# Attorneys as Public Bodies Under the WPA – Still The Law In Michigan, and Still A Curious Interpretation Of The Act

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***Executive Summary***

*In 2016, the Michigan Court of Appeals held that for purposes of a Whistleblowers' Protection Act claim, the plaintiff's attorney was a public body, so that the plaintiff's report to the attorney regarding a possible PPO violation was protected activity under that Act. Despite the seeming breadth of that decision, subsequent courts have not been liberal in applying the 2016 case, typically concluding that the factual scenario at issue did not involve an actual report to a public body.*

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Michigan courts have liberally viewed the Michigan Whistleblower's Protection Act ("WPA")[1] over the years, holding, for example, that an internal complaint to your employer is a report to a public body if your employer is a city agency; and that an employee is still a whistleblower even if reporting wrongdoing is part of the employee's regular job; and that an employee who reports solely out of her self-interest and not to protect the public is still covered by the Act. This trend continued in 2016, when the Michigan Court of Appeals, in *McNeill-Marks v MidMichigan Medical Center*,[2] held that a private conversation by an employee with her personal attorney was a report to a public body for purposes of the WPA because attorneys are licensed by the State of Michigan, itself a public body. In that case, McNeill-Marks told her attorney about a possible PPO violation by her adopted children's grandmother, who she had seen in the hospital where she worked. The employee was terminated for revealing protected health information (that the grandmother was a patient in the hospital) in violation of HIPAA.[3]

In concluding that McNeill-Marks' call to her attorney was a report to a public body, the Court reasoned that the attorney was licensed and a member in good standing of the State Bar of Michigan, a body created by state authority and, through regulation of the Michigan Supreme Court, was primarily funded by or through state authority.[4] As such, the appellate court found that McNeill-Marks had stated a prima facie claim under the WPA.[5]

Not surprisingly, the hospital sought leave to appeal to the Michigan Supreme Court, which ultimately denied the application on a 3-2 vote, as well as the subsequent request for reconsideration, despite a detailed dissenting statement from Justice Zahra.[6] As a result, the McNeill-Marks decision remains the law of the land. Still, subsequent Michigan decisions have scaled *McNeill-Marks* back somewhat by narrowly construing what constitutes a "report" to an attorney for purposes of the WPA.

## Not all communications with an attorney are created equal

In *Rivera v SVRC Indus, Inc.*,[7] the Court of Appeals revisited the issue, focusing on when communication with an attorney might serve as a report to a public body under the WPA. Linda Rivera was the director of industrial operations at SVRC Industries. One day, Rivera conducted a disciplinary meeting with an employee, "LS," to address his insubordination issues. According to Rivera, LS made several statements that she perceived as threatening, including the possibility of a revolution in the United States and the fact that he could operate a firearm and was not afraid to pull the trigger, and that he did not discriminate.[8] Rivera reported the statements to management and asked whether she should report the incident to the police.

The company's attorney told Rivera that he had advised SVRC against filing a police report. After speaking with this attorney, Rivera told SVRC's CEO that she had contacted the attorney to discuss the incident; the CEO responded by text:

> Please be very careful with sharing confidential information about employees. If you want to file a personal protection order you can do so, which may mean filing a police report, but that is not what was advised by our attorney. Let's talk when you get to work in the morning.[9]

SVRC investigated the incident and ultimately terminated L.S.'s employment. The next day, Rivera was permanently laid off from her position for "budgetary and economic reasons."[10] Rivera sued SVRC, claiming it had violated the WPA by retaliating against her because she was about to report L.S.'s conduct to the police and because she reported L.S.'s conduct to SVRC's attorney.

The trial court concluded that, under *McNeill-Marks*, attorneys who are members of the State Bar of Michigan are members of a public body, and so Rivera's discussion with SVRC's attorney was protected activity under the WPA. On appeal, the Court of Appeals reversed, holding that the trial court had failed to analyze "deep[ly] enough" the nature of Rivera's conversation with SVRC's attorney in order to discern whether it constituted a report under the WPA.[11]

The court wrote that "[a] lthough *McNeill-Marks* does hold that a licensed attorney is a member of a 'public body' for purposes of the WPA, it does not compel the conclusion" that a particular plaintiff's conversation with a licensed attorney is necessarily "a 'report' of a violation (or suspected violation) of the law."[12] Rivera's conversation was not a report because she did not take the initiative to communicate any wrongful conduct to a public body in order to bring a hidden violation to light, as required under the WPA. Instead, she spoke to her employer's attorney at her employer's request. Further, Rivera's discussion with the attorney was not a report because the attorney was acting as SVRC's agent and the information was the same as already conveyed to her employer. Thus, the Court of Appeals concluded that the trial court erred by denying summary disposition in favor of SVRC regarding Rivera's WPA claim, based on the origin and nature of her communication with the attorney.[13]

Rivera then sought leave to appeal to the Michigan Supreme Court, which heard oral argument on that application in January 2021. On June 11, 2021, in lieu of granting leave, the Supreme Court affirmed in part, vacated in part, and reversed in part.[14] Relevant to this article is the Court's decision to vacate the Court of Appeals' holding that Rivera's conversation with her employer's attorney was not a 'report' for purposes of the WPA, because such holding was unnecessary in light of the grant of summary disposition to the defendant on the WPA claim.[15]

While it is interesting that the Court would go out of its way to note that a lower court had addressed an issue without needing to do so, more interesting were the two concurrences: one by Justice Zahra and one by Justice Viviano. Justice Zahra reiterated his view, previously stated in his dissent in *McNeill-Marks v. MidMichigan*[16] that the State Bar of Michigan is not a public body, and so its attorney-members are also not 'public bodies' under the WPA.[17] Justice Viviano took a slightly different tack: noting, that while attorneys may be members of the State Bar, and while the State Bar may be a public body, those attorneys are not true 'members' under the WPA because they have no role in the State Bar apart from paying dues. After expressing concern that the current broad interpretation of 'member' as including all attorneys could present some of those attorneys with ethical dilemmas, the justice asked whether such involuntary, nominal members should fall within the scope of the WPA and suggested that the issue might be considered in "an appropriate future case."[18]

## The Sixth Circuit Court of Appeals weighs in

The Sixth Circuit Court of Appeals added its mark to the question of whether simply talking to an attorney is a protected activity under the WPA. In *Fritze v Nexstar Broadcasting*,[19] Cheryl Fritze worked as an editor for a local news station. In 2017, she complained to human resources that the news director "had engaged in an inappropriate sexual relationship with another female employee of WLNS" in violation of company policy.[20] WLNS investigated, but the allegation could not be substantiated. Following the investigation, another employee complained that the feud between Fritze and the news director had intensified and that Fritze "hate[d]" the news director and was "out to get" him.[21] The station opened a new review of Fritze and the news director's relationship, asking a neutral investigator to take a fresh look at the situation.[22] After interviewing employees who worked directly with Fritze, the investigator recommended that Fritze "be immediately removed from WLNS" because she had "exhibited countless acts of insubordination" and had "issues taking direction from" the news director.[23] After attempts to repair the relationship, Fritze was eventually discharged.

Fritze sued under the WPA, claiming she had been fired for raising concerns about inadequate investigations of sexual harassment of other employees. The district court granted summary judgment, reasoning that Fritze failed to satisfy several elements of a claim under the WPA; most importantly for our purposes, that she had failed to report to a public body despite having spoken to an attorney regarding her situation.[24]

On appeal, the Sixth Circuit observed first that in "…one Michigan intermediate court opinion," an attorney was treated as a public body, but subsequent Michigan decisions appear to have "cabined" that decision.[25] Referencing recent Michigan decisions that have narrowed the precedent established by *McNeill-Marks*, the Court noted that under Michigan jurisprudence, not all communications with attorneys

"categorically constitute reports to a public body."[26] According to the Court, courts "must engage in a deeper analysis of the particular facts and circumstances" of the plaintiff's communication with an attorney.[27] Importantly, the analysis must include a "search for record evidence of an attorney-client relationship" or evidence that the attorney "perform[ed] specific legal work" for the plaintiff.[28]

As for Fritze, the Court of Appeals agreed with the district court that Fritze had never reported a violation of law to a public body. Although she spoke to an attorney regarding her situation, she only had one meeting with the attorney and did not retain his services. As such, any relationship between the attorney and Fritze did not materialize to the level established in *McNeill-Marks*.[29]

In addition to *Rivera* and *Fritze*, other courts considered *McNeill-Marks,* accepting the initial proposition that a licensed Michigan attorney can be considered a public body for WPA purposes. Each, however, turned on separate determinations, such as the causation element of a WPA claim.[30] For example, in *Brooks v Genesee County*, the Michigan Court of Appeals cited *McNeill-Marks* in finding that the plaintiff's statements to an attorney and that attorney's wife regarding a witness committing perjury "…would, generally, qualify it as a protected activity under the WPA."[31] Despite this, the court found that the plaintiff had not offered any direct or indirect evidence to support the causation element of his WPA claim.[32] In *Yurk v Application Software Technology Corp.*, the United States District Court for the Eastern District of Michigan referenced *McNeill-Marks* when noting that the plaintiff had reported a suspected violation of law to an attorney. The court went on to say that it "…continues to proceed under the assumption that Yurk engaged in activity protected by the WPA by reporting to an attorney and by being 'about to report' to the City."[33] Again, despite this, the court concluded that plaintiff's alleged protected activity under the WPA had nothing to do with his termination.[34]

## Reports to a public body extended …dentists?

In *Shephard v Benevis, LLC*, Tina Shephard and Georgette Welch worked as the dental hygienist and dental assistant at the same dental office. When the practice was sold and a new permanent dentist, Dr. Ewing, was brought on board, Shephard and Welch began to notice issues with his dentistry, including credentialling concerns, questionable insurance billing procedures, and suspected malpractice.[35]

Shephard and Welch reported the issues internally to the dental practice's office manager, its director of operations, and directly to Dr. Ewing. Another dentist affiliated with Benevis was called in to review Dr. Ewing's work and determined that there was no malpractice. A week later, during a meeting with Dr. Ewing and management, Shephard and Welch were discharged. They sued, alleging wrongful discharge in violation of the WPA.[36]

The trial court granted summary disposition in favor of Benevis, and the plaintiffs appealed. For purposes of the appeal, the parties did not dispute that, as a licensed dentist, Dr. Ewing was a public body under the WPA, citing *McNeill-Marks* as authority. The appellate court did reverse summary disposition, finding that reports of possible insurance fraud to Dr. Ewing were protected activity and that there were sufficient factual disputes as to the defendant's proffered, non-retaliatory reason for the plaintiff's discharge to proceed to trial.[37]

So the strange saga of "attorneys as public bodies" continues, although courts appear to be working to keep the doctrine's application as narrow as possible. The oddity of the *McNeill-Marks* holding is made clear by recalling the impetus for the WPA in the first place: enacted in the wake of the accidental PBB-contamination of livestock feed, the Act "encourage[s] employees to assist in law enforcement and ... protect[s] those employees who engage in whistleblowing activities. It does so intending to promote public health and safety. The underlying purpose of the act is the protection of the public. The act meets this objective by protecting the whistleblowing employee and by removing barriers that may hinder employee efforts to report violations or suspected violations of the law. Without employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses."[38]

With the WPA, the Michigan Legislature sought to combat corruption or criminally irresponsible behavior in government or large businesses by protecting from retaliation the persons best placed to identify that corruption – employees.[39] As such, an employee who reports illegality to a public agency – presumably the agency in a position to address the illegality – should not be fired for that selfless act. It is not immediately apparent that, in enacting the WPA to protect whistleblowers acting to help public wellbeing, the legislature realized that an employee discussing workplace events with her attorney would someday be viewed as one of those whistleblowers and that the attorney would be granted the status of a public body. Surely the underpinning of the WPA was to encourage employees to take knowledge of wrongdoing to a state agency or law enforcement official that could then act on those reports and end the corruption. Labeling a private attorney as such a "public body" (based on the fact that the attorney owes her license to a state entity) does not seem likely to fulfill the Act's true purposes. In light of the concurrences offered by two Supreme Court justices in *Rivera v SVRC*, this oddity of Michigan jurisprudence may be revisited, and hopefully, soon.

### Endnotes

1 MCL 15.361, *et seq*. The WPA states that "An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body,

unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action." MCL 15.362.

2 *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1; 891 NW2d 528 (2016).

3 *Id.* at 12.

4 *Id.* at 23.

5 We discussed *McNeill-Marks* in greater detail in *Michigan Defense Quarterly*, Vol. 34, No. 3 (2018).

6 Unfortunately, two justices recused themselves from the matter, leaving only five justices to decide this relatively significant issue.

7 *Rivera v SVRC Industries, Inc.*, 327 Mich App 446; 934 NW2d 286 (2019), affirmed, vacated, and reversed in part, __ Mich __; __ NW2d __; 2021 WL 2399760 (June 11, 2021) (Docket No. 159857).

8 *Id.* at 451.

9 *Id.* at 452.

10 *Id.*

11 *Id.* at 462.

12 *Id.*

13 *Id.* at 467.

14 *Rivera v SVRC Indust, Inc*, __ Mich __; __ NW2d __ (June 11, 2021) (Docket No. 159857).

15 *Id.*, slip op at 2.

16 502 Mich 851, 856-857 n 13; 912 NW2d 181 (2018) (Zahra, J., dissenting).

17 *Rivera*, slip op at 3 (Zahra, J., concurring).

18 *Id.* at 5 (Viviano, J., concurring).

19 *Fritze v Nexstar Broadcasting, Inc*, 847 Fed Appx 312 (CA 6, 2021).

20 *Id.* at 1.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.* at 3.

26 *Id.*

27 *Id.*, citing *Rivera,* 327 Mich App at 462.

28 *Id.*, citing *Newton v Mariners Inn*, unpublished per curiam opinion of the Court of Appeals, issued Nov. 28, 2017 (Docket No. 332498); 2017 WL 5759949, at *7

29 *Id.* at 3.

30 See *Brooks v Genesee Co*, unpublished per curiam opinion of the Court of Appeals, issued July 13, 2017 (Docket No. 330119); 2017 WL 2988838; *Yurk v Application Software Technology Corp,* unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued Jan. 17, 2018 (Docket No. 2:15-CV-13962); 2018 WL 453889.

31 *Brooks*, 2017 WL 2988838 at *3.

32 *Id.*

33 *Yurk*, 2018 WL 453889 at *10.

34 *Id.* at 13.

35 *Shephard v Benevis*, LLC, unpublished per curiam opinion of the Court of Appeals, issued Jan. 7, 2021 (Docket No. 350164); 2021 WL 70642.

36 *Id.* at *2.

37 *Id.* at *4, *9.

38 *Dolan v Cont'l Airlines/Cont'l Exp*, 454 Mich 373, 378–79; 563 NW2d 23 (1997).

39 House Legislative Analysis, HB 5088, 5089 (February 5, 1981).