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FEDERAL BAR ASSOCIATION
Eastern District of Michigan Chapter

FBAnewsletter

Federal Bar Association - Eastern District of Michigan Chapter - 63 years of service to our Federal Bench and Bar

41st Annual Dinner Marks the Beginning of a New Term

By Joshua Hoebeke, Warner Norcross + Judd LLP

On June 7, 2023, the Chapter, held its 41st Annual Dinner in Detroit, Michigan. This event featured the presentation of the 2023 Julian Abele Cook – Bernard A. Friedman Civility Award (the "Cook-Friedman Civility Award"), the election of Chapter officers, and a thoughtful discussion on the importance of civility in the practice of law.

Assistant U.S. Attorney Jennifer L. Newby, the Chapter's immediate past-President, delivered the event's opening remarks—her final remarks as Chapter President of the 2022-2023 term. In these remarks, Ms. Newby discussed the term's "Moving Forward" theme and highlighted several of the chapter's accomplishments over the past year in furtherance of that theme.

Following her remarks, Chief Judge Sean F. Cox introduced and presented the 2023 Cook-Friedman Civility Award to Attorney Dennis M. Barnes, of Dennis M. Barnes PLLC. The Cook-Friedman Civility Award is an annual award presented by the Chapter recognizing a civil practitioner as an outstanding example of professional excellence and civility. When presenting this year's award, Chief Judge Cox emphasized Mr. Barnes' contributions to the legal profession, describing Mr. Barnes as the "epitome of all the best in our profession."

Upon receipt of the 2023 Cook-Friedman Civility Award, Mr. Barnes delivered a thoughtful speech regarding the role of lawyers as leaders who should strive to inspire others to approach and resolve conflict with civility. In this speech, Mr. Barnes acknowledged the increasing social and political polarization of

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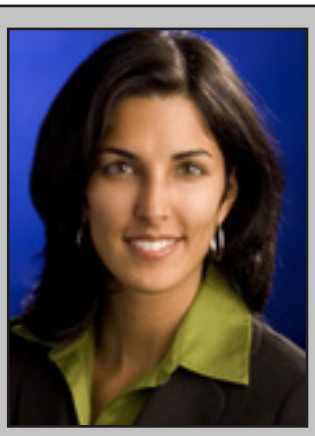

President's Column

Jennifer Newby

As I thought about writing my farewell article, I was struck with not only how fast the year went by, but with how much I enjoyed it. As a member of the FBA, I always appreciated the luncheons and the informative panel presentations. However, as an officer and particularly as the president for the last year, I gained a new appreciation for our organization and the camaraderie we have all helped to build.

Of course, the vitality of our organization depends on the robust participation of local federal practitioners and the federal bench. The year started with an excellent display of both when the FBA hosted a trial practice program. The program brought together stalwart federal practitioners, newer practitioners (and some not so new), and members of the federal bench. Not only did the event further a goal of our organization to improve the quality of federal practice in our district, but it also exposed new people to our community of federal lawyers.

We also reached new practitioners in our New Lawyer Seminar. Like the trial program, we leaned on friends of the organization to introduce new lawyers to federal practice. As important, we introduced them to the FBA and the quality of our programming.

Our perennial luncheon calendar was filled with engaging speakers. The McCree luncheon included moving remarks from Detroit Red Wings announcer Ken Daniels, who spoke openly about his son's battle with opioid addiction and what the legal community can do to combat the problem. Local news personality Roop Raj spoke at the Gilman lunch, sharing skills to effectively tell a story. We honored Julie Teicher, Amanda Alexander, Craig Weier, and Denny Barnes for their exemplary careers.

If this article seems like just a recap, I suppose it is of sorts. But I write it not just to list the wonderful events and honors we bestowed this year, but to remind you what an impressive organization you built and help to maintain.

None of this would be possible without our

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President's Column (from page 1)

members. We rely on you not just for membership and sponsorships, but also for your wisdom, your friendship, and your engagement. I hope that our organization has served you well over the last year. As the organization continues under the leadership of our new president, George Donnini, and the officers who will follow, I am confident that we will continue to nurture and grow our amazing community of federal practitioners in the Eastern District of Michigan.

Annual Dinner *(from page 1)*

recent years and noted that lawyers are uniquely positioned to lead by example to improve civil discourse. Mr. Barnes explained that, by using the tools of learning, dialogue, and persuasion to resolve conflict, lawyers can serve as an example to, or otherwise inspire, the general public to do the same, which will ultimately contribute to improving the tone and quality of modern public discourse.

After the presentation, Attorney George B. Donnini, of Butzel Long, was named President for the Chapter's 2023-2024 term. After assuming this position, Mr. Donnini thanked immediate past-President Newby for her service during the prior term and awarded her with a plaque, which recognized Ms. Newby for her "conclusive, passionate, unflappable, [and] brilliant" leadership.

Thereafter, the Chapter's Officers for the 2023-2024 term were elected as follows: President-Elect Andrew Lievense, Assistant U.S. Attorney; Vice-President Charissa Potts, Freedom Law PC; Secretary-Treasurer Lauren Mandel, Career Law Clerk to the Honorable Linda V. Parker; and Program Chair Matt Allen, Miller Canfield.

Thank you to all who contributed to the success of this year's Annual Dinner event, including all of the event's attendees, staff, organizers, and sponsors.

Kinikia Essix Court Administrator / Clerk of Court

I would like to welcome our newest District Judge Jonathan J.C. Grey! Chief Judge Sean F. Cox administered the oath of office to Judge Grey on March 9, 2023. Judge Grey filled a vacancy that resulted when Judge Denise Page Hood took senior status last year. Since Judge Grey was already a Magistrate Judge with the Court, there was a lot of work to prepare for his transition. The Court had to address his existing magistrate judge docket and reassign most of those cases, although there were several consent cases he was able to retain. Then we had to establish his caseload by placing him on the criminal and civil draw to begin his caseload accumulation. Judge Grey will be based at the U.S. Courthouse in Detroit.

Law Day was hosted at the Theodore Levin Courthouse on May 9, 2023. Approximately 200 students participated in presentations and mock trial exercises that were held in Judge Linda V. Parker's courtroom and the Historical Courtroom on the 7th floor. The event also included a law enforcement expo and a discussion group regarding de-escalation techniques and strategies employed by law enforcement. Thank you to everyone that participated in making this event a success!

If you have any questions, suggestions, or comments, please contact me at: kinikia_essix@mied.uscourts.gov.

Leonard R. Gilman Award

By James Gerometta

On March 19, 2023, the Chapter presented the Leonard R. Gilman Award to former Assistand U.S. Attorney Craig Weier, who recently retired after a distinguished career. The award is named after Leonard "Lenny" Gilman, who was United States Attorney at the time of his passing in 1985. The Award is presented annually to a practitioner of criminal law in the Eastern District who embodies Gilman's commitment to excellence, professionalism, and public service.

Steve Fishman, a prominent criminal defense attorney, and himself a past Gilman Award recipient, introduced Weier as the 2023 winner. Fishman noted that it was fitting that Weier chose a criminal defense attorney to introduce him because Weier was known in the Detroit legal community as someone whose professionalism and willingness to listen to the other side were characteristics that Lenny Gilman embodied.

Craig Weier

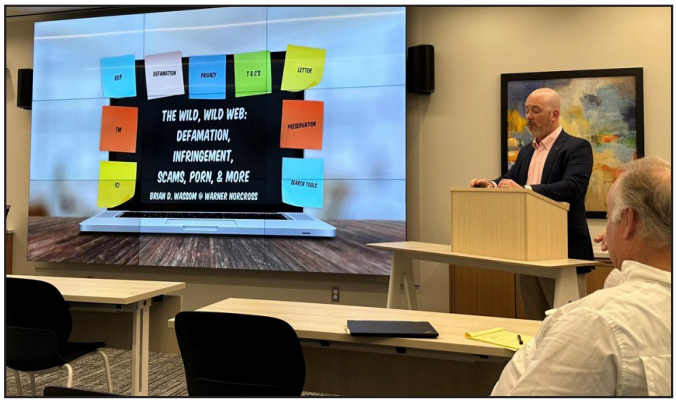
Weier's comments to the audience stressed what he felt was the most important guiding philosophy for his practice of law. He did not see those he prosecuted as cases or defendants, but rather as people. He was always aware that his charging decisions had profound effects not just on the individual prosecuted, but on their family and loved ones as well. Seeing those he prosecuted as people, with flaws and vulnerabilities, allowed Weier to respect the work of criminal defense attorneys and to reach what he felt were fair and just resolutions in most cases.

The event's keynote speaker was Roop Raj, who spoke on the importance of mentorship. Raj, a local television journalist, spoke of the importance of mentorship in career development. Raj was born in Troy, Michigan and began hosting a local access program at the age of 14. However, his career may have never gotten off the ground if it weren't for the encouragement of legendary local anchorman Huel Perkins. Raj discussed Perkins' generosity with his time and advice and how Perkins' example showed him the necessity of giving back and encouraging others to excel.

IP Committee Presentation: Issues Arising From the Internet

By Christopher G. Darrow

On May 11, 2023, the IP Committee hosted a presentation on legal issues and problems that can arise from use of the internet, and the civil and criminal tools available to attorneys to address those problems. The presenters were Brian Wassom, a Partner with Warner Norcross + Judd LLP, and Patrick Corbett, an Assistant U.S. Attorney in the Eastern District of Michigan.



Issues Arising from the Internet Presentation.
Photo by Chris Darrow.

Mr. Wassom addressed the civil law claims and remedies available to attorneys to address the various factual scenarios arising from the internet. The presentation addressed topics such as defamation, the rights of publicity and privacy on the internet, Michigan's new revenge porn statute, copyright and trademark infringement, and other common law tort claims.

Assistant U.S. Attorney Corbett's presentation was entitled, "Cyber Crime and Federal Law – How Can the Feds Help." Mr. Corbett gave the audience a background on how criminals are committing cybercrimes and related statistics, and discussed relevant federal criminal laws. Importantly, Mr. Corbett informed attorneys how they could report a crime to the various federal law enforcement agencies.

Securities Fraud Exposure Broadened Regarding Debt Instruments

By Matthew P. Allen, Miller Canfield

If your Michigan business issues promissory notes or other evidence of indebtedness, or if you purchase such debt instruments, it is important to understand whether those debt instruments could be considered "securities" under the Michigan Uniform Securities Act ("MUSA"). If a debt instrument is deemed a security, the issuer could not only be liable to the purchaser for any damages caused by any misstatements or omissions made in connection with issuance, but also be sanctioned by Michigan's securities regulator or criminally prosecuted for securities fraud, selling securities without a license, and selling unregistered securities. A recently published Court of Appeals decision broadens the MUSA definition of a "security," significantly expanding potential liability under the statute.

In *LA Developers, LLC and David Byker v. Department of Licensing and Regulatory Affairs* (2023),[1] the Michigan Court of Appeals changed the law in Michigan, holding that Michigan courts must now use the "family resemblance test" from the 1990 U.S. Supreme Court decision in *Reves v. Ernst & Young* to determine whether a note is a security under the MUSA.

Pertinent Facts Related to the Note in *Byker*

In *Byker*, a real estate developer offered to buy the plaintiff's $200,000 investment interest in a Costa Rican condominium development for $280,000. The developer gave the plaintiff a note requiring the developer to make a down payment of 5% of the note amount ($14,000) to the plaintiff, and 5% interest-only payments each year, with the remaining principal due in 5 years. The developer paid the down payment and annual interest payments for a total of $67,200, but refused to make the final balloon payment in year 5. The plaintiff sued the developer and settled the dispute for $225,000. The plaintiff then filed a complaint with the Corporations, Securities, and Commercial Licensing Bureau of the Michigan Department of Licensing and Regulatory Affairs ("the Bureau"). The Bureau fined the developer $30,000, finding that the developer violated MUSA by making material misstatements and omissions when it offered to sell the plaintiff a note in exchange for her equity interest in the condo project.[2]

The developer asked for a hearing. Citing the 1978 Michigan Court of Appeals decision, *People v. Breckenridge*,[3] the Administrative Law Judge held that the Bureau lacked jurisdiction to fine the developer because the note was not a "security" under MUSA. The Bureau asked the Administrator to affirm the sanctions order by finding that the note was a security under the federal *Reves* test. The Administrator agreed with the Bureau, and remanded the case to the ALJ to apply *Reves*, which the ALJ did and determined the notes were securities under *Reves*. The developer appealed to the Michigan circuit court, which held that the *Reves* test could not be applied because it conflicted with Michigan law on three points: 1) unlike the federal securities act interpreted by *Reves*, Michigan law did not presume that notes are securities; 2) Michigan law did not treat the fixed rate of interest under the note as profit; 3) a security under Michigan law required public solicitation of venture capital to be used in a business enterprise. Therefore, the trial court ignored *Reves* and followed *Breckenridge* and the 1988 Michigan Court of Appeals case styled *Ansorge v. Kellogg*[4] to find that the note was not a security.[5]

Byker Found that the *Reves* Test Was Not Inconsistent with Michigan Law

Byker rejected the three ways the trial court said *Reves* conflicted with Michigan law:

1. *MUSA creates the same presumption that a note is a security that* Reves *found in the federal securities laws*

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Securities Fraud *(from page 3)*

The trial court said that "nothing in [MUSA] suggests that the Legislature intended to create a presumption that promissory notes are securities."[6] *Byker* said the lower court overlooked the fact that *Reves* found the presumption because the federal act defined a "security" as "any note." MUSA defines a security as "a note." After finding no meaningful distinction between the use of "any" and "a" before note, *Byker* found no reason the same presumption *Reves* found in the federal act did not apply under MUSA. *Byker* noted that both the federal act and MUSA definition begin by stating that the definitions apply "unless the context otherwise requires." Thus, a plain reading of MUSA and the federal act provide that a note is a security "unless the context otherwise requires," which in the case of a note is whether the *Reves* test rebuts that presumption.[7]

2. *A fixed rate of interest in a note does not compel a finding that it's not a security*

The trial court relied on the 1988 *Ansorge* decision from the Michigan Court of Appeals, which found that notes were loans and not securities because they were exchanged for cash and had a fixed interest rate. First, *Byker* cited the court rule that *Ansorge* isn't binding because it was decided before 1990, which is ironically the same year *Reves* was decided. Second, *Byker* found that *Ansorge* was limited to its facts related to notes issued by a fruit processing company to cherry growers, with the court observing that the fixed rate of return did not depend on the note issuer's profits in that case. But *Byker* did not read *Ansorge* to mean that fixed interest can never be "profit," and thus not an investment security. *Byker* found this was so even though the notes in *Reves* had interest rates that were "constantly revised" to keep them above local bank rates. *Byker* said that the lower court would need to review the entire transaction and determine "whether the transaction looks like a business investment or a purely commercial or consumer transaction."[8] And while the income or return on investment a note provides is relevant to applying the *Reves* test, *Byker* found that "it does not affect whether the *Reves* test is consistent with Michigan law."[9]

3. The trial court did not support its claim that Michigan securities involve solicitation of venture capital

Quoting *Ansorge*, the trial court found *Reves* inconsistent with a quote in *Ansorge* that "the 'salient feature of a security sale in Michigan' is the public solicitation of venture capital.'" *Byker* quickly disposed of this argument since the trial court did not explain "how this is inconsistent with the *Reves* test."[10]

Byker Found that it Should Adopt the *Reves* Test as Michigan Law

Byker said that since MUSA employs language similar to the federal act, adopting the *Reves* test furthers the Michigan Legislature's goal, recognized in *Breckenridge*, of promoting uniformity in federal and state securities standards.[11] *Byker* noted earlier in its opinion that Section 608(2) of MUSA requires an interpretation "[m]aximizing uniformity in federal and state regulatory standards." And because MUSA and the federal act define securities as notes, and both say that this definition applies "unless the context otherwise requires," the presumption recognized by *Reves* and the family resemblance test to rebut that presumption "is consistent with Michigan law and better serves the plain language of the Legislature's definition."[12] *Byker* also observed that the *Reves* presumption aligned with Section 503(1) of MUSA, which places the burden on a person claiming an "exemption, exception, preemption, or exclusion" to prove it.[13]

Byker Found That MUSA's 5-Factor Test to Determine Whether "Contracts" Are Securities Did Not Apply to Promissory Notes

The initial definition of "security" in MUSA and the federal act are substantially similar, including that both list a "note" as a security. But unlike the federal act interpreted by *Reves*, MUSA's definition ends with a list of six other categories of instruments that are or are not included in the term "security" under Michigan law. Section 102(c)(i)-(vi).[14] The first category creates a 5-part test to determine whether a "contract or quasi-contractual arrangement" is a security. Section 102(c)(i)(A)-(E).[15] *Byker* notes that the Michigan case of *Ansorge*, which the trial court relied on instead of *Reves*, used this 5-factor test to determine whether the note in that case was a security. *Byker* held that this was error because a plain reading of MUSA reveals that the 5-factor test only applis to instruments that are a "contract or quasi contractual arrangement," and not to note instruments. "If the five-factor test were intended to be applied to all instruments to determine if they are a 'security,' there would be no need for the Legislature to provide such an extensive list of items that are securities. Rather, it would merely have set forth the five factor test."[16] In support of this holding, *Byker* cited the 1990 Michigan Court of Appeals decision of *Noyd v. Claxon, Morgan, Flockhard & VanLiere*,[17] which applied the 5-part test to a "loan participation agreement" because it was a contract that was not a listed instrument in the main definition of security.[18]

MUSA's 5-Factor Test Appears to Codify the 1946 U.S. Supreme Court Decision of *SEC v. WJ Howey*

The U.S. Supreme Court's 1946 decision in *SEC v Howey*[19] involved a Florida citrus company that raised money by selling portions of its grove through a land sales contract and warranty deed, and then used a service contract to take a leasehold interest in the land with the sole right to harvest and market the citrus. The landowners/lessors were paid a percentage of the profits of the business by the company lessee based on their ownership interest. Because these investment contracts were not defined as a security under the 1933 Securities Act, the *Howey* Court constructed an "economic reality" test to determine whether these undefined "investment contracts" are securities.[20] Each element of the *Howey* test for "investment contracts" is found in the 5-part test for a "contract or quasi-contractual arrangement" under MUSA: a person furnishes capital; it is subject to the risk of the issuer's enterprise; a promotor is used to represent a valuable tangible benefit from the operation of the enterprise; the person furnishing the capital is not involved in the management of the

enterprise; and the promotor anticipates a financial gain from the provision of capital.[21] One *Howey* factor — "investment in a common enterprise" — is found in a separate MUSA definition,[22] though that definition does not reference the critical contract component of the *Howey* test.

This is important because the U.S. Supreme Court would twice hold that the *Howey* test for investment contracts cannot be used to determine whether any other instruments are securities under federal law, which is exactly what *Byker* said about the 5-part MUSA test for contracts. In its 1985 decision in *Landreth Timber Co v. Landreth*, the U.S. Supreme Court held that the *Howey* test had to be limited to investment contracts because applying it to "traditional stock and all other types of instruments listed in the statutory definition would make the Act's enumeration of many types of instruments superfluous."[23] *Reves* applied *Landreth* in 1990 to say the same thing about promissory notes. In other words, the rationale employed by *Byker* to limit MUSA's 5-part test to investment contracts is supported by the U.S. Supreme Court's rationale in *Reves* and *Landreth* that the *Howey* test is limited to investment contracts.

Reves Did Not Address MUSA's "Evidence of Indebtedness" Instrument Included as a Security Because it was Not Part of the Federal Law at Issue

The federal 1934 Securities Exchange Act definition of security, interpreted by *Reves*, does not include "evidence of indebtedness." So the *Reves* test on its face does not apply to that instrument. MUSA's definition of security does include "evidence of indebtedness," as does the federal 1933 Securities Act. As a general matter, the 1934 Exchange Act applies to purchases and sales of securities, while the 1933 Securities Act only applies to sales of securities by issuers. This presents an opportunity for a plaintiff to plead that the debt instrument at issue is "evidence of indebtedness," and thus a security under MUSA, even if that instrument fails to qualify as a note security under the *Reves* test. In *A.E. Smith v. C.E. Manausa*,[24] a federal trial court in Kentucky found that an agreement to buy shares with a "corporate note" payable in nine months "clearly reveals a 'note' or 'evidence of indebtedness' under the 1933 Act."[25] The note in *Manausa* is similar to the note in *Byker* that was delivered in exchange for plaintiff's equity interest. Consider whether the Bureau on remand seeks to add an argument that the notes in *Byker* are also "evidence of indebtedness" under MUSA.

In its 1966 decision in *Beam v. U.S.*,[26] the U.S. Court of Appeals for the Sixth Circuit found that a credit sales invoice used in a forgery scheme was not "evidence of indebtedness," and thus not a security, because it could not be negotiated, and thus had no value in itself to the forger. In a 1991 W.D. of Michigan decision, *Tucker Freight Lines, Inc v. Walhout*,[27] the court found that wage deferral agreements by employees to their company were neither notes nor evidence of indebtedness because they did not induce a reasonable expectation of profit like an investment does. Interestingly, the *Walhout* court in a parenthetical said the *Reves* test for notes "seems applicable to all debt instruments, including evidence of indebtedness."[28] *Walhout* also applied the *Howey* test and held that the wage deferral agreements were not "investment contracts" because the employees did not expect profit from their agreements; they did not even expect interest payments in exchange for deferring their wages.

Finally, required reading on these issues is the 1996 opinion styled *Proctor & Gamble Co. v. Bankers Tr. Co*,[29]

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Securities Fraud *(from page 5)*

issued by a federal trial court in Ohio, but written by the late federal trial court judge from Michigan, Hon. John Feikens. Judge Feikens skillfully applied *Reves*, *Howey*, and a test under the Ohio securities law similar to MUSA's 5-part test, to separately analyze whether the complex derivative swap agreements in that case were "notes," "evidence of indebtedness," or "investment contracts." Judge Feikens found that the swaps were not "investment contracts" under *Howey* because they did not involve pooling money in a common enterprise of another company. Nor were they investment contracts under the Ohio securities test because the profit to be earned from the swap contracts — which was based on interest rate fluctuations from a complicated formula tied to commercial paper interest rates — did not depend on the performance or management of an underlying enterprise.[30] The swaps were not notes under the *Reves* test because they were not widely distributed, and the investors did not reasonably think the swap agreements were securities.[31] In finding that the swaps were not "evidence of indebtedness," Judge Feikens cited back to *Walhout* when he said that "[t]he test whether an instrument is within the category of 'evidence of indebtedness' is essentially the same as whether an instrument is a note."[32] The plaintiff argued the swaps were evidence of indebtedness "either because they may contain terms and conditions well beyond the typical terms of a note and beyond an ordinary investor's ability to understand, or because the debt obligation simply does not possess the physical characteristics of a note."[33] Judge Feikens rejected this "because that definition omits an essential element of debt instruments — the payment or repayment of principal."[34] And since swap agreements don't involve the payment of principal — since the interest rate tied to the commercial paper never changes hands, only interest payments based on that amount do — the agreements can't be evidence of indebtedness and thus can't be securities subject to the federal and Ohio securities laws.

Outline of *Reves* Family Resemblance Test That is Now Michigan Law

Both the federal securities law and MUSA expressly define a "note" as a "security." After *Byker*, both federal and Michigan law presume that notes are securities, and the *Reves* test applies. Now, under *Reves*, the Michigan and federal presumption that a note is a security can be rebutted by a showing that the note "bears a strong resemblance" to the following list of notes which are not securities:

- Note delivered in consumer financing
- Note secured by a mortgage on a home
- Short term note secured by a lien on a small business or some of its assets
- Note evidencing a 'character' loan to a bank customer[35]
- Short term notes secured by an assignment of accounts receivable
- Note that simply formalizes an open-account debt incurred in the ordinary course of business
- Notes evidencing loans by commercial banks for current operations[36]

The *Reves* Court developed four standards to determine whether an instrument "bears a strong resemblance" to the categories of loans above, or whether another category should be added to the list, sufficient to exempt the instrument from the definition of a security:

1. *Assess the motivations of the buyer and seller*

"If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a 'security.' If the note is exchanged to facilitate the purchase and sale of a minor asset or consumer good, to correct for the seller's cash-flow difficulties, or to advance some other commercial or consumer purpose, on the other hand, the note is less sensibly described as a 'security.'"[37]

2. *Examine the "plan of distribution" of the instrument*

Courts will assess whether the loan sale is an "instrument in which there is 'common trading for speculation or investment.'"[38] If the notes are marketed to a broad segment of the public, then it is more likely that the SEC or a court will find that the note is a security.

3. *Examine the reasonable expectations of the investing public*

"The Court will consider instruments to be 'securities' on the basis of such public expectations, even where an economic analysis of the circumstances of the particular transaction might suggest that the instruments are not 'securities' as used in that transaction."[39] In other words, if the people to whom the notes are being sold consider them to be investments and "securities," then securities regulators or the court may weigh this factor in favor of considering the notes securities.

4. *Existence of other regulatory schemes that protect the public*

The existence of another regulatory scheme that "significantly reduces the risk of the instrument" may render "application of the Securities Acts unnecessary."[40] "[T]he existence of collateral is significant as a risk-reducing factor," and a note secured by a mortgage "leads to the Note resembling a note secured by a mortgage on a home" under the *Reves* family resemblance test, thus leading courts to conclude that secured notes are not securities.[41]

**Matthew P. Allen is a securities, white-collar, and business litigator, arbitrator, and mediator at Miller Canfield. He has tried and arbitrated a wide variety of cases, ranging from felony matters in Detroit's criminal courts to bet-the-company securities and international intellectual property cases. Over the past decade, Matt has been consistently voted by his peers as a leading lawyer in Michigan and the United States by the publications* Best Lawyers in America *and* Michigan Super Lawyers*, and has recently been selected as a Fellow in the* Litigation Counsel of America *trial lawyer honorary society.*

[1]2023 WL 3555079 (Mich. App. May 18, 2023).
[2] *See id.* at *1-2.
[3]81 Mich. App. 6 (1978).
[4]172 Mich. App. 63 (1988).
[5]*See Byker*, 2023 WL 3555079, at *2-6.
[6]*Id.* at *8.
[7]*See id.*
[8]*Id.* at *9.
[9]*Id.*
[10]*Id.*
[11]*Id.* at *5 & n7.
[12]*Id.* at *10.
[13]*See id.* & n29.
[14]MCL 451.2102c(c)(i)-(vi).
[15]MCL 451.2102c(c)(i)(A)-(E).
[16]*Byker*, 2023 WL 3555079, at *10.
[17]186 Mich. App. 333 (1990).
[18]*Byker*, 2023 WL 3555079, at *11.
[19]328 US 293 (1946).
[20]*See id.* at 298-300.
[21]*See* MCL 451.2102c(c)(i)(A)-(E).
[22]MCL 451.2102c(c)(v).
[23]471 US 681, 692 (1985)
[24]385 F. Supp. 443 (ED Ky. 1974).
[25]*Id.* at 447 (cleaned up).
[26]789 F. Supp. 884 (WD Mich. 1991).
[27]*Id.* at 888.
[28]925 F. Supp. 1270 (SD Ohio 1996).
[29]*See id.* at 1277-78.
[30]*See id.* at 1278-80.
[31]*Id.* at 1280.
[32]*Id.*
[33]*Id.*
[35]364 F.2d 756 (6th Cir. 1966).
[36]*Reves*, 494 US 56, 65 (1990).
[37]*Id.* at 66 (cleaned up).
[38]*Id.*
[39]*Id.*
[40]*Id.* at 67.
[41]205 F. Supp. 2d 746, 753 (ED Mich. 2002).

Bankruptcy Program.
Photo by Melinda Herrmann

Bankruptcy Program.
Photo by Melinda Herrmann

Bankruptcy Committee Hosts Three Programs in Spring 2023

By Paul R. Hage,
Bankruptcy Committee Co-Chair

The Bankruptcy Committee, led by Co-Chairs Kelly Callard, Paul R. Hage, and David Lerner, continues to be one of the most active FBA Committees. The Bankruptcy Committee held three excellent events in Spring 2023.

First, on April 11, 2023, the Bankruptcy Committee co-hosted a webinar with the Consumer Bankruptcy Association entitled, "Does the Department of Justice's New Student Loan Guidance Change Anything? A Discussion with the U.S. Attorney's Office and Debtor's Counsel." The program focused on new guidelines from the Department of Justice related to the discharge of federal student loan debt in bankruptcy. Unlike other consumer debt, such as credit cards and medical bills, student loans are generally not dischargeable in bankruptcy absent a showing of undue hardship. Over time, courts have developed a stringent and difficult-to-satisfy test for establishing undue hardship. The purpose of the new guidelines is to streamline and simplify the process for discharging federal student loan debt in bankruptcy.

The discussion was moderated by Chief Judge Daniel S. Opperman (Bankr. E.D. Mich.), and featured panelists Kevin Erskine from the Department of Justice and Tricia Terry, a consumer debtor attorney from Marrs & Terry, PLLC. The panelists discussed the new DOJ guidance and provided practice pointers for dealing with student loan dischargeability cases going forward. At the conclusion of the program, the panelists answered questions from attendees. Over 100 members of the bench and bar attended this program.

Second, on April 28, 2023, the Bankruptcy Committee partnered with the United States Bankruptcy Court for the Eastern District of Michigan and its Clerk of Court, Todd Stickle, to arrange for the Court to hold live court proceedings at Cass Technical High School in Detroit. Actual, in person, bankruptcy court hearings involving real cases and practitioners were held in the auditorium at Cass Tech. Hon. Mark A. Randon (Bankr. E.D. Mich.) presided over the hearings. At the conclusion of the hearing, Judge Randon ruled from the bench and, thereafter, answered numerous questions from the dozens of Cass Tech students in attendance about the legal arguments that they witnessed. The event was a resounding success and the Bankruptcy Committee has already started planning to repeat this program in 2024 at another high school within the District.

Finally, on May 4, 2023, the Bankruptcy Committee co-hosted a webinar with the Wolverine Bar Association entitled, "How to Make a Difference In Your Community Through the Practice of Bankruptcy Law." As the title suggests, the program focused on how attorneys can use the practice of bankruptcy law to improve the lives of people living in our community. This program was a continuation of the collaborative partnership that the Bankruptcy Committee has enjoyed with the Wolverine Bar Association over the past two years.

Panelists for this program, which was conducted via Zoom, were Hon. Mark A. Randon (Bankr. E.D. Mich.), his law clerk, Krystal Player, Paula Hall of Brooks, Wilkins, Sharkey & Turco, PLLC, Ethan Dunn of Maxwell Dunn, PLC and Kimberly Shorter-Siebert, Staff Attorney for the Chapter

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Bankruptcy Committee *(from page 7)*

13 Standing Trustee. The program was geared towards law students and younger practitioners. At the conclusion of the program, the panelists and attendees had a casual, open discussion about various bankruptcy related issues.

The Bankruptcy Committee is an extremely active committee that works closely with the local bankruptcy bench. It meets monthly via Zoom and is already hard at work planning an exciting slate of programs for the 2023-2024 year. If you are interested in joining the Bankruptcy Committee, please reach out to Paul R. Hage at phage@taftlaw.com.

EEOC Commissioner Discusses Artificial Intelligence and the Workplace

By Timothy Smith, Warner Norcross+Judd LLP

On May 31, 2023, the Chapter had the privilege to host EEOC Commissioner Keith Sonderling for an illuminating discussion on artificial intelligence ("AI") in the workplace. Since joining the EEOC, one of Commissioner Sonderling's highest priorities has been ensuring that AI-based workplace technologies are designed and employed in manners consistent with civil rights laws. He has published numerous articles addressing the benefits and harms of using AI in the workplace and has spoken globally on the topic.

The conversation covered numerous topics but was generally organized around two issues—first, how AI can affect almost all aspects of employment, and second, what the EEOC is currently doing to address emerging issues surrounding AI.

Addressing AI's permeation of employment practices, Commissioner Sonderling reported that many companies now use AI in the hiring process (e.g., by screening candidates' resumes or conducting initial round interviews), the advancement process (e.g., by identifying benchmarks for promotion or pay increases), and the termination process (e.g., by identifying criteria indicating low performance). He also explained how AI might be used to help identify or implement accommodations for individuals with disabilities, and how AI could be used to limit discriminatory language sent over electronic systems.

After surveying some ways in which companies may rely on AI, the Commissioner explained how relying on AI could affect a company's risk of violating civil rights laws. He began by noting that, although many people believe that AI is non-discriminatory and might protect a company from discrimination-based liability, that is not necessarily the case. AI can take on biases through learning or development, and, according to the Commissioner, a company may still be liable for discriminatory conduct resulting from AI-based decision-making. For example, if AI was designed or implemented in a manner that caused a discriminatory disparate impact on a protected group, a company may be liable for discrimination, in his view.

The Commissioner then discussed various use cases demonstrating how AI could function in a discriminatory manner. First, he noted that AI can learn from the selections of a user (or the company historically) to act in a biased manner. An AI system at one company, for instance, suggested that the company should promote white males from preparatory schools because it had learned that this was the type of employee who had historically thrived at the company. Next, he discussed potential issues with using AI during the hiring process. One example provided was that some interviews are now conducted through AI, in the hope that it will limit bias, but AI may struggle hearing certain dialects, thereby harming non-native English speakers. An AI-generated job description could also be predicated on historical biases, creating a disparate impact on a protected group.

It was not all doom and gloom, however, as the Commissioner emphasized that, if implemented properly, AI had great potential to limit discrimination in the workplace. After all, AI, if coded correctly, is likely to be more neutral than human beings, who carry numerous biases (known and unknown). The Commissioner also emphasized that lawyers have a part to play in helping businesses ensure that their AI use is not discriminatory.

Finally, the Commissioner discussed the EEOC's current initiatives regarding AI in the workplace. He reported that the EEOC had been, and would continue to be, holding hearings, and that it would later be issuing guidance to help companies comply with the civil rights laws.

The Chapter greatly appreciates the Commissioner's participation in this instructive conversation.

The Inaugural Law Clerk Career Networking Fair

By Sarah Resnick Cohen and Jeffrey A. Crapko

March 8, 2023, was an excellent day for networking — and so, it happened. Eighteen law clerks came to the Detroit Room to meet with 16 legal employers looking to recruit. The legal employers represented the gamut of potential opportunities across the Detroit legal markets, with representatives from private practice (both plaintiff and defense), non-profits, and government (federal and state). On the private practice side, the Michigan Association of Justice, Gasiorek Morgan, Honigman, Jones Day, BSP Law, Kerr, Russell and Weber, Butzel Long, Miller Canfield, Bodman, Varnum, and Howard and Howard attended to promote their firms. The United States Attorney's Office, the Transportation Security Administration, the Federal Community Defender's Office, the State Appellate Defender's Office, and the Wayne County Prosecutor's Office represented government employment opportunities for the law clerks.

Law Clerk Career
Photo by Jeffrey Crakol.

Law Clerk Career
Photo by Jeffrey Crakol.

The Law Clerk Committee set up the Detroit Room in a circular format, with individual employers comprising the outer ring of the circle. Law clerks were free to mingle and mix as they saw fit, passing from table to table to discuss career opportunities. The Detroit Room was abuzz with the excited hum of networking law clerks and eager legal employers for two hours. Mindy Herrmann did a fantastic job providing hors d'oeuvres and refreshments. The Law Clerk Committee would also like to issue a special thank you to Chief Judge Cox, Judge Michelson, and Magistrate Judge Patti for attending, as well as a thank you to all of our Judges who encouraged their law clerks to attend.

We hope some law clerks made valuable connections that yield career opportunities in the near or not-to-distant future. The Law Clerk Committee will endeavor to schedule this event annually to assist law clerks each year. The next career networking fair will be scheduled for either the late fall or early new year, so as to give even more law clerks an opportunity to network when many are beginning their search for post-clerkship employment. If you are interested in attending (as either a recruiting employer or law clerk (present or past), please be on the lookout for an invitation in the fall. We hope to see you there.

Past Chapter Presidents' Luncheon
Photo by Melinda Herrmann.

Past Presidents' Luncheon

By Andrew Lievense

On May 31, the Chapter's Officers and more than 25 Past Presidents convened for their annual gathering to conduct Chapter business, enjoy excellent food, and connect the Chapter's past leaders with the current leadership. The group met this year at the French Quarter dining room at Fishbones Restaurant in Greektown.

Chapter President Jennifer Newby and Incoming Chapter President George Donnini led the meeting. They introduced the proposed slate of officers, which included the addition of Matthew Allen as incoming Program Chair. The slate was unanimously approved by the Past Presidents in anticipation of being presented at the Annual Dinner in June.

Newby addressed the crowd and highlighted her accomplishments for the year, while also expressing gratitude to her fellow officers and, most importantly, Executive Director Mindy Herrmann, for their support. Newby highlighted her work on pro bono programs, which is something she plans to continue working on in the years to come.

Newby then turned the program over to George Donnini, who previewed what he expects during the coming year, including a continuation of strong programs and the luncheon series.

The Chapter was pleased to have so many Past Presidents attend. Those who were unable to attend were not forgotten. At Mindy Herrmann's urging and organization, attendees signed cards with personal notes addressed to those Past Presidents who were unable to attend, reaffirming their importance to the history and future of the Chapter.

Dos and Don'ts of Opening Statements in the Sixth Circuit

By Derek J. Linkous and Brittney D. Kohn, Bush Seyferth PLLC[1]

Opening statements are one of the most critical aspects of advocacy at trial. After hours of voir dire, it is now counsel's first opportunity to introduce her story to the jury, win the jury's trust, and preview the evidence in the case.[2] Given the gravity of this opportunity, attorneys must craft their opening statements to ensure optimal delivery of case themes. But equally important is familiarity with the "dos and don'ts" of those statements in the jurisdiction. Trial courts exercise broad discretion over the provision and direction of opening statements and have the power to interrupt and limit opening statements that venture outside their permissible scope and purpose.[3] Because so little is written about the law surrounding opening statements, despite the significance of not foot-faulting on this important stage, we've compiled some key considerations to be mindful of when preparing and delivering opening statements in the Sixth Circuit.

The Don'ts

Let's first get some problematic practices out of the way: the Don'ts.

Don't include argument. The Sixth Circuit prohibits argument during the opening statement.[4] In *Cox v. Treadway*, for example, the Sixth Circuit found no abuse of discretion when the trial judge interrupted and admonished counsel three times to stop arguing her case during opening statements and ultimately cut her statement short.[5] It is therefore crucial that

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Dos and Don'ts *(from page 9)*

attorneys instruct the jury only on the evidence to be presented, rather than present facts in dispute.[6]

This distinction may be tricky for practitioners to navigate, as "[s]ometimes the line between argument and legitimate discourse during the opening statement is difficult to see."[7] A good gauge is that "argument begins when the lawyer starts to explain the evidence, characterize the evidence[,] or instruct the jury on how to use the evidence in arriving at the verdict."[8] If attorneys cross this line, the court may instruct them to stop arguing or worse, may prevent them from completing their opening statement.[9] Not a great way to start with the jury.

Don't reference issues of law. The opening statement is likewise not the appropriate time to instruct the jury on issues of law. That domain rests squarely with the court.[10] Encouraging the jury to make inferences as to issues of law during the opening statement is both argumentative and intrudes on the court's duty.[11]

Don't preview inadmissible evidence or evidence you don't intend to use at trial. Effective openings should not reference inadmissible material or purported facts that will not be introduced into evidence. Rather, attorneys should limit their openings to "such facts as [they] in good faith believe[] to be admissible."[12] While it is proper for attorneys to "argue the record, highlight any inconsistencies or inadequacies of the [opposing counsel's case], and forcefully assert reasonable inferences from the evidence" they are precluded from "discuss[ing] any purported facts not introduced into evidence." [13]

Don't misrepresent the facts or the law. Attorneys must not "knowingly misrepresent, mischaracterize, misquote, or miscite facts or authorities" in their opening statement.[14]

Beyond these broader suggestions, below are several landmines to avoid:

- Unfounded and inflammatory attacks on opposing counsel;[15]
- Disparaging personal remarks or acrimony towards other counsel or parties;[16]
- Argument that opposing counsel is attempting to mislead the jury;[17]
- Statements that attribute a position to opposing counsel that they have not taken or encouraging unjustified inferences based on opposing counsel's conduct;[18]
- Comments regarding the court's previous decisions, such as referencing what the court ruled in similar prior matters;[19]
- Suggestions that seek sympathy from jurors;[20]
- References to discovery violations for which no factual findings have been made;[21]
- References to matters ordered *not* to be discussed with the jury;[22]
- Discussion of irrelevant matters;[23] and
- Improper vouching for the credibility of one's case and witnesses.[24]

The Dos

Now that we have covered what to steer clear of, here are recommended best practices from the courts themselves: the Dos.

Do stick to advocacy. When delivering an opening statement, mind the line between permissible advocacy and inflammatory, prejudicial language that may improperly influence the jury.[25] For example, the Sixth Circuit has cautioned that "[i]t is not appropriate for a prosecutor to use the opening statement to poison the jury's mind against the defendant or to recite items of highly questionable evidence."[26] The use of inflammatory language or dubious evidence in an opening statement runs the risk of "improperly prejudic[ing] the defendant in the eyes of the jurors" by destroying the defendant's credibility before the jury has had an opportunity to hear the evidence.[27] This is especially relevant in the criminal context. Importantly, prejudicial remarks may warrant reversal and remand for a new trial.[28] Whether an advocate is engaging in permissible or prejudicial advocacy is rooted in the attorney's purpose in delivering the statement in question. Generally, attorneys do not cross the line unless they "call[] on the jury's emotions and fears—rather than the evidence—to decide the case."[29] For example, while language that is specifically "calculated to incite the passions and prejudices of the jurors" is impermissible, attorneys may engage in advocacy through "appeals to the jury to act as the community conscience."[30]

Do use this opportunity to provide a trial roadmap. Given that opening statements preview evidence for the jury, attorneys should summarize what they expect the evidence will show and prove.[31] Remarks that simply set out what a party intends to establish do not fall "significantly outside the bounds of permissible advocacy."[32] This may include "tell[ing] the jury what the advocate proposes to show"[33] and stating that "the jury should arrive at a particular conclusion based on the record evidence."[34] That said, attorneys should only refer to evidence they, in good faith, intend to admit at trial.[35]

Do respect the Court's directives. It should go without saying (but we'll say it regardless) that attorneys should follow the court's directions when delivering an opening statement.[36] Disregarding Court orders may result in any number of consequences, including mistrial.[37]

Do be prepared for interruptions. Because the court exercises broad discretion over the delivery and direction of opening statements, it may interrupt without warning if it finds impermissible conduct.[38] So be ready to think on your feet and defend your statement to the court.

There is no second chance for a first impression. Becoming familiar with the best practices for opening statements in your jurisdiction can ensure that these priceless first moments with the jury are free from interruption—or anything worse. For attorneys practicing in the Sixth Circuit, adhering to these recommendations will provide a leg up in preparing and delivering an effective and interruption-free opening statement.

[1]The authors would like to give special thanks to Amanda Navarre for her assistance in the preparation of this article.

[2]*See United States v. Burns*, 298 F.3d 523, 543 (6th Cir. 2002); *United States v. Johnson*, 299 F. Supp. 3d 909, 923 (M.D. Tenn. 2018).

[3]*See Cox v. Treadway*, 75 F.3d 230, 237 (6th Cir. 1996) ("Appellate courts review a district judge's conduct of a trial, including the conduct of opening statement, for abuse of discretion.").

[4]*Id.* ("A district court's supervisory powers over opening statements include the power to interrupt counsel who is presenting argument during opening. An abuse of discretion has been found only in rare cases, such as where the judge interrupted the proceedings more than 250 times.").

[5]*Id.*

[6]*See* ROBERT E. LARSEN, NAVIGATING THE FEDERAL TRIAL § 6:39 (2021 ed.).

[7]*Id.*

[8]*Id.*

[9]*See Cox*, 75 F.3d at 237.

[10]*See Comenos v. Viacom Int'l, Inc.*, 882 F. Supp. 677, 682 (E.D. Mich. 1995) (granting the defendant's motion to preclude mention of certain legal principle during plaintiff counsel's opening statement "because it is argumentative and [ ] would be an intrusion upon the court's duty to instruct the jury as to issues of law").

[11]*Id.*

[12]*Scripps v. Reilly*, 35 Mich. 371, 381 (1877).

[13]*Cristini v. McKee*, 526 F.3d 888, 901 (6th Cir. 2008).

[14]E.D. Mich. Civility Principles, https://www.mied.uscourts.gov/pdfFiles/08-AO-009.pdf (last visited 9/18/2022).

[15]*See Rodriguez v. Jones*, 625 F. Supp. 2d 552, 566 (E.D. Mich. 2009).

[16]*See* E.D. Mich. Civility Principles, *supra* note 14 at ¶ 2.

[17]*See Rodriguez*, 625 F. Supp. 2d at 566.

[18]*See* E.D. Mich. Civility Principles, *supra* note 14 at ¶ 27.

[19]*See Wilson v. Morgan*, 477 F.3d 326, 341 (6th Cir. 2007) (finding an improper comment where defense counsel told the jury that "[t]he judge has ruled that probable cause existed for the arrest… for Donna Wilson and Brian Davis" and instructing the jury to "disregard the improper comment" "consider the issues before you, the evidence heard in this trial, and the law as I give it to you.").

[20]*See Winburn v. Nagy*, No. 20-13045, 2021 WL 130966, at *4 (E.D. Mich. Jan. 14, 2021) (noting that "defendants improperly made statements to gain sympathy from jurors[]").

[21]*Id.*

[22]*Id.*

[23]*Id.*

[24]*Id.*

[25]*See e.g., United States v. Signer,* 482 F.2d 394, 398, 400 (6th Cir. 1973) (reversing and remanding for a new trial due to prejudicial remarks in an opening statement to the jury).

[26]*Burns,* 298 F.3d at 543 (internal quotation marks and citations omitted).

[27]*Signer,* 482 F.2d at 398.

[28]*See generally, id.*

[29]*Fuller v. Lafler*, 826 F. Supp. 2d 1040, 1059 (E.D. Mich. 2011), *aff'd sub nom. Fuller v. Woods*, 528 F. App'x 566 (6th Cir. 2013).

[30]*Id.*

[31]S*ee Strong v. Nagy*, No. 2:19-cv-11448, 2019 WL 6359147, at *7 (E.D. Mich. Nov. 27, 2019), *aff'd*, 825 F. App'x 239 (6th Cir. 2020) ("The prosecutor did not commit misconduct… because when viewed in context, the prosecutor was simply setting forth the evidence he would present in his case and what it would prove.").

[32]*Mercer v. Theriot*, 377 U.S. 152, 155 (1964).

[33]*Zora v. Winn*, No. 15-cv-11550, 2017 WL 85840, at *10 (E.D. Mich. Jan. 10, 2017) (holding that a statement based on an accurate stipulation was permissibly referred to during the opening statement and closing argument.).

[34]*Rodriguez*, 625 F. Supp. 2d at 566.

[35]*See Michigan First Credit Union v. Cumis Ins. Soc., Inc.*, 641 F.3d 240, 250–51 (6th Cir. 2011) (finding no error requiring reversal resulted from a party's opening comments about certain evidence because the "statements at issue were made with the good-faith belief that evidence regarding the [evidence] would be admitted").

[36]*See Winburn*, 2021 WL 130966, at *4 (finding the trial court's grant of a mistrial was proper and not an abuse of discretion where, among other things, the defendant raised matters that were ordered not to be discussed with the jury").

[37]*See id*.

[38]*See Cox*, 75 F.3d at 237 ("An abuse of discretion has been found only in rare cases, such as where the judge interrupted the proceedings more than 250 times.").

Calendar of Events

September

September 13
State of the Court Luncheon
12:00 pm - 1:00 pm

September 28
The Hon Marci B. McIvor Annual Fundraiser for Access to Bankruptcy Court
6:00 pm - 9:00 pm

October

October 4
RISE Event: Taking care of Business/Taking Care of Me!

October 20
Civil Rights Etouffee on the Road – Discussion on Section 1983 and Qualified Immunity: (Nearly) Everything There is to Know
Detroit Room of the Theodore Levin Courthouse, 231 West Lafayette Boulevard, Detroit, MI 48226
11:45 am

November

November 15
Late Fall Chapter Luncheon (traditionally Barbara Rom/Ed Rakow/Historical Society Luncheon)
12:00 pm - 1:00 pm

Updates and further developments at www.fbamich.org

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