COMMENTARY

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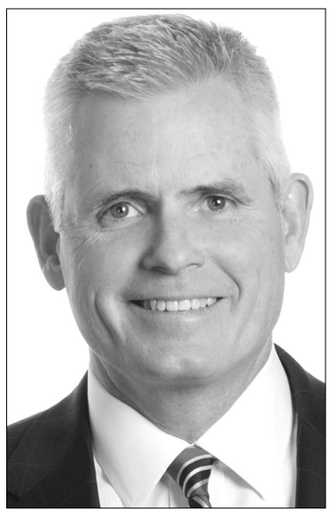
Pre-hearing third party discovery in arbitration

BY WILLIAM D. GILBRIDE JR.



William D. Gilbride Jr.

What is the authority of an arbitrator to issue third-party subpoenas for the pre-hearing production of documents and to compel deposition testimony in a matter where the parties' inter se arbitration agreement expressly invokes the Federal Rules of Civil Procedure?

Based on the following authorities, an arbitrator may be authorized by law to issue non-party subpoenas for both the production of documents and to compel deposition testimony in certain cases.

It has become more commonplace in arbitration agreements that the parties are expressly authorized to conduct pre-hearing discovery through the issuance of subpoenas to third parties for documents and testimony. For example, a typical discovery clause may provide, "each party shall have the right to conduct discovery in any manner and to the extent authorized by the Federal Rules of Civil Procedure as interpreted by federal courts. If there is a conflict between those Rules and the provisions of this section, the provisions of this section shall prevail."

The Federal Rules of Civil Procedure clearly provide the right for parties to obtain discovery from non-party witnesses in the form of document requests and deposition testimony. See FRCP 30(a)(1) (Depositions); FRCP 34(c) (Document Production from Non-Parties); FRCP 45 (Subpoena).

Thus, by invoking the Federal Rules by contract into the arbitration agreement, parties are expressing an intent to empower the arbitrator to permit, compel and oversee third party discovery in accordance with Federal practice.

Authority for the Arbitrator's issuance of non-party, pre-hearing subpoenas is also found in the AAA Commercial Rules, which Rules are frequently incorporated into the parties' arbitration agreement. For example, Rule 34 provides, "[a]n arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently." The AAA's Commercial Rules for "large, complex cases" include "[b]road arbitrator authority to order and control the exchange of information, *including depositions*." Commercial Rules, p. 9 (emphasis added). Rule 34 also includes the power—in exceptional cases and upon the showing of good cause—to "order depositions to obtain the testimony of *a person* who may possess information determined by the arbitrator to be relevant and material to the outcome of the case." L-3(f) (emphasis added).

Based on the express language of the parties' agreement to engage in broad discovery in accordance with the Federal Rules of Civil Procedure, along with AAA rules, it appears that the Arbitrator may have authority to subpoena non-parties to produce documents and appear for deposition. But, what have the courts ruled in such cases?

Some case law exists holding that the Federal Arbitration Act, 9 U.S.C. §§ 1, et seq. ("FAA") alone, does not authorize pre-arbitration discovery, however those cases are distinguishable from cases in which the parties have expressly empowered themselves and the arbitrator to conduct/oversee third-party discovery in accordance with the Federal Rules of Civil Procedure.

While it is well-established that, under the FAA, an arbitrator has the power to summon third-party witnesses to provide testimony and produce documentation at a hearing, see 9 U.S.C. § 7, there is presently a split among the circuits as to whether non-parties can be compelled by a court to provide documents and/or testimony prior to the arbitration hearing.

The Sixth and Eighth Circuits have held that parties to an arbitration should be able to take discovery from third parties in advance of any arbitration. See *Security Life Ins Co. of Am. v. Duncanson & Holt Inc.,* 228 F.3d 865, 970-971 (8th Cir. 2000) (holding that, although the language of Section 7 is unclear, "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing" when a nonparty was "integrally related to the underlying arbitration."); see also *Television and Radio Artists v WJBK-TV,* 164 F.3d 1004, 1010 (6th Cir. 1999). The Fourth Circuit has taken the position that, while Section 7 of the FAA does not empower an arbitrator to issue prehearing discovery subpoenas to nonparties, an arbitration panel might be able to subpoena a nonparty for prehearing discovery "under unusual circumstances" and "upon a showing of special need or hardship." *COMSAT Corp v Natl. Science Foundation,* 190 F.3d 269, 275-276 (4th Cir. 1999).

The Third, Second and Ninth Circuits, however, have taken a more restrictive approach and have held that the FAA does not grant arbitrators the power over third parties to produce documents or appear in advance of the arbitration hearing. See, e.g., *Hay Group Inc. v E.B.S. Acq. Corp.,* 360 F.3d 404 (3rd Cir. 2004); *Stolt-Nielsen SA v Celanese AG,* 430 F.3d 567 (2d Cir. 2005); *CVS Health Corp v Vividus LLC,* 878 F.3d 703 (9th Cir. 2017). However, despite these restrictive views, the Second and Third Circuits have recognized that third-party evidence may be obtained in advance of the arbitration hearing so long as the evidence is taken before the arbitrator. See *Stolt-Neilsen,* 430 F.3d at 577-578 (holding that the arbitration panel had the authority to compel a third-party to testify and produce documents in advance of the full merits hearing so long as the evidence was taken before the arbitration panel); see also, *Hay Group,* 360 F.3d at 413 (concurring opinion).

The cases expressing the more restrictive views may not preclude discovery in a case in which the parties' arbitration agreement expressly invokes full discovery under the Federal Rules of Civil Procedure – a factor that is not present in the cases outlined above: neither the *Hay Group, Stolt-Nielsen,* nor *CVS Health Corp* involved arbitration agreements in which the parties created an express contractual right to discovery co-extensive with that which is permitted under the Federal Rules of Civil Procedure. Given this distinguishing factor, the more restrictive view of pre-arbitration discovery (for both production of documents and depositions) may not prevent discovery in cases in which the parties have agreed to it.

Furthermore, even if it is determined that a case is pending in a jurisdiction that follows the more restrictive view of pre hearing discovery from third parties, the arbitrator is likely permitted under the law in all circuits that have addressed the issue to compel third-party pre-arbitration production, so long as the evidence is taken before the arbitrator.

Given the existent authority, counsel should be cognizant of the potential for pre-hearing third party discovery when drafting or enforcing agreements to arbitrate.

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Recreational marihuana: How Michigan municipalities are dealing with legalized marihuana

BY REBECCA A. CAMARGO

Rebecca A. Camargo

With the passing of Proposal 1 in 2018, legalizing recreational marihuana, cities and towns across the state of Michigan have had to deal with deciding whether to opt in or opt out, drafting ordinances reflecting the decision, and preparing the infrastructure necessary when opting in. While each municipality had to either opt in to allow growing, testing, and/or sales of marihuana, or opt out by November 2019, many communities are still grappling with that decision and potentional outcomes.

Proposal 1 was passed with 55.9% of voters voting yes. However, of the 1,773 municipalities in the state, only 20% had opted in by December 1, 2019 Many communities chose to opt out and take a wait and see approach. Any municipality that previously opted out can later choose to enact an ordinance to allow sales of recreational marihuana. Additionally, the citizens of a municipality can create a ballot initiative to be placed in a general election and allow the entire community to vote for or against recreational marihuana.

Of the 380 communities that opted in to allow sales of recreational marihuana, many have not yet issued a single adult use license. In fact, as of July 7, 2020, there were only 111 active licenses in the State of Michigan. The cause of the delays in many communities is simply due to the many considerations it takes to draft and administer a recreational marihuana ordinance.

Take for instance, a city that opted in and drafted an ordinance allowing certain recreational marihuana facilities, grow operations, or testing facilities, or all of the above. That city then has to consider zoning requirements, building permits, and general infrastructure to regulate these operations. In particular, the city must ensure that its ordinance contains equal opportunities for all applicants to obtain a license. This includes fair criteria and point systems for the city to determine the winner or winners of a particular type of license. Should there be any intimation of inequality, the city will undoubtedly face litigation.

After drafting the ordinance with a fair scoring system, the city must then accept applicants for a license and regulate the licensees. The city needs to have an adequate infrastructure to regulate zoning and compliance. Many smaller communities that opted in are still putting together that infrastructure in order to prepare for the licenses. Once those smaller communities have implemented the necessary tools to go forward, we can anticipate hundreds of additional adult use licenses across the state.

While the majority of the municipalities that opted out in 2019 have not since drafted ordinances opting in, there has been a small wave of community driven ballot initiatives to allow recreational marihuana licenses. The success of such an initiative is unclear as there were only a few on the 2019 ballots. Of those, only one community driven proposal was approved by the voters to allow recreational marihuana. The rest failed. There will be ballot initiatives on the 2020 ballot, and the results of those may help to guide other communities going forward.

As Proposal 1 matures, it will be interesting to see how communities that opted in are handling the many aspects of recreational marihuana. Based on the successes or failures of those communities, we can expect to see municipalities either opting in or steadfastly opting out.

Rebecca Camargo is an attorney with Beier Howlett in Troy.

MY TURN

BY TOM KIRVAN
Legal News

A word choice that somehow spelled 'trouble'

A recent move unearthed all sorts of interesting items, including a treasure trove of photos from when my hair (or what's left of it) was a decidedly different color than the various shades of gray that it is now.

The move also brought to light a real-life police story from yesteryear, when I labored in the ever-changing environs of the weekly newspaper business with my longtime colleague Brian Cox, the current editor of The Detroit Legal News.

In 2002, Brian was a relatively new addition to the weekly newspaper staff that I managed, although he had quickly proved his worth as a talented and prolific writer. As such, he was assigned to various city beats, including the critically important police blotter where all forms of lawless behavior played out for our readers to digest.

In October of that year, Brian earned a back-page byline summarizing the police news for the week, highlighted by his detailed coverage of a teen-age tryst that took place under the cover of darkness in a local park. His four-column story would soon become the talk of the small town and rightly so, we were about to discover.

To set the stage for the unfolding story, Brian opened with the sentence "On a routine 'proactive' patrol of Curtiss Park the evening of Oct. 11," a police officer "came upon a parked vehicle in a rear lot."

Nothing too noteworthy there it would seem, but suddenly there was more.

"Upon approaching the car and shining his flashlight in the window, the officer observed a naked boy in the front seat and a naked girl in the back. He also saw a case of beer in the front."

The combination of unclothed teens and unbridled alcohol consumption would soon prove deadly in a vaudevillian sort of way, Brian reported.

"The startled male youth threw his car in reverse and attempted to flee, nearly hitting the patrol car, according to the officer's report," Brian wrote.

"Driving erratically and with the officer in controlled pursuit with lights flashing, the youth apparently attempted to exit the park, driving over grass and through a newly constructed playground area covered with woodchips.

"The vehicle finally came to a stop near the exit, and the officer conducted a 'high risk stop,' demanding the youth get out of the car with his hands raised, and get on the ground. The officer then handcuffed the subject, who had been able to get a shirt on but was still without pants."

Both occupants of the vehicle, Brian noted, were then transported to the local police station where their parents were notified of the multiple misdeeds.

"The male youth was charged with fleeing and eluding, open intoxicants, and minor in possession of alcohol," Brian reported. "The girl was issued a citation for minor in possession of alcohol. The case was turned over to juvenile prosecutors and both teens were released to their parents."

But then there was this addendum.

"In a related story, earlier that same day another two . . . students, albeit fully dressed, were arrested and ticketed for possession of alcohol as they left the Middle School parking lot," Brian indicated in his police beat summary.

The word "albeit" was a conjunction seldom used in our newspaper jargon, but it was a nice turn of a phrase by our ace police reporter, I thought at the time.

By the next afternoon, when the respective mothers of the two teens involved in the late-night romantic escapade made their way into my upstairs newspaper office, I began to think differently about the word choice.

Both mothers, one of whom was unabashedly nursing a newborn throughout the discussion, were equally incensed over our coverage of the incident, basically saying that we had subjected their teens to unwanted attention and widespread ridicule across the community. This, despite the fact that neither one of the two teens were named in the article due to privacy restraints involving juveniles.

In effect, one of the moms said in anguish, "You have ruined our kids' lives" by thoughtless and heartless reporting of a matter she believed was published solely to "sell newspapers" and to "titillate readers."

That, of course, was another interesting turn of a phrase, given what the two newspapermen in the room were unable to avoid witnessing during the butt-kicking session.

And then, with her voice reaching another octave level, she demanded we explain the use of "albeit," a word she believed had particularly sinister connotations given the totality of the unfortunate set of circumstances.

For that explanation, I left it to Brian, since he was architect of that word construction. His somewhat tongue-in-cheek reply, meant to lend a bit of humor to a discussion that was starting to wander into veiled threats of legal action, failed to pacify the aggrieved audience, leaving me to assure them that such a "cruel" and "unusual" word would never grace a printed page again.

Until now.

What helps the voters to decide?

BY LEE H. HAMILTON

Like any American who cares about this country, I have a deep interest in the results of this election. But as a politician (I think one never really retires from that job), I take a professional interest, as well. Not only for policy or partisan concerns, but because I'm always interested in how people make up their minds on how to vote.

This is an occupational hazard, I think. I was on the ballot 34 times over the course of my career and have spent a lot of time thinking about why people vote as they do. To be sure, we each have our own reasons for where we come down: sometimes based on policy preferences, sometimes because projects we care about will be advanced by voting a certain way, sometimes because there's one issue we care about above all others. Still, I think there's one key factor that doesn't get taken as seriously as it should: likability.

We've all heard this notion expressed as, "Who'd you rather have a beer with?" Or, as a group of Democratic women who were planning to vote for Ronald Reagan once explained, they liked the unfailingly gracious and courteous way he treated his wife, Nancy.

This is not frivolous. I'd argue, in fact, that "likability" is actually a complex decision. We tend, for instance, to like people who are positive, constructive, and forward-looking, and who enunciate or profess a feeling of hope. The Rev. Jesse Jackson used to have a phrase he used, "Keep hope alive." Whatever you thought about his politics, that optimistic, forward-looking view appealed to a lot of people.

We also, whether we know it or not, pay attention to authenticity. It's a favorite word in politics these days, but I think it's always been the case that we want candidates who are not fake and who give you a sense of a genuine personality undergirding their public persona. We know it intuitively, and it plays a role in whether or not we like someone.

There's a policy element to all this, as well, in that we like people who have views and values we can relate to. Or, to put it another way, we don't favor candidates whose values are alien to ours. Nobody fits our likes and dislikes perfectly, but we make judgments on candidates based on whether they more closely align with our values than the other candidate does.

We also judge "likability" by whether or not we think a candidate is going to serve our interests. We evaluate them on whether they hold roughly the same goals and interests we do, and if so, we're much more likely to support them. Which is also why we want our candidates to be reliable and steady in their views. We want officeholders we can trust, not people who jump all over, saying one thing one day and another the next.

I think Americans also prefer candidates who display a basic sense of honesty and decency, who possess a strong moral compass, and who show compassion for people who are struggling in their lives. This does not mean we always vote for them—political circumstances or straight-on political calculation can get in the way—but I believe that for most Americans, those qualities matter a great deal.

Clearly, a lot goes into whether or not a candidate is likable, and one voter's gut sense will differ from another's. But I can tell you that right now, candidates for office all over the country are focused on this question.

Campaigning is a matter of going from one group to another— sometimes small, sometimes large—and the question always on your mind is how you appeal to this group or person, and how you make yourself likable to them. In the wake of the election, the winners will be patting themselves on the back for having figured it out. And the losers will be left wondering how they might have behaved differently… and been more likable.

Lee Hamilton is a senior advisor for the Indiana University Center on Representative Government; a distinguished scholar at the IU Hamilton Lugar School of Global and International Studies; and a professor of practice at the IU O'Neill School of Public and Environmental Affairs. He was a member of the U.S. House of Representatives for 34 years.

COMMENTARY PAGE

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