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# BAR BEAT

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*Fall in Michigan*

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# Table of Contents



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# *Criminal Law – The Right to Counsel and Guilty Pleas*

By Michael A. Tesner, Assistant Prosecuting Attorney – Appeals Division

Michael A. Tesner

**Summary:** The Sixth Amendment right to effective assistance of counsel extends to a defendant's consideration of a formal plea offer. Defense counsel must communicate any formal offer to the defendant in a timely manner and must act competently in advising a defendant whether to take advantage of a plea offer. If a defendant foregoes a plea offer based on his attorney's deficient performance, and the result is a higher penalty following a subsequent guilty plea or conviction at trial, the defendant may have the right to have his conviction set aside and accept the previously tendered plea offer.

The trial court must find that, but for counsel's error, defendant would have accepted the offer, the prosecutor would not have withdrawn it, and the trial court would have accepted it. The trial court would then have the discretion to fashion a remedy ranging from allowing the defendant to plead to the original plea offer with the lesser sentence to leaving the conviction and sentence undisturbed.

**Analysis:** On March 21, 2012, the U.S. Supreme Court decided two cases that recognized and discussed a criminal defendant's Sixth Amendment right to effective assistance of counsel in considering formal offers to plead guilty.[1] The Court analyzed counsels' conduct that led to defendants' rejection of guilty plea offers under the requirements set forth in *Strickland v Washington*, 466 US 668 (1984). The defendant has the burden of establishing that his counsel's performance was deficient and that counsel's failure caused the defendant prejudice in rejecting a plea offer.

In *Lafler*, the defendant allegedly shot at the victim and missed, then chased down the victim and shot her in the buttocks and in the legs. The defendant was charged under Michigan law with Assault with Intent to Murder (AWIM), Felon in Possession (FIP), Felony Firearm and Possession of Marijuana. The prosecutor offered to dismiss two counts and allow the defendant to plead to AWIM and FIP with sentencing guidelines of 51-85 months.

*"In a communication with the court"* the defendant admitted guilt and expressed a willingness to accept the offer; but instead, he twice rejected the offer on advice of his attorney that the prosecution could not prove intent to murder because the victim had been shot below the waist. The defendant was convicted at trial and sentenced to 185 to 360 months in prison. On appeal, the parties conceded that defense counsel's conduct was deficient. Therefore, the question considered by the Supreme Court was whether the defendant could prove he was prejudiced by submitting himself to the trial process and receiving a harsher penalty.

The Court held that to satisfy the prejudice prong of *Strickland*, the defendant must show that, but for the ineffective advice, there is a reasonable probability (1) the plea would have been presented to the court (i.e., defendant would have accepted the offer and the prosecutor would not have withdrawn it prior to the plea); (2) the court would have accepted its terms; and (3) the conviction or sentence would have been less severe than the result obtained through trial. In *Lafler*, the Court held that the defendant had shown he would have pled guilty to the offer and that the sentence he received (185-360 months) was 3 ½ times greater than his potential sentence under the plea offer. As a remedy, the Supreme Court remanded the case for the state to re-offer the plea. If the defendant accepts the plea offer, then the trial court has discretion either to vacate the convictions and resentence pursuant to the plea agreement, to vacate only some of the convictions and resentence accordingly, or to leave the conviction and sentence resulting from the trial undisturbed.

The true significance of *Lafler* is that the Supreme Court recognized for the first time that the Sixth Amendment right to counsel is implicated not only when a defendant accepts a plea that is unfavorable, but also when he or she rejects a plea offer and then proceeds through a fair trial and receives a more severe penalty than had he accepted the plea offer.

In *Frye*, the defendant was charged under Missouri law with driving on a suspended license, which was enhanced to a four-year felony as a multiple repeat offender. The prosecutor formally offered by letter to defense counsel that defendant could plead guilty to a 90-day misdemeanor. The offer was not conveyed to the defendant, and after picking up another charge for driving on a suspended license, the defendant pled guilty to the original felony charge. He was sentenced to three years in prison. In a post-conviction hearing, the defendant testified that had he known of the offer he would have pled guilty to the misdemeanor. Thus, it was another

clear case of deficient performance by defense counsel.

The Supreme Court held that defense counsel has a duty to communicate *formal* plea offers that may be favorable to the accused. To prove prejudice, the defendant must establish that there was a reasonable probability that he or she would have accepted the plea offer and that it would have been entered without objection by the prosecutor or the court. The *Frye* case was remanded for the Missouri courts to determine whether the defendant could establish prejudice.

Placing any formal plea offer on the record will prevent the issue that arose in *Frye* where the offer was not communicated to the defendant. Having the court inquire of the defendant whether he has discussed the offer with his attorney, whether he understands the offer, whether he has any questions about the offer, and whether he wishes to accept or reject it, should prevent a defendant from complaining that he rejected an offer upon poor advice. Finally, if the defendant or his attorney indicates that he is rejecting the offer upon advice of counsel, it would be prudent for the court to inquire into the reasoning where it is not readily apparent.

### About the Author

*Michael A. Tesner has been an Assistant Prosecuting Attorney with the Genesee County Prosecutor's Office for the past 12 years. He has conducted over 30 felony jury trials and is currently assigned to the Appeals Unit. Prior to that, he worked in civil practice and as a law clerk to U.S. District Judges Hon. Stewart A. Newblatt and Hon. Robert H. Cleland. Mr. Tesner graduated with a B.A. from Kalamazoo College in 1988 and earned his J.D. from Boston College Law School in 1991.*

### Endnotes

1 *Lafler v Cooper*, ___ US ___; 132 S Ct 1376; 182 L Ed 2d 398 (2012) and *Missouri v Frye*, ___ US ___; 132 S Ct 1399; 182 L Ed 2d 379 (2012).

# *Durable Power of Attorney: How Has It Been Changed*

By Craig L. Wright

Craig L. Wright

Governor Snyder signed Senate Bill 92 (PA 2012, No. 141) into law on May 22, 2012. The statute is found in MCL 700.5501(7). It takes effect on October 1, 2012, thus creating new requirements for drafting a general durable power of attorney (for finances) in Michigan. These requirements do not apply to a general durable power of attorney executed before October 1, 2012. Read MCL 700.5501 in its entirety since this article is only a summary. This article summarizes the most important changes.

MCL 700.5501(2), paraphrased, requires that the durable power of attorney (execution) shall be one or both of the following: The Power of Attorney must be (a) signed in the presence of two witnesses, or (b) acknowledged by the principal before a notary public, or both.

**Fiduciary**. MCL 700.5501(3)(a)-(f), is paraphrased below. For the first time, the duties and expectations for an attorney-in-fact to follow are clearly defined and stated. More importantly, the agent is referred to as a "fiduciary," which carries with it real added responsibility and accountability.

(a) The attorney-in-fact shall act in accordance with the standards of care applicable to fiduciaries.
(b) The attorney-in-fact shall take reasonable steps to follow the instructions of the principal.
(c) The attorney-in-fact shall, upon request of the principal, provide explanation of his/her actions and render an accounting to the principal.
(d) The attorney-in-fact shall not make a gift of principal's assets unless specifically permitted to do so in the instrument.
(e) The attorney-in-fact shall not create an account or other asset in joint tenancy between the principal and attorney-in-fact unless specifically permitted to do so in the instrument.
(f) The attorney-in-fact shall maintain records of actions taken on behalf of the principal, including transactions, receipts, disbursements, and investments.

**Penalties**. MCL 700.5501(3)(g) addresses penalties for the attorney-in-fact's breach of the "fiduciary duty" owed to the principal. The penalties include damage or loss to the principal and other remedies. The attorney-in-fact's acceptance (MCL 700.5501(4)(h)) which they now must sign, takes it a step further by acknowledging "I may be subject to civil or criminal penalties if I violate my duties to the principal." The acknowledgment must substantially include the provisions found in MCL 700.5501 (4)(a)-(h). These provisions essentially restate sections (3)(a)-(g) above and operate to put the attorney-in-fact on notice of their duties, limitations and potential liabilities.

**Exceptions**. Exceptions to MCL 700.5501 are found in MCL 700.5501(7)(a)-(h), and are paraphrased as follows:

(a) executed before October 1, 2012;
(b) involving delegation of care, custody or property of a minor or ward;
(c) for patient advocate involving principal's health care;
(d) as an instrument coupled with an interest in the subject matter of the power;
(e) as instruments that involve loan/security/pledge/escrow/other similar transaction;
(f) for certain business transactions;
(g) involving a business or commercial purpose and a form prescribed by a government, subdivision, agency, or instrumentality for a governmental purpose.

Please Note: MCL 700.1212 defines the "Fiduciary Relationship." The attorney-in-fact "fiduciary" may well now be subject to MCL 700.1501 "Michigan Prudent Investor Rule" and is subject to MCL 700.5503 where there is accountability to a court-appointed fiduciary and MCL 700.1303(j) which confers jurisdiction to a court to hear an accounting of an agent.

So what does all this mean? Based on previous experience, banks and other financial institutions that deal with these instruments will do as they please; they may view the new law as retroactive and refuse to honor all previously executed, non-complying instruments. At that point, the best suggestion is to either have the client execute a new power of attorney or, if that is no longer possible, file an appropriate petition in probate court to convince the non-compliant party that they must honor the existing instrument.

In reality, most of us have probably already been complying with the new requirements or some version of them in our drafting for quite some time. I like these guidelines as they establish parameters, and once exceeded, they can help the probate judge more easily implement accountability and assess liability if necessary. The attorneys-in-fact no longer have any excuses that they did not know what they were doing was wrong. The new language sets forth the duties and expectations for an attorney-in-fact to follow in administering his/her duties. The signed acceptance contains language addressing penalties for the attorney-in-fact's breach of the "fiduciary duty" owed to the principal.

It has been suggested that the attorney-in-fact sign the acknowledgment just before he/she acts, which is not

Continued on next page

# *Who We Are: Sherri C. Frame*

Sherri C. Frame

**Why did you decide to become an attorney?** My interest in the law was first sparked as a child through my acquaintance with a local judge who went to my church. Every week she sat in the row in front of us, and I was intrigued by her work as a judge. As I grew up, I was always interested in talking with attorneys and learning about their practice. During my school years, I chose to serve in volunteer positions helping people. My favorite courses in college were those that were law-related and involved research and writing. I was excited to find a part-time position with an estate-planning attorney where I learned more about the practice of law. I have always enjoyed helping people solve problems and plan to achieve their goals.

**In what area(s) of law do you practice?** I practice in the areas of Elder Law, Estate Planning & Probate, and Business Planning. I am also a United States Department of Veterans Affairs Accredited Claims Attorney.

**Which area of the law do you like the best and why?** I enjoy all my areas of practice. However, I especially enjoy working with my elderly clients. I had a very close relationship with my maternal grandparents growing up, which was one of the primary reasons for my decision to get my LL.M. in Elder Law and practice in that field.

**What do you like best about being an attorney?** I enjoy assisting my clients in achieving their goals.

**What part of being an attorney can you do without?** The stress associated with the practice of law.

**What words of advice could you offer to new lawyers?** Evaluate the needs of your community along with the practice areas that interest you. Focus on making a positive impact in your community.

**What suggestions do you have to improve the legal system?** Implement e-filing and electronic files, etc., for all the court systems, for the Register of Deeds, and in law offices to protect the environment and to promote efficiency. I would also like to see more mentoring in the profession.

**Offer one suggestion for improving our local Bar.** I am happy with our local Bar. We have a lot of professional, social, and service opportunities available to us.

**Tell us about your life outside of the law.** I enjoy spending time with my husband and children, boating on Lake Michigan, my Pembroke Welsh Corgi and my tuxedo cat. I also enjoy reading and playing tennis when I have time.

**If you had not become an attorney what career would you have chosen?** I am currently an adjunct faculty member at a college, where I teach law courses. If not an attorney, I would be a full-time college professor. I considered pursuing a Ph.D. in history before I went to law school.

**Durable Power** Continued

necessarily at execution of the power of attorney. This way the privacy of the instrument is preserved until, or if, the nominated attorney-in-fact is told of the nomination. Many clients do not want such information disclosed until absolutely necessary, or they may change the instrument at a later date nominating a new attorney-in-fact. This decision depends on the privacy expectation of the client. One thing that has not changed is the need for selection of an honest and trustworthy attorney-in-fact. The bottom line is that if the attorney-in-fact steals and is not collectable the new law helps little in recovering the assets.

# *Constitutional Law in Everyday Settings*

By Alec S. Gibbs

Alec S. Gibbs

No attorney can afford to be a stranger to constitutional law. For starters, we have all sworn to uphold both the state and federal constitutions. Beyond that simple but vital oath, federal and state constitutional issues are likely to arise in the ordinary course of litigation. Even transactional attorneys who avoid courtroom settings need to be aware of possible constitutional issues when drafting documents for both individual and institutional clients.

If you practice criminal law, there's a good chance you are already familiar with some constitutional arguments, including Fourth Amendment violations and due process challenges. Still, there is plenty of room for out-of-the-box thinking. An attorney representing a client charged with violating a knife ordinance might investigate a possible Second Amendment claim. Similarly, a client charged with domestic violence, or one facing a sentencing enhancement for domestic violence, might challenge the law by arguing that it violates the Michigan constitutional prohibition on recognizing a romantic union similar to marriage. These examples are not purely conjectural or speculative.

In *People v Yanna*, 2012 Mich App LEXIS 1269 (June 26, 2012), a defendant successfully challenged Michigan's stun gun law on Second Amendment grounds. A challenge to Ohio's domestic violence laws failed, but not before at least one intermediate appellate court accepted the defendant's argument that the laws ran afoul of the state's ban on civil unions and domestic partnerships. *See State v Carswell*, 114 Ohio St3d 210 (2007).

Although it is more rare, constitutional issues do sometimes arise in commercial and employment contexts. This is particularly true with public employers. For example, the ACLU of Virginia recently filed an amicus brief supporting a First Amendment claim brought by former sheriff department employees who were fired for "liking" a political candidate's Facebook page. "ACLU Argues Facebook Like is Constitutionally Protected Speech," available at *www.acluva.org* (last accessed August 13, 2012).

And even well-intentioned policies designed to prevent bullying and intimidation in public schools can run afoul of the federal constitution. As one federal appellate court has observed, "there is no 'harassment exception' to the First Amendment's Free Speech Clause." *DeJohn v Temple Univ*, 537 F3d 301 (CA3, 2008). An attorney developing a social media policy for local schools, townships or other public employers should keep possible constitutional challenges like this in mind when drafting policies on computer and internet use. Failing to consider the constitutional ramifications of poorly designed policies could cost municipalities, local school districts and other public bodies thousands of dollars in avoidable litigation.

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Similar considerations apply to commercial transactions with state and local governments. Both the federal and state constitutions impose limits on state laws that impair contractual obligations. While most laws affecting contracts between private parties will survive a Contracts Clause challenge, courts are more skeptical of laws designed to impair the contractual obligations of states and municipalities. *See Toledo Area AFL-CIO Council v Pizza*, 154 F3d 307 (CA6, 1998).

In recent years, state and local governments have sought to cut costs by modifying, terminating or rescinding contracts with private parties, including corporations and collective bargaining associations. In Michigan, for example, Public Act 4 of 2011 allowed Emergency Managers to "reject, modify, or

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**Constitutional Law** . . Continued

terminate one or more terms and conditions of an existing contract." MCL 141.1519(1)(j). It is easy to imagine situations where local governments simply terminate unpopular contractual agreements. Attorneys counseling small cities, townships or villages should be prepared to advise their clients of possible exposure under 42 USC § 1983 for Contracts Clause violations, which can include attorney fees and other damages not normally associated with breach of contract litigation.

The need to recognize constitutional issues at initial hearings cannot be overstated. Although certain constitutional errors will always require reversal, failing to raise other issues in the lower courts will prevent appellate courts from considering them. For that reason, every attorney benefits from continuing legal education, whether in the form of seminars, perusal of law reviews or daily updates on leading law blogs. Every practicing attorney will come across a constitutional question in the course of his or her career, but the key to successful constitutional practice is recognizing the issue when it lands on *your* desk.

# *Senior Attorney Update*

By Richard J. Ruhala

Richard J. Ruhala

The Senior Attorney luncheon group will continue to meet on the second Thursday of each month at noon. The next three luncheon meetings are scheduled for October 11, November 8, and December 13 at the Valley Coney Island Restaurant located at the corner of Miller and Linden Roads. Genesee County Bar Association members age 65 or older, whether practicing or not, are encouraged to attend.

At the Senior Attorney Luncheon Meeting set for October 11, the Genesee County Senior Attorneys attending will vote on whether to change its name to coincide with the State Bar's name of "Master Lawyers Section."

It should be noted that the State Bar of Michigan, at its annual Bar Meeting, honored the 50-year members. Members from the Genesee County area who were recognized are Robert A. Burchfield (deceased), Hon. Harland R. Caswell, J. David Karr, Kittredge R. Klapp, Hon. Robert M. Ransom, Robert J. Reid, Richard J. Ruhala and Robert L. Shegos.

# *How Sweet It Is!*

By Roberta J.F. Wray

George F. Brueck

George Brueck became a member of the GCBA in 2007, after retiring from General Motors' labor relations staff. His job was to negotiate and administer GM labor contracts with the UAW. He says he worked on the line at GM early in life, decided he wanted an advanced degree and followed some other family members into the law. He graduated from Detroit College of Law in 1978 and transferred to the labor relations staff. After 40 plus years with GM, he retired.

These days he spends his professional time in private practice doing domestic relations and civil mediations. His other part-time job is really sweet. George has been able to engage in a long-time interest—as an apiarist. (NO! It doesn't have anything to do with apes.) As we all know, a lot of our language is based upon Latin; so with "apiarist"—derivative of "apis" or bee.

The environmental threat to the honeybee population triggered a renewed interest in beekeeping, so when he retired, George was attracted to an ad for a beekeeping class. Then some beehive equipment came to his attention. That was all it took. He purchased a pair of hives and set to work.

Actually, the bees pretty much do all the work. He checks on the hives every week or two to make sure the bees haven't filled all the frames with honey. Generally, that is not a dangerous job; but last fall, George says, he miscalculated the mood of the bees. They apparently objected to his effort to harvest some honey. Some of them got inside his protective clothing. He wears more now (see photo).

Last year he harvested between two and two and a half gallons of honey from two hives, one of which was not doing too well. No one could tell him what might have been wrong. He didn't change anything, but now both hives are functioning, and he's hoping for a bigger harvest.

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