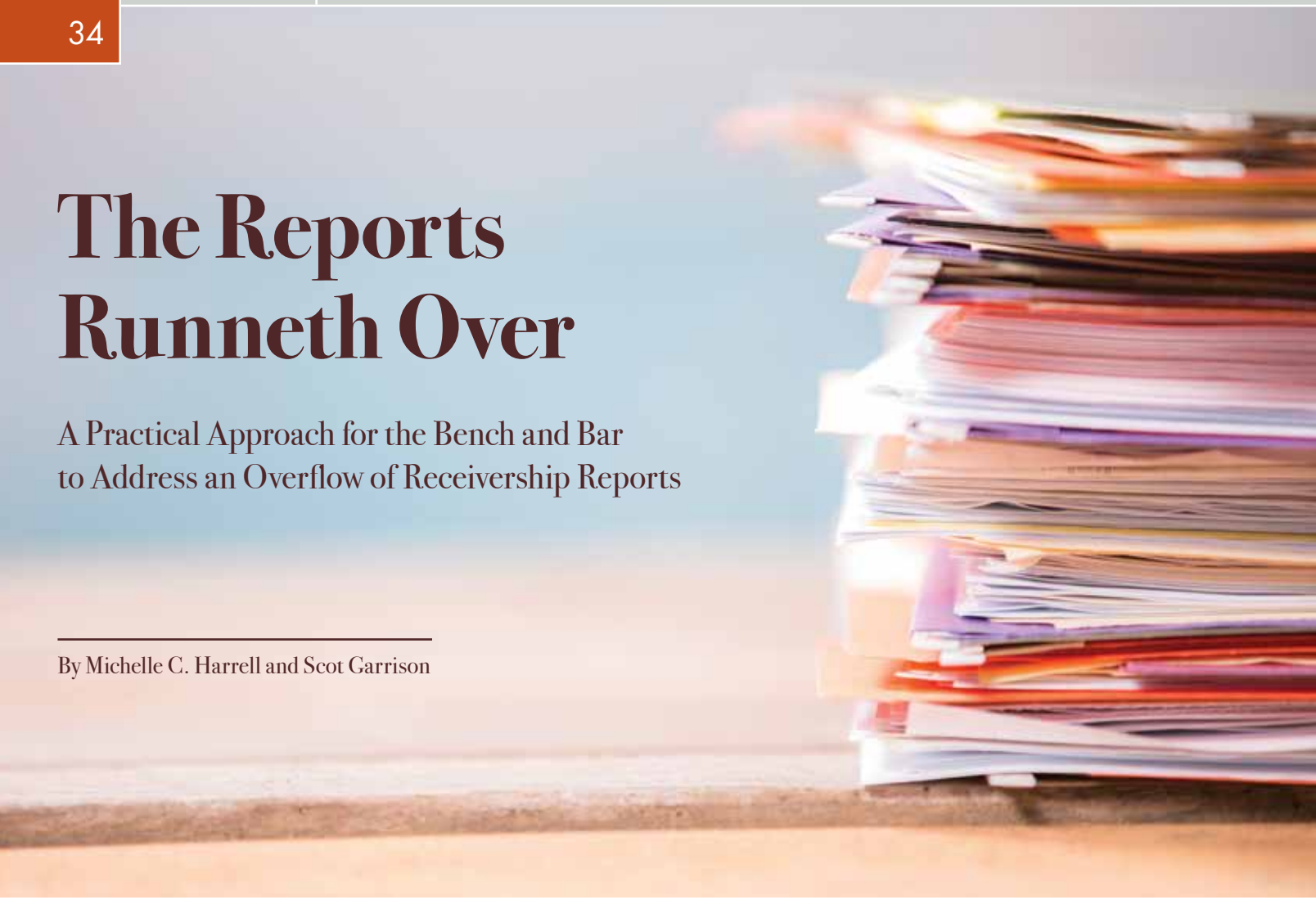

The Reports Runneth Over

A Practical Approach for the Bench and Bar to Address an Overflow of Receivership Reports

By Michelle C. Harrell and Scot Garrison

Michigan courts have routinely appointed receivers in cases in which the appointment is necessary and appropriate. The appointment may be by stipulation of the parties, upon contested motion to appoint a receiver, or sua sponte by the court when circumstances warrant.[1] The reports filed by the receiver are unique when compared to other documents filed during the course of routine matters. This article addresses the concerns from the bench and bar on the proper method of dealing with the lengthy reports, which are unlimited in number.

Unlike other filings during a contested matter, receiver reports are not filed in the public court file.[2] Rather, they are sent directly to the judge presiding over the matter for an in camera review. Nonpublic submission to the court is typical because often the information contained in the report may be confidential and sensitive.

For example, in the context of a receivership established to liquidate real property, the receiver (and parties) may not want to publicly disclose the content of offers to purchase receivership property. If the receiver is appointed to operate a going concern, the reports will likely contain sensitive, nonpublic financial information.

Pursuant to MCR 2.622—the recently amended Michigan court rule governing receiverships that went into effect May 1, 2014—receivers are required to file an inventory of the receivership estate's property within 35 days of appointment.[3] The receiver must file reports accounting for "all receipts, disbursements and distributions of money and property of the receivership estate" as provided by the order appointing receiver.[4]

Given the number of receiverships that can be pending before a particular court at any given time and the length of many of the reports, filing cabinets

are overflowing with receivership reports. There is currently no rule regarding any obligation of the courts to review the reports, and limited guidance regarding the reports' retention period.

The receiver's source of authority and reporting obligations

The receiver, as an appointee of the court, is deemed to be an "arm of the court" and is discharged only upon entry of a written order.[5] As the appointing authority, the court—and not the parties or their counsel—controls and defines the authority, functions, goals, and activities of its receivers.[6] These are defined by the order appointing receiver and any subsequent orders regarding proposed receiver activities.

The Michigan court rules set forth the minimum required provisions of an order appointing receiver and state that the order must identify which reports are required to be produced and filed by the receiver, including the final report and accounting.[7] As a result, the appointment of the receiver and the scope and nature of the receiver's reporting obligation arise from and are governed by the order appointing receiver. Because the court controls the content of the order, it also has the ability to control the nature and scope of the reports submitted for review.

What is the court's obligation concerning the review and retention of receiver reports?

Receiver reports are important to the receivership process. The reports are intended to apprise the parties and their counsel regarding the status of the receivership and enable the court to review the activities of its receiver as appropriate and necessary. In practice through the adversarial system, the receiver submits a report and the parties file their objections, if any, as they deem necessary or beneficial. For example, if the report states that the receiver is marketing receivership property at a certain price and a party feels the price is too low, that party can raise the issue with the court by motion. The court can then review the report and the objection and direct the receiver's actions.

Receivers often prefer to submit ongoing reports so that subsequent challenges to their actions by the parties are reduced or prevented. In other words, the burden is on the parties (or their counsel) to object to the receiver's actions as contained in a report. If a party fails to raise an issue, it becomes more difficult for the party to object later in the proceeding. It also becomes more difficult for a court to direct the actions of the receiver after the fact; for instance, after a piece of equipment has been sold.

The adversarial process works well in this setting because the parties are keenly interested in the contents of their own receiver's reports, can spot issues and problems more quickly and efficiently, and can then formulate and present any objections. Most receiver reports are detailed and financially complex, which makes them difficult for a court to review in substance, particularly when the court is faced with so many receiverships with varying factual backgrounds and histories in addition to the remaining docket. While the parties may be in the best position to review the reports' details, the court is best served by the ongoing submission of receiver reports because the court can take notice—either directly or through the parties raising the issue—if a receiver has failed to file reports. If the receiver fails to file reports, the presiding judge can review whether the receivership is adrift, not being managed, or no longer necessary.

Given that the reports are often lengthy and receiverships can continue for a long period, court staff may face an overwhelming volume of reports. A single receivership can often produce a full drawer of reports, which must be maintained in some fashion depending on the presiding judge's direction. Since the reports are not filed in the same manner as other pleadings, each judge routinely maintains the reports in chambers.

Once the receivership is concluded, the reports are destroyed to make room for subsequent litigation. The practice of destroying documents submitted to the court may seem odd, but the Michigan State Court Administrative Office (SCAO) has provided some guidance on the issue. Specifically, SCAO allows for destruction of "reference materials for case files" once the court determines the item holds "no further reference value."[8] For most courts, this is upon termination of the receivership; for some courts, it is upon receipt of the most recent report. This should be addressed in the order appointing receiver to avoid any misunderstanding between counsel and the presiding judge. Recognizing that courts will not maintain copies of the reports, counsel is well-advised to maintain copies pursuant to the record-retention policy of the respective law firm.

FAST FACTS

A receiver's duties and obligations flow directly from the order appointing the receiver.

Counsel should maintain copies of receiver reports in accordance with the record-retention policy of the respective law firm.

There is currently no rule regarding any obligation of the courts to review receiver reports, and limited guidance regarding the reports' retention period.

While reports fulfill an important function in the receivership process, the court has the power to control the nature of its review of these reports and their retention by the court and the parties. Because all receivership terms are set forth in the order appointing receiver and the court controls the content of its orders, the court's obligation to review and retain receiver reports is whatever it reasonably defines as its obligation, if any, and absent any requirement set forth in the order.

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Receivership orders typically do not contain provisions relating to any specific, required review of reports by the presiding judge or provide for the court's retention or disposal of the reports. However, the court is empowered to require specific provisions in its receivership orders relating to the submission of reports to the court by receivers and the subsequent review and disposal of those reports by the court. Instead of allowing the parties to define the court's obligations relating to receiver reports, the court could require provisions in its receivership orders that:

(1) The receiver only file with the court a proof of service of the receiver reports upon the parties, while the receiver reports are *not* to be submitted to the court on a routine or automatic basis. Instead, any issues with a receiver report would be brought before the court by motion with attached copies of any relevant reports or nonpublic submission to the court.

(2) All receiver reports as served upon the parties are to be retained *by the receiver* (or counsel for the petitioner party) for a period of years the court considers appropriate, with copies to be provided to the court or the parties immediately upon request from the court or the parties.

(3) Counsel and the receiver acknowledge that the court may not review or retain any of the receiver reports unless objections are filed and noticed for hearing. The court can tailor reporting provisions to serve its preferences or the unique attributes of the case or receivership property.

In summary, the court has the authority to require provisions in its orders appointing receivers that address the issues of court review and retention of reports. Those provisions can include a method for parties to raise objections for the court's review and determination without overburdening and burying the court in unnecessary reports. Counsel should consider the options available to both the parties and the court when drafting a proposed order regarding the appointment of receiver, and modify the order according to the needs of each case. ■

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ENDNOTES

1. MCR 2.622(A) and (B).
2. MCR 8.119(G).
3. MCR 2.622(D)(3).
4. MCR 2.622(D)(4).
5. MCR 2.622(E)(4).
6. MCR 2.622(C)(5).
7. MCR 2.622(C)(4).
8. State Court Administrative Office, *General Records Retention and Disposal Schedule #16—Michigan Trial Courts* <http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_schd.pdf> (accessed February 1, 2016).