The Michigan Constitution

An Independent Source of Legal Rights

By John Postulka

Fast Fact

The Michigan Constitution differs from the United States Constitution in several ways. These textual differences may mean that the Michigan Constitution offers broader rights than the federal constitution.

There is general agreement on the Michigan Supreme Court that, when possible, issues of interpretation should be resolved by giving a plain reading to the text. But despite this recent consensus, historically the more common practice when interpreting the Michigan Constitution is to borrow the interpretation given to its federal counterpart. The result is that quite a bit of language in the Michigan Constitution has never been fully explored. In light of the current textualism domination, now may be a good time to take a second look at the Michigan Constitution, specifically areas where it differs from the United States Constitution. The outcome may be new and broader rights for Michiganders. This article gets the ball rolling by discussing some of the more obvious differences between the constitutions and offering some thoughts on what they may mean.

Fair and Just Treatment Clause

Most of the specific rights recognized in the Michigan Constitution have equivalents in the U.S. Constitution. But a few are unique to the Michigan Constitution. One of them is the right to fair and just treatment in legislative and executive investigations and hearings. Odds are that most Michigan residents, including attorneys, have probably never even heard of this right.

The right to fair and just treatment, which is not mentioned in the U.S. Constitution, can be found in Article I, Section 17 of the Michigan Constitution. Specifically, that section provides:

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

Based solely on the language used, this right seems fairly broad. By its plain terms, the Michigan Constitution guarantees a right to fair and just treatment in all nonjudicial investigations and hearings. Due to its apparent breadth, the
these possible defenses, the fair and just treatment clause may still be worth considering by plaintiffs’ attorneys, at least for injunctive relief, if not more.8

However, as in the criminal context, the cases applying the fair and just treatment clause in the civil context are few and far between. Accordingly, despite the clause being approximately 50 years old, there still remain to be resolved very important questions about its proper interpretation. Criminal defense and plaintiff-side employment attorneys should take note.

Freedom of Speech

While the fair and just treatment clause has received little attention from the courts, the same cannot be said of most of the other rights discussed in the Michigan Constitution. However, it is not uncommon for Michigan courts to simply adopt the interpretation given to the corresponding federal constitutional provision. Usually, when courts have done this despite textual differences, the reasoning has been based on an examination of sources external to the text, like the history and debates surrounding the provision’s adoption.9 But the Michigan Supreme Court has thrown this method of interpretation into doubt in recent years. In 2008, the Court criticized the consideration of nontextual sources in constitutional interpretation, stating that “extrinsic evidence can hardly be used to contradict the unambiguous language of the constitution.”10 It specifically stated that the “constitutional convention debates and the Address to the People...are...not controlling.”11 In light of these statements, it may be a good time to take another look at those parts of the Michigan Constitution that have been given the same interpretation as their federal counterparts despite textual differences.

An example of a right that is worded differently in the Michigan and U.S. Constitutions but has been given the same basic interpretation is freedom of speech. The First Amendment of the U.S. Constitution provides that “Congress shall make no law...abridging the freedom of speech.” Article 1, Section 6 of the Michigan Constitution states “Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.”

The plain language of both the Michigan and U.S. Constitutions prohibits laws abridging speech. But the Michigan Constitution goes further by saying that every person “may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right.” Based on this additional language, the Michigan Constitution may offer broader protection than the U.S. Constitution. For example, under the U.S. Constitution, certain categories of speech are not afforded any constitutional protection.12 It could be argued that since the Michigan Constitution says people “may speak freely...on all subjects,” there are no similar categories of unprotected speech in Michigan.

With that said, the Michigan Constitution does temper its free speech protections by saying individuals are “responsible for the abuse of such right.” This phrase could be interpreted broadly to
Attorneys may want to take another look at the Michigan Constitution, which, textually at least, appears to offer more protection than its federal counterpart.

ENDNOTES

1. The Michigan Supreme Court justices seem to accept that unambiguous text should be given its plain meaning. The difference among the justices focuses on when text is “unambiguous.” See Peterson v Magna Corporation, 484 Mich 300; 773 NW2d 564 (2009).
2. Scheuer v Rhodes, 416 US 232, 244–245; 94 S Ct 1683; 40 L Ed 90 (1974) (the “segment of the executive branch of a state government that is most frequently and intimately involved in day-to-day contacts with the citizenry…[is the local police officer]” emphasis added).
3. See Michigan v. Summers, 452 US 692, 700 n 12, 101 S Ct 2587, 69 L Ed 2d 340 (1981) (“several investigative techniques which may be utilized effectively in the course of a Terry-type stop. The most common is interrogation…” emphasis added).
4. E.g., McConkie v Nichols, 446 F3d 258, 261 (CA 1, 2006) (though lying to a suspect is “not something to be condoned,” neither does it violate due process).
5. Jo-Dan, Ltd v Detroit Bd of Ed, unpublished opinion per curiam of the Court of Appeals, issued July 14, 2000 (Docket No. 201406).
6. In Jones v Powell, 462 Mich 329; 612 NW2d 423 (2000), the Michigan Supreme Court held that the Michigan Constitution does not allow for damage suits against cities or government employees when suit can be brought under 42 USC 1983.
7. Michigan courts have held that the Whistleblower Act provides the exclusive remedy and preempts common law wrongful discharge claims. See Anzaldua v Neogen Corp, 292 Mich App 626, 631; 808 NW2d 804 (2011). That argument, however, may not carry weight when an employer is relying on a constitutional provision and not the common law.
8. At least one court has held that the Michigan Constitution can be relied on to state a cause of action against a county for declaratory relief. Swartz Ambulance Service v Genesee Co, 666 F Supp 2d 721, 726 (ED Mich, 2009).
9. Michigan and U.S. Constitutions diverge. There are many others. Since recent Michigan jurisprudence indicates the text of the constitution controls above all other sources, attorneys may want to take another look at the Michigan Constitution, which, textually at least, appears to offer more protection than its federal counterpart. As Justice Thomas Brennan stated 35 years ago, “[s]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the [United States] Supreme Court’s interpretation of federal law.”

Conclusion

The differences discussed are just a few examples of how the Michigan and U.S. Constitutions diverge. There are many others. Since recent Michigan jurisprudence indicates the text of the constitution controls above all other sources, attorneys may want to take another look at the Michigan Constitution, which, textually at least, appears to offer more protection than its federal counterpart. As Justice Thomas Brennan stated 35 years ago, “[s]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the [United States] Supreme Court’s interpretation of federal law.”

John Postulka is a graduate of Michigan State University College of Law. He has served as a clerk for Justice Marilyn Kelly, an adjunct professor at MSU College of Law, and a deputy city attorney in Flint.