MIR-ed in Medicare

To the Editor:

Thank you for including Mr. Gullen's very informative article, "Get Ready for MIR (No More Avoiding Medicare)," in the December 2009 *Journal*. Not only was it informative, it was also understandable, unlike so much about Medicare.

However, I read it twice, and may have missed two facts of importance to me in applying the information to my practice:

(1) Where in time does the looking back to "old cases" end? Has the six-year statute of limitations on Medicare's demands from the date of notice to Medicare also been changed by this legislation?

(2) Now that almost every conceivable entity of interest is within the ambit of those required to report to Medicare, will Medicare reciprocate by (a) *timely* providing notice of the amount of its claimed recovery AND (b) entering the litigation as other claimants are required to do in order to work within the procedure to resolve its claims?

If the answers to these questions are not part of MIR, then it needs to go back to the drawing board. Between the lines of the legislation, one could infer a lurking suspicion that lawyers representing claimants try to circumvent Medicare's statutory recovery. While there may be a few who do, I suggest that the few who fail to communicate with Medicare often do so out of ignorance or out of the confused notion they owe a duty to their client first and out of frustration rather than shady intent.

Most plaintiffs' lawyers have for years struggled to consider Medicare's interest during litigation with absolutely no response, assistance, or participation from Medicare other than refusal to respond to court orders to provide information or attend pretrial conferences and rude peremptory form letters repeating that the Centers of Medicare and Medicare Services (CMS) is collecting data—for years—and will not divulge a final number until the lawyer notifies CMS of the final settlement amount. No litigants can reach a "final settlement amount" without knowing the size of Medicare's claims. The overwhelming majority of trial lawyers representing claimants wants to include Medicare's lien in settlement consideration, but when CMS will not even communicate, the best we have been able to do is guess or try an end run by contacting the providers' Medicare billing clerks directly.

In my 36 years of experience, Medicare's "final payment summary" has in *every* instance been incorrect—not because of evil intent, but because the overworked clerks compiling the figures have no way to determine which payments have been made for conditions related to the litigation and which have not. The present hugely expensive paperwork could be reduced by (1) bringing CMS to the litigation forum as all other providers must do and (2) creating a filter within Medicare to separate case-related expenses from unrelated expenses, perhaps an office of legal counsel within Medicare Administration rather than the U.S. Attorney's office to handle directly Medicare's responsibilities to collect its statutory recovery fairly.

Thank you, Mr. Gullen, for giving us the MIR information. Will MIR further punish claimants, or can it be a first step toward moving Medicare forward to working with us to resolve claims rather than continuing to be a stubborn drag on the entire system?

Linda Miller Atkinson
Channing

Law Applies Equally, Without Regard to Cultural Ethnicity

To the Editor:

While I recognize that cultural diversity is all the rage these days, I was disappointed and confused by Cynthia M. Ward and Nelson P. Miller of the Thomas M. Cooley Law School when they advocated that law schools must train "culturally competent lawyers" in your January 2010 issue ("The Role of Law Schools in Shaping Culturally Competent Lawyers").

Let me get this straight: Law schools are supposed to teach the law of diverse cultures instead of the existing American jurisprudence applying to all persons in this country. The bar exams of the future will pose a set of facts and ask if a contract was formed. The next question will be, "What is your response if plaintiff was of ethnicity A, B, C while defendant was of ethnicity X, Y, Z?" I think this is what the authors are actually proposing—that we have a separate set of rules for various ethnicities instead of the existing set of rules we were all taught to use in the courtroom.

It seems that a member of one ethnic group would get a remedy in a certain case because he or she is of that ethnicity, while a member of another ethnic group would not get that remedy. This is obviously insane and would quickly lead to the rapid deterioration of everything that we rely on and take for granted, like the rule of law, property rights, criminal sanctions, basic constitutional freedoms, and the list goes on and on.

The reason America is America is because the law is intended to apply equally to all persons without regard to their particular cultural ethnicity. In this country, a contract is a contract for all ethnic groups. Either you have one or you don't, and we simply cannot delve into a party's cultural ethnicity to evaluate the elements of a contract.

In my humble opinion, I don't think Justice Thomas M. Cooley, former dean of the University of Michigan whose good name has been borrowed by this law school, would agree with the authors that there is a different set of rules for different "cultures." I recommend that the professors review Cooley's treatise "The General Principles of Constitutional Law in the United States of America," particularly the parts that discuss equal protection under the law.

Philip Vestevich
Bloomfield Hills

Response from the Authors

Our good reader has completely missed our point. It is the clients who are different, not the laws. Of course we believe in equal protection and equal rights under the rule of the same laws. Cultural competence has nothing to do with different sets of law or even different constructions of law for different individuals. It has instead to do with the ability of lawyers to understand and serve their (often quite different) clients under those same laws. We thank our reader for this opportunity to reiterate our belief in the value of cultural competence among lawyers. We recognize and celebrate his difference, as would our common inspiration Justice Cooley, even as we most gently correct him, as we believe Justice Cooley would, too.

Cynthia M. Ward, Lansing
Nelson P. Miller, Grand Rapids

Doubly Disappointing

To the Editor:

The *Bar Journal* article entitled "The Role of Law Schools in Shaping Culturally Competent Lawyers" (January 2010) disappointed in that it ignored the great challenge facing law schools today: ensuring the cultural competence of future lawyers through economic diversity among law students. Tuition at Michigan law schools has tripled from what it was 20 years ago while family incomes have stagnated. Will today's law students with their comparatively privileged economic backgrounds be "culturally competent" to protect the public interest when they become lawmakers, judges, and lawyers tomorrow?

The other disappointment was that the article was something of an advertisement for the Thomas M. Cooley Law School. The authors, themselves Cooley deans, boasted of the number of degrees that Cooley awards to ethnic minorities without also disclosing that it is now (I believe) the largest law school in the country and, therefore, the number of degrees awarded to minorities may not actually reflect any increased ethnic diversity.

Del A. Szura
Grosse Pointe Farms

No Justification for Printing Pejorative Term

To the Editor:

I am writing to express my dismay of the review of the book *Calvin,* published in the January issue of the *Michigan Bar Journal.* I was enjoying reading the review when I was abruptly shocked by the use of a racially derogatory epithet which has for all practical purposes been relegated to non-use by all reputable publications. This word is one of the most demeaning, degrading, and dehumanizing words in the English language. It is a pejorative term that not only insults the reader, but also self-insults and discredits the user.

In recent years there has been a massive and highly publicized effort to voluntarily ban this word from common usage. Most news and literary organizations have done so, and even young, immature hip-hop artists have been known to reduce their exploitive use of the word. I take exception to reading this word in a publication of an organization for which I am required to pay mandatory dues in order to practice my profession, and I am requesting that you never publish it again in any context.

I have spoken to the author of the review and we agree to disagree. He was quite open to criticism and debate and suggested that I write this missive. Even though the book may be a period piece that evokes the evil of the times, I do not believe this justifies use of that word in your publication. Those who wish to read the novel after the review are free to do so.

There are a number of derogatory words that have been used to demean probably every religion, minority, ethnic origin, gender, and sexual preference in America. And you never see those words in print. I urge you to add the word used in the *Calvin* review to that list.

Hon. William H. Crawford II
Flint

Response from the Author

Actually, we did not agree to disagree. Despite the clear intention of both the book review and *Calvin*'s author to expose and excoriate racism, on reflection, I agreed with

Mr. Crawford that the *Michigan Bar Journal* should refrain from spelling out the word in full if it were ever necessary in future to refer to it, and the State Bar Publications and Website Advisory Committee since has adopted that as our editorial policy. Though the review plainly states that *Calvin* explores the theme "of racism (and the unbridled brutality that it spawns)," and the example of racist brutality quoted of which Mr. Crawford complains was not, in that context, gratuitous, it is nevertheless true that the same point could have been made without spelling out the word in full. Thus, Mr. Crawford and I actually agreed to agree, and I thank Mr. Crawford for voicing his concern and prompting us to address this issue. We have altered the online version of the review, in keeping with this new policy.

Frederick Baker, Jr.
Lansing

Setting the Record Straight

To the Editor:

I am responding to an article published in the February 2010 edition of the *Michigan Bar Journal* entitled "Indian Gaming and Tribal Self-Determination: Reconsidering the 1993 Tribal-State Gaming Compacts." In this article, the author took issue with several aspects of my November 2009 article, "Michigan Tribal Casino Compacts: Rethinking the 2 Percent Solution to Impacts on Local Government," in which I argued that local units of government in nearby counties may incur casino-related effects that deserve consideration for casino revenue sharing when the 1993 tribal casino compacts are renegotiated.

The author did issue a disclaimer at the end of his article that he spoke only for himself and not the section of the bar he chairs nor any tribal government. Nonetheless, he made several misleading assertions and conclusions about the primary focus of my article, and I wish to set the record straight in those areas.

First, the author states that I am advocating that casino funds in adjacent counties be given to private businesses and parties. Nowhere in my article is that stated. I explained that examining the impact on certain types of businesses located near a casino (which the casino literature suggests are casino sensitive) may be indicative that adjacent, nearby counties are being affected by tribal casinos. But the premise of my article was reimbursement to the local units of government in those counties for these casino-related impacts, not to private parties.

Secondly, the author dismisses a long-term, state-funded study I directed on the social and economic impact of tribal casinos on Michigan. He suggests it is flawed because any negative impacts are due in part to the poor state of Michigan's economy. Had he read the title of the study—"The New Buffalo: A Comparative Examination of Tribal Casino Gaming in Michigan 1993–2003"—he would have discovered that the period covered in the study occurred primarily in the relatively more prosperous 1990s, and the last year of study was five years before the financial collapse to which he alludes.

Finally, he argues that the state of Michigan has no "meaningful concessions" to offer the tribes to encourage compact renegotiation in 2013 now that casino market exclusivity has been lost by the opening of the Detroit casinos. However, he seems to overlook the fact that many tribes are also concerned about the expansion of competing state-sponsored gaming activities, state litigation over original reservation boundaries and tribal jurisdiction in these areas, and expansion of tribal casinos to off-reservation lands, to mention just a few issues. Contrary to the author's assertion, it is clear the state does indeed have some "meaningful" issues of tribal concern over which to negotiate in the compact renegotiation process, not to mention guarantees of regional exclusivity accepted by many tribes as valuable in their post-1993 tribal casino compacts.

The author raises several other points, including reliance on a tattered consent decree, that deserve discussion. However, my point is simple: the compacts in 1993 were drafted in relative ignorance of the impact that tribal casinos would have on the state's economy. After more than 15 years of experience, shouldn't we use this information to better inform the compact renegotiation process?

James P. Hill
Mount Pleasant

Unvarnished Truth About Unpublished Opinions

To the Editor:

Your Westlaw research finds a Michigan Court of Appeals case right on point in your favor. Slam dunk! Case closed. Not quite. There, in the case heading, you see "UNPUBLISHED." Under MCR 7.285, the "opinion is not precedentially binding under the rule of *stare decisis*." In other words, the trial court is free to ignore it. But under the standards of MCR 7.285, there must be earlier cases on the same point that are precedentially binding. Good luck finding them. You are stuck with what has been designated as a second-class opinion.

When the concept of unpublished cases was introduced by court rule in 1985, there was a legitimate concern that case books would be overwhelmed with routine cases that were controlled by their particular facts. Initially, you had to go to a Court of Appeals office and go through a pile of unindexed copies to even find an unpublished decision. Now anyone with a computer can easily find all of the court's decisions. In reality, all are published electronically.

Saving paper is a laudable goal, but case books are now quaint items whose main function is a backdrop for lawyer photographs. It is hard to give them away. A lawyer who relies solely on paper documents for research risks being accused of malpractice or ethics violations.

Now that all the opinions are fully available, is there any reason to treat some as second-class decisions that can be ignored by trial courts? Do the judges who sign "unpublished" decisions think they represent bad law? That is not one of the standards for designating a decision as unpublished.

The time has come to stop designating some opinions as not precedentially binding. Let the litigants and the trial judges determine whether an appellate decision represents new law. At a minimum, MCR 7.285 should be amended to make all appellate decisions binding on lower courts. Better yet would be elimination of the whole concept of unpublished decisions.

R. Bruce Laidlaw
Ann Arbor