

Diversity, Civility, and Dialogue



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If there is a single unifying principle behind American law and politics, it's this: listening to opposing views makes us wiser.

The art of listening is at the heart of our daily work as lawyers and judges. We work up cases by seeking colleagues' advice and testing ideas—maybe over a cup of coffee (or a steaming double latte mocha with two sugars.) We emphasize diversity when we recruit new attorneys to our law firms because we want people who bring different experiences and a different view.

Judges are ethically obligated to make their decisions only after hearing from both sides, ensuring that their decision-making benefits from the back-and-forth of advocacy. Appellate judges engage in dialogue with other judges before and after hearing arguments. Written appellate opinions are accompanied by concurrences and dissents.

In all these ways, our work as attorneys embodies the belief that vetting ideas among those whose views may differ from our own helps expose weaknesses and promote sound thinking. Dialogue makes us better.

An attorney cannot develop a successful practice without entertaining others' ideas. It is the reason we review bar-sponsored listservs, attend discussions at meetings and

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professional organizations, and consult professional journals on a regular basis. My point: you cannot be effective as a lawyer if you exist in an echo chamber of your own thoughts; debate is the laboratory of law.

Democracy, too, depends on debate. Candidates for political office compete in the marketplace of ideas, vying with others within their political parties and beyond to convince voters that their positions are the most sound. Once elected, the time-honored tradition is that they debate issues on the legislative floor or submit to questioning from skeptical journalists.

There are sharp elbows in politics, but they are thrown with a purpose. At their best, the political jabs expose the weaknesses in candidates' ideas and highlight the propositions that, in the public's judgment, have the most promise. It isn't a perfect system. But the rough-and-tumble of debate in the political arena has mostly served our nation for more than two centuries.

Discussion of opposing views is so essential to our legal and political systems that it is not an exaggeration to say it is central to what we mean by the "rule of law." A fair and just government—indeed, a legitimate government—must foster the airing of different views. When a commitment to real dialogue and open debate breaks down, strange things can happen. Michigan has just witnessed such an event.

On October 24, 2013, state senators introduced Senate Bill 652. This bill transferred all actions against the state from the Lansing-based Court of Claims to a new panel composed of four judges from the Michigan Court of Appeals. Reasonable minds can differ about whether it was a good idea to have five or six judges—from one county representing about 3 percent of the state population—deciding all cases that

are filed against the state of Michigan. But regardless of your view of the wisdom of the fundamental change the legislation makes, you should be troubled by the way it became law.

The bill came up so quickly that even lobbyists were caught unaware. It was introduced in the Senate on October 24, and reported out of committee and passed by the Senate six days later. The Senate committee heard testimony from only two individuals—Bob LaBrant, senior counsel for the Sterling Corporation supporting the bill,¹ and Bruce Timmons,² recently retired legislative counsel who worked for legislative Republicans for several decades, opposing it. Attorney General Bill Schuette filed a card in support of the bill, but did not testify.

The state constitution requires that a bill be in the possession of each house for at least five days before the House can pass it. When the House received the bill from the Senate on the sixth day after its introduction, word about the bill had begun to spread throughout the legal community. In the House, the bill was referred to the rarely used Government Operations Committee rather than the Judiciary Committee that typically considers bills affecting the court system. The committee heard testimony from the SBM Appellate Practice Section, the Michigan Association of Justice, the Oakland County Bar Association, individual attorneys, and judges of the 30th Circuit Court (from whose court the bill transferred Court of Claims jurisdiction), and accepted written statements from the SBM Negligence Law and Appellate Practice sections. The thrust of most of the testimony was to ask that the process be slowed so a more complete analysis of the bill could be provided to answer many of the questions surrounding the legislation.

The House Government Operations Committee was asked to consider and listen to ways the bill could accomplish what was apparently the primary purpose of the legislation—moving cases from the Ingham County bench—without burdening the Court of Appeals or affecting rights of litigants. But the bill passed without any changes.

The State Bar did not have an opportunity to weigh in on the bill. Michigan Supreme Court Administrative Order 2004-01 prohibits the Bar from considering pending legislation for at least 14 days after posting notice on its website. The enactment of the bill, from proposal to signing by the Governor, was so swift—13 days—that we did not have a chance to post the notice and wait the requisite 14 days before it became law.

In enacting what is now Public Act 164 in such summary fashion, the legislature ignited needless innuendo and cynicism and, more importantly, deprived itself of an essential ingredient to an optimal result—a meaningful airing of opposing viewpoints and constructive input.

Obvious and important questions were left unanswered as the bill sped toward enactment. At the time the Senate and House “considered” and then passed Public Act 164, they did not know—and, in some cases, still do not know—the following:

- The exact scope of the jurisdictional expansion of the new Court of Claims
- The number of cases immediately transferred to the Court of Claims
- The constitutional implications of the bill; specifically, the bill’s impact on the right to jury trial³
- How jury trials in the Court of Claims would be handled (jury boxes, court reporters, etc.)
- The due process implications of assigning appellate review to judges in the same court
- How appeals from the Court of Claims would be handled
- Whether the Court of Claims judges would also be in regular Court of Appeals panel rotation

- An assessment of the relative convenience for parties throughout the state
- How costs of the new Court of Claims system would be assigned
- How joinder works if the Court of Claims cases are/were assigned to a special master
- The bill’s fiscal impact
- The role of special master and who appoints the special master, and who is responsible for assessment and assignment of costs relating to the special master
- How to address the practical and conceptual difficulties of mixing an appellate court with the role of a trial court of record, including (1) how hearing panels will be selected to hear and decide appeals from decisions of fellow Court of Appeals judges and (2) how to accommodate jury trials
- How to handle the joinder of the Court of Claims with related circuit court actions when one or more of the parties has a right to jury trial

Had these questions been asked and answered and opposing viewpoints fully aired as the bill moved through the legislative process, surely we would have arrived at a bill that accomplished what the majority wanted—moving cases away from a single circuit court bench—but in a way that did not burden the Court of Appeals, stress the court system, and cause widespread confusion and disruption throughout the legal community.

In 1998, Portuguese writer Jose Saramago won the Nobel Prize for his novel *Blindness*.⁴ It’s a jarring work built on a simple premise: an epidemic of blindness sweeps through a town. The afflicted are locked away in an asylum where, existing in the invisibility of universal blindness, they inflict horrible acts on each other.

The small-scale violence of *Blindness* invokes the still-unimaginable violence of the twentieth century, suggesting that the root of both is an inability to perceive others’ shared humanity. Saramago’s allegory comes full circle toward the novel’s end,

when a doctor hints that the epidemic was one of the heart rather than the eyes or the head: “I don’t think we did go blind, I think we are blind, Blind but seeing, Blind people who can see, but do not see.”⁵

The same epidemic is spreading throughout our political system—in Washington and in state legislatures, and in civic discourse everywhere. But instead of robbing us of our sight, it robs us of hearing—or worse, *wanting* to hear.

Saramago’s painfully apt allegory for the twentieth century sometimes seems to fit twenty-first century politics, with only a small alteration: We are deaf. Deaf people who can hear, but do not hear.

Just as scorched-earth litigation strategies are inimical to long-term success and good law, the view that ideological purity on either side of the aisle is more important than open inquiry and meaningful dialogue is a danger to good public policy. It rejects the wisdom that is embodied in our legal and political traditions.

I’ve practiced long enough to know that nothing lasts forever. Perhaps the downside of steamroller politics will soon become obvious enough to prompt national and state lawmakers and Washington to stop, reflect, and return to first principles. And to listen.

In the meantime, we must insist of our politicians and in our own lives and practices that diversity, civility, and dialogue *matter*. We can lead by example and cheer on the lawmakers of both parties who recognize that healthy laws are the product of healthy debate. ■

ENDNOTES

1. His testimony before the Senate committee is available at: <<http://www.senate.michigan.gov/committees/Default.aspx?commid=62>> (accessed December 19, 2013).
2. His testimony before the House committee is available at: <<http://house.michigan.gov/MHRPublic/CommitteeInfo.aspx?comkey=229>> (accessed December 19, 2013).
3. This was an issue specifically flagged by the governor before he signed the bill as needing quick resolution. The House has now passed HB 5156 to preserve rights to a jury trial.
4. Saramago, *Blindness* (New York: Harvest Books, 1999).
5. *Id.* at 326.