Thanks for Addressing Ethics and Civility

To the Editor:

I would like to compliment both Ron Keefe, immediate past president, and Janet Welch, SBM executive director, on their columns ("The Honest Lawyer" and "All That Glitters," respectively) appearing in the August 2008 issue of the *Michigan Bar Journal*. Each, in his and her respective fashion, addresses the two most critical issues facing the Bar today: ethics and civility. For many of the reasons pointed out by the two of them, the public perception of lawyers has sadly deteriorated over the course of the past decades.

No longer do young lawyers hope to attempt to model themselves after the tenacious but always courteous Perry Mason of yesteryear. Instead, they attempt to model themselves after the aggressive, abrasive, and rude attorneys appearing on today's television shows. Furthermore, perhaps because of the very examples depicted in current fiction, many attorneys no longer understand the importance of being ethical in all that they do. I am convinced that lawyers can serve their clients, and judges can serve the public, without demeaning the profession.

Thanks again to Janet and Ron for keeping us aware.

Hon. W. Wallace Kent, Jr.
Caro

Editorial Oversights Should Be Corrected

To the Editor:

The *Michigan Bar Journal* enjoys a well-deserved reputation for accurate and objective articles that keep pace with the law. Unfortunately, that reputation was placed at risk when "A New Era of Video Competition in Michigan" was printed in the August 2008 edition.

The "New Era" article suggests that Michigan's Uniform Video Services Local Franchise Act is a success. In support of that view, the "New Era" article touts the investment that AT&T promised when the Uniform Act was passed, and the authors even quote AT&T Michigan's president on the issue of investments to be made and jobs to be created. Alarmingly absent from the article, however, is any mention that the "New Era" authors represent AT&T. That relationship casts the authors as advocates and not as objective observers. Certainly, advocates' voices deserve to be heard. But readers of the *Bar Journal* also deserve to know when authors may be compromised by an understandable desire to forward a client's view. Here, AT&T's interest in promoting the Uniform Act can be gathered from the "New Era" article itself, so the authors' relationship with AT&T should have been plainly disclosed. Only then can your readers determine whether an advocacy piece is posing as an objective analysis.

The need to carefully distinguish between advocates and objective observers is revealed by the article's final sentence. According to the "New Era" authors, local governments' pre-passage concerns with the Uniform Act "have not been realized." In support, the authors cite a cover story that I recently wrote for the *Michigan Township News*. That article, entitled "Still Broken: Michigan's Video Franchising Law 18 Months Later," details problems with the Uniform Act that are now beginning to surface. Among other concerns, it appears that video competition will never develop in the vast majority of Michigan communities; that deregulation of cable's near-monopoly is now leading to higher prices and lower levels of customer satisfaction; and that there will never be an objective way to measure the impact of the Uniform Act because the law does not require AT&T to certify any build-out, investment, or job creation activity with any government agency. I can assure you that my "Still Broken" article no more stands for the direct or indirect proposition cited in the "New Era" piece than the Old Testament can be read to support the theory of evolution. It is unfortunate that the misdirected citation eluded the *Bar Journal*'s editorial scrutiny. Nevertheless, your readers can confirm the actual content of my article and gather a more complete understanding of the issues surrounding the Uniform Act by visiting http://www.michigantownships.org/downloads/cover_story_1.pdf.

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Disgracefully Wrong

To the Editor:

The highly skewed view of Michigan's Uniform Video Services Local Franchise Act, 2006 PA 480, delivered by John M. Dempsey and Michael A. Holmes ("A New Era of Video Competition in Michigan") in the August 2008 issue of the *Michigan Bar Journal* deserves a balancing response from the local government point of view.

The Uniform Act trampled on an important provision of the State Constitution, article 7, section 29, added 100 years ago in 1908 and continued ever since that gave local government broad, discretionary authority over public utilities wanting to do business in the community:

> No…public utility shall have the right… to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

This had always been interpreted as giving local government full authority to decide if it did or did not want a particular public utility service provided in the community—electric, gas, or whatever. That decision was a local prerogative closely guarded by court decisions since 1908, beginning with street railways and years of litigation mounted by the City of Detroit in the state and federal courts into the 1920s.

> State Constitution, article 7, section 29… had always been interpreted as giving local government full authority to decide if it did or did not want a particular public utility service provided in the community—electric, gas, or whatever.

However, this provision of the State Constitution has been under relentless attack in the state legislature by public utilities since the late 1970s beginning with cable television companies, then natural gas companies, electric companies, and, most recently, telecommunications companies under the political guise of Reagan-style market and infrastructure deregulation of monopoly public utilities promoting competitive entry by every Tom, Dick, and Enron who could put together a few investors with a few customers.

True, the technology of delivering competitive telecommunication service has changed dramatically since the late 1970s when satellite-delivered television programming propelled Wall Street into backing the mom and pop cable television operators of New York City, Pennsylvania, and other broadcast-hampered (mostly mountainous) areas into offering service everywhere else. What these new companies—Comcast, Continental, TCI, and many others—got for needed entry into the public right-of-way and consent to transact local business was a municipal franchise—a completely discretionary decision framed by local negotiation and consideration. Nonetheless, the municipal franchise was a constitutional privilege granted by local government that might be denied without legal recourse to judicial review.

In adopting the Uniform Act, the state legislature seized on "reasonable control" language of the State Constitution in a power grab under dubious legal theories developed by Governor Engler. Explaining them would demand too much space here. Michigan's Engler-appointed Supreme Court had dutifully interpreted "reasonable control" wrongly from the point of view of the state legislature. The "New Era" article highlights the Metropolitan Extension Telecommunications Rights-Of-Way Oversight Act (METRO Act) of 2002, which sidesteps the State Constitution by hornswaggling local government into a questionable statewide intergovernmental agreement.

What the "New Era" authors fail to explain is the Uniform Act's constitutional deprivations juxtaposed to the legal and competitive position and the role of AT&T in its passage. AT&T's predecessor and holder of a statewide, perpetual franchise to provide telephone service is the Michigan Bell Telephone Company. The perpetual franchise it obtained for the use of the public rights-of-way and permission to transact local business statewide preceded voter approval of the 1908 State Constitution. Obviously, that franchise did not extend to transacting local business as a provider of video service.

Meanwhile, deregulation of its possible competitors at the state and federal level and the convergence of technology—fiber optics—was allowing cable television companies to add telecommunications services—voice and data—to their marketbasket of services. The reverse did not apply. So AT&T spent millions lobbying the state legislature toward adoption of the Uniform Act. It imposed by legislative fiat an unconstitutional straightjacket on local government's discretionary authority over the granting of municipal franchises—a tremendous and probably irrevocable loss of local control municipalities cannot afford to contest. And, what's worse, my neighbors and I cannot get AT&T competitive service where we live in southeastern Michigan, and probably never will. AT&T is cherry picking where it will provide service, and secretly so. None of the 160 communities in which AT&T says it is providing service can tell you if any particular home can or cannot get service. It is a travesty of law and politics and local government control. Of Michigan's 2,000 communities, 1,730 remain without any hope of a telecommunications and cable television competitor and won't get one under the Uniform Act. I think the "New Era" article is just disgracefully wrong.

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