WEST MICHIGAN CHAPTER OF THE FEDERAL BAR ASSOCIATION
BAR & BENCH NEWSLETTER
VOL 35, NO 3
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Table of Contents

President's Letter—Provide Input

James Liggins Jr., President
Federal Bar Association, W.D. Michigan

The West Michigan Chapter of the Federal Bar Association has a strong and rich history. We strive to improve the practice of law in our federal courts and foster a positive and collegial relationship among the attorneys and judges who practice law and dispense justice in this district. These goals permeate every luncheon series, program, conference, and seminar, and they continue to be our guiding light as we look to 2024.

Our luncheon series, including but not limited to our Supreme Court Year in Review, are wonderful and convenient opportunities for the federal court practitioner to hear dynamic presentations integral to our practice and to those we represent. The Hillman Advocacy Program will be returning for its 42nd year in 2024 and continues its longstanding tradition of providing high-quality professional courtroom training to newer attorneys under the guidance of some of Western Michigan's top trial attorneys. And we are excited that the Bench-Bar Conference is scheduled for September 2024 and planning is on the way to facilitate an exciting opportunity for judges and lawyers to interact, exchange ideas, and network with each other.

We stand on the shoulders of the many people who have come before us and committed to being good stewards over our mission and goals for our district. In 2024, our hope is to maintain and advance that good stewardship with a focus on continuing to define ourselves and to identify and clarify our mission, vision, and focus. We also hope to be intentional about outreach to all practitioners in our district with the goal of furthering an inclusive and diverse organization. Finally, we are committed to supporting civic educational needs within our district and our community as we have a responsibility to empower people to participate in our democratic processes.

2024 promises to be an exciting and dynamic year for our organization, and we hope that you will join us as we embark on our continued quest to cultivate and enrich our profession and our community.

James Liggins Jr. *is the 2024 president of the West Michigan Chapter of the FBA. He is an attorney at Warner Norcross + Judd LLP, where he has a multifaceted litigation practice.*

WEST MICHIGAN CHAPTER OF THE FEDERAL BAR ASSOCIATION
www.westmichiganfederalbar.org

Recap of 2022–2023 Events: Serving Our Membership

By Britt Cobb

Since the last issue of *Bar & Bench* was published, the officers of the FBA have changed, and James Liggins is now leading the organization. But, as I mentioned at the Annual Meeting, I wanted to take the opportunity to recap the various events, programs, and material the FBA took part in sponsoring during the 2022–2023 year—we put your $50 annual dues to good use:

- Meet the Judges Panel with Judges Jarbou and Beckering
  November 30, 2022, One Bourbon, Grand Rapids
- Judge Neff's Portrait and Portrait Dedication Reception
  December 22, 2022, Grand Rapids Federal Courthouse
- Hillman Advocacy Program
  January 18–20, 2023, Grand Rapids
- Supreme Court Review Lunch and Learn
  February 2, 2023, Grand Rapids Federal Courthouse
- Teaching the Rule of Law Abroad Lunch and Learn
  March 15, 2023, Grand Rapids Federal Courthouse
- Appellate Advocacy with Sixth Circuit Judges McKeague and Larsen
  April 11, 2023, MSU College of Law, East Lansing
- Prisoner Rights: An Overview of 1983 Cases Lunch and Learn
  May 3, 2023, Warner Norcross + Judd, Grand Rapids
- Civics Outreach Program with Wyoming High School students
  May 15, 2023, Grand Rapids Federal Courthouse
- Anatomy of a Trial Program with the American College of Trial Lawyers
  June 21, 2023, Grand Rapids Federal Courthouse

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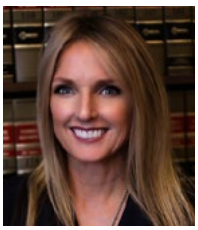
Recap of 2022-2023 Events ...
Continued from page 2

- Young Lawyers Division Summer Mixer
  June 21, 2023, Paddock Place, Grand Rapids
- Cleveland Guardians and District Break Out, Sixth Circuit Judicial Conference
  September 5–7, 2023, Cleveland
- POWER Act Program on Human Trafficking Lunch and Learn
  September 20, 2023, Grand Rapids Federal Courthouse
- Mixer with the Eastern District FBA Chapter with Chief Judges Cox and Jarbou
  October 2, 2023, MSU College of Law, East Lansing
- Annual Meeting with the Honorable Joan Larsen
  October 12, 2023, City Flats Hotel, Grand Rapids
- *Bar & Bench*, email updates, and biannual bar admission ceremonies

I hope you were able to take advantage of some of our programming. It was personally a very rewarding experience to be your chapter President. Thank you for the privilege!



***Britt Cobb** served as the 2023 president of the West Michigan Chapter of the FBA. She is a partner at Willey & Chamberlain LLP in Grand Rapids, a criminal defense law firm.*

Chevron and Its "Bright" Future

By Nicholas M. Ohanesian

Earlier this year, the U.S. Supreme Court granted certiorari in *Loper Bright Enterprises v. Raimondo* on the following question:

> Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.[1]

This article briefly traces the history of the doctrine of administrative deference, introduces the criticisms of the doctrine, and predicts where the Supreme Court might now be headed. Oral arguments are scheduled for January 17, 2024.

How We Got Here

Skidmore

Skidmore v. Swift & Co. was the first case following the New Deal expansion of the administrative state that addressed agency interpretations of the statutes they were charged with enforcing.[2] Swift challenged the Department of Labor's application of the Fair Labor Standards Act ("FLSA") to time spent by employees "on call" while being required to remain on company premises. In evaluating the Department of Labor's interpretation of the FLSA, the Court held,

> We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[3]

Chevron

Chevron v. Natural Resources Defense Council represents the modern standard on how courts review agency interpretations of their statutes.[4] *Chevron* imposes a two-step test:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the mat-

Continued on next page

Chevron and Its "Bright" Future

Continued from page 3

> ter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[5]

Chevron helped address the unpredictability generated by the *Skidmore* test.[6]

Mead

Chevron did not directly address the continuing vitality of *Skidmore*, but whatever ambiguity existed was resolved in *United States v. Mead Corp*.[7] Mead challenged a tariff determination from the U.S. Customs Service involving the importation of day planners. The Court added a threshold question to the *Chevron* test asking if "Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority."[8] The Court further held that in circumstances where the *Chevron* test does not apply, the *Skidmore* test does.[9]

West Virginia

In *West Virginia v. EPA*, the Supreme Court further qualified the *Chevron* test through the major questions doctrine.[10] In this case West Virginia challenged the EPA's regulation of carbon dioxide as a pollutant under the Clean Air Act. The Court proceeded to hold that the major questions doctrine "instructs courts to presume that Congress does not delegate policy decisions of great economic and political magnitude to agencies."[11] Given the recency of this opinion, it is difficult to predict whether this caveat functions independently of the *Chevron* test or as an adjunct to the existing test at step zero or step one.[12]

Discontent with *Chevron*

Although the Supreme Court qualified *Chevron* first in *Mead* and more recently in *West Virginia*, there continues to be discontent over the *Chevron* test. These critiques come from two principal directions. The first focuses on the diminishment of the legislative branch. Under this argument, administrative deference creates a perverse incentive for Congress to delegate broad swathes of its authority instead of resolving difficult decisions through the legislative process.[13] The second critique comes from the judicial branch and focuses on how *Chevron* intrudes upon the province of the judiciary to "say what the law is" and how deference arguably infringes upon due process of law.[14]

Possible Outcomes

Now that we have some idea where we are, we can talk about where the Supreme Court might be going in *Loper Bright*. As the grant of certiorari itself suggests, the Court could either opt to further prune *Chevron* or uproot it outright. Amongst the remaining members of the Court, three justices have expressed an interest in overruling *Chevron* outright.[15] By contrast, Chief Justice Roberts has consistently favored an incrementalist approach when dealing with *Chevron* in prior cases and so far Justice Alito has joined him in this endeavor. Justices Kagan and Sotomayor have taken a similar tack, likely to preserve *Chevron* and other administrative deference doctrines.[16] Apart from joining the majority opinion authored by Chief Justice Roberts in *West Virginia*, it is difficult to sort out whether Justice Barrett will join the incrementalist camp or whether she will favor jettisoning the entire enterprise.[17]

Chevron's fate likely hinges on whether Chief Justice Roberts can hold together a majority content to curb the perceived excesses of *Chevron* or whether the group seeking to overturn *Chevron* outright can attract Justices Barrett and Alito. Assuming the majority opts for the incrementalist route, the Court may further qualify *Chevron* at step one and hold that silence is not sufficient to find ambiguity sufficient to advance past step one.[18]

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Chevron and Its "Bright" Future

Continued from page 4

Given what happened first in *Mead* and later in *West Virginia*, the Court may continue its incrementalism approach, further refining *Chevron*'s scope. On the other end of the continuum, the Court could jettison *Chevron* entirely, while perhaps leaving the *Skidmore* standard in its place. At the end of the day, while *Chevron*'s prospects may not *bright*, they may not be as dim as they seem.

Nicholas M. Ohanesian *serves as the Hearing Office Chief Administrative Law Judge for the Social Security Administration, Office of Hearings Operations in Grand Rapids, Michigan and also is an Adjunct Professor at Michigan State University College of Law. He also served as attorney for the National Labor Relations Board in Peoria, Illinois and Jacksonville, Florida. The views expressed in this article belong to the author alone, in his personal capacity as a private citizen. The views expressed in this article do not represent the views of the Social Security Administration or the United States government. The author is not acting as an agent or representative of the Social Security Administration or the United States government in this activity. There is no expressed or implied endorsement of his views or activities by either the Social Security Administration or the United States government.*

Endnotes

1 142 S. Ct. 2429 (2023) (mem.); *The Relentless, Inc. v. Dep't of Com.*, No. 22-1219, 2023 WL 6780370 (U.S. Oct. 13, 2023) (mem.) (granting certiorari and consolidating for argument on the same question presented as *Loper Bright*); *see also Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

2 323 U.S. 134 (1944).

3 *Skidmore*, 323 U.S. at 140.

4 467 U.S. 837.

5 *Id.* at 842–43.

6 *See, e.g.*, *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976) (surveying the analytical approaches to administrative deference pre-*Chevron* and noting the conflicting lines of cases).

7 533 U.S. 218 (2001).

8 *Mead*, 533 U.S. at 226–27; *see also* Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 189 (2006).

9 *Mead*, 533 U.S. at 240.

10 142 S. Ct. 2587 (2022).

11 Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 Yale L.J. Forum 693, 694 (2022) (2022).

12 *Id.*

13 Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 Geo. J.L. & Pub. Pol'y 103, 112–13 nn.49–51 (2018); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463, 1504 (2015).

14 *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *Walker*, *supra* note 13, at 112 n.44; Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1189 (2016); *see also Michigan v. EPA*, 576 U.S. 743, 760–763 (2015) (Thomas, J., concurring).

15 *Michigan*, 576 U.S. at 760 (2015) (Thomas, J., concurring); *Buffington v. McDonough* 143 S. Ct. 14 (2022) (mem.) (Gorsuch, J., dissenting from denial of certiorari); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2014) (book review)

16 *See generally Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

17 *See generally West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *see also* Evan Bernick, *Judge Amy Coney Barrett on Statutory Interpretation: Textualism, Precedent, Judicial Restraint, and the Future of Chevron*, Yale J. on Reg. Notice & Comment (July 3, 2018), https://www.yalejreg.com/nc/judge-amy-coney-barrett-on-statutory-interpretation-textualism-precedent-judicial-restraint-and-the-future-of-chevron-by-evan-bernick/.

18 *See* Nathan R. Sales & Jonathan H. Adler, *The Rest of Silence: Chevron Deference, Agency Deference, and Statutory Silence*, 2009 U. Ill. L. Rev. 1497, 1499–1500 (2009).

Fall 2023 Events a Success

By Rachel Frank

East/West Mixer – October 2

Members of the Western District and Eastern District of Michigan Chapters of the FBA, in addition to judges from both districts, gathered at the Michigan State University College of Law on October 2 for an "East Meets West" Mixer! MSU Law hosted the informal event, complete with drinks and a string quartet. We heard remarks from Western District Chief Judge Hala Jarbou and Eastern District Chief Judge Sean Cox and made new connections with Eastern District practitioners. We hope to make this great event an annual one!

The East/West Mixer was well attended by members of the bench and bar

Annual Meeting – October 12

The FBA Annual Meeting took place on October 12 at the City Flats ballroom. We heard remarks from our outgoing president, Britt Cobb, and new president, James Liggins. We congratulate Dave Gass for receiving the Service to the Profession Award, presented by the Honorable Hugh Brenneman. Sixth Circuit Judge Joan Larsen was the event's featured speaker, and we enjoyed hearing her tips on practice before the court of appeals, especially with respect to state-law issues. Congratulations again to Dave, and thank you again to Britt for her term as president!

Continued on next page

Fall 2023 Events a Success

Continued from page 6

Melissa Rabidoux presented the Service to the Profession Award plaque to Dave Gass at the 2023 Annual Meeting.

Don Davis Memorial Event – November 8

Our longtime friend and colleague, Don Davis, passed away in early February. SBBL Law hosted a memorial event on November 8 at Founder's, where Don enjoyed getting a beer and spending time with friends. We heard toasts and speeches from Don's friends and colleagues and were reminded of what a special person Don was.

Rachel Frank *is the 2024 vice president of programs of the West Michigan Chapter of the FBA. She is the founder of Rachel Frank Law, PLLC in Grand Rapids, a criminal defense law firm.*

Call for Articles

Interested in contributing to *Bar & Bench*? We invite you to draft an article on a subject of interest to federal practitioners in the Western District of Michigan. Please contact our editor, Charlie Quigg, at cquigg@wnj.com for more information.

District Court Roundup

By C.J. Schneider and Richard Perez

United States v. 524 Florence Street
Kalamazoo, MI, No. 1:23-cv-425 (Oct. 17, 2023)

The Government initiated an in rem civil forfeiture action against real property and jewelry that allegedly either were used in sale of controlled substances or were proceeds traceable to the exchange of controlled substances. The purported owner of the real property, Menyon Ozomaro, proceeding pro se, filed a verified statement of interest in the property. The Government moved to strike Ozomaro's claim, and Ozomaro filed an answer. Subsequently, the Government moved to strike the answer. The Court granted the Government's motions to strike.

The Court concluded that Ozomaro's answer was untimely, unsigned, and nonresponsive to the verified complaint, which warranted striking the answer. Ozomaro's filings fell under Rule G of Federal Rules of Civil Procedure's Supplemental Rules for Admiralty or Maritime Claims and Civil Forfeiture Actions. The Court explained that, under Sixth Circuit precedent, claimants must strictly comply with Supplemental Rule G to have statutory standing to challenge a forfeiture action. Here, Ozomaro's answer was (i) untimely, (ii) unsigned, and (iii) failed to substantively respond to the Government's complaint. Accordingly, the Court granted both the Government's motion to strike Ozomaro's answer and the Government's motion to strike Ozomaro's claim.

Assistant U.S. Attorney Joel Fauson represented the Government. Ozomaro proceeded pro se.

C.J. Schneider *is a member at Miller Johnson in Grand Rapids. He practices in commercial crisis counseling and litigation, helping businesses and nonprofit organizations successfully navigate high-profile matters, including mass tort claims, high-stakes contract disputes, global supply chain emergencies, and corporate governance reform.*

Richard Perez *is an associate at Miller Johnson in Grand Rapids. His litigation practice primarily focuses on commercial, governmental, and criminal litigation in all phases of disputes and investigations.*

Appellate Roundup—Winter 2023

Noteworthy Cases from the Sixth Circuit

By Ashley Yuill

Hile v. Michigan
86 F.4th 269 (6th Cir. 2023)

This challenge to a 1970 amendment to the Michigan Constitution prohibiting payment of "public monies" to private schools resulted in a split, published decision from the Sixth Circuit. An advocacy organization and five families sued the State of Michigan, Governor Gretchen Whitmer, and Treasurer Rachael Eubanks, raising free exercise and equal protection claims in an attempt to strike down the amendment that allegedly had anti-religious origins. Judge Jonker dismissed these claims, finding that the amendment was facially neutral and did not single out any religious group for unequal treatment.

On appeal, a majority of the Sixth Circuit affirmed. Plaintiffs admitted that the amendment was facially neutral but argued that it was enacted for anti-religious reasons and it has a discriminatory impact on religious people and schools by restructuring the political process. Unlike public-school parents, Plaintiffs argued, religious persons and schools cannot lobby the legislature for governmental aid or tuition help; rather, they must seek an amendment to Michigan's Constitution. The majority rejected this argument, reasoning that Plaintiffs—parents who wish to send their children to religious schools—are treated the same as parents who wish to send their children to private, non-religious schools. Moreover, the majority noted, the amendment "embodied a legitimate policy choice that public funds be spent on public schools." Judge Murphy, who believed Plaintiffs lacked standing, dissented from the majority's decision to reach the merits of this case.

John J. Bursch, of Bursch Law, represented Plaintiffs. AAGs Linus Banghart-Linn and Christopher Allen, of the Office of the Michigan Attorney General, represented the State.

Johnson v. Sootsman
79 F.4th 608 (6th Cir. 2023)

In this § 1983 action, the Sixth Circuit affirmed that the mere fact that a correctional officer may have violated a prison use-of-force policy or committed an intentional tort does not necessarily mean that the officer violated the Eighth Amendment. After Plaintiff caused a disturbance in county jail, a responding deputy grabbed him by the neck, shoved him against the wall, and threw him to the ground to be handcuffed. Investigators later concluded that the deputy's actions violated jail policies, and he ultimately pleaded guilty to a misdemeanor battery.

Plaintiff sued the deputy, alleging that his conduct violated the Eighth Amendment. Judge Beckering dismissed this claim, finding that the deputy's use of force did not

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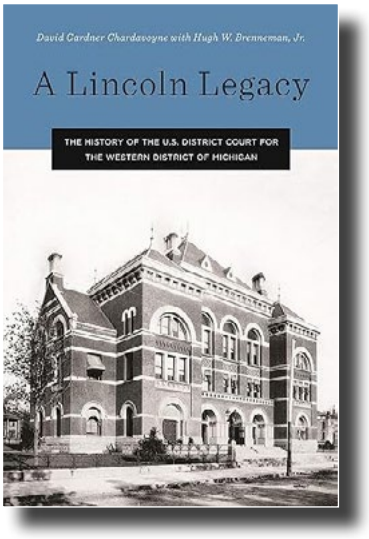
Interested in the Court's History?

A Lincoln Legacy: The History of the U.S. District Court for the Western District of Michigan by David Gardner Chardavoyne with Hugh W. Brenneman Jr. provides the first and only comprehensive examination of the history of the federal courts in the Western District of Michigan. Copies may be purchased in the Gerald R. Ford Presidential Museum Store in Grand Rapids.



amount to an Eighth Amendment violation and, even if it did, he would be entitled to qualified immunity. The Sixth Circuit unanimously affirmed in a published decision, holding that Plaintiff could not prove that the deputy used force "maliciously and sadistically for the very purpose of" inflicting pain. That the deputy's actions violated the jail's use-of-force policy could not save Plaintiff's claim, the Court held, because a sheriff's department may choose to hold its officers to a higher standard than that required by the Constitution. But the Court cautioned that its ruling should not be construed as approval of the deputy's conduct: "Just because the Constitution does not bar certain actions does not make those actions right."

Adam G. Winn and Robert G. Kamenec, of Fieger, Fieger, Kenney & Harrington P.C., represented Plaintiff. Richard V. Stokan, Jr. and Joanne Geha Swanson, of Kerr, Russel, and Weber, PLC, represented the deputy.

Waters v. Becerra
80 F.4th 782 (6th Cir. 2023)

In a published decision, the Sixth Circuit affirmed the denial of Medicare coverage for a child's nutritional formula that provides her with necessary protein to compensate for her limited liver function. Although there was no error below warranting reversal, one judge concurred to draw the Legislature's attention to the distressing result.

On behalf of her minor daughter, Plaintiff submitted a Medicare claim seeking reimbursement for the prescribed formula under the prosthetic-device benefit of Medicare Part B. Because Plaintiff's daughter consumed this formula orally, the Medicare Appeals Council denied her request because it was not a prosthetic device, which is defined as a device replacing "all or part of an internal body organ." On appeal to the district court, Magistrate Judge Berens found that the decision was supported by substantial evidence and contained no legal error.

On appeal to the Sixth Circuit, Plaintiff argued that the formula replaces the function of part of her daughter's liver because her liver cannot break down certain amino acids. The Court rejected this argument, finding that it "goes against the plain reading of the definition, which indicates that a device is not to be eliminated through consumption, but rather has some degree of lasting permanence outside one's body."

Because the Council's decision was based on substantial evidence and contained no legal error, the Sixth Circuit affirmed. While acknowledging the difficult circumstances of Plaintiff and her family, the Court advised that it "can only interpret the law in this case, not change it." Judge Readler concurred to highlight the practical reality of the Court's decision and to invite the Legislature to give "a second look" to the statutory provisions and regulations involved in this case. "One family, perhaps others as well, would welcome that effort," he concluded.

Thomas J. Waters, of the Running Wise Law Firm, represented Plaintiff. Assistant U.S. Attorney Nicole Mazzocco represented the Government.

Ashley Yuill *focuses on litigation and dispute resolution, including appeals, at Warner Norcross + Judd LLP.*

Upcoming Events

January 17–19, 2024 ..... Hillman Advocacy Program, Grand Rapids (contact sonja_cubillo@fd.org if you are interested in volunteering as a witness or juror)

February 7, 2024 ..... Supreme Court Year in Review, Grand Rapids

September 18-20, 2024 ..... Bench-Bar Conference at Crystal Mountain Resort

Help Wanted—Pro Bono Trial Attorneys for Prisoner Civil Rights Cases

Each year, members of our chapter represent prison inmates whose civil rights claims have survived summary judgment and are headed to trial. The district court is again looking for attorneys to accept pro bono appointments in this worthwhile program. The Western District's prisoner civil rights pro bono program presents an excellent opportunity for trial work, without lengthy discovery. We encourage our members—and especially our young lawyers, for whom trial experience can be hard to find—to participate. The link to the Court's Pro Bono Plan is: https://www.miwd.uscourts.gov/sites/miwd/files/Pro%20Bono%20Guidelines.pdf.

If you would like to learn more or volunteer, please email stephanie_carpenter@miwd.uscourts.gov, and either Stephanie Carpenter or Judge Ray Kent can tell you about the process.

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