



THE LITIGATION NEWSLETTER



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LETTER FROM THE CHAIR

by: *Bonnie Y. Sawusch*

"Justice is open to everyone in the same way as the Ritz Hotel." ~Judge Sturgess. The Michigan Legislature currently has before it House Bills 5527-5529, which propose a tax on legal services. Because the need for legal services is, for the most part, not discretionary, such a tax would burden citizens and businesses that seek legal advice in order to ensure compliance with the law. It also affects those securing legal services for the purpose of ascertaining, exercising and defending their legal rights, including constitutionally protected rights such as the right to representation for criminal defense. Those who seek legal services for family law issues such as child custody, support and divorce will also be adversely affected. The tax on legal services is aimed at those in need legal services who are in the worst possible position to afford it.

The Litigation Section is currently developing a position statement in support of the State Bar of Michigan's position opposing the tax on legal services. It is imperative that every attorney in this state reviews these pending House Bills and makes known to his or her state representative the impact such a tax would have on their clients. The State Bar's Position Statement can be viewed at www.michbar.org/publicpolicy/pdfs/taxinglegalservicesQA.pdf. To find out more about how your legal voice can make a difference, contact the State Bar's Director of Governmental Relations, Elizabeth K. Lyon, at 517/346-6325 or elyon@mail.michbar.org

The Litigation Section's Annual Summer Conference will be held at The Homestead in Glen Arbor on July 30-31, 2010. A Friday evening social gathering at the Top of Bay Mountain is planned for the participants. On Saturday morning, our featured speaker is James W. McElhaney in the Mountain View Lodge. Attorney McElhaney is one of the most popular and enduring CLE presenters in the country. **"A Day in Discovery with Jim McElhaney"** is a program that unlocks secrets for turning pre-trial discovery into building blocks for the most powerful results you can achieve for your clients. McElhaney is sure to entertain and provide you with litigation techniques and strategies that will be used for many years to come.

The Masters in Litigation Series is pleased to present Robert Musante's **"Attacking the Expert's Opinion"** on September 23, 2010. Attorney Musante is the country's foremost teacher of cross-examination skills and is a former lecturer of trial advocacy at the University of California. Musante is the creator of four unique and highly entertaining seminars involving litigation. He has taught over 25,000 lawyers in 39 states and 11 offices of state attorneys general in the science and art of taking great adverse depositions. Robert Musante is a former prosecutor, an accomplished civil trial attorney, and has

made numerous appearances on national TV and local radio as a trial commentator.

The Litigation Section's Publications Committee is always in search of litigation related articles for its Newsletter. If you have an article to submit or would like more information, please contact the committee chair, Dari Bargy, at (269) 381-7030 or bargy@millercanfield.com.

"If you're not actively involved in getting what you want, you don't really want it." ~Peter McWilliams.

The adverse impact a tax on legal services will impose on citizens of this state cannot be taken lightly. As attorneys, it is imperative that we all become involved *early on* in an effort to educate both the Legislature and the general public of the punitive affect such a tax would have on the citizens of the State of Michigan.

Sincerely,

Bonnie Y. Sawusch

PIERCING THE CORPORATE VEIL AND PROCEEDINGS SUPPLEMENTARY TO JUDGMENT: MAJOR PROCEDURAL CHANGES

by: *Daniel J. McGlynn**

Green v. Ziegelman, 282 Mich App 292, 767 N.W. 2d 660 (2009)

The redress of grievances through the filing of suit in the various courts is the hallmark of our judicial system. Fighting the fight is one thing, but in our courts of damages, actual recovery on claims is what renders the fight worthwhile. A successful resolution in litigation is rendered pyrrhic in the face of an inability to collect on the judgment.

...[S]ince time immemorial, parties plaintiff have been interested not in obtaining a judgment but in obtaining satisfaction thereof. While the road to the judgment may have been broadened and straightened and generally improved, the road from the judgment to the satisfaction thereof is suffering badly from neglect and want of repair.¹

Practitioners are certainly very familiar with the concept of limited liability afforded shareholders and directors of corporate entities, be they corporations or limited liability companies. Relevant to any analysis in the prosecution of suit is the liability for claims which must be considered as against any and all potential defendants, including principals of a corporation arguably protected by the statutory concept of limited liability associated with corporations and limited liability companies.

It is clear under Michigan law that the concept of whether to disregard a corporate entity is to be considered *sui generis* and must be decided in accordance with a case's underlying facts².

With respect to the procedural manner in which a plaintiff could pursue piercing of the corporate veil, it has not been uncommon for plaintiffs to pursue such claims as part of their case-in-chief, or as part of proceedings supplementary to judgment pursuant to MCR 2.621 and MCL 600.6101 et. seq.³

The ostensible ability of a plaintiff to pursue entities or individuals who may or may not have been a party to an underlying suit in order to satisfy a judgment is found at MCL 600.6104, which provides, in pertinent part:

After judgment for money has been rendered in an action in any court of this State, the judge may, on motion in that action or any subsequent proceeding:

(5) Make any order as within his discretion seems appropriate in regard to carrying out the full intent and purpose of these provisions to subject any non-exempt assets of any judgment debtor to the satisfaction of any judgment against the judgment debtor.⁴

In short, the previous application of MCR 2.621 appeared to allow, by motion or separate action, the ability to obtain relief supplementary to the entry of a judgment, meaning that a practitioner could elect either procedural route in order to secure his or her client's rights. However, the recent case of *Green v. Ziegelman*, 282 Mich App 292, 767 N.W. 2d 660 (2009) telegraphs that the ability of a practitioner to assert liability, post-judgment, against individuals or entities other than the named parties in the suit pursuant to proceedings supplementary to judgment is, arguably, at an end.⁵

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Specifically, the Plaintiffs in *Green* alleged that evidence obtained post-judgment, in the form of a creditors examination, could serve as the basis, pursuant to MCL 600.6101 et. seq. and MCR 2.621, to pursue individuals who are not subject to the underlying judgment in that case. On the strength of that deposition, the Plaintiffs in *Green* filed a motion to pierce the corporate veil, asking the circuit court to impose personal liability on an individual for a judgment adjudicated against a corporate entity in the underlying suit.⁶

The *Green* Court expressly ruled that it was clear that MCLA 600.6104(5) "did not authorize entry of judgment" against [the individual]. Moreover, the Court emphasized that the circuit court "...essentially used a proceeding *supplementary to judgment* to enter an additional judgment against a party not previously subject to a judgment on the claim at issue."⁷

The *Green* Court goes on to invoke authority from the State of Illinois, citing the rejection of efforts to hold a third party liable under a corporate veil piercing theory in the course of proceedings supplementary to judgment, ruling that it is improper to do so.⁸

What should be of great significance to any practitioner is the court's dicta set forth in the *Green* case, *supra*, ..."We will not answer the questions whether Plaintiffs are legally entitled to file a new and separate action against Ziegelman (Defendant in that suit) outside the PSJA, under a corporate veil piercing theory and whether *res judicata* or the compulsory joinder rule, MCR 2.203, would bar such an action...."⁹

CONCLUSION

Based upon the totality of the court's ruling in *Green v. Ziegelman*, it is almost certain that, to the extent that it is believed that certain individuals/shareholders/principals of a corporate entity may have committed an act rendering them personally liable for a debt or damage suffered by

a plaintiff, this issue may be required to be raised as part of the case-in-chief by virtue of inclusion of that party as a party defendant, in light of both the substantive ruling in *Green v. Ziegelman* as well as the associated dicta. The previously broad construction of proceedings supplementary to judgment pursuant to MCL 600.6101 et. seq., which would arguably allow assertion of a judgment against non-parties to the underlying judgment, appears to have been foreclosed by the *Green* court.

Accordingly, close examination of such potential liability would seem to be required in order to ensure the ultimate proper parties are rendered liable for any successful claim prosecuted through litigation.

ENDNOTES

1. Joseph I. King. *The Enforcement of Money Judgments in California*, 11 S. Cal. L. Rev. 224 (1937-1938).
2. *Herman v. Mobile Homes Corp.*, 317 Mich. 233, 243, 26 N.W. 2d 757 (1947); *Klager v. Robert Meyer Co.*, 415 Mich. 402, 329 N.W. 2d 721 (1982).
3. MCR 2.621; MCL 600.6101 et. seq.
4. MCL 600.6104
5. *Green v. Ziegelman*, 282 Mich App 292 (2009).
6. *Green*, *supra* at 298.
7. *Green*, *supra* at 303, 304.
8. *Miner v. Fashion Enterprises, Inc.* 342 Ill. App. 3d 405, 415, 794 N.E. 2d 902 (2003); *Pyshos v. Heart-Land Dev. Co.*, 258 Ill. App. 3d 618, 624, 630 N.E. 2d 1054 (1994).
9. *Green*, *supra* at 305.

LITTLE GREEN MEN AND CIVIL PROCEDURE: AN EXPLORATION OF ASHCROFT V. IQBAL

by: *Kristen Rewa*

Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 860 (2009), is creating quite a hullabaloo in federal courts and among the law professoriate active in the blogosphere. The case changed the analysis of the pleadings requirements under FRCP 8(a)(2)—redefining the term notice pleading, or possibly getting rid of it entirely.¹ *Iqbal* also has language which could be read to either severely limit, or abrogate entirely, claims of supervisory liability under 42 U.S.C. § 1983. This article will focus on how *Iqbal* has affected federal pleadings requirements.

IQBAL FACTS AND PROCEDURE

After the 9/11 attacks, the FBI conducted a broad-sweeping investigation in an attempt to find the 9/11 assailants and prevent further terrorist plots. The FBI questioned more than 1,000 people, holding 762 of those people on immigration charges, and deeming 184 to be “of high interest” to the investigation. High-interest detainees were held under restrictive conditions in a maximum security prison.

Plaintiff/respondent, a Muslim Pakistani citizen, was living in the New York area on September 11, 2001. He was arrested on immigration fraud charges, and later held by the FBI as a high-interest person. Plaintiff pled guilty to the criminal charges, served jail time, and was deported to Pakistan. He then filed a *Bivens* claim² in the Eastern District of New York against nineteen “John Doe” federal corrections officers and thirty-four named federal officials, including then-Attorney General Ashcroft, and then-FBI Director Mueller, the petitioners on appeal. The complaint does not allege false arrest or false imprisonment. Plaintiff only alleged claims pertaining to his treatment while at the maximum security prison. Ashcroft and Mueller were alleged to be liable under a theory of supervisory liability.

Petitioners moved to dismiss the complaint under FRCP 12(b)(6) for failure to state sufficient allegations

to show their own involvement in clearly established unconstitutional conduct. The district court denied the motion; the Second Circuit affirmed. The Supreme Court, relying on its recent decision, *Bell Atlantic Corp. v. Twombly*,³ reversed and remanded,⁴ holding that the complaint failed to state sufficient facts to state a claim upon which relief could be granted.

THE PRECURSOR: BELL ATLANTIC CORP. V. TWOMBLY

To understand *Iqbal*, it is necessary to discuss its predecessor, *Bell Atlantic Corp. v. Twombly*. *Twombly* was an antitrust case. The issue, as framed by the opinion’s author, Justice Souter, states, “[t]he question in this putative class action is whether a § 1 [of the Sherman Act] complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action.”⁵ The Court found that the pleadings were defective, and granted the defendant’s 12(b)(6) motion.

In so doing, the Court “retired” the infamous statement from *Conley v. Gibson*: “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which should entitle him to relief.”⁶ While the Court emphatically stated that *Conley* is still good law, it found that the “focused and literal” reading of this no-set-of-facts phrase “is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”⁷ The *Twombly* Court then held:

[i]n applying these general standards to a § 1 claim, we hold that stating such a claim requires

a complaint with enough factual matter (taken as true) to suggest that an agreement was made. The need at the pleading stage for allegations *plausibly suggesting* (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’⁸ While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘ground[s]’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.⁹

Additionally, the Court rejected the argument that limited discovery can be used to determine whether a claim is meritorious on its face: “[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through ‘careful case management’ . . . given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.”¹⁰

IQBAL EXTENSION OF THE TWOMBLY PLAUSIBILITY REQUIREMENT

Prior to *Iqbal*, there were as many as six different federal circuit interpretations of *Twombly*.¹¹ Many courts were limiting *Twombly* to complex litigation, like antitrust suits. The Second Circuit, in deciding *Iqbal*, held that “*Twombly* called for a ‘flexible plausibility standard,’ which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.”¹² The Second Circuit further found that *Iqbal*’s claims were not ones requiring amplification, and thus held that the claims were adequately pled.

The Supreme Court rejected this analysis. First, it held that *Twombly* is not a heightened pleading standard, akin to FRCP 9, but rather the general rule that applies to *all* civil cases.¹³ *Twombly* is a two step process: first, the court must distinguish between factual pleadings and conclusory pleadings. “[A] court must accept as true all of the allegations of fact contained in a complaint.”¹⁴ However, courts “are not bound to accept as true legal conclusions couched as a factual allegation.”¹⁵ Allegations that are merely legal conclusions are those “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements.”¹⁶ Legal conclusions are not entitled the presumption of truth. When analyzing a

complaint, the Court clarified that “[i]t is the conclusory nature [of allegations], rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”¹⁷

Second, “only a complaint that states a plausible claim for relief survives a motion to dismiss.”¹⁸ Thus, where there is only a threadbare recitation of the elements, a motion to dismiss requires the reviewing court to draw on its judicial experience and common sense.¹⁹ But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not “show[n]”—that the pleader is entitled to relief.²⁰ Put another way, the plaintiff has not nudged her claims “across the line from conceivable to plausible.”²¹

Applied to *Iqbal*’s complaint, the Court determined that three paragraphs pertaining to Ashcroft and Mueller were conclusory and thus *not* entitled to the presumption of truth, namely: (1) petitioners “‘knew of, condoned, and willfully and maliciously agreed to subject [Iqbal]’ to harsh conditions of confinement ‘as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest;’” (2) Ashcroft was the “‘principle architect’” of this policy; and (3) Mueller was “‘instrumental’ in adopting and executing it.”²²

Applying step two, the Court juxtaposed the three conclusory allegations against the complaint’s factual allegations to determine whether the factual allegations “plausibly suggest an entitlement to relief.” The Court found that the factual allegations that (1) Mueller arrested and detained thousands of Arab and Muslim men after September 11, and (2) this policy was approved by Ashcroft and Mueller “in discussions in the weeks after September 11, 2001,” were “consistent” with *Iqbal*’s claim of invidious discrimination, but not plausible given the “obvious alternative explanation” that the detentions were “lawful and justified by the nondiscriminatory intent to detain illegal aliens present in the United States.”²³ Thus, the Court found that the complaint failed to show that *Iqbal* was entitled to recovery, and dismissed claims against the petitioners.

Additionally, *Iqbal* reaffirmed *Twombly*’s rejection of the careful-case-management approach of using limited or “cabined” discovery to weed out meritless claims. The Court noted that its rejection of this device is “especially important” where defendants can assert qualified immunity, because the purpose of the doctrine is “to free officials from concerns of litigation, including ‘avoidance of disruptive discovery.’”²⁴ The Court also

noted that the case-management method can “slant” cases involving multiple defendants, which either results in prejudice to a party’s position, or forces that party to partake in discovery to prevent such prejudice. Thus “even if [defendants] are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.”²⁵

Justice Souter (i.e., the author of *Twombly*), dissented, but not out of disagreement with the majority’s understanding of *Twombly*:

“*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. . . . The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel. That is not what we have here.”²⁶

Justice Souter believed that the majority misapplied the facts to the rule. He would have held that the complaint was sufficient to survive a 12(b)(6) motion because the allegations were “neither confined to naked legal conclusions nor consistent with legal conduct.”²⁷ Justice Breyer, also dissenting, wrote separately to express his endorsement of the careful-case-management approach to litigation.²⁸ Thus, the majority’s rule extending the plausibility requirement to all civil litigation was, in effect, approved by all nine Justices in *Iqbal*.

POST IQBAL

The *New York Times* reported that lower courts cited *Iqbal* more than 500 times in the two months after its publication.²⁹ Judges in the Western District of Michigan, for example, relied on *Iqbal* numerous times to dismiss § 1983 prisoner claims in whole or part.³⁰ Despite the many citations, negative history is rather limited. Some courts grant a 12(b)(6) dismissal, but are quick to point out these complaints would have been deficient under the pre-*Iqbal* standard.³¹ The Middle District of Tennessee dismissed a case pursuant to *Iqbal*, but noted its discontent.³²

Moreover, courts are balking at *Iqbal*’s kibosh on cabined discovery.³³ Dictum in *Smith v Duffney*, a Seventh Circuit opinion penned by Judge Posner, indicates that courts may try to limit the Supreme Court’s

rejection of cabined discovery to “special cases.” Just as *Twombly* involved a complex antitrust suit, *Iqbal* was “special in its own way,” in that it involved a defense of qualified immunity.³⁴ Thus, courts may distinguish *Iqbal* and *Twombly* by defining a case as “un-special” and still allow for the old practice of case-management.

This may prove a difficult maneuver for lower courts, however. The Supreme Court, while pointing out the exceptional need to shield these high-ranking officials from discovery, was also very clear to note that cabined discovery was denied because the complaint failed to satisfy FRCP 8, suggesting all FRCP 8-deficient claims will be precluded from limited discovery.³⁵

IQBAL IN MICHIGAN?

Interestingly, *Iqbal* was cited by the dissent in the Michigan Court of Appeals case *Duncan v. State*,³⁶ which is currently before the Michigan Supreme Court. *Duncan* is a class action § 1983 suit challenging how the state operates its system of court-appointed legal assistance for indigent criminal defendants. The dissent, penned by Judge Whitbeck, recognized that there is no Michigan analog to FRCP 8(a)(2), but found that *Iqbal* has “considerable applicability” to the issues at bar.³⁷

Judge Whitbeck used *Iqbal* as an instructive tool to argue that the *Duncan* plaintiffs failed to sufficiently allege causation where the complaint in this regard was “a legal conclusion wrapped within a factual allegation.”³⁸ The majority rejected this extension of *Iqbal* in a lengthy footnote.³⁹ *Duncan* is no doubt important to watch for its possible ramifications on indigent defense and class action certification in Michigan, but it will also be interesting to see what—if anything—the Supreme Court does with this *Iqbal* analysis.

RAMIFICATIONS:

Most courts and scholars agree that this plausibility standard raises the bar for plaintiffs to proceed to discovery. But it remains unclear exactly how high this bar has been set. Litigators representing defendants to federal lawsuits, can benefit from this heightened standard by increasing its 12(b)(6) motion practice. Note, however, the flip side of this coin: defendants must also properly draft their answers, crossclaims, and counterclaims to fit within the plausibility requirement, because they are pleadings, too.⁴⁰

Of course, an increase in 12(b)(6) motions may also increase appeals, which in turn would increase resource expenditures in the earliest stages of litigation. Even if there is a cost increase initially, a defendant can still save on litigation costs in the long run. Motions under 12(b)(6) are relatively inexpensive to produce and present to the court as compared to summary judgment. Motions under FRCP 12(b)(6) can also reduce or eliminate discovery costs by dismissing entire complaints, or at least weed out the more frivolous claims in a lawsuit—a plaintiff may simply sacrifice some claims to proceed with others. Moreover, even if the plaintiff is given leave to amend, a defendant still benefits. The plaintiff must be more concise with the allegations, limiting a defendant's exposure to liability and discovery.

CONCLUSION

There is no doubt that *Iqbal* has changed the pleadings standard for civil litigation, though the outer boundaries of what constitutes a plausible claim will continue to be teased out in the coming years. Litigators should consider taking several steps in response. First, continue to monitor how courts interpret and utilize *Iqbal* as it pertains to federal (and possibly state) pleadings requirements. Second, ensure that any federal pleadings filed—as plaintiff or defendant—comport with the relevant interpretations of *Iqbal*. Finally, consider increasing FRCP 12(b)(6) motion practice.

ENDNOTES

1. See, e.g., *Wade v. Morton Bldgs, Inc.* No. 09-1225, 2010 WL 378508 (C.D. Ill. Jan. 27, 2010) (unreported).
2. *Bivens* is the federal analog to a § 1983 claim. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).
3. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).
4. The Supreme Court sent the claim back to the Second Circuit to determine whether the complaint could be amended. The Second Circuit remanded the issue back to the district court to make that determination pursuant to FRCP 15(a)(2). *Iqbal v. Ashcroft*, 574 F.3d 820 (2009).
5. *Bell Atl. Corp. v. Twombly*, supra at 548.
6. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).
7. *Bell Atl. Corp. v. Twombly*, supra at 563 (citations omitted).
8. *Id.* at 556 (emphasis added).
9. *Id.* at 555.
10. *Id.* at 559 (citations omitted).
11. Khan & Magee, *Twombly Trumps Conley: Ashcroft v. Iqbal and the Quest for a Standard Pleading Standard*, *Albany Law Review Fireplace* (Feb. 27, 2009).
12. Cited in *Iqbal*, 129 S. Ct. at 1944.
13. See *Iqbal*, 129 S.Ct. at 1953, 1954.
14. *Id.* at 1949.
15. *Id.*
16. *Id.*
17. *Id.* at 1951.
18. *Id.* at 1950.
19. *Id.*
20. *Id.* (citing FRCP 8(a)(2)).
21. *Id.* at 1951 (quoting *Twombly*).
22. *Id.* at 1051.
23. *Id.* at 1951-52.
24. *Id.* at 1953 (citations omitted); accord *Everson v. Leis*, 556 F.3d 484 (6th Cir. 2009).
25. *Id.* at 1953.
26. *Id.* at 1959 (Souter, dissenting).
27. *Id.* at 1960 (Souter, dissenting).

28. *Id.* at 1961-62.
29. Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, *New York Times*, July 20, 2009.
30. *Lawson v. Haddon*, Slip Copy No. 1:09-cv-551, 2009 WL 2242692 (W.D.Mich. July 16, 2009) (Maloney); *Cage v. Caruso*, Slip Copy No. 1:09-cv-512, 2009 WL 2252669 (W.D.Mich. July 28, 2009) (Maloney); *Peterson v. Cooper*, Slip Copy No. 1:09-cv-224, 2009 WL 2448141 (W.D.Mich. Aug. 10, 2009) (Jonker); *Williams v. Cass Co. Sheriff Dept.*, Slip Copy No. 1:09-cv-590, 2009 WL 2370713 (W.D.Mich. July 30, 2009) (Neff); *Gavins v. Hofbauer*, Slip Copy No. 1:09-cv-48, 2009 WL 1874074 (W.D. Mich. June 26, 2009) (Quist).
31. *Tooley v. Napolitano*, 586 F.3d 1006 (D.C. Cir. 2009) (finding complaint "patently insubstantial," quoting Justice Souter's "little green men" standard). See also *al-Kidd v. Ashcroft*, 580 F.3d 949, (9th Cir. 2009); *Smith v. Duffney*, ___ F.3d ___, 2009 WL 2357872 (7th Cir. Aug. 3, 2009).
32. *Hutchinson v. Metropolitan Gov't of Nashville and Davidson Co.*, ___ F.Supp.2d ___, 2010 WL 565156 (M.D.Tenn. Feb. 5, 2010).
33. See also *Padilla v. Yoo*, ___ F.3d ___, 2009 WL 1651273 (N.D. Cal 2009) (arguing limited discovery to weed out meritless claims is a good practice);
34. *Id.* at *4.
35. See *Iqbal*, 129 S.Ct. at 1954.
36. *Duncan v. State*, 284 Mich.App. 246 (2009) *lv granted*, 775 N.W.2d 745 (2009).
37. *Duncan*, 284 Mich.App. at 373 (Whitbeck, dissenting).
38. *Id.* at 374 (Whitbeck, dissenting).
39. *Id.* at 326, n. 24.
40. See FRCP 7, 8.

MAKING THE COMPLICATED SIMPLE: CHRISTOPHER RITTER'S POWERFUL DELIBERATIONS

by: *David C. Sarnacki**

*Making the simple complicated is commonplace;
making the complicated simple, awesomely simple,
that's creativity*

– Charles Mingus

You might remember trial lawyer/professor/trial consultant Christopher Ritter. He's the author of another best-selling ABA book, *CREATING WINNING TRIAL STRATEGIES AND GRAPHICS*. That manual for persuasive presentations and exhibits helped attorneys make complex facts easier to understand and, in turn, made attorneys more persuasive. Here, in *POWERFUL DELIBERATIONS*, Ritter continues his work in the area of persuasion at trial, focusing on how your client's version of the facts can become "the truth" as selected by the trier-of-fact.

Ritter combines psychology and trial advocacy into a useable guide for building the persuasive case. He walks us through the concepts and the steps for implementing those concepts in our case preparations. All along, he presents charts and graphics to aid our understanding and promote the use of such tools in our presentations.

While Ritter's discussions center on jurors, his case preparation lessons are equally applicable to bench trials. For example, Ritter explains five different paths that can be taken to arrive at the same verdict: emotion, checklist, science, fairness and common sense. He shows how we need to relate something new to what is already known by using the "toeholds" of analogies, stories and visual devices. Ritter explains the process of mental mining and the benefits of working from the inside-out (i.e., from the core of the case to the underlying structure for that core). His lessons enhance

the ability of a neutral fact finder to become an advocate for your client, seeing the case from your client's perspective and carrying that perspective to verdict. That is the point of all your efforts and the goal for your client's outcome.

Ritter states one of his basic themes in his preface: identify your base and treat them right. "Your case will undoubtedly benefit—and you will be better able to treat your base right—if you understand what the jurors need and the way things work during deliberations in the jury room." *He is not promoting pandering. He is suggesting targeted efforts to hit what really matters from a variety of different positions.*

POWERFUL DELIBERATIONS shows us how the trier-of-fact uses both resources and processing or mechanics. The resources begin with the personal schema of attitudes, values and experiences living within the trier-of-fact and flow to the "Four Inputs" crafted by the attorney: the factual strand (case theory combining facts, law, moral authority and explanation of motives), the persuasive tools (making facts real and understandable), the operating instructions (defining what is legally important and how to process the evidence) and the arguments (synthesizing the facts and making sense of the story).

The trier-of-fact's processing combines portions of the competing trial stories with the personal schema. Since we each begin in different places (i.e., with different schemas), there can be different paths to the same result. Ritter explains how jurors determine the "ultimate reality," from the formation of coalitions within a jury to the influence of active jurors and to the eventual dominance of one coalition.

* *David C. Sarnacki practices family law, mediation and collaborative divorce in Grand Rapids, Michigan. He is a past Chairperson of three State Bar Sections: Family Law, Litigation and Law Practice Management Section. He is listed in Best Lawyers in America.*

As trial attorneys, we need to provide tools of persuasion to the trier-of-fact, and a variety of tools is much more effective than just one. Ritter wants you to find the right tools, some of which provide guidance on and connection to core values and others which educate on core details of the case. He advocates using multiple tools, instructing us "to convey a *single message* in a variety of ways, using an *array* of Persuasion Tools." Regardless of the tool, his touchstones are: using common language, connecting to familiar concepts, being memorable, and creating a buzz.

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THE MICHIGAN SUPREME COURT'S NEW DISQUALIFICATION RULE: SMOOTH SAILING ON THE WINDS OF "TRANSPARENCY" AND "PROGRESS" OR "UNCONSTITUTIONALITY MAELSTROM" AHEAD?

by: *David L. Moffitt**

On November 25, 2009, the Michigan Supreme Court, for the first time since the inception of statehood, adopted its arguably first¹ written rule specifying procedures for the disqualification of its own Justices, in the form of amendments to MCR 2.003, that formerly appeared to apply by its terms to all jurists except Justices. The already deep divisions in the Court particularly evident in the past year were dramatically intensified, with the majority claiming progress and transparency in the adoption of the amendments, and the minority side of the 4-3 vote darkly branding the initiative as a sudden, unexplained play for advantage unconstitutionally threatening the Court's traditional operation and ultimately, perhaps, its very case-by-case decisional membership.

This article reviews significant positions of the Justices on the amendments, discusses the only interpretive case handed down to date, evaluates the potential for further amendment, considers prospective interpretation by the sole undecided case seeking disqualification under the new provisions, and reviews the potential practical consequences of actual implementation of the amendments.

PRIOR PRACTICE

Michigan's high court generally adhered to an unwritten practice similar to that of the United States Supreme Court, where the challenged Justice alone made the decision whether recusal was appropriate, on a "actual bias" standard, with no review or vote

by other Justices regarding that unilateral decision permitted; the only review was to the United States Supreme Court. This procedure was stated by the minority to have been in effect for some 173 years. The existing court rule for disqualification did not expressly apply to Justices.

THE AMENDMENTS

The amendments, formally proposed and moved for adoption by Justice Hathaway, and supported by Justices Cavanagh, Weaver, and Chief Justice Kelly, were actually adopted November 5, 2009 "with immediate effect," but remained unavailable to the public in written order form until the day before Thanksgiving. Important provisions included that the rule would apply to the Justices themselves², allowed the disqualification of a Justice to be raised by another Justice³, established the "appearance of impropriety" as a ground for disqualification of any judge⁴, required publication by a challenged Justice of the reason for participation or not⁵, and, upon motion by a party, permitted decision by the full court of whether a challenged Justice should be recused.⁶

THE CONCURRING JUSTICES: "PROGRESS" AND "TRANSPARENCY"

Concurring, Justice Cavanagh asserted that there was no reasonable basis that a Justice accused of bias, regardless of the amount of evidence that he was actually biased, should be the only one who decides

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whether he should be disqualified, except “that we have always done it this way,” and stated the practice was indefensible to the public and “incongruous with reason.” Justice Weaver hailed the change as a “positive historical step forward toward achieving more transparency and fairness in the Michigan Supreme Court.”

Chief Justice Kelly found that the Supreme Court’s decision in *Caperton v. A.T. Massey Coal Company, Inc.*⁷ demonstrated that the decision of a Justice to recuse one’s self is inherently subjective, that the due process clause requires an objective decision, and that an independent inquiry into an individual Justice’s refusal to recuse that has now been written into the rule may be necessary to satisfy due process.

THE DISSENTING JUDGES: “CONSTITUTIONAL CRISIS”

Opposing votes to the amendments were cast by Justices Markman, Corrigan and Young. Justice Corrigan’s dissent characterized the changes as the most important issue she had ever worked on, inflicting a “lacerating wound to this institution,” “eviscerating fundamental freedoms,” that would “precipitate a constitutional crisis,” and invoked George Orwell’s ANIMAL FARM maxim “that all animals are equal, but some are more equal than others,” in declaring that “only the four Justices adopting these rules arrogate to themselves this new, ‘more equal’ dominion over their colleagues.”

Justice Corrigan observed that to the extent the impetus for amendments included the U.S. Supreme Court’s reversal in *Caperton* of a Pennsylvania Supreme Court Justice’s refusal to recuse himself despite massive campaign contributions received from a pending litigant, that decision changed only the standard for recusal, not the identity of the decision maker of the recusal decision.

Interpreting the amendments as potentially allowing “removal of a Justice” from office, she deemed them contrary to the state constitution, which authorizes removal only by impeachment⁸, state joint-legislative declaration by two-thirds vote on reasonable cause⁹, or by the Court itself upon recommendation by the Judicial Tenure Commission¹⁰, and contrary to the Federal Constitution, as detailed in Justice Young’s dissent.

Justice Young declared the amendments denied First Amendment constitutional protections to judicial campaign speech of Justices of the court itself, and advocated further amendments affording to challenged Justices the right to counsel, the right to file a brief, and the right to an evidentiary hearing on material issues. Although due process demands the right to challenge bias of those voting on another Justice’s recusal refusal, the new procedure in his view lacked any provision for such review. The results of a March 11, 2010 further administrative meeting on related agenda items, including Justice Young’s proposed amendments, were not available at publication. Informed sources suggest that these amendments were not adopted, but that a presently unspecified amendment to the time for filing¹¹ of recusal challenges proposed by a member of the prevailing side was adopted.

INTERPRETIVE CASE LAW: PELLEGRINO – POLITICAL SPEECH AS EVIDENCE OF BIAS OR THE APPEARANCE OF IMPROPRIETY

Two cases before the court in which recusal is sought may shape future interpretation of the amended rule, *Pellegrino v Ampco Systems*¹², a just-decided challenge by the Feiger law firm in a civil case to alleged bias on the part of Justices Markman, Young and Corrigan, referencing political speech as evidence of actual bias, and *People v Alexander Aceval*¹³, a criminal case, seeking recusal of Justice Hathaway on rehearing on an actual bias and appearance of impropriety standard in the context of alleged personal ties to the pending cause.

The *Pellegrino* recusal challenge was filed before the amendments were adopted and alleged that various statements made by Justices Young, Corrigan, and Markman in the course of political campaigns and public addresses demonstrated personal bias against the Feiger firm. Justices Young and Corrigan filed their responses November 18, 2009, after the “effective date” of the amendments but before the Order was available November 25, 2009. They asserted the applicability of the prior practice, disclaimed actual prejudice or bias, and declined to recuse themselves, seemingly avoiding full court review of their respective unilateral decisions.

Justice Markman’s decision not to disqualify himself, made after the amendments, required issuance of a

detailed statement in support. He noted that he had decided numerous decisions in the moving firms' favor since making the questioned remarks during the pendency of Mr. Feiger's 1990 gubernatorial campaign, and that he had ruled favorably in the past for causes for which he had little personal regard, and unfavorably for causes for which he had considerable personal regard.

His decision was subject, upon motion by the plaintiff, to a full court vote. In upholding his decision, Justices Kelly and Cavanagh noted the "staleness" of the remarks made over ten years ago, and Justices Weaver and Hathaway, concurring, held that the appearance of impropriety standard would not be retroactively applied to statements made by a Justice concerning a party or a party's attorney prior to the rule's amendment, but that the standard would be prospectively applied to statements made after the effective date of the amendments. No rehearing was sought.

PROSPECTIVE INTERPRETIVE CASE LAW: ACEVAL – JUDICIAL RELATIONSHIPS, BIAS AND THE APPEARANCE OF IMPROPRIETY

The grounds for recusal in the remaining unresolved disqualification motion before the court, *People v. Aceval*, are more complex. A first trial, now admitted by the trial judge, prosecutor and two principal police officers to have been perjured practically from beginning to end, ended in mistrial. It was retried, in violation of due process and double jeopardy safeguards, according to Defendant Aceval, in part upon the testimony for the prosecution by the officers and the involved judge attempting to explain and excuse their perjurious conduct in the first trial. Aceval pled soon after one of his retained attorneys was ejected from the case. The trial judge, prosecutor, and officers were subsequently criminally charged, not by the involved prosecutor's office, but three years later by the Michigan Attorney General regarding their perjury at the first trial. Confidential interviews were conducted by the Attorney Grievance Commission and the Attorney General of the involved judge, the police, and the involved prosecutor's top staff members.

The Michigan Supreme Court effectively denied Aceval's leave to appeal his conviction on a 3-3 vote, with Justice Corrigan recusing herself to be a potential witness in "a related case" Newspaper investigation elicited that the "related case" testimony was to be as

a character witness on behalf of all of the accused trial judges. Also denied was a defense motion to compel the production of the confidential interviews which Aceval alleged revealed the full extent of suppression of the scheme in the prosecutor's office, implicated the highest level of the prosecutor's staff, and proved the re-trial was similarly perjured and obstructed. Aceval sought rehearing of both application and motion, and moved to recuse Justice Hathaway from the rehearings, alleging that the interviews the court refused to order be disclosed included that of her ex-husband, the chief assistant in the involved prosecutor's office, who was stated in an Attorney General summary of the confidential interviews to have been, at some point, aware of the perjury, and that her vote to deny disclosure of the interviews was in reality a vote shielding her ex-husband's supervisory actions, and his colleagues, from further scrutiny in the case.

The motion to disqualify further alleged that Justice Hathaway was at the time a judge in the same circuit and division where the perjury trials took place, under considerable media coverage, and that she and other circuit judges there situated failed:

1. To report or question the misconduct;
2. To raise the impropriety of the involved judge, still uncharged, testifying in the re-trial, before a judge of their same circuit and division, as a prosecution witness regarding her purported justification for actively allowing and concealing from the defense the perjury in the first trial;
3. To raise the impropriety of that judge continuing to sit and hear cases in that circuit and division;
4. To raise the impropriety of the obvious conflict of interest of the involved prosecutors' offices in re-trying that case, once transcripts (made by the involved judge and prosecutor *in camera* regarding their operation of the perjury scheme) surfaced, in that same circuit and division, all demonstrative, the motion alleged, of actual and figuratively "incestuous" bias amounting to a "culture of judicial protectionism" in favor of both the involved, testifying judge and the involved prosecutor's office.

In the re-trial the retained attorney that had discovered the alleged perjury scheme was *sua sponte* ejected from the re-trial on the pretext that his "limited appearance" (for pretrial motions and interlocutory appeal, not trial)(specifically authorized by written

order of the involved judge prior to the first trial) were prohibited in that circuit and division by a prior, explicit Supreme Court directive. The motion to disqualify alleged that Justice Hathaway not only had personal knowledge of whether or not there existed any such directive to that circuit and division, which the Supreme Court's staff had acknowledged could not be located if it ever existed, but that actual bias stemming from personal involvement in that division and circuit caused misapplication of that knowledge in her denying appellate review of the ejection on Sixth Amendment denial of counsel grounds.

The ejection, moreover, took place on the very day that additional disclosures were demanded by counsel from the prosecutor of every person in the prosecutor's office who had known of the first trial perjury, of what "deal" had been approved for the testifying judge, and why she and the officers were not being criminally charged (before testifying, enhancing their credibility as prosecution re-trial witnesses) by that very prosecutor's office (on the basis of the self-incriminating testimony each would be offering in re-trial), a situation that could only have been pre-approved at the highest level, e.g. the chief assistant prosecutor, Justice Hathaway's ex-husband. If not demonstrative of actual bias, the motion continued, the appearance of impropriety was sufficient for Justice Hathaway's recusal from any rehearing of the application, particularly on that issue, and rehearing of the motion to disclose the ex-spouse's/chief assistant prosecutor's AGC and AG interviews.

The disqualification motion and rehearing were filed October 16, 2009, and a stay of proceedings was sought on the latter until the disqualification is decided. The Supplemental Affidavit in support of disqualification invites the challenged Justices to make "a bold and magnanimous gesture in the defense of the moral and ethical outer boundaries of the newly revised disqualification rule proposed by the Justice herself." No response from Justice Hathaway under the new procedure has yet been filed.

CONCLUSION

The newly granted power of a majority to disqualify one or more of their colleagues against their decision otherwise is simultaneously praised as the long-awaited reform needed to ensure that an actually biased Justice does not unilaterally thwart disqualification, and vilified as a tool to disenfranchise the voters' electoral choice and as the trigger of an impending constitutional crisis.

It is unclear whether a challenged Justice could effectively thwart a challenge by similarly challenging for recusal one or more of the remaining Justices, whether an actual disqualification of a sitting Justice would be appealed by the challenged Justice himself, and to whom, and whether such challenges and appeals of challenges could be accomplished in a time frame that did not bring the cases, or worse, the classes or categories of cases, to an impractically lengthy halt.

There is little doubt that the number of such challenges will increase, as appellate practitioners indulge the new opportunity to test progressively ingenious strategic disqualification tactics, and devise novel efforts to divide, pick, and choose between the Justices in development of a special issue-by-issue judicial constituency, based upon judicial philosophy, political sympathy, and vulnerability to ever-enlarging categories of potential "appearances of impropriety."

In applying the new language, the court let bygones be bygones for Justice Markman in *Pellegrino*, but appears to be ready to actively police future political speech under the largely undefined "impropriety" standard. Whether the stated promulgator of the amendments, Justice Hathaway, will find an equally benign reception from her newly incensed dissenting colleagues in defining the new standard in the more complicated personal factual scenario of *Aceval*, or whether the majority will sidestep the challenge on procedural grounds or a tersely unenlightening fiat, remains to be seen shortly.

Future rule changes with additional consequences may not be far off. Chief Justice Kelly stated at the November 5, 2009 meeting that the "question of when financial contributions to sitting Justices constitute the appearance of bias or the probability of bias such as to require disqualification" was "an important matter that has to be addressed." Justice Weaver has long insisted on her website that the Michigan Constitution permits the appointment of a temporary "replacement Justice" where another Justice is disqualified [14]. Just such a motion, to appoint a temporary Justice in the absence of the already disqualified Justice Corrigan in *Aceval*, is already pending, as is, consistent with the advent of "transparency" cited in support of the amendments, a motion in the same case seeking disclosure of the circumstances of her recusal to testify on behalf of the involved, accused judge.

The widely divergent views of the justices on the content, interpretation, and application of the amendments

portend difficult days ahead for a court likened by former Justice Thomas Giles Kavanagh to “seven people in a boat upon stormy seas;” wags have suggested the four horsemen of the sea, mutiny, shipwreck, piracy and maelstrom, should be figuratively considered part of the court’s future seascape. Perhaps added to the metaphor should be, like a crew’s shore-bound family anxiously gazing out to sea, that the practicing bar and public can only hope the competitive, high-stakes maneuvering in that beleaguered vessel does not cast overboard its precious cargo, their right to fair, unbiased, and final decision-making on the merits according to law.

ENDNOTES

1. *Johnson v. Henry Ford Hospital*, 477 Mich. 1098, 729 N.W.2d 515 (2007) (“MCR 2.003. . . has never been held applicable to disqualification of Justices.”); but see Weaver, J., concurring/dissenting opinion, “[I]n *Adair v. Michigan*, 474 Mich. 1027, 1043, 709 N.W.2d 567 (2006), Chief Justice Taylor and Justice Markman stated that “[p]ursuant to MCR 2.003(B)(6), we would each disqualify ourselves if our respective spouses were participating as lawyers in this case, or if any of the other requirements of this court rule were not satisfied.” Justice Young concurred fully in this legal analysis. *Id.* at 1053.”
2. MCR 2.003 (A).
3. MCR 2.003 (B).
4. MCR 2.003 (C)(1)(b)(ii)
5. MCR 2.003 (D)(3)(b).
6. *Id.*
7. *Caperton v. A.T. Massey Coal Co., Inc.* ___US___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009).
8. Mich Const 1963, art XI, § 7.
9. Mich Const art VI. § 25.
10. Mich Const art VI, § 30(2).
11. MCR 2.003 (D) (1).
12. Michigan Supreme Court No. 137111, Motion for Disqualification, decided January 28, 2010.
13. Michigan Supreme Court No. 138577, Motion for Disqualification and Rehearing, *etc.*, presently undecided.
14. See justiceweaver.com, Justice Weaver’s comments to “ADM File No. 2009-04 Proposals Regarding Procedure for Disqualification of Supreme Court Justices,” state:

“Art 6, § 23 is the constitutional authority that allows, but does not require, the Supreme Court, as it has done in the past and continues to do so today, to “authorize persons who have been elected and served as judges [i.e., current and retired trial judges, Court of Appeals judges, and Supreme Court Justices who have been elected and served as judges] to perform judicial duties for limited periods or specific assignments” in the trial courts and the Court of Appeals when illness, disqualification, recusal, or other temporary occurrence or need prevents judicial duties from being performed by trial or Court of Appeals judges.”

Former United States Supreme Court Justice Felix Frankfurter observed that “the highest example of judicial duty is to subordinate one’s personal will and one’s private views to the law.”

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