on the Michigan Supreme Court, the new majority is apparently utilizing *Smith*, *id*, as authority for remand when the lower court has granted low attorney fees, while the present three Justice minority would use *Smith*, *id*, as authority for remand when the lower court has granted high attorney fees. Juarez, *id*. Before the one Justice switch, just the opposite had occurred. *Smith*, *id*.

3. Attorney Fee Amount Caused By Other Party's Litigation Conduct

Beach v Kelly Auto Group, Inc, 482 Mich 1101(2008). Although the attorney fee award was disproportionate to "the amount involved and the results obtained," the Cir-

cuit Court properly attributed the extraordinary fees to Defendant's conduct, which unnecessarily caused additional costs.

B. Published Court of Appeal Decisions --C. Unpublished Court of Appeals Decisions

1. Timely Notice of Appeal After Case Evaluation Attorney Fees Order Required

King v American Axle & Manufacturing, Inc, unpublished opinion of the Court of Appeals, issued June 4, 2009 (Docket No 281928), involved a situation where the case evaluation sanction Plaintiff timely appealed on November 9, 2007, the October 23, 2007, "final order" granting Defendant summary disposition. Plaintiff did not file a new claim of appeal of the December 14, 2007, order granting case evaluation sanctions. The Court of Appeals held that it did not possess jurisdiction over the case evaluation issue because Plaintiff did not file a timely notice of appeal covering such sanctions. A "final order" includes "a post-judgment order awarding ... attorney fees and costs under MCR 2.403." MCR 7.202(6)(a)(iv).

2. Interest of Justice Exception

Dormak v Zook, unpublished opinion of the Court of Appeals, issued May 21, 2009 (Docket No 284665), held that the Circuit Court erred when it denied Defendant's motion for costs by utilizing the MCR 2.403(O)(11) "interest of justice" exception. The Court of Appeals indicated that the Circuit Court's denial of sanctions pursuant to the interest of justice exception is reviewed for an abuse of discretion. For the interest of justice exception to be applicable, one of several "unusual circumstances" has to exist. Examples of these circumstances include legal issue of first impression or public interest, law is unsettled and substantial damages are at issue, a significant financial disparity between the parties, the effect on third persons may be significant, and where the prevailing party engages in misconduct.

IV. MEDIATION

A. Supreme Court Decisions --B. Published Court of Appeals Decisions — C. Unpublished Court of Appeals Decisions

1. Court Rejects Mediation Custody Agreement

Roguska v Roguska, unpublished opinion of the Court of Appeals, issued September 29, 2009.(Docket No 291352). In this domestic relations mediation, MCR 3.216, et seq, case involving custody, the Court of Appeals held that the Circuit Court did not err in rejecting the parties' mediated agreement concerning custody, finding that no custodial environment existed with respect to one of the parties' children, and applied the proper standard in evaluating the custody factors.

The parties negotiated a mediation settlement agreement that was signed by the mediator, both parties, and their attorneys. The Circuit Court held a hearing and heard testimony that an agreement existed regarding custody, parenting time, property and child support. The parties stated that the consent judgment was consistent with the mediated agreement. During the hearing, Plaintiff testified that she thought Defendant was "lying" during the mediation. The Circuit Court rejected the mediated agreement regarding custody.

The Court of Appeals held that the trial court is not bound by the parties' agreements regarding child custody. Regardless of the existence of a mediated agreement, the Child Custody Act (CCA), MCL 722.21 et seq, requires a trial court to determine independently the custodial placement that is in the best interests of the children, because the statutory best interest factors are paramount whenever a court enters an order affecting child custody.

According to the Court of Appeals, the Circuit Court did not act erroneously while exercising its discretion or applying the law to set aside the custody portion of the mediated agreement.

The Circuit Court's apparently hearing testimony concerning statements made during the mediation session might be considered in light of MCR 3.216(H)(8) which provides that:

"Statements made during the mediation, including statements made in written submissions, may not be used in any other proceedings, including trial. Any communications between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties. This prohibition does not apply to:

(a) the report of the mediator under subrule (H)(6),

(b) information reasonably required by court personnel to administer and evaluate the mediation program,

{c) in formation necessary for the court to resolve disputes regarding the mediator's fee, or

(d) information necessary for the court to consider issues raised under MCR 2.410(D)(3) or 3.216(H)(2)." Emphasis added.

2. Public Body Mediation And Open Meetings Act

Hunt v Green Lake Twp, unpublished opinion of the Court of Appeals, issued May 21, 2009 (Docket No 283524). In this case, Defendant Township failed to have all of its Board of Trustees at the mediation session. In addition, it failed to submit a pre-mediation written position statement as required by a Scheduling Order. The Court of Appeals held that the Township made a good faith attempt to comply with the mediation attendance requirements by having some Board members present in light of the fact that full Board attendance would have created a public meeting under the Open Meetings Act. MCL 15.261, et seq. The Court of Appeals further held that the Township's failure to provide a written mediation statement did not materially harm the Plaintiff because the Township had previously provided Plaintiff with the rational for its position.

V. CONCLUSION

The Michigan Supreme Court and Court of Appeals have recently issued several important decisions concerning arbitration, case evaluation, and mediation. Some of these decisions impacted on areas of law in addition to ADR. Such decisions included: *Coblentz*, *id* (attorney fee calculation); *Vyletel-Rivard*, *id* and *Healey*, *id* (timeliness of filing jurisdictional documents); *City of Ann Arbor*, *id* (six year limitations for vacation of labor arbitration award); and *Roguska*, *id* (rejection of mediated custody agreement).

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GTLA Bar Association

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GTLA Bar Association Mission Statement: *The Grand Traverse-Leelanau-Antrim Bar Association is a Michigan not-for-profit corporation whose members are attorneys principally practicing in Grand Traverse, Leelanau and Antrim counties. Its mission is to maintain the highest professional standards and competence among attorneys, to promote collegiality and camaraderie among attorneys, to improve the administration of justice, and to provide law-related service and education to its members and the public.*

2009-2010 - The GTLA Bar Association officers for 2009-2010 were elected at the May 7, 2009, annual meeting.

Board of Governors

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President-Elect	Shelley A. Kester		922-6800
Past-President	Jennifer Berry		929-3113
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	Michael Richey	6/30/10	947-4900
	Corey J. Wiggins	6/30/10	946-8630
	Shawn Worden	6/30/10	929-4878
	Larry LaSusa	6/30/11	392-9616
State Bar	John Blakeslee		946-2700
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Women Lawyers	Sara Mason		
Exec. Director	Jill Porter		922-4715

Bar Association Newsletter

Editor & Committee Co-Chairs: Aaron Bowron and Corey J. Wiggins. Published Quarterly. Kindly mail articles and information to GTLABA by **March 22, 2010**, for publication in the spring issue. Questions or comments should be directed to Aaron Bowron at legaloil@aol.com or Corey Wiggins at coreyjwiggins@aol.com.

Committee Chairs

Alternative Dispute Resolution	John Racine	947-0400
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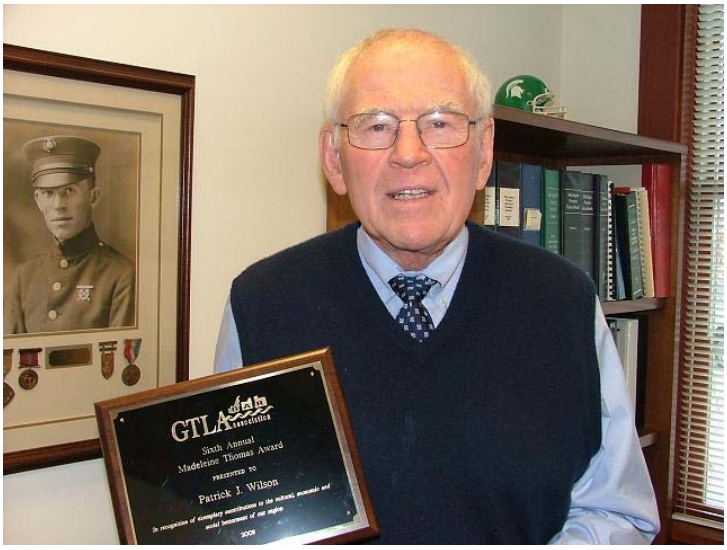

Patrick J. Wilson receives Sixth Annual Madeleine Thomas Award at Fall Dinner

Pat Wilson with the Madeleine Thomas Award.

An excerpt from his letter the GTLA Bar Association is below.

Ladies and Gentlemen of the Bar:

I was recently honored to be named the Sixth recipient of the Madeleine Thomas Award, given annually by our Bar Association in "recognition of exemplary contributions to the cultural, economic, and social betterment of our region."

Madeleine Anne Thomas died in a tragic rafting accident June 22, 1999. At the time of her death, she was a compassionate lawyer with Thomas and Gilbert, PC, wife and mother; and a woman of faith. Her undergraduate degree was earned at MSU, and her law degree at the University of Detroit.

Commencing in 1984, with her husband Bob Eichenlaub and two children, Christopher and Caroline, they embarked on years of legal and public service and Christian living in Traverse City. In fifteen short years, as a member of our Bar, Madeleine distinguished herself as an advocate for women and children. In addition to her own children, she took into her home a foster child and a Russian exchange student, Glen and Stahsy, raising them as confidently and warmly as she did her own.

Outside her home, she worked tirelessly for the Woman's Resource Center, and following her death, the WRC named their transition facility for abused women and children the "Madeleine House." Other agencies which were benefactors of her service included, among others, the Michigan Association for Emotionally Disturbed Children, United Way, American Cancer Society, and the Crooked Tree Girl Scouts Council. Another post-death recognition is the Kaye Krapohl, Madeleine Thomas Memorial Winter Tour, a fun-filled day for women, with chocolate, for the benefit of abused women, and hundreds of women participants "get on their skis or snowshoes to help abused women get on their feet."

Madeleine Thomas's legacy, as recognized by the Bar and social service agencies, particularly the Woman Resource Center, should serve as a reminder to us all that the practice of law and pursuit of justice often require more than advocacy; in Madeleine's case, it required living and doing justice in her home and in her community, without a fee agreement or expectancy of recognition.

Happily, our Bar Association is blessed with many more Madeleine wannabes, both men and women, who work outside the practice of law for the "betterment" of our community.

Respectfully,

Patrick J. Wilson

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