

Law Review



Michigan Rule of Evidence 702: Amend It or Leave It to Schanz?

By Honorable Daniel P. Ryan

In this article, the Hon. Daniel P. Ryan examines the Michigan Supreme Court's proposal to amend Michigan Rule of Evidence (MRE) 702 by incorporating into it MCLA 600.2955. According to Judge Ryan, the proposed amendment creates further confusion about the standard for admissibility of expert testimony in Michigan, resulting in a "radical and confusing difference between admissibility of expert opinion testimony in federal courts under FRE 702 and the admissibility of expert opinion testimony in Michigan courts under MRE 702." Part of the problem is that the statute is not as flexible as the current federal standard, set forth in *Daubert v. Merrell Dow Pharmaceuticals*. Like the *Daubert* standard, the proposed amendment charges the court with a "gatekeeping" responsibility. That is, the court is responsible for the preliminary determination of soundness of the expert testimony. This determination is made using several factors under both the proposed Michigan statute and *Daubert*. The proposed Michigan amendment diverges from *Daubert* in that it requires that the scientific methodology used to support the opinion be generally accepted by the scientific community at large. The *Daubert* standard requires only that general acceptance be counted as one factor in the reliability and relevance analysis, and it is not dispositive. Thus, Judge Ryan argues, the federal standard is far more flexible than the proposed Michigan amendment.

Another difference observed by Judge Ryan is that the cases evolving from *Daubert* have held that the *Daubert* relevance and reliability test applies not only to scientific expert testimony, but also to expert testimony in any technical or specialized field. According to Ryan, the drafters of the Michigan statute did not have the benefit of these cases, and, consequently, the statute applies only to expert testimony that is scientific in nature.

Judge Ryan's analysis of this problem recognizes that there are arguments in favor of the proposed amendment. One such argument is that if rules regarding expert testimony are primarily substantive in nature, then the legislature has the authority to govern such issues. Changing MRE 702 to reflect this could be an acknowledgement by the Supreme Court that this is a substantive, rather than a procedural matter.

The author concludes that while MRE 702 is in need of revision, the proposed amendment will only add to the confusion faced by Michigan courts. The article proposes three alternative drafts of the amendment, all of which have one common feature: the deletion of the word "recognized" from the rule. According to Judge Ryan, this simple deletion "changes MRE 702 to conform to the interpretation of FRE 702 in [*Daubert*]."

Uniform Commercial Landlord and Tenant Act—Proposal to Reform "Law Out of Context" By Gary Goldman

In this article, Vice President and Associate General Counsel of CDI Corporation, Gary Goldman, reviews the history of landlord-tenant law and states that today's commercial landlord-tenant law is "law out of context" and in need of reform. Specifically, the author suggests that the state legislatures adopt a Uniform Commercial Landlord and Tenant Act (UCLTA) modeled along the lines of the Uniform Residential Landlord and Tenant Act (URLTA).

Mr. Goldman begins his discussion by emphasizing the importance of the commercial lease, stating that "[r]eal estate often represents a firm's largest single financial commitment." As such, he examines the reasons that mandate reform and reiterates the concerns of past commentators whose advocacy has gone without action.

Because a close link exists between residential and commercial tenants, Mr. Goldman focuses on the purpose and content of the URLTA, and the widespread acceptance that it has received since its approval 29 years ago. Although the issues surrounding residential and commercial tenants are not identical, the author proposes that the URLTA would provide an "excellent working model" for enacting a UCLTA. Mr. Goldman's analysis provides a thorough discussion of several considerations that need to be addressed in an effort to draft an effective and efficient UCLTA.

LAW REVIEW BOARD OF EDITORS: **Front row, from left:** Jennifer Shephard, Interim Casenotes Editor; Natalie Alane, Articles Editor; Tracey Lackman, Editor-in-Chief. **Second row, from left:** Robert J. Andretz, Casenotes Editor; Alecia Noteboom, Symposium Editor; Kara Henigan, Managing Editor. **Back row, from left:** Lorne Carignan, Comments Editor; Herbert Gaylord, Interim Articles Editor; Shawna Langston, Interim Managing Editor.



People v. Attebury: Where's the Gun? Loaded Questions and Michigan's "New" Public Safety Exception

By Kara Henigan

Last year the Michigan Supreme Court adopted the public safety exception to *Miranda v. Arizona* recognized by the U.S. Supreme Court in its 1985 decision, *New York v. Quarles*. Applying *Quarles*, the Michigan Supreme Court held that when police officers are concerned for their own safety or the safety of the public, they may ask "an objectively reasonable question necessary to protect the police or the public from an immediate danger" without first reading suspects the *Miranda* warnings.

In this casenote, Ms. Henigan revisits the rationale and result of *Miranda*, where the U.S. Supreme Court held that the prosecution cannot use defendants' statements against them unless "procedural safeguards" – the now-famous

Ms. Henigan contends the *Attebury* decision rewards the police for materially contributing to an exigency that allows them to invoke the public safety exception.

Miranda warnings – are used before in-custody questioning begins. This casenote also examines *Quarles* and the scholarly criticism that this opinion attracted – particularly the criticism that *Quarles* blurred *Miranda*'s bright-line rule without giving the police and courts a clear test for what constitutes a threat to public safety. Ms. Henigan contends that the Michigan Supreme Court applied

the public safety exception in a situation factually distinguishable from *Quarles*. Moreover, like the *Quarles* decision, *Attebury* also fails to create a clear test for what constitutes the type of public safety threat that allows defendants' un-Mirandized statements to be used against them.

In failing to articulate such a test, Ms. Henigan contends, the *Attebury* decision rewards the police for materially contributing to an exigency that allows them to invoke the public safety exception. Building on the *Quarles* decision and the scholarly criticism aimed at that decision, this casenote proposes a two-part test for situations in which courts would apply the public safety exception. This test looks to the objectively reasonable concern of the officers involved and then looks to whether their conduct materially contributed to the threat to public safety. If the police materially contributed to the threat to public safety, Henigan argues, then the public safety exception should not apply and the suspects' un-Mirandized statements should be inadmissible.

Consumer Welfare and the Sherman Antitrust Act: Reflecting on the Microsoft-Netscape Browser Competition

By Robert Bejesky & Orlando Valle

In this article, Adjunct Professor Robert Bejesky and attorney Orlando Valle discuss the effect that the recent

The article further examines the short-term market competition benefits to consumers and the long-term monopolistic impact on consumers.

court case dealing with the competition between Microsoft and Netscape has on consumer welfare.

The article first discusses the provisions of the Sherman Antitrust Act and the provisions of the act that were applicable to the Microsoft case. The authors discuss tying arrangements and how these types of arrangements violate section 1 of the Sherman Act. The authors further

discuss activities that are prohibited by section 2 of the Sherman Act and how a monopolist violates section 2 of the Act including restricting access to essential products and predatory pricing.

The article next discusses an economic analysis of the browser market. The authors describe exactly what a Web browser is and differentiate a Web browser from an operating system. They go on to give an account of the history behind the competition between Netscape and Microsoft and how Microsoft became the Web browser of choice. The authors discuss how, in becoming the browser of choice, Microsoft has become a benefit to consumers. The article further examines the short-term market competition benefits to consumers and the long-term monopolistic impact on consumers.

The article concludes by posing a question concerning how the government will deal with monopolies, such as Microsoft, who emerge in new arenas where there is tying arrangements to products and services. The authors suggest that there should be a standard economic approach that deals with the short-term harm to consumers based on "rational economic analysis and issues such as expected trends in technology, new potential perceptions of a (tied) product, and broadly defined notions of consumer utility."

The article concludes by posing a question concerning how the government will deal with monopolies, such as Microsoft, who emerge in new arenas...

The Thomas M. Cooley Law Review – What Happens After the Issue Is Put to Bed?

Evelyn C. Tombers, Faculty Co-Adviser to the Thomas M. Cooley Law Review

We all know that the law review credit looks great on a résumé. It tells that future employer quite a bit about you: You've achieved that level of excellence that distinguishes you from others, you have solid research skills, you have solid analytical skills, and you don't mind hard work.

But did you ever wonder just what happened to that law review edition that you worked so hard on? Did it merely sit on someone's shelf as part of someone's personal library? Did people really refer to it? I wondered that, too.

I got my answer not too long ago after Michael Kitson, the *Thomas M. Cooley Law Review's* Publicity Editor, searched LEXIS and Westlaw to see exactly what has happened with our law review's articles, comments, and casenotes once the issue had been sent off to the publisher. The answer he came up with was too good not to share.

Various courts have cited the *Thomas M. Cooley Law Review* in over 40 opinions. In 1989, the United States Supreme Court cited the late Professor Gerald Boston's article, "Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause," 5 *Cooley L. Rev.* 667 (1988). "*Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*," 492 U.S. 257, 287 (1989). And not only has the Michigan Supreme Court cited material that appeared in our law review, but so have the supreme courts of 10 other states, including the supreme courts of Alaska, Arizona, Colorado, Florida, Massachusetts, New Jersey, South Dakota, Tennessee, Texas, and West Virginia. The United States Federal Courts of Appeals in the 5th, 6th, and 8th circuits have also cited works in our law review. And lest I forget, we've been cited by various intermediate appellate courts, including the Michigan, Ohio, Kentucky, Texas, and Utah courts of appeals.

Judges and scholars are using the material that our law review publishes. They turn to it for support for their decisions and theories.

But what was truly surprising to see was how many secondary sources have cited the *Thomas M. Cooley Law Review*. Michael Kitson's search revealed 581 citations to the law review in sources ranging from the *Yale Law and Policy Review*, to the *Harvard Women's Law Journal*, to the *Revista Juridica Universidad de Puerto Rico*. Moreover, the legal encyclopedia *American Jurisprudence* has cited the law review twice, and the authors of the annotations in the *American Law Reports* have cited us four times.

What do all these numbers say? Compared to some of the most often cited law reviews, our numbers say quite a bit. Of the top 30 most-cited law reviews, the *Yale Law Journal* ranked first with over 7,000 citations to it. Fred R. Shapiro, "The Most-Cited Law Reviews," 29 *J. Legal Stud.* 389, 394

(2000). But the 30th-ranked journal, the *University of Cincinnati Law Review*, was cited only 237 more times than the *Cooley Law Review*.

Judges and scholars are using the material that our law review publishes. They turn to it for support for their decisions and theories. All of us — students, faculty, and alumni — should be very proud.

LAW REVIEW ASSOCIATE EDITORS: **Front row, from left:** Marc Lawrence, Associate Editor; Michele Toler, Assistant Editor; Kristy Wisniewski, Assistant Editor; Jennifer Olson, Assistant Editor. **Back row, from left:** Derrick Etheridge, Associate Editor; Jenice Deming, Assistant Editor; Heather Horwath, Associate Editor; Crystal Barth, Associate Editor.

