



# Law Review

*Michaelmas Term, 2000*

## **Separation of Powers in Conflict: Legislative and Judicial Roles Within Evidence Law**

*By Professor Elliot B. Glicksman*

This article discusses the history of evidence rules and how the separation-of-powers doctrine has generally allowed the judiciary to adopt, amend, and discard rules of evidence. Author Elliot Glicksman acknowledges that the legislature has the authority to unilaterally enact evidentiary rules, but that this is a dormant power and the legislature has traditionally deferred to the judiciary. However, this trend has changed in recent years. The legislature has become subject to increasing public pressure to change evidentiary and procedural practices. This trend has led to changes in evidentiary law that are subject driven, subjectively applied, or result oriented. Professor Glicksman argues that evidence rules should be broad in scope, uniform in application, and flexible in interpretation to allow traditional judicial interpretation and construction of evidentiary rules.

Recent changes to the Michigan Rules of Evidence (MRE) are discussed in this article, specifically the apparent conflict between MRE 702 and MCLA 600.2129 concerning expert witness testimony in medical/dental malpractice suits. The author analyzes the Michigan Supreme Court's ruling in *McDougall v. Shanz*, which held that the Michigan Supreme Court will no longer continue to mechanically characterize all legislative statutes that resemble rules of evidence as relating solely to court practice and procedure. Therefore, the court deferred to the legislature by stating that section 2169 was a substantive change rather than a procedural change. In addition to discussing MRE 702, character evidence changes under MRE 413, 414, and 415 are also examined.

## **Great Lakes Diversions Revisited: Legal Constraints and Opportunities for State Regulations**

*By Chris A. Shafer, Associate Professor*

The legal constraints and opportunities for state regulation of Great Lakes diversions are examined in this timely article. Author Chris Shafer focuses on the Commerce Clause and the implications it has on state regulations. The Water Resource Act of 1986, which requires the approval of each Great Lakes governor for any new diversion of Great Lakes water, is also discussed.

Additionally, the Public Trust Doctrine is reviewed as establishing an overriding duty and appropriate standards for state

protection of Great Lakes water resources. The Great Lakes Charter is also examined as a source of standards and procedures to govern state and provisional decision-making. This article is of great importance to all, especially residents of the Midwest.

## **Michigan Insurance Agents Special Relationship Test Gives Way to No-Duty Rule Exceptions: *Harts v. Farmers Insurance Exchange***

*By Carol Barrick*

In a Casenote that is sure to have all readers examining their own insurance policies, author Carol Barrick brings over 20 years of experience as an insurance professional to her examination of *Harts v. Farmers Insurance Exchange*. When the Michigan legislature enacted the Michigan Auto No-Fault Act in 1973, the legislature negated any duty of an insurance agent to offer certain types of auto insurance to potential insureds. Ms. Barrick explains the tragic consequences to some insureds as exemplified in *Harts v. Farmers Insurance Exchange*, and outlines issues still unresolved by the Michigan Supreme Court's decision. This Casenote is sure to be of interest to anyone who drives a car in Michigan.

## **Do the Michigan Department of Environmental Qualities Part 201 Clean-up Criteria Qualify as Applicable or Relevant and Appropriate Requirements Under the Comprehensive Environmental Response, Compensation, and Liability Act?**

*By Randall S. Gregg*

This Comment discusses an issue important to all in Michigan – how state environmental standards are implemented in Superfund remediation. Author Randall Gregg specifically addresses the issue of whether Michigan's Part 201 clean-up criteria qualify as applicable or relevant and appropriate requirements (ARARs) under Superfund.

A brief history of Superfund and its procedures for ensuring state involvement in the remedy selection process is discussed, and then Michigan's clean-up criteria are explained in detail. Mr. Gregg then analyzes whether Michigan's Part 201 clean-up criteria qualify as ARARs. Included are public policy arguments in support of considering Michigan's Part 201 clean-up criteria as potential ARARs. The conclusion of the analysis is that the Part

201 clean-up criteria does qualify as potential ARARs and that Michigan has enacted a policy that allows environmental clean-up criteria to be established without encountering the states promulgation complexities.

**The Unborn Victims of Violence Act: Friend or Foe to the Unborn?**

*By Colleen Jolicoeur-Wonnacott*

This Comment discusses a proposed federal law that would make it a crime to injure or kill a fetus during the commission of a federal offense. Author Colleen Jolicoeur-Wonnacott discusses the background of the proposed federal law and what the legislation seeks to do. The background of other fetal protection laws in the United States is then discussed and how the new law

compares to state laws already in place. A discussion of the United States Supreme Court's decision on *Roe v. Wade* follows and how this decision had some impact on the federal legislation. In discussing the implications of this new legislation, Ms. Jolicoeur-Wonnacott focuses on possible challenges to the new law that could be brought by defendants, such as challenges brought under the Equal Protection Clause and the Due Process Clause of the United States Constitution.

While the proposed law has good intentions, it will probably not succeed in doing what it is set out to do, protect the unborn. Under the language of the proposed law, the defendant does not have to know that a fetus even exists. The purpose of the legislation is to deter violence against the unborn, but there is not even a knowledge or intent requirement for the defendant.



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