Witness Preparation

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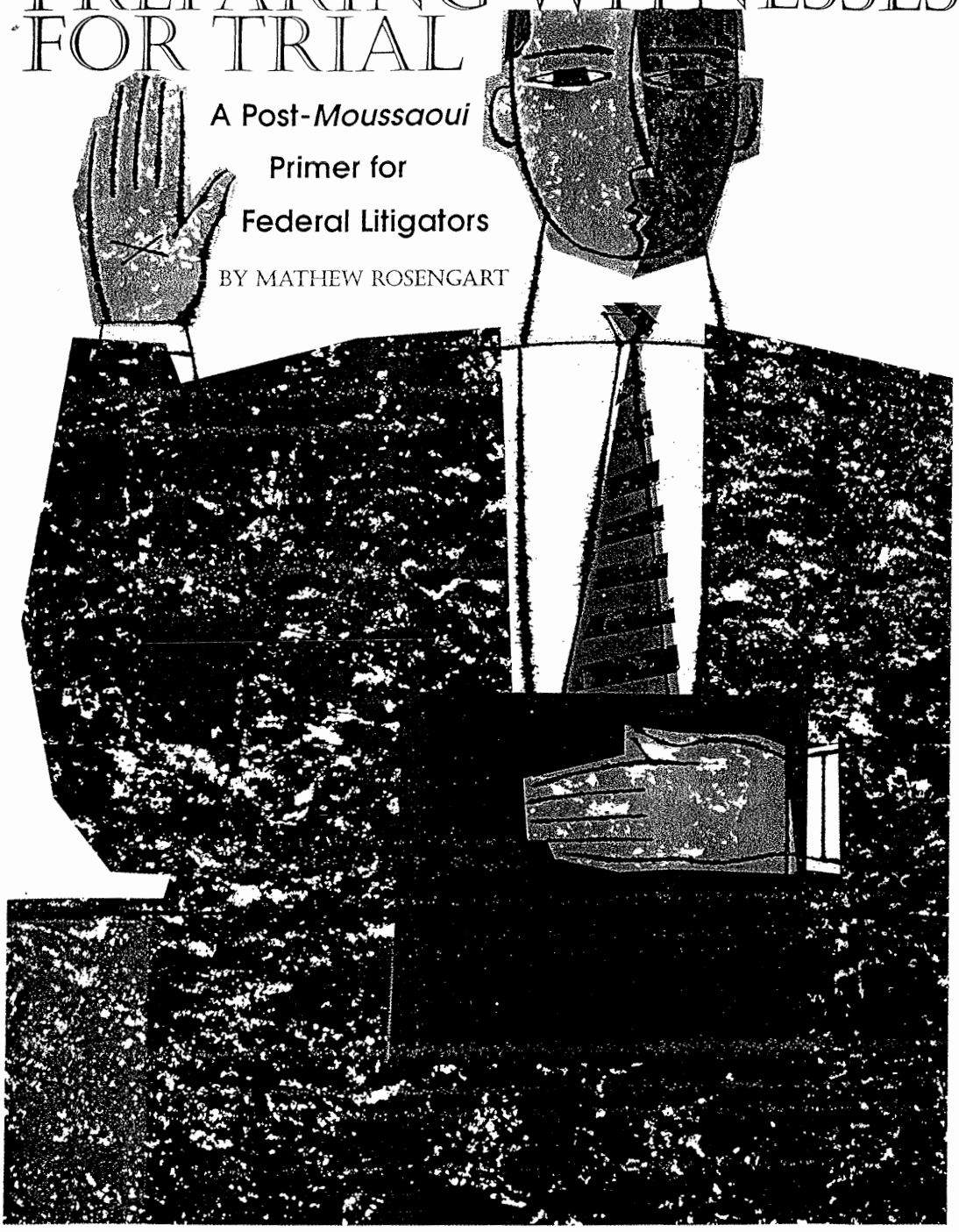
PREPARING WITNESSES FOR TRIAL

A Post-*Moussaoui* Primer for Federal Litigators

BY MATHEW ROSENGART



Early last year, a formerly obscure, but generally well-regarded government lawyer named Carla Martin became a household name—and, for a time, the most infamous lawyer in America. By crossing legal and ethical boundaries in preparing witnesses for trial in *United States v. Moussaoui*—the high-profile case against Al Qaeda's notorious "20th hijacker"—Martin nearly scuttled the government's case and, in so doing, she irreparably harmed her legal career.

The morning after the government disclosed Martin's misconduct, her name appeared on the front pages of every major newspaper in the country, and she was the lead story on the nightly news. This, of course, is not the type of fame any lawyer would want. Martin is being investigated by the Justice Department for obstruction of justice and witness tampering. She has been publicly pilloried by legal and ethics experts (who have called her "reckless," "incompetent," and even "bone-headed"), by the presiding judge in *Moussaoui* (who referred to her as a "bald-faced" liar), and by her former colleagues (who quickly disassociated themselves from her). In the government's motion for reconsideration of the presiding judge's harsh order barring the prosecution from presenting testimony from any witness "prepped" by Martin, the government referred to Martin as a "lone miscreant," who had "apparently" engaged in "criminal behavior."[1] Martin was even sued by several family members of Sept. 11 victims.

Given the potential collapse of the government's four-year-old case, the Justice Department's excoriation of Martin was understandable. And the prosecution team's immediate disclosure of her misconduct was commendable—both as a strategic move *and* an ethical one.[2] There has been a great deal of confusion, however, concerning exactly what it was that Martin did wrong. Most journalists—and even some legal "experts"—concluded that Judge Brinkema's rulings were the result of Martin's witness "coaching." But that conclusion was both facile and misleading. As one noted trial lawyer has commented, "Witnesses *should* be coached, so long as they are not coached to play dirty. ... Not all coaching is bad. Justice Holmes pointed out in *Superior Oil Co. v. Mississippi*, 280 U.S. 390 (1930) that '[t]he very meaning of a line in the law is that you intentionally may go as close to it as you can.'"[3] Similarly, although he did not go as far as Justice Holmes did, Justice John Paul Stevens more recently promoted witness preparation as a truth-seeking device. As he stated in *Nix v. Whiteside*, 475 U.S. 157, 190–191 (1986), "after reflection, the most honest witness may recall ... details that he previously overlooked."

On the other hand, there are those who believe that *all* witness coaching is *always* improper. Professor Richard Wydick, for example, has taken the position that witness coaching (or "preparation") interferes with a search for the truth, and he wonders, "If a trial is supposed to be a search for the truth, why then are lawyers allowed to interview and prepare witnesses?"[4] In a similar vein, Professor James McElhany recently expressed concern (contrary Holmes' view) that there is a "whole subculture centered around coming as close to the line ... as you can without factually crossing it.[5]

Although there are, indeed, differences of opinion regarding just what "coaching" is and whether any form of it is permissible, apart from patently obvious and conclusory maxims such as not coaching witnesses to lie, there are few bright-line rules concerning ethical and proper preparation of witnesses. In fact, the line between permissible witness preparation and impermissible coaching can be subtle, "like the difference between dusk and twilight."[6]

Moreover, despite the importance—and prevalence—of witness preparation, which some have described as the "dark" or "dirty" secret of the American adversary system, surprisingly little has been written about the topic.[7] Few law schools cover the subject in any detail, it is rarely litigated, and it is not expressly covered by the Model Rules of Professional Conduct or the Code of Professional Responsibility.

Thus, not only should Martin's misconduct serve as a cautionary tale for all trial attorneys, but it also provides an excellent basis for a primer on proper—and ethical—witness preparation, Federal Rule of Evidence 615, and how to stay on the right side of the sometimes murky line between zealously representing your client and improperly coaching him or her (or other witnesses) in your case.

The *Moussaoui* Case, the Court's Sequestration Order, and Martin's Violations

On Dec. 11, 2001—the three-month anniversary of 9/11—Zacarias Moussaoui was charged with, among other things, conspiring with other members of Al Qaeda to kill innocent Americans. After more than three years of pretrial proceedings, on April 22, 2005, Moussaoui pleaded guilty to all six charges contained in the government's indictment. He also confessed to being selected personally by Osama bin Laden to participate in an operation to fly hijacked airplanes into several American landmarks, including the White House.

Given Moussaoui's plea, the sole issue at trial was whether he would be sentenced to life imprisonment or to death. The trial commenced on March 6, 2006. Several weeks earlier, Judge Brinkema had issued a sequestration order pursuant to Federal Rule of Evidence 615 that prohibited all fact witnesses—that is, nonvictim or expert witnesses—from attending or following the trial proceedings until *after* they were called to testify.[8]

The order was straightforward, and its purpose was clear. As the Supreme Court explained more than 30 years ago, the "aim of imposing the rule on witnesses, as the practice of sequestering witnesses is sometimes called, is twofold. It exercises a restraint on witnesses tailoring their testimony to that of earlier witnesses, and it aids in detecting testimony that is less than candid."[9] Observing that the practice of sequestration as a truth-seeking measure is at least as old as the Bible, Professor Wigmore famously stated that "when all allowances are made it remains true that the expedient of sequestration is (next to cross examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice."[10]

In this case, despite the judge's order and in violation of fundamental tenets of proper witness preparation, Martin sent copies of trial transcripts to several government witnesses. Perhaps even more egregiously, and documenting her own misconduct, Martin also sent these witnesses e-mail messages with specific instructions concerning how they should testify to counteract her perceived problems with the government's case.

Upon learning of Martin's actions, the court halted the trial and held a hearing concerning Martin's actions. At the conclusion of the hearing, Judge Brinkema found that Martin's actions had irrevocably tainted the government's case. She also stated that Martin had not only violated the court's sequestration order but also violated basic rules of proper witness preparation by "prepping" multiple witnesses simultaneously, thereby creating at least the *appearance* that they had improperly shaped (or might shape) their testimony into a consistent story. As Judge Brinkema stated,

> I certainly recall when I was a prosecutor, the standard practice was you never interviewed two potential witnesses at the same time for just that fear, that you would open the door to the defense coming in [and exploiting the issue]. ... [Y]ou want to make sure what you are hearing from that witness is not going to be in any respect affected by, colored by, slanted by what they are hearing the other person say. The whole bit about getting stories in sync is a real concern and in evidence, in a truth-seeking process, which a trial is supposed to be, so I have to tell you that would concern me.[11]

Judge Brinkema also found that Martin had falsely told the prosecution team that the witnesses who were to testify about aviation security would not meet with defense lawyers prior to the trial. In fact, Martin had *instructed* one of those witnesses not to speak with the defense and had failed to ask another witness whether he would be willing to meet with the defense.[12]

In her post-hearing ruling, after stating that she was unaware in the "annals of criminal law" of problems as serious as those Martin had brought about in the *Moussaoui* case, Judge Brinkema barred the government from presenting *any* testimony about aviation security measures.[13] A few days later, however, after reviewing the government's motion for reconsideration—in which it (1) isolated Martin's "aberrant and apparently criminal behavior" from the good work done by the "sea of government attorneys and agents" who had "played by the rules" for more than four years and (2) explained that, without the testimony at issue, it would have effectively been *unable* to prove its case—she amended her ruling to permit the government to present testimony from other witnesses who had not been tainted by Martin.

After the trial resumed and additional evidence was presented, the jury rejected the government's request for the imposition of the death penalty. Instead, Moussaoui was sentenced to serve life in prison without the possibility of parole.

Regardless of the outcome of the case, the *Moussaoui* debacle raises several important questions for federal trial attorneys—and for all litigators:

- Murky as it is, where should practitioners draw the line between proper witness preparation and *improper* witness coaching (and *is there* a line to be drawn)?
- Should lawyers ever prepare witnesses simultaneously, or should they always be prepared separately?
- Is it ever permissible (or wise) for a lawyer to share transcripts of testimony with potential witnesses?
- What are an attorney's obligations regarding providing opposing counsel access to witnesses who are within that lawyer's control?

Proper Witness Preparation Versus Improper Witness Coaching

Preparing witnesses is, of course, an essential part of trial work, and doing so is neither unethical nor improper. Indeed, the practice was expressly sanctioned almost 50 years ago in *Hamdi & Ibrahim Mango Co. v. Fire Ass'n of Philadelphia*, 20 F.R.D. 181, 182–183 (S.D.N.Y. 1957), in which the court acknowledged that "[i]t is the usual and legitimate practice for ethical and diligent counsel to confer with a witness whom he is about to call prior to his giving testimony, whether the testimony is to be given on deposition or at trial. Wigmore recognizes 'the absolute necessity of such a conference for legitimate purposes' as a part of intelligent and thorough preparation for trial" (citing 3 *Wigmore on Evidence*, 3d ed., § 788).[14] As Professor Wigmore has also noted, witness preparation actually *promotes*, rather than undermines, the proverbial "search for the truth, and it should, therefore, be encouraged."[15]

Moreover, although attorneys are under no affirmative duty to prepare witnesses for trial, they are, of course, required to represent clients zealously and diligently. It would be difficult to imagine the zealous or diligent attorney who fails to prepare his or her own witnesses. The attorney must do so "within the bounds of the law," however,[16] and, even though "[c]ounsel does have an obligation to defend with all his skill and energy ... he also has moral and ethical obligations to the court, embodied in the canons of ethics of the profession."[17] As the *Hamdi* court observed, "[t]here is no doubt that these practices are often abused. The line is not easily drawn between proper review of the facts and refreshment of the recollection of a witness and putting words in the mouth of the witness or ideas in his mind." The *Hamdi* court nevertheless expressly declined to *draw* any line. Rather, it noted that "the line must depend in large measure, as do so many other matters of practice, on the ethics of counsel."[18] Wigmore agreed with this assessment. Although he recognized that the right to prepare witnesses "may be abused, and often is," he also concluded that "to prevent the abuse by any definite rule seems impracticable. It would seem, therefore, that nothing short of an actual fraudulent conference for concoction of testimony could properly be taken notice of; there is no specific rule of

behavior capable of being substituted for the proof of such acts." *Wigmore on Evidence*, 3d ed., § 788.

Thus, although it is clear—and obvious—that a lawyer must not call as a witness someone he or she knows will commit perjury, *see, for example*, New York Lawyer's Code of Professional Responsibility, Disciplinary Rule (DR) 7-102(A)(4), or "assist a witness to testify falsely," Model Rules of Professional Conduct, the Rules of Professional Responsibility fail to provide any guidelines regarding preparation of witnesses. Highlighting the lack of clarity in this area, Cornell Law School's American Legal Ethics Library offers the following "Guidance on Interviewing Techniques:"

> [A] potential client consulted an attorney about a traffic accident. As the client began to explain the facts in detail, the attorney said, 'Before you tell me anything, I want to tell you what you have to show in order to have a case.' The attorney then proceeded to explain the law.
>
> Whether the attorney's technique is proper *depends* in part on his motive and the client's motive. Under NY DR 7-102(A)(6), an attorney may not participate in the creation of false evidence. However, NY EC 7-6 explains that 'the lawyer should resolve reasonable doubts in favor of the client.' Moreover, an attorney has an 'obligation' to disclose and explain to a client the applicable rules of evidence and facts required to prove a case. Absent a specific Code Provision, an ethics committee should not 'mandate or prohibit specific interviewing techniques in an area so subjective.' As long as the attorney in good faith does not believe that he or she is participating in the creation of false evidence, the attorney may resolve reasonable doubts in favor of the client and may explain the law before hearing the facts.[19]

Although this passage helps to explain the dearth of specific rules in the area, the hypothetical question and answer provide little comfort to the trial lawyer concerned with balancing the ethical obligations to the client with those owed to the court.

Further summarizing the dilemma sometimes faced by trial lawyers, Professor Monroe Freedman has observed that trial lawyers have no less than *four* duties, which often compete with one another:

- the duty of zealous advocacy,
- the duty of preparation of the facts,
- the duty of candor to the court; and
- the duty of confidentiality to the client.

These duties create a "trilemma" when the *lawyer* knows the full story, the *client* wants to testify, and the lawyer knows the client will commit perjury. Under this scenario, the lawyer obviously cannot fulfill all four of his or her duties. Some propose escaping this dilemma with the fiction that the lawyer can never really "know" what happened. Therefore, they contend, the duty of candor to the court must yield to the duty of zealous advocacy owed to the client. Others unequivocally believe that the lawyer's duty of candor is paramount.[20]

The case law is similarly vague, offering no clear guidelines. Rather, it is laden with platitudes such as the following oft-cited statement from New York's highest court: "While a discreet and prudent attorney may very properly ascertain from witnesses in advance of the trial what they in fact do know ... as a guide to his own examinations, he has no right, legal or moral, to go further. His duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know."[21]

In *Moussaoui*, Martin ran afoul of these principles, vague as they are, by sending e-mail messages to witnesses in which she stated, for example, the following:

- "[W]e MUST emphasize the deterrent value of the [safety] measures." (Emphasis in original.)
- "There is no way anyone could say that the carriers could have prevented all short bladed knives from going through—[the government] must elicit that from you and the airline witnesses on direct, and not allow the defense to cut your credibility on cross."
- "*You need to assert* that we did not necessarily need to wait until we got all available information, that we acted independently, indeed, we had a statutory mandate, to follow up on any issue that we thought was a threat to civil aviation." (Emphasis added.)

Viewed in a vacuum, the e-mail messages are not necessarily problematic. For example, if the witnesses had already conferred with or been prepared by Martin and the e-mails were simply an effort to refresh their recollections regarding testimony that they could already provide truthfully, they would not necessarily have constituted improper coaching. But Martin used language in her e-mails that suggests otherwise. Rather than conveying her thoughts in the form of questions or comments, she spoke in the imperative, making her instructions *mandatory*, as if she were "pour[ing]" the facts into the witnesses, rather than "extract[ing]" the facts from them.[22] In so doing, Judge Brinkema ruled that Martin had crossed the ethical boundaries of proper witness preparation.

Martin's e-mail instructions and her other actions (discussed below) provide vivid illustrations of what counsel should avoid when preparing witnesses for trial. But trial lawyers often operate in zones of grey, rather than black and white. Thus, despite (or because of) the lack of clarity in the area—as well as the absence of any practical guidelines—practitioners should take note of the following "Top 10" list of practice tips, gleaned from the *Moussaoui* case and the principles discussed above. It might be helpful for the reader to consider each tip with the following admonition from *Geders* in mind—"An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it:"[23]

1. *Do* prepare witnesses—thoroughly. As discussed above, "[i]t is not improper for an attorney to prepare his witness for trial, to explain the applicable law ... and to go over before trial the attorney's questions and the witness's answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer ... and is to be commended because it promotes a more efficient administration of justice and saves court time."[24]
2. *Do* tell witnesses to tell the truth. Repeat this admonition often, especially when the witness is not your client and your discussions are therefore not protected by the attorney-client privilege. As famed trial lawyer Edward Bennett Williams once stated on the subject of legal ethics, "If someone is going to go to prison, make sure it is the *client*," and not you. Not only is this warning ethically appropriate, it is also strategically wise, because, when the hostile cross-examiner suggests that you have improperly coached the witness, the witness may fairly—and disarmingly—respond by saying, "no, ... actually, I was just told to tell the truth."
3. *Do* gather from the witness *all* relevant facts and information. Although some criminal defense lawyers believe that sometimes "less is more," particularly if there is a concern that the witness or client may say something incriminating (which might hamper the presentation of a defense), having all of the facts (the good, the bad, and the ugly) will allow you to formulate the best defense—or offense.
4. *Do* show the witness documents during your preparation sessions in an effort to refresh his or her recollection. As the *Hamdi* court observed, "[t]his sort of preparation is essential to the proper presentation of a case and to avoid surprise."[25] Determining when to show the witness the documents (that is, before or after the witness provides an overview of the facts) will depend on the particular circumstances of your case.
5. *Do* ask the witness the hard questions that he or she can expect on cross-examination.
6. *Do* conduct a mock direct examination and cross-examination of the witness and explain to the witness how the trial proceedings will work, *see, for example, United States v. Torres*, 809 F.2d 429, 439 (7th Cir. 1987); but in so doing, bear in mind the Supreme Court's admonition in the *Geders* ruling.
7. *Do not* say anything to a witness that you would be uncomfortable reading on the front page of the *New York Times*. Trite as this maxim is, keeping this in mind will help keep you stay on the right side of the ethical line. This is especially true if the preparation session will not be covered by the attorney-client privilege or by some other privilege that would preclude opposing counsel from delving into the pretestimonial discussions between the lawyer and the witness.
8. *Do not* even remotely suggest that the witness may be "forgetful" or evasive, much less misleading in response to questions posed by the hostile examiner. In addition to being morally and ethically improper and violating principles of professional responsibility, *see, for example*, Model Rules of Professional Conduct 3.3(a)(4), depending on the context, making such a suggestion could also subject you to criminal prosecution for obstruction of justice or conspiracy to make false statements, *see, for example*, 18 U.S.C. §§ 1001, 1512. On the other hand, to the extent that the witness truly does not remember a fact, it is entirely appropriate to suggest that he or she respond by saying "I do not recall."
9. *Do not* tell the witness what he or she should or "must" say in order to "win," especially if you believe that such an instruction would "have the probable effect of inducing a witness to falsify or misrepresent facts ... either expressly through testimony or implicitly through demeanor."[26] Despite the lawyer's twin obligations to represent the client zealously and to be candid with the tribunal, counsel must not sacrifice the latter to serve the former. Although "[c]ounsel does have an obligation to defend with all his skill and energy ... he also has moral and ethical obligations to the court, embodied in the canons of ethics of the profession." *Mitchell v. United States*, 259 F.2d 787, 792 (D.C. Cir. 1958).
10. *Do not* prepare several witnesses together. Joint preparation of witnesses may tempt them to coordinate their stories in an effort to avoid inconsistencies. Not only is this arguably improper (especially if the witnesses' testimony was inconsistent to begin with), but it also creates an opportunity for a skillful cross-examiner to create *the impression* that the testimony is untruthful, even if it is not. Moreover, it is reasonable for a jury to expect there to be inconsistencies in the testimony of percipient witnesses. As long as such inconsistencies are immaterial, they may actually help your case by bolstering the credibility of your witnesses. For instance, as a prosecutor, when defense counsel challenged the credibility of government witnesses because of purported inconsistencies in their testimony, I would explain to the jury during summation that memories are, of course, imperfect and that, if the witnesses were, in fact, lying, their stories would have been directly in sync—that is, if the testimony of Witness A and Witness B track each other perfectly (without even minor inconsistencies), their testimony will seem over-rehearsed and incredible.[27]

In short, the "law" of witness preparation has always been and will likely remain illdefined. But Martin's conduct should put all trial lawyers on notice that cavalier behavior might not only hurt their case, it might also harm their career. At a minimum, the practitioner must carefully balance his or her legal and ethical obligations to the client and to the system. Thoughtful consideration of the principles discussed above will help ensure that a proper balance is maintained.

Sharing Transcripts and Federal Rule of Evidence 615

Rule 615 of the Federal Rules of Evidence—commonly referred to as the federal rule of sequestration—provides the following, in pertinent part: "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." The Advisory Committee Note to Rule 615 explains that "[t]he efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion." As noted above, the Supreme Court observed in *Geders* that the practice of sequestration dates back to "our inheritance of the common Germanic law [and] serves two purposes: it exercises a restraint on witnesses 'tailoring their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid.'" 425 U.S. at 87.[28]

By its plain terms, the rule solely precludes a putative witness from hearing the testimony of a witness who has already testified—the rule refers only to "*witnesses*" and serves only to "exclude[]" them from "hear[ing]" the testimony of other witnesses in court. Given the rule's purposes, however, several courts have extended its reach beyond its plain terms to cover acts that suggest fabrication or collusion among witnesses. In *United States v. Greschner*, 802 F.2d 373, 375–376 (10th Cir. 1986), for example, the Court of Appeals for the Tenth Circuit stated that "a circumvention of [Rule 615] does occur where witnesses indirectly defeat its purpose by discussing testimony they have given and events in the courtroom with other witnesses who are to testify." Similarly, holding that a witness's reading of trial transcripts violated a general sequestration order, the Court of Appeals for the Fifth Circuit observed in *Miller v. Universal City Studios Inc.*, 650 F.3d 1365, 1373 (5th Cir. 1981) that "the opportunity to shape testimony is as great with a witness who reads trial testimony as with one who hears the testimony in open court." Recognizing that Rule 615 might otherwise be rendered meaningless, the *Miller* court further stated that "[t]he harm may be even *more* pronounced with a witness who reads trial transcripts than with one who hears testimony in open court, because the former need not rely on his memory of the testimony but can thoroughly review and study the transcript in formulating his own testimony."

Despite the sensible approach of the *Greschner* and *Miller* rulings, the federal circuits remain split about whether or not "the scope of Rule 615 extends beyond the courtroom to permit the court to preclude out-of-court communication between witnesses about the case during trial." C. Wright and V. Gould, 29 *Federal Practice and Procedure* § 6243 (1997). For instance, following the Sixth Circuit's approach in *United States v. Scharstein*, 531 F. Supp. 460, 463 (E.D. Ky. 1982), the court held that Rule 615 does not *necessarily* preclude prospective witnesses from discussing the case with other witnesses who have already testified.[29] Similarly, in *United States v. Friedman*, 854 F.2d 535, 568 (2d Cir. 1988), the Second Circuit stated that "the reading of testimony *may* violate an order excluding witnesses issued by a district court under Rule 615." (Emphasis added.)[30]

The Importance of Strict Adherence to Sequestration Orders

Consistent with the broad discretion granted to federal judges to prevent "the influencing of a witness's testimony by another witness," Judge Brinkema's sequestration order in the *Moussaoui* case went further than the plain text contained in Rule 615. Her order not only barred potential witnesses from the courtroom (consistent with the plain language of Rule 615), it also barred them from following the trial proceedings by, among other things, reading trial transcripts.[31] Because Judge Brinkema's order expressly covered sharing transcripts with witnesses, Martin's conduct was in clear violation of it.

Even if a judge's order does not clearly extend to sharing transcripts with witnesses or several preparing witnesses simultaneously, however, the best practice is to avoid doing so—regardless of the circuit in which you practice. As Judge Brinkema stated in her ruling in *Moussaoui*, "the other problem that occurred here is that in many cases, the e-mails were being sent by [Martin] to more than one witness at a time; that is, they were addressed to one witness and copies to another ... [leading] to ... the very real potential that witnesses are rehearsed, coached, or, otherwise, that the truth-seeking concept of a proceeding is significantly eroded."[32]

Finally, in addition to the problems that sharing transcripts may create for lawyers at trial, trial lawyers should be aware of authority suggesting that, despite Rule 615's silence on this point, if *counsel* discusses trial testimony with prospective witnesses, he or she may be *sanctioned for misconduct* by a court or the bar. In *United States v. Rhynes*, 218 F.3d 310 (4th Cir. 2000) (en banc), for example, the district court granted the government's motion to strike the testimony of a witness because defense counsel had previously discussed a prior witness's testimony with that witness. According to the lower court, even though such comunications are common and took place in the context of counsel's zealous representation of his client, the attorney's discussions with the witness constituted "an absolute breach of Rule 615." *Rhynes*, 218 F.3d at 314.

In an important and lengthy en banc opinion, however, the Fourth Circuit reversed the ruling, stating that "[i]t is clear from the plain and unambiguous language of Rule 615 that lawyers are simply not subject to the [r]ule. This [r]ule's plain language relates only to 'witnesses,' and it serves only to exclude witnesses from the courtroom." *Id.* at 316. Thus, the court held, Rule 615 did *not* prohibit Rhynes' counsel from discussing one witness's testimony with another witness. In so holding, the court drew a distinction between witnesses (who are not bound by rules of professional responsibility) and attorneys (who *are* so bound). Among other things, the court observed that lawyers, unlike witnesses, are officers of the court and owe the court a duty of candor under Rule 3.3 of the

Model Rules and are, therefore, less likely to improperly influence the testimony of a prospective witness. The court also noted that defense counsel's constitutional and ethical duties to provide effective assistance to a criminal defendant supersede "even the 'powerful policies behind sequestration.'" *Id.* at 318 (citation omitted).

Despite the Fourth Circuit's sound analysis, the careful lawyer should take note of Judge Paul Niemeyer's dissenting opinion, in which he forcefully sided with the lower court. Judge Niemeyer argued that the majority's literal interpretation of Rule 615 would render the rule meaningless by creating an "attorney exception" that would allow attorneys to act as "go-betweens," "relating to prospective witnesses what has already been testified to by other witnesses." *Id.* at 334. This practice, Judge Niemeyer believed, would violate the spirit, if not the letter, of Rule 615.

Although Judge Niemeyer's view is in the minority, the fundamental lesson is that, whether they are involved in a high-profile case like *Moussaoui* or in a relatively routine one, lawyers must act with caution. As the Seventh Circuit stated in *United States v. Williams*, 136 F.3d 1166, 1169 (7th Cir. 1998), "It is not at all uncommon for trial attorneys to treat sequestration orders under Rule 615 in a cavalier manner, but a cavalier approach is not advisable." And as Martin's actions have shown, the "cavalier approach" can end a career.

Access to Witnesses

The final issue raised by Martin's conduct in the *Moussaoui* case concerns her refusal to allow opposing counsel access to the government's witnesses. Based on Martin's representations to the prosecutors, they informed defense counsel that the aviation security witnesses had voluntarily declined to consent to interviews by Moussaoui's defense team. In fact, however, Martin had actually *instructed* one witness not to speak with the defense, and she failed even to ask another witness if he would be willing to speak with the defense team.

Although it is customary and proper for a witness to decline to speak with opposing counsel, it is generally a choice that must be made by the *witness*, and, absent unusual circumstances, counsel should not instruct a witness not to do so. To the contrary, courts have held that witnesses—in criminal cases, in particular—are the "property of neither" side.[33] In a similar vein, the government may not insist that a prosecution witness meet with defense counsel only if a member of the prosecution team is present. As the U.S. Court of Appeals for the Second Circuit held in the noted antitrust case brought by the government against IBM, "We know of nothing in the law which gives the prosecutor the right to interfere with the preparation of the defense by effectively denying defense counsel access to witnesses except in his presence." Troubled by the imbalance of power between prosecutors and defense counsel, the court further stated as follows: "Presumably, the prosecutor, in interviewing the witness, was unencumbered by the presence of defense counsel, and there seems to be no reason why defense counsel should not have an equal opportunity to determine, through interviews with the witnesses, what they know about the case and what they will testify to."[34]

The general rule of equal access is not limited to criminal cases, however—where there usually is a disparity of power between the prosecution and the defense. The American Bar Association's Model Rules of Professional Conduct, Rule 3.4(a), provides that "[a] lawyer shall not ... unlawfully obstruct another party's access to evidence or ... counsel to assist another person to do any such act. ..." Thus, counsel should not obstruct an adversary's access to a witness. It is usually up to the *witness*, not *counsel*, to decide whether or not to speak with opposing counsel.

Conclusion

Preparing witnesses for trial is a fundamental part of trial practice. Former government attorney Carla Martin's behavior in the *Moussaoui* case should serve as a reminder to all trial attorneys to consider carefully their conduct in preparing witnesses, adhering to the strictures of Federal Rule of Evidence 615, and not impeding access to witnesses.

Given the very nature of witness preparation, in particular, it is unlikely that courts, legislatures, or state bars will ever set forth bright-line tests in the area. It is therefore all the more important for counsel to be careful and use Martin's misfortune as a cautionary tale. By being sensitive to the issues raised by her conduct in the *Moussaoui* case and adhering to the suggestions set forth above, attorneys can help ensure that they fulfill their obligations—to the client *and* to the system. **TFL**

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Endnotes

[1]*See* Government's Motion for Reconsideration of the Court's Order Striking All Aviation Evidence, filed March 15, 2006.

[2]The government had spent thousands of hours, over the course of four years, preparing its case. It also had an obligation to disclose Martin's conduct, consistent with its mission statement, as summarized by the Supreme Court more than 70 years ago in *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose

interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

[3]J. Solovy and R. Byman, *What's Wrong With Coaching?* NATIONAL LAW J. (Aug. 1999).

[4]R. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1 (1995). But *see* Solovy and Byman, *supra* at n.4, who argue that finding the "'truth' is a false premise. It might be desireable that a trial be a search for the truth, but it is not. ... If your client has admitted to you that he did in fact knock over the liquor store, you cannot let him get on the witness stand and deny it. But you can put the [s]tate to its proof, you can cross-examine the [s]tate's witnesses, and you can suggest to the jury that the [s]tate has failed to prove its case. When your client is acquitted it will not be because the truth was found, but because Justice ... has been done." The authors elaborate: "What is truth? Nine observers to the same event will have nine different recollections. Are eight of them lying? No, usually they simply have different recollections and perceptions. Your obligation ... is to make sure that the witness provides testimony the witness believes to be the truth; the jury will sort it out from there. And you have the right, and the obligation, to help the witness express his own perception of the truth effectively."

[5]James W. McElhaney, *The Legal Weasel Trap*, 86 ABA J. 68 (2000).

[6]*See Crossing a Fine Line*, N.Y. TIMES (March 16, 2006) (quoting Professor James A. Cohen).

[7]*See* J. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 279 (1989).

[8]Rule 615 provides: "At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." The rule provides exceptions for (1) a party who is a natural person, (2) an officer or employee of a party who is designated as the party's representative, and (3) a person whose presence is shown by a party to be essential to the presentation of the case.

[9]*Geders v. United States*, 425 U.S. 80, 86 (1976).

[10]John H. Wigmore, 6 *Wigmore on Evidence* § 1838 at 463 (Chadbourn ed., 1976); *see also* J. Weinstein and M. Berger, *Weinstein's Evidence Manual* (Bender, 2003) (observing that "the Story of Susanna and the Elders was relied upon almost from the beginning of recorded trials as justifying the practice of separating witnesses to expose inconsistencies in their testimony.").

[11]*United States v. Moussaoui*, Crim. No. 1:01CR-455 (March 14, 2006 Tr. at 142).

[12]*Id.* at 125–126, 160–162.

[13]*Id.* at 214.

[14]The *Hamdi* court went on to observe that, "In such a preliminary conference counsel will usually, in more or less general terms, ask the witness the same questions as he expects to put to him on the stand. He will also, particularly in a case involving complicated transactions and numerous documents, review with the witness the pertinent facts, both for the purpose of refreshing the witness' recollection and to familiarize him with those that are expected to be offered to be offered in evidence. This sort of preparation is essential to the proper presentation of a case and to avoid surprise."

[15]*See, for example*, Restatement (Third) of the Law Governing Lawyers § 116, Interviewing and Preparing a Prospective Witness (2006) ("A lawyer may interview a witness for the purpose of preparing the witness to testify.").

[16]New York Lawyer's Code of Professional Responsibility, DR 7-101; ABA Model Rule of Professional Conduct 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

[17]*Thornton v. United States*, 357 A.2d 429, 438 (D.C. 1976).

[18]*Hamdi*, 20 F.R.D. at 183.

[19]American Legal Ethics Library, NEW YORK LEGAL ETHICS 3:3:404, Interviewing and Preparing Witnesses (Cornell Law School 1994) (Emphasis added.).

[20]*See* Monroe H. Freedman, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 4 (1975).

[21]*In re Eldridge*, 82 N.Y. 161, 171 (1880).

[22]*Id.*

[23]*Geders*, 425 U.S. at 90.

[24]*State v. McCormick*, 259 S.E.2d 880, 882 (N.C. 1979).

[25]*Hamdi*, 20 F.R.D. at 182–183.

[26]J. Piorkowski, 1 GEO. J. LEGAL ETHICS at 409–410.

[27]*See generally What's A Lawyer to Do? The Tension Between Zealous Advocacy and the Model Rules of Professional Conduct*, 21 AM. J. TRIAL ADVOCACY 357 (Fall 1997); L. Salmi, *Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial*, 18 REV. OF LITIGATION 135 (Winter 1999).

[28]*See United States v. Jackson*, 60 F.3d 128, 133 (2d Cir. 1995).

[29]*See also United States v. Sepulveda*, 15 F.3d 1161, 1176 (1st Cir. 1993); *Gregory v. United States*, 369 F.2d 185, 191–192 (D.C. Cir. 1966); S. Saltzburg and K. Redden, FEDERAL RULES OF EVIDENCE MANUAL at 187 (Supp. 1981).

[30]*See also United States v. Covington*, 133 F.3d 639, 645 (8th Cir. 1998); *United States v. Eyster*, 948 F.2d 1196, 1211 (11th Cir. 1991) (extending the rule from the courthouse to the jailhouse, these cases suggest that federal prosecutors should advise incarcerated witness-prisoners not to discuss trial testimony once the trial begins).

[31]*United States v. Solorio*, 337 F.3d 580, 592 (6th Cir. 2003).

[32]March 13, 2006 Tr. at 1014–1

[33]*Gregory v. United States* at 185.

[34]*International Business Machines Corp. v. Edelstein*, 526 F.2d 37, 43–44 (2d Cir. 1975).

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	Chapter 7
John Doe and Carol Doe,	Case No. 14-99999
Debtors. _____/	Hon.
Mack Means, Trustee,	Adversary Proceeding No. 15-9999
Plaintiff,	
v.	
Kalamazoo College,	
Defendant. _____/	

COMPLAINT TO AVOID AND RECOVER TRANSFERS

1. This is an adversary proceeding brought pursuant to 11 U.S.C. §§ 544 and 548 and Fed. R. Bankr. P. 7001 to avoid fraudulent transfers.

2. This is a core proceeding over which this Court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(2)(H) and 1334.

3. John and Carol Doe ("Debtors") filed this Chapter 7 bankruptcy case on December 25, 2014 ("Petition Date").

4. Mack Means ("Trustee") is the Chapter 7 trustee for the Debtors' bankruptcy estate.

5. Kalamazoo College is a four year private liberal arts college located in Kalamazoo, Michigan.

6. The Does have one child, David.

7. David enrolled in Kalamazoo College beginning in September, 2012, and has been a full time student at Kalamazoo College for each of the school years beginning September, 2012, September, 2013, and September, 2014.

8. The Debtors made payments ("Transfers") to Kalamazoo College on behalf of David totaling approximately $170,000.00 during the years 2012, 2013 and 2014 as follows:

2012	$49,740.00
2013	$49,740.00
2014	$69,740.00

9. The Transfers were made to compensate Kalamazoo College for tuition and related educational expenses for David.

10. The Debtors did not receive any consideration in exchange for the Transfers.

11. At the time of the Transfers, the Debtors were not generally paying their debts as they became due.

12. At the time of the Transfers, the Debtors were insolvent because the sum of their debts exceeded the value of their assets.

13. Those Transfers made within two years before the Petition Date are avoidable by the Trustee under § 548(a)(1)(B) of the Bankruptcy Code.

14. Under § 544(b) of the Bankruptcy Code, the Trustee may avoid the transfer of any interest of the Debtors in property that is avoidable by a creditor under state law.

15. The Transfers are avoidable by the Trustee under § 544(b) of the Bankruptcy Code because the Transfers are avoidable by the Debtors' creditors under § 566.35(1) of the Michigan Uniform Fraudulent Transfer Act.

Wherefore, the Trustee requests that this Court enter judgment against Kalamazoo College avoiding the Transfers and requiring Kalamazoo College to repay the Transfers to the bankruptcy estate, together with interest and costs.

/s/
Attorney for Mack Means, Chapter 7 Trustee

FACTS FOR TRIAL OF
MACK MEANS V. JOHN AND CAROL DOE
CBA TRIAL SKILLS WORKSHOP, APRIL 17, 2015

On December 25, 2014, John and Carol Doe filed a Chapter 7 bankruptcy case. Mack Means is the Chapter 7 Trustee. On January 2, 2015, the Trustee filed an adversary proceeding against Kalamazoo College to avoid and recover for the bankruptcy estate $170,000.00 of payments made by the Does to Kalamazoo College for tuition and related expenses for their son, David. The Trustee's complaint alleges that these payments were made without the Does receiving reasonably equivalent value from Kalamazoo College and all the payments were made while the Does were insolvent. The case is scheduled for trial on April 17, 2015. The Trustee intends to call two witnesses. The first witness will be either John or Carol Doe to testify about their financial condition during the time that they made the payments to Kalamazoo College. The second witness will be Edward Expert, a financial consultant and accountant, to testify regarding whether the Does were insolvent at the time that they made the payments to Kalamazoo College. Kalamazoo College will call one witness, Sam Scholar, the president of Kalamazoo College. All of the witnesses were deposed before trial. The following is a summary of their testimony at their depositions.

John and Carol Doe

John and Carol Doe are married and in their mid fifties. They have one son, David, who is now grown. David is away at school.

The Does formed Macomb Automotive Group, Inc. ("MAG") around 1990. They have been the 100% shareholders since its formation. MAG is an automotive supplier that has provided a good living for them. Over the years, it did well when the automotive industry was healthy, but struggled when the automotive industry was not healthy. John Doe has always been its president and has drawn a substantial salary approximating and even exceeding $300,000.00 annually. During those times when the business struggled,

John and Carol made loans from time to time to MAG, aggregating approximately $600,000.00. Like other automotive suppliers, MAG traditionally carried substantial long-term debt secured by its building, machinery, equipment, receivables, and inventory. From time to time, it defaulted in its bank relationships, but always seemed to be able to recover and cure any outstanding defaults.

Virtually all of the Does' wealth and income over the years have been derived from their ownership of MAG. In February, 2011, when the Does applied to First Megabank for a loan to finance the purchase of a 2011 Cadillac Escalade, they estimated the value of their ownership interest in MAG at $3 million. Although they never had a formal appraisal or valuation of MAG, the Does made this estimate based upon their knowledge of the automotive industry and the amount of salary and other benefits that they were able to take out of it.

In 2012, the Does' son, David, enrolled as a student at Kalamazoo College. He is now in his third year. Kalamazoo College is a private liberal arts 4 year school. It has the highest tuition in the state ($40,278) but is widely considered to be an excellent school. David receives no scholarship or financial aid because parents were too well off at the time he started school.

The Does' financial issues began before David started at Kalamazoo College, where he was already accepted, so there was never any thought about him attending anywhere else. MAG began to experience cash flow problems due to customers' non-payment of their receivables owing to MAG, and also due to other difficulties affecting the automotive industry generally. Although things were tight for MAG, it continued to operate, but continued to experience difficulties paying its bills in 2012 and 2013. First Megabank, its long time lender, had an outstanding secured loan of approximately $3.8 million. It was personally guaranteed by John and Carol. Although First Megabank was concerned about MAG's performance, it continued to work with MAG throughout 2012 and 2013.

After David started school at Kalamazoo College, the Does' debt steadily climbed as MAG's performance became more precarious. However, they methodically paid all David's school expenses, for total annual cost of $49,740. Furthermore, and because it is David's junior year, he is presently on foreign study in the French Riviera, which increased the cost of his fall and winter quarters by $20,000, so he could live, eat and drink well while he was so far from home. To insure that they would be able to cover these extra expenses, and after meeting with their bankruptcy attorney, the Does liquidated $75,000 from a nonexempt mutual fund that their attorney told them would not be protected if they filed bankruptcy, and prepaid David's tuition and other educational expenses for the entire school year in August, 2014, as well as his extra expenses for foreign study.

After working with MAG and forbearing from its enforcing its remedies against MAG to give MAG a chance to turnaround its performance, First Megabank finally declared a default and called all of MAG's loans in April, 2014. Even after that, MAG negotiated a forbearance from First Megabank. However, when First Megabank would not grant any more forbearance, MAG shut down its business operations in June, 2014.

John and Carol Doe insisted that they could do a better job selling MAG's assets than First Megabank and believed that they could sell them for an amount more than enough to pay off First Megabank, but First Megabank hired an appraiser and had a receiver appointed to liquidate MAG's assets. In September, 2014, all of MAG's assets were sold at auction. The proceeds of the auction paid off $2.6 million of First Megabank's total secured debt, leaving a deficiency of $1.2 million that was personally guaranteed by John and Carol. Staring at this deficiency, having maxed out their credit cards and having no further source of income, the Does filed Chapter 7.

When asked why they paid for David to attend an expensive college, the Does testified that:

- They understood that they were not legally obligated to pay for David's schooling now that he was an adult.
- But paying for their son's education gave them peace of mind that that their son would be afforded opportunities in life because of a top notch education.
- And providing their son with a college education would lessen the likelihood that he would remain dependent upon them.
- The payments were necessary and reasonable in order to maintain the family unit.
- The comfort that they gained in knowing their son's school expenses were paid for and he was graduating with no debt was either direct or indirect "reasonably equivalent value."
- They were not insolvent at the time they made payments to Kalamazoo College.

Edward Expert

Edward Expert testified that he has 20 years of experience in valuing businesses with a concentration on closely-held corporations in the automotive industry. He also has 20 years' experience in performing insolvency analyses. In this case, he was hired by the Trustee to perform an analysis as to whether the Does were insolvent at the time that they made the payments for their son, David, to Kalamazoo College. Edward Expert reviewed the Does' schedules filed in the bankruptcy case, a credit application that the Does signed and submitted to First Megabank on February 20, 2011 in connection with their request for a loan to purchase a 2011 Cadillac Escalade, and a transcript of the Does' deposition. Having reviewed all of those materials, and drawing on his extensive educational

background, work experience, and previous instances when he has testified as an expert, Edward Expert testified that the Does were insolvent on the dates that they made all the payments to Kalamazoo College.

Sam Scholar

Sam Scholar has been the President of Kalamazoo College for the past 10 years and before that held other positions with Kalamazoo College and other higher education institutions, from the admissions office on up. He holds a Ph.D. in Education, is well-read, has written numerous publications and is well-respected in educational circles. His entire professional career has been in the academia arena.

President Scholar was "appalled" that anyone would suggest that a Kalamazoo College education was not "reasonably equivalent value" for the cost of attending the School. Scholar testified that it is common knowledge that Kalamazoo College is the "Harvard of the Midwest," and the finest education institution in the state of Michigan, if not the entire Midwest. As evidence of this fact, Scholar relies on U.S. News & World Report, which ranks colleges and universities nationally, and by state, every year, including publishing numerous items of data about each school. These items include annual tuition and expenses for each school; average income of graduating students; and percentage of students going on to post-graduate studies. President Scholar knows that U.S. News & World Report sends a questionnaire to Kalamazoo College in preparation for these surveys and solicits the information needed for the reports. He or someone in his administration provides the information to the magazine, but he has no idea whether information from the other schools included in the survey is solicited the same way, and would obviously have no firsthand knowledge as to the other schools' data or the accuracy of the information they provide. He does know U.S. News & World Report to be a respected publication among educational institutions and he, personally, relies on the surveys and their data to gauge Kalamazoo's progress.

As of the last publication of rankings, Kalamazoo College was ranked #100 overall nationally and #1 in the state of Michigan. He acknowledged that graduating students' salaries coming out of Kalamazoo College are "not very high," but dismissed that particular data on the basis that the vast majority of Kalamazoo graduates go on to post-graduate studies, which "substantially" increases their income (although admittedly, not necessarily). According to Scholar, the starting salaries for Kalamazoo students listed in the U.S. News & World Report "probably relate to students who did not go on to post-graduate studies" and "did not apply themselves, during their time at Kalamazoo." President Scholar had no firsthand knowledge of what kind of student David Doe has been in his time at Kalamazoo; whether he has "applied himself" during his time at Kalamazoo; or whether Doe intends to go on to any sort of post-graduate program.

President Scholar admitted that the French Riviera foreign study program is the most expensive foreign study program offered by Kalamazoo, but defended the value of the program by saying you "simply cannot put a price tag on the culture and sophistication offered by three months' study abroad in the French Riviera."

In sum, President Scholar was very confident that the Does received more than reasonably equivalent value for all of their payments because of the outstanding education that David received and how it would positively affect both David and the Does throughout their entire lives.

EXHIBITS

Exhibit 1	Schedules
Exhibit 2	Credit Application
Exhibit 3	2013-2014 Annual Tuition
Exhibit 4	Average Income of Graduating College Students

B 6 Summary (Official Form 6 - Summary) (12/14)

UNITED STATES BANKRUPTCY COURT

Eastern District of Michigan

In re John Doe and Carol Doe, *Debtor*

Case No. 14-99999

Chapter 7

SUMMARY OF SCHEDULES

Indicate as to each schedule whether that schedule is attached and state the number of pages in each. Report the totals from Schedules A, B, D, E, F, I, and J in the boxes provided. Add the amounts from Schedules A and B to determine the total amount of the debtor's assets. Add the amounts of all claims from Schedules D, E, and F to determine the total amount of the debtor's liabilities. Individual debtors also must complete the "Statistical Summary of Certain Liabilities and Related Data" if they file a case under chapter 7, 11, or 13.

NAME OF SCHEDULE	ATTACHED (YES/NO)	NO. OF SHEETS	ASSETS	LIABILITIES	OTHER
A - Real Property		1	$ 500,000.00		
B - Personal Property		3	$ 55,400.00		
C - Property Claimed as Exempt					
D - Creditors Holding Secured Claims				$ 515,000.00	
E - Creditors Holding Unsecured Priority Claims (Total of Claims on Schedule E)				$ 0.00	
F - Creditors Holding Unsecured Nonpriority Claims				$ 1,315,000.00	
G - Executory Contracts and Unexpired Leases					
H - Codebtors					
I - Current Income of Individual Debtor(s)					$
J - Current Expenditures of Individual Debtors(s)					$
TOTAL			$ 555,400.00	$ 1,830,000.00	

B6A (Official Form 6A) (12/07)

In re John Doe and Carol Doe, Debtor

Case No. 14-99999 (If known)

SCHEDULE A - REAL PROPERTY

Except as directed below, list all real property in which the debtor has any legal, equitable, or future interest, including all property owned as a co-tenant, community property, or in which the debtor has a life estate. Include any property in which the debtor holds rights and powers exercisable for the debtor's own benefit. If the debtor is married, state whether the husband, wife, both, or the marital community own the property by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community." If the debtor holds no interest in real property, write "None" under "Description and Location of Property."

Do not include interests in executory contracts and unexpired leases on this schedule. List them in Schedule G - Executory Contracts and Unexpired Leases.

If an entity claims to have a lien or hold a secured interest in any property, state the amount of the secured claim. See Schedule D. If no entity claims to hold a secured interest in the property, write "None" in the column labeled "Amount of Secured Claim."

If the debtor is an individual or if a joint petition is filed, state the amount of any exemption claimed in the property only in Schedule C - Property Claimed as Exempt.

DESCRIPTION AND LOCATION OF PROPERTY	NATURE OF DEBTOR'S INTEREST IN PROPERTY	HUSBAND, WIFE, JOINT, OR COMMUNITY	CURRENT VALUE OF DEBTOR'S INTEREST IN PROPERTY, WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION	AMOUNT OF SECURED CLAIM
711 Big Shot Blvd., Hollywood, Michigan 48888	Fee simple, tenants by the entireties	J	500,000.00	510,000.00
		Total➤	500,000.00	

(Report also on Summary of Schedules)

B 6B (Official Form 6B) (12/07)

In re John Doe and Carol Doe, Debtor

Case No. 14-99999 (If known)

SCHEDULE B - PERSONAL PROPERTY

Except as directed below, list all personal property of the debtor of whatever kind. If the debtor has no property in one or more of the categories, place an "x" in the appropriate position in the column labeled "None." If additional space is needed in any category, attach a separate sheet properly identified with the case name, case number, and the number of the category. If the debtor is married, state whether the husband, wife, both, or the marital community own the property by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community." If the debtor is an individual or a joint petition is filed, state the amount of any exemptions claimed only in Schedule C - Property Claimed as Exempt.

Do not list interests in executory contracts and unexpired leases on this schedule. List them in Schedule G - Executory Contracts and Unexpired Leases.

If the property is being held for the debtor by someone else, state that person's name and address under "Description and Location of Property." If the property is being held for a minor child, simply state the child's initials and the name and address of the child's parent or guardian, such as "A.B., a minor child, by John Doe, guardian." Do not disclose the child's name. See, 11 U.S.C. §112 and Fed. R. Bankr. P. 1007(m).

TYPE OF PROPERTY	NONE	DESCRIPTION AND LOCATION OF PROPERTY	HUSBAND, WIFE, JOINT, OR COMMUNITY	CURRENT VALUE OF DEBTOR'S INTEREST IN PROPERTY, WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION
1. Cash on hand.	X			
2. Checking, savings or other financial accounts, certificates of deposit or shares in banks, savings and loan, thrift, building and loan, and homestead associations, or credit unions, brokerage houses, or cooperatives.		Checking account	J	500.00
3. Security deposits with public utilities, telephone companies, landlords, and others.	X			
4. Household goods and furnishings, including audio, video, and computer equipment.		Furniture, TV, laptop, & ordinary household furnishings located in personal residence	J	5,300.00
5. Books; pictures and other art objects; antiques; stamp, coin, record, tape, compact disc, and other collections or collectibles.	X			
6. Wearing apparel.		Ordinary wearing apparel	H	1,000.00
7. Furs and jewelry.		Ordinary wearing apparel	W	1,500.00
8. Firearms and sports, photographic, and other hobby equipment.	X			
9. Interests in insurance policies. Name insurance company of each policy and itemize surrender or refund value of each.	X			
10. Annuities. Itemize and name each issuer.	X			
11. Interests in an education IRA as defined in 26 U.S.C. § 530(b)(1) or under a qualified State tuition plan as defined in 26 U.S.C. § 529(b)(1). Give particulars. (File separately the record(s) of any such interest(s). 11 U.S.C. § 521(c).)	X			

B 6B (Official Form 6B) (12/07) -- Cont.

In re John Doe and Carol Doe, Debtor

Case No. 14-99999 (If known)

SCHEDULE B - PERSONAL PROPERTY
(Continuation Sheet)

TYPE OF PROPERTY	NONE	DESCRIPTION AND LOCATION OF PROPERTY	HUSBAND, WIFE, JOINT, OR COMMUNITY	CURRENT VALUE OF DEBTOR'S INTEREST IN PROPERTY, WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION
12. Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans. Give particulars.		401(k) account through Macomb Automotive Group, Inc.	H	35,000.00
13. Stock and interests in incorporated and unincorporated businesses. Itemize.		100% of common stock of Macomb Automotive Group, Inc. (business closed)	J	0.00
14. Interests in partnerships or joint ventures. Itemize.	X			
15. Government and corporate bonds and other negotiable and non-negotiable instruments.	X			
16. Accounts receivable.		$600,000 loans to Macomb Auto.-uncollectible	J	0.00
17. Alimony, maintenance, support, and property settlements to which the debtor is or may be entitled. Give particulars.	X			
18. Other liquidated debts owed to debtor including tax refunds. Give particulars.	X			
19. Equitable or future interests, life estates, and rights or powers exercisable for the benefit of the debtor other than those listed in Schedule A – Real Property.	X			
20. Contingent and noncontingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust.	X			
21. Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims. Give estimated value of each.	X			

B 6B (Official Form 6B) (12/07) -- Cont.

In re John Doe and Carol Doe, Debtor

Case No. 14-99999 (If known)

SCHEDULE B - PERSONAL PROPERTY

(Continuation Sheet)

TYPE OF PROPERTY	NONE	DESCRIPTION AND LOCATION OF PROPERTY	HUSBAND, WIFE, JOINT, OR COMMUNITY	CURRENT VALUE OF DEBTOR'S INTEREST IN PROPERTY, WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION
22. Patents, copyrights, and other intellectual property. Give particulars.	X			
23. Licenses, franchises, and other general intangibles. Give particulars.	X			
24. Customer lists or other compilations containing personally identifiable information (as defined in 11 U.S.C. § 101(41A)) provided to the debtor by individuals in connection with obtaining a product or service from the debtor primarily for personal, family, or household purposes.	X			
25. Automobiles, trucks, trailers, and other vehicles and accessories.		2005 Ford Taurus (105,000 miles)	H	6,100.00
26. Boats, motors, and accessories.		2010 Chevrolet Malibu (112,000 miles)	W	6,300.00
27. Aircraft and accessories.	X			
28. Office equipment, furnishings, and supplies.	X			
29. Machinery, fixtures, equipment, and supplies used in business.	X			
30. Inventory.	X			
31. Animals.	X			
32. Crops - growing or harvested. Give particulars.	X			
33. Farming equipment and implements.	X			
34. Farm supplies, chemicals, and feed.	X			
35. Other personal property of any kind not already listed. Itemize.	X			
		0 continuation sheets attached Total ➤ (Include amounts from any continuation sheets attached. Report total also on Summary of Schedules.)		$ 55,400.00

B 6D (Official Form 6D) (12/07)

In re John Doe and Carol Doe, Debtor

Case No. 14-99999 (If known)

SCHEDULE D - CREDITORS HOLDING SECURED CLAIMS

State the name, mailing address, including zip code, and last four digits of any account number of all entities holding claims secured by property of the debtor as of the date of filing of the petition. The complete account number of any account the debtor has with the creditor is useful to the trustee and the creditor and may be provided if the debtor chooses to do so. List creditors holding all types of secured interests such as judgment liens, garnishments, statutory liens, mortgages, deeds of trust, and other security interests.

List creditors in alphabetical order to the extent practicable. If a minor child is the creditor, state the child's initials and the name and address of the child's parent or guardian, such as "A.B., a minor child, by John Doe, guardian." Do not disclose the child's name. See, 11 U.S.C. §112 and Fed. R. Bankr. P. 1007(m). If all secured creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H – Codebtors. If a joint petition is filed, state whether the husband, wife, both of them, or the marital community may be liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Total the columns labeled "Amount of Claim Without Deducting Value of Collateral" and "Unsecured Portion, if Any" in the boxes labeled "Total(s)" on the last sheet of the completed schedule. Report the total from the column labeled "Amount of Claim Without Deducting Value of Collateral" also on the Summary of Schedules and, if the debtor is an individual with primarily consumer debts, report the total from the column labeled "Unsecured Portion, if Any" on the Statistical Summary of Certain Liabilities and Related Data.

☐ Check this box if debtor has no creditors holding secured claims to report on this Schedule D.

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE AND AN ACCOUNT NUMBER (*See Instructions Above.*)	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED, NATURE OF LIEN, AND DESCRIPTION AND VALUE OF PROPERTY SUBJECT TO LIEN	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL	UNSECURED PORTION, IF ANY
ACCOUNT NO. Big Bank of Hollywood 777 Celebrity Drive Hollywood, MI 49999		J	10/1/2004 711 Big Shot Blvd., Hollywood, MI VALUE $ 500,000.00				415,000.00	0.00
ACCOUNT NO. Higher Ground Mortgage Co. 999 Celebrity Drive Hollywood, MI 49999		J	3/31/2007 711 Big Shot Blvd., Hollywood, MI VALUE $ 500,000.00				100,000.00	15,000.00
ACCOUNT NO. VALUE $								
0 continuation sheets attached			Subtotal ► (Total of this page)				$ 515,000.00	$ 15,000.00
			Total ► (Use only on last page)				$ 515,000.00 (Report also on Summary of Schedules.)	$ 15,000.00 (If applicable, report also on Statistical Summary of Certain Liabilities and Related Data.)

B 6F (Official Form 6F) (12/07)

In re John Doe and Carol Doe, Debtor

Case No. 14-99999 (if known)

SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

State the name, mailing address, including zip code, and last four digits of any account number, of all entities holding unsecured claims without priority against the debtor or the property of the debtor, as of the date of filing of the petition. The complete account number of any account the debtor has with the creditor is useful to the trustee and the creditor and may be provided if the debtor chooses to do so. If a minor child is a creditor, state the child's initials and the name and address of the child's parent or guardian, such as "A.B., a minor child, by John Doe, guardian." Do not disclose the child's name. See, 11 U.S.C. §112 and Fed. R. Bankr. P. 1007(m). Do not include claims listed in Schedules D and E. If all creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H - Codebtors. If a joint petition is filed, state whether the husband, wife, both of them, or the marital community may be liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of all claims listed on this schedule in the box labeled "Total" on the last sheet of the completed schedule. Report this total also on the Summary of Schedules and, if the debtor is an individual with primarily consumer debts, report this total also on the Statistical Summary of Certain Liabilities and Related Data..

☐ Check this box if debtor has no creditors holding unsecured claims to report on this Schedule F.

CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER *(See instructions above.)*	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE.	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM
ACCOUNT NO. x-1357 First Megabank 111 Celebrity Drive Hollywood, MI 49999		J	2003 - Deficiency on pers. guaranty of business loans owed by Macomb Automotive Group, Inc.				1,200,000.00
ACCOUNT NO. x-8888 Busy Bank VISA 567 Big Street Raleigh, NC 27770		J	2012 - 2014 Credit card				40,000.00
ACCOUNT NO. x-4400 Capital Two Bank P.O. Box 12398 Cleveland, OH 45089		J	2012 - 2014 Credit card				25,000.00
ACCOUNT NO. x-2589 JPMorgan Chase It Bank 679 Fifth Avenue New York, NY 10025		J	2012 - 2014 Credit card				50,000.00
						Subtotal➤	$ 1,315,000.00
						Total➤ (Use only on last page of the completed Schedule F.) (Report also on Summary of Schedules and, if applicable, on the Statistical Summary of Certain Liabilities and Related Data.)	$ 1,315,000.00

0 continuation sheets attached

FIRST MEGABANK
CREDIT APPLICATION

Applicant Information

Name: John and Carol Doe

Address: 711 Big Shot Blvd., Hollywood, MI 48888

Telephone: (711) 711-7117

Email Address: johnandcarol@gmail.com

Purpose of application: Finance purchase of 2011 Cadillac Escalade

Employment Information

Employer: Macomb Automotive Group, Inc.

Address: 123 Horatio Alger Drive, Macomb, MI 49999

Telephone: (711) 123-1234

Position: John is the president and John and Carol are the owners

Length of Employment: John has been president for 21 years

Salary: $300,000.00 annual

Bank Information

Name of Bank: First Megabank

Branch: Hollywood, MI

Bank Contact: E.Z. Credit

Type of Account: Checking X Savings X

Have you ever filed for bankruptcy before: Yes ____ No X

Have you ever defaulted in payment of credit before: Yes X No ____

If yes, please explain: Previous business loans had gone into default when business contracted, but any defaults were quickly cured

Assets

Cash:

Savings accounts (list bank or other institution, and amount): $18,000, First Megabank

Checking accounts (list bank or other institution, and amount): $2,000, First Megabank

Other (list bank or other institution, and amount): $35,000.00, 401(k) account

Marketable securities (list issuer, type, shares and market value): Shares of common stock in reorganized General Motors, $100,000

Accounts and loans receivable (list name of account debtor or borrower and amount owing): Macomb Automotive Group, $600,000 for loans made to it by John & Carol over the years

Life insurance (list name of insurer and cash surrender value): Term insurance only

Real estate (list description of property, location, and market value): Personal residence at 711 Big Shot Blvd., Hollywood, MI, estimated value of $500,000

Automobiles (list make, model and market value): 2011 Lexus, estimated value of $65,000

Stock holdings, partnership interests, limited liability memberships, and other interests in business entities (list name of entity, description of interest, and estimated value of interest): Own 100% of stock in Macomb Automotive Group, Inc., estimated value of $3 million

TOTAL ASSETS: **$4,320,000.00**

Liabilities

Mortgages on real property (list name and address of creditor, total outstanding for each debt, description and location of property that the mortgage encumbers): Big Bank of Hollywood, 1st mortgage on residence, $390,000; and Higher Ground Mortgage Co., 2nd mortgage on residence, $90,000

Other secured debts (list name and address of creditor, total outstanding for each debt, description of property that secures the debt): 2011 Lexus, $65,000, Big Bank of Hollywood

Tax debts (list name of taxing authority, nature of tax, and total outstanding for each debt): None

Unsecured debts (list name and address of creditor, and total outstanding for each debt): $75,000, credit cards (VISA, MasterCard and American Express)

Guaranties of debts of others (list name and address of creditor, total amount guaranteed for each debt, and name of principal obligor for whom the debt is guaranteed): First Megabank, personal guaranty by John and Carol of $3.8 million of business loan made to Macomb Automotive Group, Inc., consisting of $3 million of term debt secured by building, machinery and equipment, and $800,000 secured by accounts receivable and inventory

Contingent liabilities (list name and address of creditor, description of contingency, and total outstanding for each debt): None

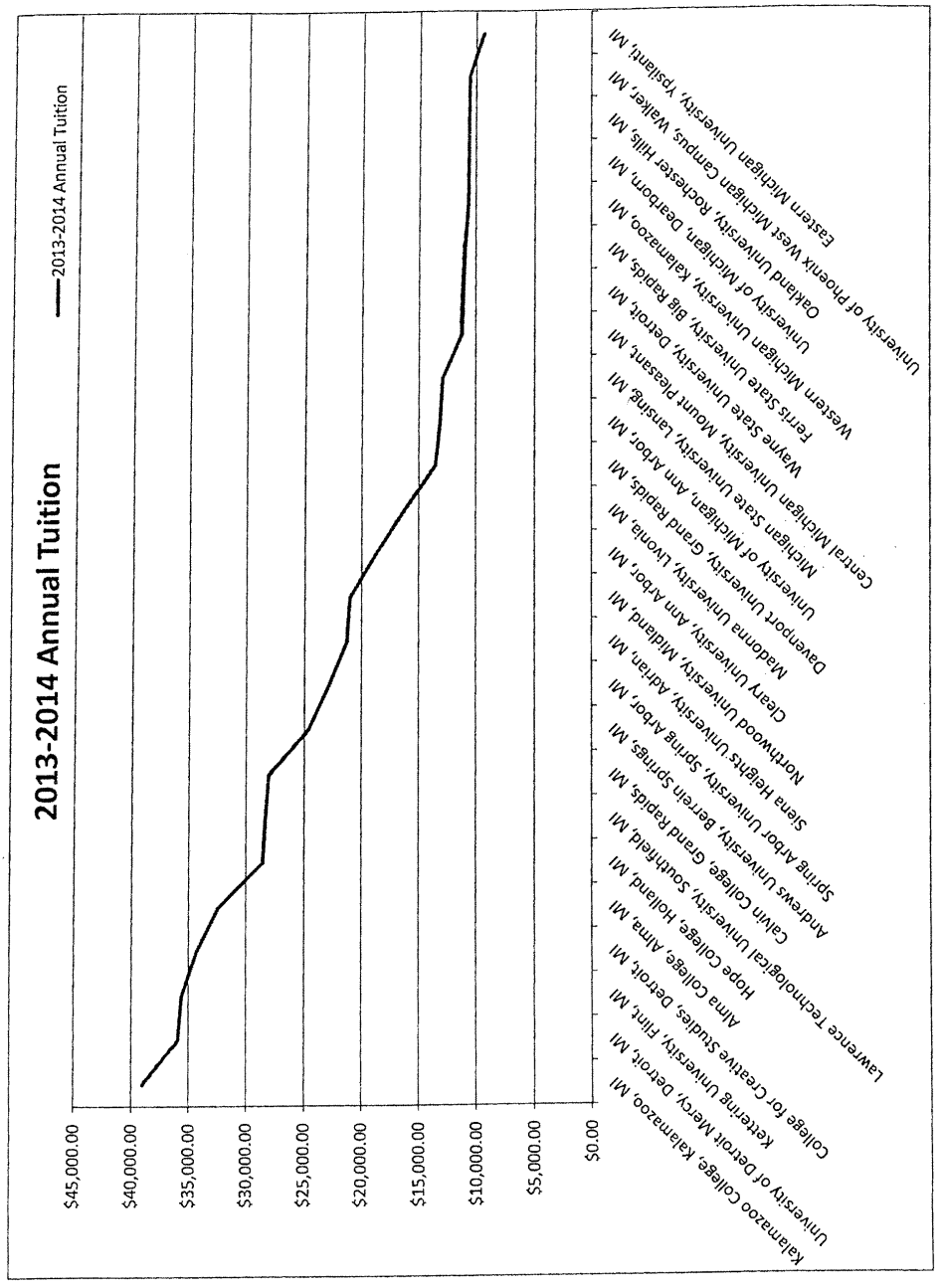
TOTAL LIABILITIES: **$620,000.00**

We, John and Carol Doe, are the Applicants. We have read this Application and represent that the information contained in it is complete and accurate.

_____
John Doe

_____
Carol Doe

February 20, 2011


2013-2014 Annual Tuition
2013-2014 Annual Tuition
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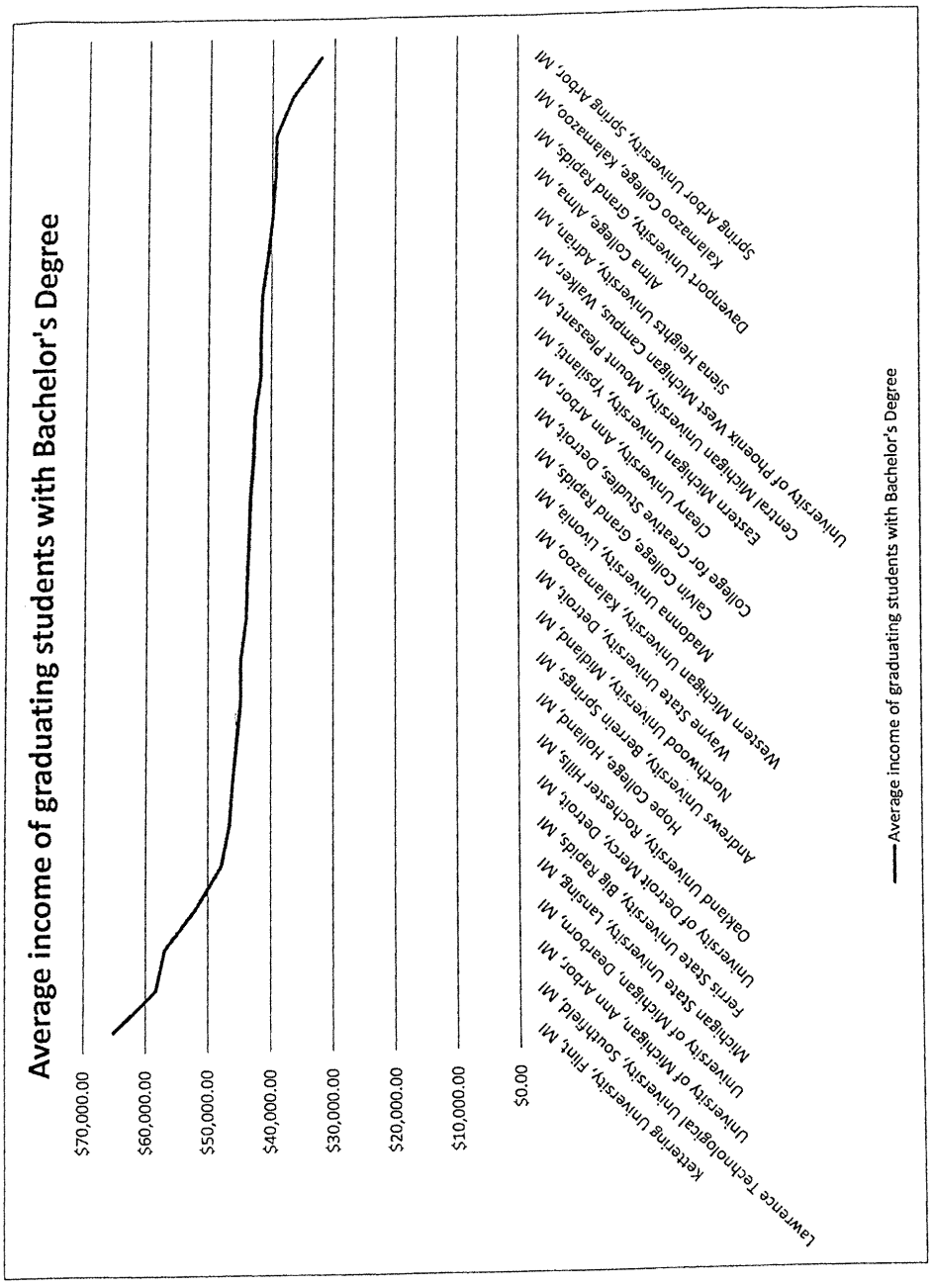
$40,000.00
$35,000.00
$30,000.00
$25,000.00
$20,000.00
$15,000.00
$10,000.00
$5,000.00
$0.00
Kalamazoo College, Kalamazoo, MI
University of Detroit Mercy, Detroit, MI
Kettering University, Flint, MI
College for Creative Studies, Detroit, MI
Alma College, Alma, MI
Hope College, Holland, MI
Calvin College, Southfield, MI
Lawrence Technological University, Southfield, MI
Andrews University, Berrien Springs, MI
Spring Arbor University, Spring Arbor, MI
Siena Heights University, Adrian, MI
Northwood University, Midland, MI
Cleary University, Ann Arbor, MI
Madonna University, Livonia, MI
Davenport University, Grand Rapids, MI
University of Michigan, Ann Arbor, MI
Michigan State University, Lansing, MI
Wayne State University, Mount Pleasant, MI
Ferris State University, Detroit, MI
Central Michigan University, Big Rapids, MI
Western Michigan University, Kalamazoo, MI
University of Michigan, Dearborn, MI
Oakland University, Rochester Hills, MI
Eastern Michigan University, Walker, MI
University of Phoenix West Michigan Campus, Ypsilanti, MI

EXHIBIT 3


Average income of graduating students with Bachelor's Degree
$70,000.00
$60,000.00
$50,000.00
$40,000.00
$30,000.00
$20,000.00
$10,000.00
$0.00
Lawrence Technological University, Flint, MI
Kettering University, Flint, MI
University of Michigan, Dearborn, MI
University of Michigan, Ann Arbor, MI
Michigan State University, Lansing, MI
Ferris State University, Big Rapids, MI
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Central Michigan University, Mount Pleasant, MI
University of Phoenix West Michigan Campus, Wixom, MI
Siena Heights University, Adrian, MI
Alma College, Alma, MI
Davenport University, Grand Rapids, MI
Kalamazoo College, Kalamazoo, MI
Spring Arbor University, Spring Arbor, MI
Average income of graduating students with Bachelor's Degree

EXHIBIT 4