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All articles published in the Michigan Defense Quarterly reflect the views of the individual authors. The Quarterly always welcomes articles and opinions on any topic that will be of interest to MDTC members in their practices. Although MDTC is an association of lawyers who primarily practice on the defense side, the Quarterly always emphasizes analysis over advocacy and favors the expression of a broad range of views, so articles from a plaintiff's perspective are always welcome. Author's Guidelines are available from Michael Cook (Michael.Cook@ceflawyers.com) or Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).

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President's Corner

By: Hilary A. Ballentine, *Plunkett Cooney* P.C.

Hilary A. Ballentine is a member of Plunkett Cooney's Appellate Law Practice Group who concentrates her practice primarily on appeals related to litigation involving general liability, municipal liability, construction claims, constitutional and medical liability cases, among others. Ms. Ballentine is admitted to practice in Michigan's state and federal courts, as well as the Michigan Court of Appeals, the Michigan Supreme Court, the U.S. Court of Appeals for the Sixth Circuit, and the U.S. Supreme Court.

Ms. Ballentine, who is a member of the firm's Bloomfield Hills office, has been selected as a "Rising Star" in appellate law by Michigan Super Lawyers magazine since 2011. She was also selected as an "Up and Coming" lawyer by Michigan Lawyer's Weekly in 2011.

President of the Michigan Defense Trial Counsel, Ms. Ballentine was named as MDTC's Volunteer of the Year in 2012. She is also an active member of the Michigan Appellate Bench Bar Planning Committee and the DRI – The Voice of the Defense Bar.

A magna cum laude graduate from the University of Detroit Mercy School of Law in 2006, Ms. Ballentine served as a barrister for the school's American Inns of Court program, which involves third- and fourth-year students. Ms. Ballentine currently mentors undergraduate students at the University of Michigan – Dearborn, where she received her undergraduate degree, with high distinction, in 2003

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Teamwork Works

"Great things in business are never done by one person. They're done by a team of people."

--Steve Jobs

This past weekend, I watched a (very) patient sports coach attempt to teach teamwork to a group of three and four-year-olds. Not surprisingly, each child initially thought that he or she should be "in charge" of the team. And when they first gathered around the edges of a large play tent with two soft footballs in the middle, they all shook the tent to their own rhythms. Much to their chagrin, the footballs just bounced erratically on the tent. But after a bit of coaching, the children learned that if they slowly lifted the tent up in unison and then snapped it down together, the footballs would fly high in the air (cue the squealing delight of toddlers). A successful demonstration of teamwork, I would say.

This basic concept of teamwork, which we learn as children, permeates every aspect of our adult lives. At home, we rely on our familial team to accomplish even the most mundane tasks (laundry, anyone?). Professionally, we frequently utilize a team-centered approach to achieve the best results for our clients. Whether it be round-tabling a case to determine the best litigation strategy, utilizing co-chairs at trial, or mooting an appellate oral argument, the old adage that "two heads are better than one" certainly rings true in the practice of law. Even operating within the same set of legal rules, different attorneys approach cases differently. Each attorney brings a unique perspective to the team; and, as the late Steve Jobs aptly observed, the collective knowledge of a team of people is greater than that of any single person.

The MDTC does not just subscribe to these principles; teamwork is the very heart of the organization. In fact, the MDTC has many "teams"; just take a look at our list of committees (http://www.mdtc.org/About-Us/Committees.aspx) and section chairs (http://www.mdtc.org/About-Us/Section-Chairs.aspx) to see some of our many team members who are hard at work to further our organizational goal. Just recently, a very diligent team worked together to plan the MDTC's Legal Excellence Awards event at the Detroit Historical Museum – a completely new event for the organization. It was one of our most heavily-attended, successful events. Teamwork: case-in-point.

It is amazing what can be accomplished when a true team spirt is invoked, wherein the focus is on the end result rather than on receiving individual credit or applause. This is exactly how I view the MDTC team – a collection of attorneys working together, not to receive individual praise, but to achieve together a larger goal: promoting excellence in civil litigation. I am proud to be a member of this team.

Since this is my last opportunity to address you as President, I must take a moment to recognize some special members of the MDTC team: Vice President **Rick Paul** (Dickinson Wright PLLC), Treasurer **Josh Richardson** (Foster Swift Collins & Smith PC), Secretary **Irene Hathaway** (Miller Canfield Paddock and Stone PLC) and Past President **D. Lee Khachaturian** (Law Offices of Diana Lee Khachaturian). Through monthly conference calls, attendance and participation at

This is exactly how I view the MDTC team – a collection of attorneys working together, not to receive individual praise, but to achieve together a larger goal: promoting excellence in civil litigation. I am proud to be a member of this team.

Board meetings, and strategic planning of various events, these team members have been instrumental in the MDTC's success over the past year. Moreover, they also took on additional responsibilities without complaint when I welcomed my daughter in August. I am extremely grateful to this team, which I have no doubt will lead the MDTC to even greater heights in the coming year.

Finally, many thanks is to be given to our Executive Director, **Madelyne Lawry**, and her team, including **Valerie Sowulewski** and **Kyle Platt**. Much of the behind-the-scenes work of the organization is attributable to the outstanding efforts of these individuals.

During the past year, I have gained a unique perspective into how our organization works together to plan seminars, publish our Quarterly, filter amicus requests and author amicus briefs on the organization's behalf, and host our various meetings and events. Great things, indeed, accomplished by an enthusiastic team of people I am proud to have worked with and privileged to know. Thank you for a wonderful year.

What Do You Control? Document Preservation and Production Under Federal Rule 34

By: Tom Isaacs, Jodi Schebel, and Brandon Pellegrino

Executive Summary

The digitization of business processes around the world has created a divide among United States federal courts in the interpretation of Rule 34 of the Federal Rules of Civil Procedure. Rule 34 requires parties responding to document requests to produce documents – including, of course, electronically stored information (ESI) – so long as those documents are in their "possession, custody, or control." Currently, there are three different tests used by federal courts in deciding whether a party is in "possession, custody, or control" of documents. A uniform standard should be adopted by the courts to resolve the inconsistency and confusion that many parties face during discovery.

The digital revolution has disrupted traditional business practices around the globe and the practice of law has certainly not been spared. The maintenance and expansion of global businesses and supply chains, including the sheer amount of digital data generated and the countless locations where it can be stored (including by third parties), has challenged old assumptions and given renewed importance to provisions of the federal discovery rules that many thought were settled. Examples are plentiful, such as the recent, much-publicized emphasis in the Federal Rules of Civil Procedure on proportionality to determine the scope of discovery, as well as the efforts to prioritize rules requiring cooperation and mutual planning during discovery. The modern realities of globalization and digital record keeping have also called into question another longstanding feature of the federal discovery rules: What precisely is considered to be in a party's "possession, custody, or control" for purposes of document preservation and production under Federal Rule of Civil Procedure 34?

Tom Isaacs is a Partner in the Bloomfield Hills office of Bowman and Brooke LLP. Tom has experience representing a diverse lineup of businesses in litigation, including in product liability, personal injury, contractual, antitrust, regulatory, and business tort matters. He has also presented and published extensively on e-discovery topics.

Jodi Munn Schebel focuses her practice on product liability defense litigation and holds significant experience with discovery coordination and eDiscovery in commercial and business cases, complex litigation and class action matters. She currently serves as National Discovery Counsel for a major automotive manufacturer on class action and other product liability matters in both state and federal courts throughout the United States. She can be reached at 248.205.3352 and emailed at jodi.shebel@bowmanandbrooke.com

Brandon Pellegrino is an Associate at Bowman and Brooke LLP in the Bloomfield Hills office. Brandon has experience representing businesses in product liability, personal injury, and complex construction litigation. Brandon has also focused his practice on e-discovery issues, including extensive experience with complicated product liability discovery.

Rule 34 neatly spells out that a party responding to document requests need only produce documents and electronically stored information (ESI) in its "possession, custody, or control."[1] But what does this limitation actually mean in practice? While document collection and production was once as simple as opening a few file cabinets in a centralized location or two, that is no longer the case. Imagine you represent a domestic arm of a multinational corporation with offices located and separately incorporated in Asia or Europe. To what extent does the domestic corporation have possession, custody, or control of documents kept by its parent, subsidiary, or sister companies, which are all distinct legal entities?[2] Does the answer change if the international parent, subsidiary, or sister company had previously – and voluntarily – produced documents to the domestic company for use in litigation?[3] And how do foreign privacy or blocking statutes (which generally prohibit the production of documents for use in U.S. litigation) affect this analysis, if at all?

For many practitioners, grappling with these complex issues is a daily reality. This all matters because parties deemed to control documents and ESI may be under a legal obligation to preserve and produce those materials, and can face serious sanctions for failing to do so. Having a clear understanding of the state of the current law – and an informed awareness of where it may be headed – can greatly assist practitioners in advising clients about their legal obligations and in establishing a defensible discovery protocol.

Control Here, But Not There

To skip to the heart of the matter: What currently constitutes "possession, custody, or control" of documents and ESI under Rule 34? The phrase itself is not defined anywhere in the Rules. As it stands, three related, but different, standards generally prevail: the legal right standard, the legal right plus notification standard, and the practical ability standard. While these tests are used by different circuits to varying degrees, many district courts have sewn confusion by citing to and applying multiple tests within the same circuit. The result is a tangle of oftentimes inconsistent rulings, and a consequent lack of clear direction for litigants.

The Legal Right Standard

The first, and narrowest, of these tests is the "legal right" standard, under which a party is deemed to have possession, custody, or control of documents and ESI only if it has the legal right to obtain the material. Simply put, courts applying this standard deem documents and ESI to be in a party's control if they maintain actual possession of the material or if the party has a clear right to obtain the documents, usually through a contract. This test has been used by courts in the First,[4] Third,[5] Fifth,[6] Sixth,[7] Seventh,[8] Eighth,[9] Ninth,[10] Tenth,[11] and Eleventh[12] circuits.

The Legal Right Plus Notification Standard

The "legal right plus notification" standard, which is used in the Fourth Circuit,[13] is similar to the "legal right" standard in that a party must preserve and produce documents and ESI that it actually possesses or has a legal right to obtain. Under this test, however, if the responding party does not have a legal right to the documents requested, the responding party is obligated to notify its adversary if it is aware that the material specifically requested is held by a third party.[14] At least one district court in three other circuits -- the First, Sixth, and Tenth circuits -- have applied a similar notice obligation when determining compliance with Rule 34.[15]

The Practical Ability Standard

The last and broadest standard is the "Practical Ability" test. Under this standard, documents and ESI are judged to be within a responding party's possession, custody, or control even if the party does not have a legal right to, or physical possession of, the documents requested as long as the party has the "practical ability" to obtain them. That is, this test extends the meaning of "control" to include documents and ESI that a party could possibly obtain on demand, irrespective of whether the party has an actual right to the documents. This is in stark contrast to the two other standards, which focus on whether a party has an actual legal right to the materials and do not consider whether it is merely possible that a party may obtain documents if it asked a non-party in possession of such documents and/or ESI. The "practical ability" standard has been cited to by courts in the Second,[16] Fourth,[17] Fifth,[18] Eighth,[19] Tenth,[20] Eleventh,[21] and D.C. circuits.[22]

Toward A Common Standard

The practical differences between these standards can be enormous; after all, a broad interpretation of "possession, custody, or control" may require an equally broad definition of the documents and ESI that a party is obligated to preserve and produce. Additionally, the sanctions for failing to preserve or produce documents can be severe.

It is, therefore, desirable to resolve the current split and work toward a common standard to determine when a party has possession, custody, or control over documents and ESI. Indeed, the Sedona Conference recently issued several principles to guide the legal community in accomplishing this goal.[23] According to the Sedona Conference, a responding party should be deemed to be in

possession, custody or control of documents and ESI when the party has actual possession or the legal right to obtain the material on demand, and a responding party should timely notify the requesting party if documents sought belong to a third party.[24] The "practical ability" or mere prospect that a responding party may be able to obtain documents upon demand would not matter. In other words, the Sedona Conference has endorsed the "legal right plus notification" standard, and has encouraged its nationwide adoption.

The "legal right plus notification" standard advanced by the Sedona Conference is clear, reliable, and understandable. Settled case law has already established the basic parameters of this test – that is, control is established either by actual possession or the legal right to obtain the documents – which means it can be easily applied across jurisdictions and will lead to predictable outcomes. Further, the Sedona Conference's proposal encourages courts to give proper consideration to significant real-world document preservation and production concerns, such as the legal status of distinct companies and foreign privacy or blocking statutes, while maintaining the flexibility to recognize that a party's deliberate maintenance of documents by a third party or in a foreign jurisdiction in order to secure an advantage in litigation is not allowed.[25] Moreover, in a reversal of much of the current case law,[26] the Sedona Conference's proposed test puts the burden squarely on the **producing** party to show that it does not have actual possession or the legal right to retrieve the requested documents.[27] Only if the producing party meets its burden will the onus appropriately shift to the requesting party to seek the material from the correct source under Rule 45.

Issues with the Practical Ability Standard

In contrast, the "practical ability" standard is flawed and more likely to lead to inequitable outcomes. For one, because the "practical ability" standard disregards whether a responding party has the actual right to obtain documents, it encourages courts to overlook the actual legal relationships between distinct corporate entities and instead make assumptions concerning the ability of a corporation to retrieve material from a sister, parent, or subsidiary company.[28] Such assumptions can be incorrect, and thus application of this standard can result in a company being ordered – under threat of sanctions – to produce documents it simply does not have or cannot acquire.

Moreover, application of the "practical ability" standard may harm a party's ability to comply with foreign law, as the idea of "control" under this standard does not take into account the actual location of the documents, whether they are subject to the laws of another jurisdiction, and whether the responding party may face penalties for its non-compliance with foreign law.[29] The subjectivity inherent in the "practical ability" test can lead to situations where a responding party is compelled to produce documents that, according to a court or the requesting party, it has the "practical ability" to obtain – but which, in reality, are not within the party's actual ability to acquire.

Conversely, a uniform standard based on the "legal right" test would promote consistency among circuits (and indeed, between districts within circuits), so that a party's obligation to preserve and produce documents in its possession, custody, or control does not hinge on what jurisdiction a party is sued in. Consistency will also provide much needed guidance to lawyers and clients in assessing their duties to preserve and produce documents.

Conclusion

Because companies will only continue to integrate in a digital, borderless world, the consistent and predictable application of discovery rules will remain important. While the courts, of course, will still maintain and apply their own standards for determining control for the near future, the issue has at least been recognized and a workable solution proposed. As such, the effort towards a uniform standard should be of practical assistance to courts and litigants.

Endnotes

1 FR Civ P 34(a)(1).

2 See generally *Dugan v Lloyds TSB Bank, PLC*, unpublished opinion of the United States District Court for the Northern District of California, issued Sept. 4, 2013 (Docket No. 12-CV-02549-WHA-NJV); 2013 WL 4758055, *1.

3 *In re Citric Acid Litig*, 191 F3d 1090, 1108 (CA 9, 1999).

4 *Rosie D v Romney*, 256 F Supp 2d 115, 119 (D Mass, 2003).

5 *Princeton Digital Image Corp v Konami Digital Entm't Inc*, 316 FRD 89 (D Del, 2016).

6 *Enron Corp Sav Plan v Hewitt Associates, LLC*, 258 FRD 149 (SD Tex, 2009).

7 *Pasley v Caruso*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued May 16, 2013 (Docket No. 10-CV-11805); 2013 WL 2149136, *5.

8 *United States v Approximately $7,400 in U.S. Currency*, 274 FRD 646, 647 (ED Wis, 2011).

9 *Beyer v Medico Ins Grp,* unpublished opinion of the United States District Court for South Dakota, issued Mar. 17, 2009 (Docket No. 08-5058); 2009 WL 736759, *5.

10 *Dugan v Lloyds TSB Bank, PLC*, unpublished opinion of the United States District Court for the Northern District of California, issued Sept. 4, 2013 (Docket No. 12-CV-02549-WHA-NJV); 2013 WL 4758055, *1.

11 *Noaimi v Zaid*, 283 FRD 639, 642 (D Kan, 2012).

12 *Searock v Stripling*, 736 F2d 650, 654 (CA 11, 1984).

13 *Victor Stanley, Inc v Creative Pipe, Inc*, 269 FRD 497, 523 (D Md, 2010).

14 *Id.*

15 *See Perez v Hyundai Motor Co,* 440 F Supp

2d 57 (D PR, 2009); *Chavez v Hatterman*, unpublished opinion of the United States District Court for Colorado, issued Jan. 20, 2009 (Docket No. A06-CV-02525-WYD-MEH); 2009 WL 807440, *2; *Lexington Ins Co v Tubbs*, unpublished opinion of the United States District Court for the Western District of Tennessee, issued June 2, 2009 (Docket No. 06-2847-STA); 2009 WL 1586862.

16 *Bank of NY v Meridien BIAO Bank Tanzania Ltd*, 171 FRD 135, 146 (SDNY, 1997).

17 *Grayson v Cathcart*, unpublished opinion of the United States District Court for South Carolina, issued Apr. 8, 2013 (Docket No. 2:07-00593-DCN); 2013 WL 1401617, *3.

18 At least one district court in the Fifth Circuit has cited the "practical ability" test. See *Enron Corp Sav Plan*, 258 FRD at 164, citing *Tomlinson v El Paso Corp*, 245 FRD 474 (D Colo, 2007). The court, however, did not appear to have actually applied the test.

19 *Prokosch v Catalina Lighting, Inc*, 193 FRD 633, 636 (D Minn, 2000).

20 *Tomlinson v El Paso Corp*, 245 FRD 474 (D Colo, 2007).

21 *ANZ Advanced Techs v Bush Hog, LLC*, unpublished opinion of the United States District Court for the Southern District of Alabama, issued Jan. 26, 2011 (Docket No. 09-00228-KD-N); 2011 WL 814663.

22 *Bush v Ruth's Chris Steak House, Inc*, 286 FRD 1, 5 (D DC, 2012).

23 The Sedona Conference, *The Sedona Conference Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control,"* 17(2) The Sedona Conf J 467, 477-478 (July 2016).

24 *Id.*

25 *Id.* at 11.

26 Currently, in the Sixth Circuit, the burden rests on the requesting party to prove that the responding party has possession, custody, or control of the documents sought. *See Robert Bosch, LLC v Snap-On Inc.*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued Mar. 6, 2013 (Docket No. 12-11503); 2013 WL 823330, *1.

27 The Sedona Conference, *supra* note 23, at 11.

28 See generally *Wells v FedEx Ground Package Sys, Inc*, unpublished opinion of the United States District Court for the Eastern District of Missouri, issued Oct. 1, 2012 (Docket No. 4:10-CV-02080-JAR); 2012 WL 4513860, *2; *Dietrich v Bauer*, unpublished opinion of the United States District Court for the Southern District of New York, issued Aug. 16, 2000 (Docket No. 95 CIV. 7051 (RWS)); 2000 WL 1171132, *5, on reconsideration in part, 198 FRD 397 (SDNY, 2001).

29 *Tiffany (NJ) LLC v Qi Andrew*, 276 FRD 143, 149 (SDNY, 2011), aff'd sub nom. *Tiffany (NJ) LLC v Andrew*, unpublished opinion of the United States District Court for the Southern District of New York, issued Nov. 14, 2011 (Docket No. 10 CIV. 9471 WHP); 2011 WL 11562419.

Dog Bites and Pet Related Injuries: Keeping Your Dog-Bite Case on a Short Leash

By: Ron Berman

Executive Summary
Despite years of litigation experience many adjusters and defense attorneys do not possess enough in-depth knowledge regarding the complexities of canine behavior, forensic-dog-bite investigation and bite-wound evaluation and analysis to provide the best possible defense against exorbitant and false claims made by plaintiff attorneys. This article, although by no means complete, seeks to offer specific information that can be used to more accurately assess cases as well as to organize and present the best defense during settlement negotiations and, if necessary, to a jury. Not retaining a qualified and highly experienced expert, especially early on, can often result in problems.

Ron Berman is an expert in the forensic investigation and litigation of dog bites and pet related injuries who has appeared in Municipal, Civil, Criminal and Federal courts as well as local dangerous dog hearings nationwide. He has testified in deposition and trial on over 260 occasions. He is an Approved Expert for the Superior Court of Los Angeles, a Certified Forensic Expert and a Licensed Animal Evaluator. His web site is www.dogbite-expert.com. He can be reached at 310-376-0620 and emailed at ropaulber@earthlink.net

Dog bites and pet related injury claims to insurers have risen substantially over the years. The value of claims according to the Insurance Information Institute jumped from $324 million in 2003 to $571 million in 2015 showing a 76.2% increase. California accounted for the largest number of claims in the U.S. in 2015 at 1684 with a total value of $75.8 million. State Farm Insurance has stated that one-third of all homeowners liability pay outs in 2014 were for dog bites and although actual claims decreased by 4.7 percent, the average cost per claim was up by 15%. Plaintiff demands for $1,000,000.00 or more are not uncommon in dog bite cases. A recent New Jersey case in which a 5-year-old girl was bitten in the face by a dog up for adoption settled for a total of $900,000 well before trial.

Despite strict liability statutes in most states which create liability in the absence of *scienter*, negligence or intentional behavior, it is still possible to successfully mount a solid defense and mitigate potential losses using in-depth forensic investigation as well as the science of canine behavior and bite wound evaluation. Without sufficient knowledge needed to fully understand important connections, patterns and subtleties in the fact pattern of their case which often lay several layers beneath the surface, this can be hard to do. Add to that potentially missed discovery opportunities and defense errors by either not using an expert, choosing the wrong expert and/or not fully utilizing the expert they have. Even though strict liability may apply, issues of provocation can turn a case upside down and at times end with substantial comparative fault being given to the plaintiff at trial. Cases involving third-party landlord/tenant issues or pet related injuries not involving dog bites, such as knockdowns or fright cases, present a whole host of other difficulties for an attorney without the level of understanding needed to give their defense the foundation it deserves.

This article attempts to shed light on specific issues commonly encountered by defense attorneys and insurance adjusters in dog bite and pet related injury cases. Although, not by any means complete, important information is offered that can be used as a guide, when appropriate, to insure that as much relevant evidence can be produced and accurately utilized, in defense of your case, as possible.

It is well-known that even eyewitness accounts of the very same incident are often inconsistent and that dog bites can happen in the "blink of an eye." Plaintiffs and defendants are not always clear about how the incident happened or why. Even when they seem to be clear, their descriptions of what happened are not always supported by the evidence, at least on the surface. Defendants, in litigation, are not always truthful about the aggressive history of their dog and may state that their beloved pets have never even growled prior to this incident. Bite victims also have been

known to misrepresent the facts and change their version of what happened in order to avoid questions about any potentially provocative behavior they may have displayed just prior to the bite. Plaintiffs also sometimes over-dramatize their accounts of the incident by increasing such factors as the amount of time the attack lasted, the number of times they were bitten and the intensity with which the dog bit. Once litigation starts, it isn't unusual for a plaintiff who was bitten on the face while on their knees trying to kiss a dog he or she didn't know to change their account of the incident and testify that they were standing up and the dog jumped up and bit them for no apparent reason. Statements that the dog shook the victim, a factor in predatory aggression, are often not consistent with the bite wounds, which can sometimes also show that the plaintiff's wounds are not from a dog bite at all.

Although there are many good sources of evidence in a dog bite or pet related injury case that can be used to mount a solid defense, there are two in particular that often are the most reliable: the dog and the bite wounds.

The Dog

There are three things about dogs that make them very important evidence:

1- Dogs are creatures of habit.
2- A dog's temperament doesn't change over time.
3- Dogs do not lie or change their behavior because they are involved in litigation.

Typically a dog's behavior can change due to old age, illness or injury or if they have been trained or had their behavior modified after an incident but their temperament does not change over time. That is why a professional forensic evaluation of a dog is valid even years after the incident. A non-aggressive friendly dog will always have a non-aggressive temperament. Also, if a dog is friendly at the door or towards strangers on its territory, that behavior will likely be ritualized with time and repetition, making the same behavior highly likely to show up in an evaluation whenever it is done as long as it is done properly.

Below are areas regarding the subject dog that deserve more than a superficial review as they may be very important in establishing your defense:

Breed- Many plaintiff attorneys litigating a dog bite case believe that if the defendant's dog is an "aggressive breed," such as an American Staffordshire Terrier or other breed commonly called a "pit bull," that their case is in the bag. However this may not help their case unless it is being tried in a state or county in which "pit bulls" have been declared a dangerous or vicious breed.

The defense should counter by focusing on the fact that every dog is an individual and that it's breed is only one factor out of many that may be important. A forensic investigation and evaluation can offer a jury a very different picture of your client's dog than the one the opposing attorney will try to paint. If opposing counsel has not done their homework, their attempt to lean on the dog's breed as an "ace in the hole," may leave them surprised at the jury's response.

"Pit bulls" are no longer a dog for inner city neighborhoods and gang members as they once were. Now, they can be seen being walked in Beverly Hills and other enclaves of the rich and famous. America both loves and hates "pit bull" terriers and an "attack" on the breeds that make up this group can meet just as much resistance as it does support.

Sex— Intact (un-neutered) male dogs are involved in 70-76% of reported dog bite incidents (Wright J.C., Canine Aggression toward people: bite scenarios and prevention. Vet Clinc North Am Sm Ani Pract 1991:21(2):299-314).

Age/Health - Certain breeds see males become much more aggressive between 1-3 years of age. Also, older dogs often become aggressive due to painful physical issues like hip dysplasia or eye issues like glaucoma. Claims that older dogs, in poor health, ran up to the victim and jumped up on them typically meet with strong resistance from the defense. A recent serious injury case went up in smoke when the victim testified about how her neighbor's Siberian Husky ran full speed down the driveway and leaped at her causing her to fall. Veterinary records, witnesses and expert testimony presented to the jury led to a defense verdict when it was revealed that the dog was partially crippled and nearly 20 years old at the time of the incident. The average lifespan of a Siberian Husky is 12-15 years at the most. The plaintiff's attorney did not seem to be aware of this when his client's deposition was taken.

Size - Large breeds can cause more damage, especially when the incident involves a child. Check the dog's veterinary records at the date closest to the incident for the dog's weight. In dog-on-dog aggression cases where a person is bitten, the facts about each dog, including size and weight, the dynamics of how the incident happened, and which one was the aggressor, can be important. Sometimes, even though the defendant's dog is the larger dog, they can have the most benign temperament and no previous aggression in their history.

Behavioral History - Individual behavior history is extremely important as each dog is an individual within of a breed and may not present all or any of the characteristics commonly attributed to that breed. An in-depth investigation into the defendant's dog's temperament and previous behavior is a must.

If your client swears to you that their

beloved pet is a complete sweetheart and wouldn't hurt a fly, do an evaluation and find out for yourself. Owner denial, in spite of clear evidence to the contrary, is common and a prime factor in many bite incidents. It is best to find out early, before the plaintiff hires their own expert and demands production of the dog for their own evaluation. If that is the case, remember that not all experts are ethical and an unscrupulous opposing expert can attempt to provoke your client's dog into an aggressive display. Do not, under any circumstances, produce your client's dog unless you have your own expert present and the ability to record the entire evaluation from as many angles as possible.

Types of aggression previously displayed - There are numerous types of canine aggression such as dominance aggression, territorial aggression, protective aggression, maternal aggression, etc. Even if a dog has demonstrated aggression in the past, it can be problematic when used as a support for the plaintiff's case unless it directly relates to the incident being litigated. For example, dog-on-dog aggression does not relate to dog-on-human aggression. Having evidence that the defendant's dog has attacked other dogs or animals in the past will not carry much weight if the plaintiff's case is strictly dog-on-human aggression and he or she did not have a dog with him or her at the time of the incident.

If there is evidence that the defendant's dog bit someone who was trying to take their food away, that evidence will only have weight if the plaintiff was bitten in the presence of food. If he or she was attacked while walking down the street or riding a bicycle, showing a history of food aggression may not support their case. In fact, a dog that is food aggressive may not be aggressive in any other situation. Also, previous incidents the opposing attorney is hanging their hat on, may not be as valuable as they think due to the fact that the dog was provoked and bit in a defensive manner. A dog is only "vicious" if it attacks without provocation.

When looking at previous incidents reported or unreported, interviews of witnesses regarding all incidents should be done by your expert as investigators typically do not have the knowledge needed to ask the right follow-up questions or to clarify specific terms regarding dogs often misused by the general public. Also, your experts can rely on "hearsay" evidence even if, after their one and only interview, the person suddenly decides they no longer want to be involved, moves to another state or simply disappears.

Socialization - Dogs that are not well socialized, especially as puppies, have a higher likelihood of aggression. This should be explored early in the case.

Inside/Outside - Dogs that are kept outside and not allowed into the home are typically poorly socialized and more likely to demonstrate aggression toward strange people and dogs. However, your client's outside dog might be an exception to the rule and be a total sweetheart. Here is another reason to capture the dog's friendly nature in an evaluation video which can be shown at trial with behavioral commentary by your expert.

Chaining - Dogs that have been chained for long periods of time have been shown to be 3 times more likely to bite. (PETA.org). Typically, the victims of chained dogs are children. Also, some states, like California, have laws against chaining a dog for more than 3 hours at a time. Again, even if a dog has been chained, it doesn't mean for a fact that it is dangerous or vicious but it does need to be explored early on.

Stray or rescue - Many stray dogs or rescue dogs are wonderful pets but there are a fair percentage with behavior issues which may be the reason they were on the street or put up for adoption. Previous owners sometimes don't tell the rescue organization about aggression issues because they are afraid the dog will be euthanized. Time bombs can often be found either in rescue organization or shelter records or through utilizing them to discover further evidence. It is best that this avenue be explored early in litigation as well.

Training - If the defendant's dog has been professionally trained, previous aggression may be one of the main reasons why. The trainer can be an excellent percipient witness regarding the dog's prior behavior and what the defendant knew about their dog prior to the day of the incident. If the dog had aggression issues, you need to know, if not, they can give a statement or deposition on your client's behalf.

Leash - Most cities have leash laws, but a lot of them also require a dog to be restrained on a leash not over 6 feet long. If your client's dog was being walked on a retractable leash that was extended over 6 feet, it might be important in establishing owner/handler negligence. A lot of incidents happen when dogs are off leash either illegally or legally in a dog park where dog owners typically have to have voice control over their dogs. Does your client have off leash voice control over their dog? If they claim that they do, they need to prove it.

Exercise - Dogs that are under-exercised can build up tension that can either fuel or intensify aggression.

Aggressive behavior - Canine aggression involves growling, snarling, lunging, snapping and biting. Barking is not necessarily aggressive but based on tonality and other exhibited behaviors, it may be construed as such. It is important to clarify the dog's tone, body language, etc., in order to determine if aggression

was actually what was being displayed. For example, what many people would call a snarl (showing teeth), which is an aggressive behavior, might actually be a "greeting grin," which looks similar but is the opposite of aggressive.

Bite Wounds

It is very important that the plaintiff's bite wounds support their account of the incident. Typically, the main issues in a dog-bite case are: (1) Are the plaintiff's wounds from a dog bite? (2) Is the defendant's dog the dog that bit the plaintiff? (3) Did the attack happen as the plaintiff describes? and (4) Did the plaintiff provoke the dog into biting him or her?

Bite wounds are an actual physical representation of the incident. They stand alone as evidence even if the plaintiff was the only witness and the dog has been euthanized. If the wounds are not consistent with the plaintiff's account or in some cases with a dog bite at all, his or her credibility should be questioned in great detail.

Dog bites typically present as punctures, lacerations, avulsions and abrasions. As bites are by nature crush injuries, deeper wounds often are accompanied by contusions (often cited as ecchymosis in the victims medical records) otherwise known as bruises caused by broken blood vessels around the central wound.

Dog Bite or Dog Attack

Although all dog bites are serious from a medical standpoint and even by an emotional standpoint due to the potential long term damage they can do to the victim, there is a motivational difference between offensive and defensive aggression that shows up in the dynamics of the attack as well as the type, depth, location and number of bite wounds. All bites are an aggressive display, but a dog that is provoked into defending itself and responds with a quick inhibited bite is qualitatively a different dog than one who runs up to and attacks with multiple deep punctures over different parts of the victim's anatomy and has to be pulled off the victim by the owner/handler. Plaintiff attorneys often use the word attack in their settlement demands and complaints. If the evidence does not support this claim, your expert should be able to neutralize the emotional power that such words inherently convey to a jury

Defensive aggression

Dogs may bite defensively as a reaction to pain or to "avoid" a threat from a person who has provoked them. This could be by stepping on their tail or paw or by putting their face very close to a strange dog's face in an attempt to kiss or hug them will often receive one inhibited bite. Inhibited bites are where the dog controls its severity. In these cases, the dog is simply trying to remove a threat. One quick bite usually succeeds in creating enough distance between the dog and the threat and no further aggression is displayed. They also tend to produce only lacerations and abrasions and occasionally contusions caused by blunt force trauma as a result of the direct contact of the dog with the victim. Medical records can also be confusing if one doctor states that a wound is a puncture and the next cites it as a laceration. Clarity about the wounds is imperative.

Offensive aggression

Offensive attacks, typically but not always, involve multiple bites and often to different parts of the body. They can be provoked, based on the specifics of the incident and whether or not the dog's level of aggression was grossly out of proportion to the actions of the victim. However, most offensive attacks are unprovoked, meaning that the victim's actions just prior to the incident would not be considered something that is likely to cause a dog to bite. A particular dog, due to one or a combination of factors, such as poor socialization and fear aggression, may interpret an outstretched hand as a threat and bite it, but in the eyes of the law a friendly and common gesture such as reaching out to pet a dog is not provocation and walking toward a dog does not constitute provocation.

Attack Dynamics

There are often reasonable explanations why a particular wound pattern does not seem to add up but these answers are typically only available to attorneys through expert opinion after a thorough analysis. For example, where a stranger trying to kiss or hug a dog would clearly be provocative, the same person who is very familiar with the dog and who has kissed and hugged the dog on numerous occasions previously (with no warnings or aggressive response) may not meet the criteria of provocation due to their history with the dog accepting the behavior. Still, an explanation why the dog bit on this occasion and not on others should be investigated as other actions by the plaintiff may have caused this seemingly "abnormal" reaction.

Provocation can be intentional like kicking or hitting a dog, or unintentional such as a person not very familiar with the dog initiating rough play. Certainly, the victim of the bite is not intending to threaten or hurt the dog but nevertheless their actions can be viewed as likely to cause a dog to feel threatened and bite. Dog bite incidents often are the culmination of a complex interaction that on the surface can appear confusing at best. Each dog, victim and incident is unique. All the facts should be reviewed and interpreted before a decision on whether the victim provoked the dog or

not can be accurately made. In most cases this requires an expert opinion after a complete forensic investigation and evaluation of all relevant discovery.

Experts

There are only a handful of self-titled dog experts in the United States who have more than a very limited amount of experience in court. Many more would like to act in an expert capacity and offer their services without the background needed to insure that the attorney who hires them gets the high level of service they expect. Your expert should know exactly what documents you need and what actions need to be taken in order to maximize all discovery options. Also, they need to know how and where to find evidence that is not readily available through normal channels. Lastly, they need to know how to complete those tasks in a professional manner that does not create impeachment opportunities when facing an aggressive cross-examination. Experts that only review what is sent to them by attorneys and do not do their own independent investigation can appear to be nothing but "hired guns."

Dog experts come in all shapes and sizes and their experience and training vary greatly. Some offer opinions on dogs trained in aggression, such as police dogs and guard dogs, but have no actual experience training dogs in Shutzhund, developed in Germany in which nearly all police dogs are trained and in some cases have no experience in aggression training at all. In one case, a plaintiff's expert testified regarding a bite incident that happened during a training class when a specific training exercise was taking place. His opinion was that the exercise was dangerous to do and should never have been used. His testimony fell apart when it was revealed that his doctorate had nothing to do with dogs and that he had never taught a dog training class. Even worse, he had no experience teaching the specific exercise to which he so strongly objected. The case did settle but for a great deal less than the defense had expected to pay.

That all experts need to be carefully vetted is well known but rarely done. In cases involving dog bites and pet related injuries, it is vital to go over each and every area of the litigation that the expert might be asked about. He or she must have expert qualifications in every area. Just calling yourself a dog expert does not make you an all-purpose expert. Has the expert now offering opinions on dog bite wound evaluation been published on that topic? Unlike construction-defect cases or slip-and-fall cases involving specific gradients, people know dogs or at least believe they do. Every juror will have had some experience with dogs at some time in their life. Many will have been bitten. More than anything they need to be educated in what they don't know and confirmed in what they do know. Most importantly, dogs are basic and real. Your expert's testimony must reflect that with their tone and language.

It is a good idea to "cross-examine" your own expert before their deposition. He or she is only as good as their ability to apply their knowledge and experience to the matter at hand and then communicate their opinions, under enemy fire, in a deposition or courtroom. If they can't thoroughly convince you, they likely won't convince an adjuster or a jury.

Hopefully, the information presented here will be helpful in clarifying important issues encountered in dog bites and pet related injury cases as well as beneficial during all phases of the litigation process.

Attendant Care and Delegation of Tasks in Injury Litigation

By: Erin O'Callaghan BS, MA, JD, LPC, NCC, CRC, CLCP

Executive Summary
Attendant-care costs are one of the most expensive damages as it relates to future-medical care in personal-injury and medical-malpractice actions. Often attendant-care costs may be reduced under the nursing "delegation rule." It is imperative that life care planners consider the reasonableness and medical necessity of future attendant care needs in light of the delegation rule when creating a life care plan.

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When litigating an injury, attendant-care costs are undoubtedly the most costly item as it relates to future-medical-care considerations. When choosing a life care planner, make certain they are experienced in handling level-of-care concerns.

Skilled Versus Unskilled Home Care

Home health aide workers, certified nurse's aides, licensed practical nurses, as well as registered nurses, all provide home or attendant care services in some instances.

Unskilled care is considered attendant care by an individual who has not been issued a healthcare license by a state. Unskilled care workers would include a certified nurse's aide. This certification requires completion of a 75-hour course program, but does not provide significant training for patient-care purposes.[1] A non-certified home care worker, often called a home health aide, could obtain equivalent training to a certified nurse's aide through on the job training. Registered nurses and licensed practical nurses, on the other hand, would be considered skilled care providers. A licensed nurse requires two to four years of training and a licensing exam through the state.

Most attorneys and life care planners would agree that an assumption is made regarding physicians providing attendant care. A physician providing 24-hour attendant care is simply not practical, economically feasible, and it is generally unnecessary. However, there are many arguments in personal-injury litigation regarding whether a licensed nurse is required to provide attendant care. In most instances, a licensed practical nurse or a registered nurse is also not practical or economically feasible, and is generally unnecessary.

There is a substantial cost difference when looking at skilled versus unskilled care. Wages earned by licensed nurses can be three to four times higher than unlicensed home care wages.[2] When litigating this issue, attorneys must have a life care planner who understands healthcare professional rules and laws relating to healthcare provider care and delegation.

Home Care in Practice

From a practical perspective, non-licensed or unskilled home care workers administer medications and perform all sorts of medical care related tasks. These care workers could be parents caring for children with illness or injury, adult children caring for elderly family members, and often times simply hired home care workers without supervision or training by a licensed healthcare provider.

> An argument for skilled or licensed nursing care assumes medical care tasks are so complicated that they require two to four years worth of training and a

healthcare license to perform, and in some instances that is true. However, in many instances, your average competent individual would be able to understand and follow instructions related to simple medical care tasks. That is not to take lightly the risks that are associated with a medication error or other potential harms; however, with some training and protocols in place, an individual could learn to perform these tasks and mitigate risks involved.

Delegation of Tasks

We know that from a practical perspective these tasks are performed by unskilled workers or nursing aides on a regular basis without supervision or training. In addition, unlicensed and licensed individuals are given authority to administer medications and perform other medically related care tasks under the delegation doctrine codified by the Michigan Public Health Code, MCL 333.16215. Which states in part:

> (1)…a licensee who holds a license other than a health profession subfield license may delegate to a licensed or unlicensed individual who is otherwise qualified by education, training, or experience the performance of selected acts, tasks, or functions where the acts, tasks, or functions fall within the scope of practice of the licensee's profession and will be performed under the licensee's supervision. A licensee shall not delegate an act, task, or function under this section if the act, task, or function, under standards of acceptable and prevailing practice, requires the level of education, skill, and judgment required of the licensee under this article.

Further, the Michigan Department of Consumer & Industry Services, Board of Nursing – General Rules Rule 104 states that:

1. Only a registered nurse may delegate nursing acts, functions, or tasks. A registered nurse who delegates nursing acts, functions, or tasks shall do all of the following:
   a. Determine whether the act, function or task delegated is within the registered nurse's scope of practice.
   b. Determine the qualifications of the delegate before such delegation.
   c. Determine whether the delegate has the necessary knowledge and skills for the acts, functions, or tasks to be carried out safely and competently.
   d. Supervise and evaluate the performance of the delegate.
   e. Provide or recommend remediation for the performance when indicated.
2. The registered nurse shall bear ultimate responsibility for the performance of nursing acts, functions, or tasks performed by the delegate within the scope of the delegation.

Key issues regarding delegation in Rule 104 above are necessary knowledge, skill, and supervision. A licensed registered nurse must ensure that the home healthcare worker or nurse's aide has been adequately trained and is providing some type of oversight. Thus, when tasks in a life care plan are "delegated," skilled nursing visits or nurse on-call availability must be included in the future cost projection to adequately address future needs.

Adult foster care homes and assistant living facilities are not required to have a licensed nurse on staff 24 hours a day. The State of Michigan requires an unskilled worker, generally called "direct care staff" to be trained and prepared to handle multiple medical scenarios and provide hands-on care consistent with delegation concepts.[3]

Conclusion

All too often, experts give opinions inconsistent with delegation concepts, which can skyrocket future medical damages in personal-injury litigation. Life care planners must consider reasonableness and medical necessity of future care needs in light of the delegation doctrine.

Endnotes

1 Michigan Department of Licensing and Regulatory Affairs, *Nurse Aide Training Curriculum Model*, p 4 (2014), available at http://www.michigan.gov/documents/mdch_na_train_curr_model_123067_7.pdf (last visited Apr. 4, 2017).

2 Bureau of Labor Statistics, www.bls.gov (last visited Apr. 4, 2017).

3 Michigan Department of Consumer and Industry Services, Division of Adult Foster Care Licensing, Adult Foster Care Family Homes, http://w3.lara.state.mi.us/orr/Files/AdminCode/617_10588_AdminCode.pdf

Greer Revisited … By the Michigan Legislature, MCL 600.1482[1]

By: Richard J. Joppich, *Kitch Drutchas Wagner Valitutti & Sherbrook, PC*

Executive Summary
Evidentiary rules historically have precluded reference to insurance in an attempt to reduce damages in personal-injury litigation. The bases of this long-standing rule is eroding with the development of mandatory health insurance coverage through the Affordable Care Act (ACA), to the point that some courts are recognizing the realities of modern healthcare and health insurance coverage and allowing reference to and evidence of the impact of the ACA on economic-medical-expense-damage calculations.

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Late in 2016, I wrote a brief published discussion of a Michigan collateral source case, *Greer v Advantage Health,* 305 Mich App 192; 852 NW2d 198 (2014), and its potential applicability to Medicare or Medicaid, since it only referenced private health insurance coverage.[2]

As referenced in that article, the *Greer* Court concluded that, although the amount of medical expenses paid by insurance and the amount of any negotiated discount accepted by a provider of the services under the insurance-provider agreement constitute "collateral sources," they were expressly excluded as such elsewhere in the statute (MCL 600.6303) and thus could not be used to reduce a damage verdict.

The point of particular interest was the refusal to allow for a collateral-source reduction in the amount of the physician discount, which had never been paid and was not payable. As a result, full charges, rather than the insurance payment subject to the insurance lien, were allowed to be recovered without reduction. The *Greer* court noted: "The Legislature could have, but did not, write the statute to say that the § 6303(4) collateral source exclusion is limited to the 'amount of' a validly exercised lien." *Id.* at 212.

The Legislature has now spoken.

> The **damages recoverable for past medical expenses or rehabilitation service expenses shall not exceed the actual damages** for medical care that arise out of the alleged malpractice.
>
> * * *
>
> **… 'Actual damages for medical care' means** both of the following:
>
> (i) The **dollar amount actually paid** for past medical expenses or rehabilitation service expenses by or on behalf of the individual whose medical care is at issue, including payments made by insurers, but excluding any contractual discounts, price reductions, or write-offs by any person.
>
> (ii) **Any remaining dollar amount that the plaintiff is liable to pay** for the medical care. [MCL 600.1482 (emphasis added).]

Interestingly, the Legislature did not alter the collateral-source statute (MCL 600.6303) as prompted in the *Greer* opinion, but instead added a statute defining recoverable damages for healthcare expenses.

By doing so, historical appellate decisions on the collateral-source statute remain undisturbed in the interpretation of such a complex legal iteration of a common law

doctrine. The only medical-expense damages recoverable under this new statute (MCL 600.1482) are those amounts actually paid for the medical expense, plus any amounts the plaintiff remains liable for.

The difference between the actual insurance payment that the provider agreed to accept as payment in full in a negotiated provider agreement with a healthcare insurer and what the provider normally charges is sometimes referred to as the "discount." Where the plaintiff does not remain liable for payment of the discount, it will not be introduced at trial as an element of medical damages and thus would not be part of any verdict. Following from this analysis, there is no need for reduction of any verdict for the discount as a collateral source, such as discussed in *Greer*. (The insurance payments may remain collateral sources subject to reduction of the verdict if no lien is asserted.)

It is specifically noted that this medical expense recovery statute is applicable only in medical-malpractice cases. In so limiting the application, the Legislature seems to have placed a potential imprimatur on allowing proofs of full healthcare charges regardless of whether they are paid or even payable in full, and leaves in place the *Greer* refusal to reduce any verdict for a discounted fee under the collateral-source statute, in personal-injury matters other than medical malpractice (I leave it to the appellate attorneys to determine if this is appropriate statutory extension and interpretation). As always, care should be taken to ensure the charges of healthcare providers in these other claims are reasonable and meet the evidentiary standards for admissibility and recovery.

Although we remain at status quo for all actions outside of the medical-malpractice claims world, we now have "clear" direction from the Legislature on medical-expense damage proofs in medical-malpractice cases. We can look for the challenges to this damage statute as it plays out in the litigation arena actual application. It is effective for those claims filed on and after April 10, 2017.

Endnotes

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2 Joppich, *Valuing Past-Medical-Expense Damages after* Greer v Advantage Health, 33-2 Mich Defense Quarterly, p 11 (2016).

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MDTC Legislative Report

As is often the case, there is not much to report at this time of the year when things are still getting off to a slow start in Lansing for the new year, and this is especially true in this odd-numbered year when our Legislature is beginning a new two-year term with a whole new group of Representatives. The cast of characters in the Senate will be the same, and the Republicans will retain their control of the House with a comfortable majority since the Democrats didn't pick up any seats in the last election. All of the bills and resolutions that did not receive final approval at the end of last year's session are now dead, and the new session is starting off with a new set of bills. Many of the bills introduced in this new session are reintroductions of bills that died at the end of the last session, but there hasn't been a lot said so far as to which of them are likely to be taken up this year.

As usual, much of the focus in the first part of the year will be on passage of the budget for the next fiscal year. But it does seem safe to predict that the Republicans in charge will also find time to take up a few of their favorite issues, although some of them may choose to proceed cautiously until they have reached some solid conclusions about what happened last fall and what it will really mean for both parties in the next election. An example of this was seen recently when a proposal to phase out the state income tax was defeated in the House after the Governor and a few Republican Representatives questioned the wisdom of doing so without a better idea of how the lost revenue would be replaced. This was a considerable embarrassment for the Republican leadership in the House, but it did provide fascinating entertainment for political junkies like myself (although it admittedly paled by comparison to the show unfolding each day in Washington).

New Public Acts

As of this writing on March 8, 2017, there are no Public Acts of 2017, but there is now a total of 563 Public Acts of 2016. Those of interest approved by Governor Snyder since my last report include:

2016 PA 556 – Senate Bill 1104 (Shirkey – R), which will amend the Revised Judicature Act to add a new section MCL 600.1482, providing that, in actions alleging medical malpractice, the damages recoverable for past medical expenses or rehabilitation service expenses shall not exceed the actual damages for medical care arising from the alleged malpractice, and that the court may not allow presentation of evidence of past medical expenses or rehabilitation service expenses in excess of the actual damages for medical care. The new section defines "actual damages for medical care" as the dollar amount actually paid for past medical expenses or rehabilitation services by or on behalf of the individual whose medical care is at issue – including payments made by insurers, but excluding any contractual discounts, price reductions or write-offs – and any remaining dollar amount that the plaintiff is liable to pay for the medical care. This act will take effect on April 10, 2017.

2016 PA 552 – Senate Bill 982 (Schuitmaker – R), which will rename the Uniform Fraudulent Transfer Act, MCL 566.31, *et seq*., as the "Uniform Voidable Transactions Act" and establish new procedures and standards to govern actions for avoidance of voidable transactions and preservation of assets involved in such

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As usual, much of the focus in the first part of the year will be on passage of the budget for the next fiscal year.

transactions. This act will also take effect on April 10, 2017.

2016 PA 550 – Senate Bill 289 (O'Brien – R), which will create a new "bad-faith patent infringement claims act" to provide new protections against "patent trolls" – individuals or entities that assert unfounded claims of patent infringement in bad faith to extort payments of royalties from businesses that often feel compelled to acquiesce rather than bear the considerable cost of defending threatened infringement litigation. This new act will take effect on October 1, 2017.

2016 PA 519 – Senate Bill 1045 (Jones – R), which has amended the Revised Judicature Act, MCL 600.1987, to extend the authorization for courts and court funding units to collect additional e-filing fees authorized by Supreme Court order before September 30, 2015 ($2.50 for filing or service or $5.00 for filing **and** service) from December 31, 2016 until December 31, 2017.

2016 PA 445 – 448 – House Bills 4423 and **4424 (Jacobsen – R), 4425 (Outman – R)** and **4426 (Kivela – D)**, which have amended several sections of the Vehicle Code addressing establishment of speed limits and speeding violations. The amendments include new provisions which will require MDOT and the State Police to increase the speed limit to 75 miles per hour on at least 600 miles of limited access highways and 65 miles per hour on 900 miles of trunk line highways within a year after the effective date of the legislation (January 5, 2017) if engineering and safety studies determine that the speed limits may be raised to those levels.

2016 PA 419 – House Bill 4686 (Santana – D), which has amended the Governmental Liability Act, 1964 PA 170, MCL 691.1402a, regarding municipal liability for maintenance of sidewalks, to insert a new Subsection (5). The new provision will clarify that a municipal corporation having a duty to maintain a sidewalk under subsection (1) may assert, in addition to other available defenses, "any defense available under the common law with respect to a premises liability claim, including, but not limited to, a defense that the condition was open and obvious."

New Initiatives

The bills and resolutions of interest introduced in the new session include:

SJR F (Bieda – D) This Senate Joint Resolution proposes an amendment of 1963 Const, art 6, § 19, to eliminate subsection (3), which currently provides that: "No person shall be elected or appointed to a judicial office after reaching the age of 70 years." This joint resolution was reported by the Senate Judiciary Committee without amendment on March 7, 2017, and now awaits consideration by the full Senate on the General Orders calendar. The proposed constitutional amendment will be presented to the voters for approval at the next general election if approved by both houses of the Legislature by the required two-thirds vote. The same resolution has been introduced in the House as **HJR G (Vaupel – R)**.

Senate Bill 65 (Bieda – D), a reintroduction of the last session's Senate Bill 1020, proposes the creation of a new Michigan False Claims Act, to establish procedures for pursuit of qui tam actions similar to those authorized under the Federal False Claims Act against those who present false or fraudulent claims to obtain money, property or services from the state or a local unit of government. This bill was introduced and referred to the Senate Judiciary Committee on January 26, 2017.

House Bill 4277 (LaFave – R), which would amend Chapter 66 of the Revised Statutes of 1846, MCL 554.131 *et seq.*, to add a new section MCL 554.140. Subsection (1) of the new section would provide that: "A person that is in possession of land that is held open to the public for business or commercial purposes is not liable for personal injury to an individual who is on or near the land, or damage to the individual's property, caused by another individual's use of a firearm." Interestingly, subsection (2) of this new provision would state that: "This section does not apply if the person in possession of land has posted the land with a sign prohibiting individuals from bringing a firearm onto the land." This bill was introduced and referred to the House Judiciary Committee on February 28, 2017.

House Bills 4148 through 4157 (Republicans Chatfield, VanderWall, Allor, LaFave, Hauck, Iden and Bellino; and Democrats Moss, Lasinski and Guerra) This bipartisan package of bills proposes amendment of the Freedom of Information Act (FOIA) to add a new Part 2, to be known as the "Legislative Open Records Act" ("LORA"). The new sections would add new provisions, modeled after existing sections of FOIA, requiring disclosure of records of legislators and legislative branch agencies and employees previously exempted from disclosure

This bipartisan package of bills proposes amendment of the Freedom of Information Act (FOIA) to add a new Part 2, to be known as the "Legislative Open Records Act" ("LORA").

under FOIA, subject to specified exclusions and the privileges and immunities provided under Article IV, Section 11, of the State Constitution. The new sections provide for a limited review of decisions of the "LORA Coordinator" denying requests for production of documents by appeal to the Administrator of the Legislative Council. These bills also propose amendments to existing sections of FOIA to eliminate the existing exemptions of the Governor, the Lieutenant Governor, their executive offices, and the employees thereof, from the act's definition of "Public Body," thereby extending the coverage of the act to their records, subject to specified exemptions. These bills, a reintroduction of a package (House Bills 5469 to 5478) passed by the House last September, were introduced and referred to the House Committee on Michigan Competitiveness on February 2, 2017.

Senate Bill 195 (Casperson – R), which would amend the Revised Judicature Act's provisions addressing admission to the State Bar to allow attorneys licensed to practice in other states to be admitted to the Michigan Bar without satisfying the established educational requirements under specified circumstances. This bill was introduced and referred to the Senate Judiciary Committee on February 28, 2017. The same bill was introduced as **House Bill 4312 (LaFave – R)** and referred to the House Judiciary Committee on March 7, 2017.

What Do You Think?

Our members are again reminded that the MDTC Board regularly discusses pending legislation and positions to be taken on Bills and Resolutions of interest. Your comments and suggestions are appreciated, and and may be submitted to the board through any officer, board member, regional chairperson or committee chair.

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Appellate Practice Report

Three Habits for Writing More Civilly—and More Effectively

There are plenty of articles about the level of venom in politics these days, but lawyers can't lay all the blame at the feet of politicians. We fall prey to the same temptations in our rhetoric—the temptation to be snide, to belittle an opponent, to overstate a point, to bully, to eschew nuance in favor of scoring cheap points. And, like all temptations, uncivil writing seems justified at the time but usually harms us in the end. In most cases, taking cheap shots and throwing elbows will alienate the judge who's trying to make a dispassionate decision about the application of law to fact.

Yet it's often hard to recognize incivility when it creeps into our writing. A lot of unnecessarily sharp writing is the product of habit. So here are three ways incivility may appear in the writing of even the most high-minded attorneys, and some thoughts on alternative approaches.

1. Avoid [sic]

When you catch typos in an opposing party's brief, it's awfully tempting to quote the error and add [sic]. Usually, the hope is that you've made the opposing attorney look more prone to error and, therefore, less credible. But what's the chance that a judge is really going to think that much less of an opposing party's arguments because the party's attorney forgot to add an apostrophe to "it's"? Or typed the wrong section number when quoting a statute? Or used the wrong verb tense? Bryan Garner's very successful career as a Professional Grammar Corrector notwithstanding, most people don't care for grammar snobs. Whatever points you score in correcting someone else's error may be offset by the appearance of being petty.

So here's an alternative. Assuming you actually need to quote the offending material and you're not just quoting it to take a cheap shot, try correcting the error with brackets rather than adding [sic]. For example,

Smith contends that "[n]ot one of the plaintiffs are [sic] injured"

could be:

Smith contends that "[n]ot one of the plaintiffs [is] injured"

This way, you've corrected the error while also making the sentence more readable. Your fourth-grade teacher will still be proud of your mastery of grammar, and the judge can focus on the merits of your argument rather than irrelevant quibbles.

2. Don't be ridiculous.

We all encounter arguments so bad that they warrant ridicule. It can be almost cathartic to call these arguments ridiculous, absurd, or even gibberish. Perhaps the best proof that you're better off avoiding those words is the Sixth Circuit Court of Appeals' opinion in *Bennett v State Farm Mut Auto Ins Co*, 731 F3d 584 (CA 6 2013). The Court's opening paragraph is worth quoting in full:

There are good reasons not to call an opponent's argument "ridiculous," which is what State Farm calls Barbara Bennett's principal argument here. The reasons

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Yet it's often hard to recognize incivility when it creeps into our writing. A lot of unnecessarily sharp writing is the product of habit.

include civility; the near-certainty that overstatement will only push the reader away (especially when, as here, the hyperbole begins on page one of the brief); and that, even where the record supports an extreme modifier, "the better practice is usually to lay out the facts and let the court reach its own conclusions." … But here the biggest reason is more simple: the argument that State Farm derides as ridiculous is instead correct. [*Id.* at 584-85 (citation omitted).]

If you ever find yourself faced with a client or colleague who wants to cast aspersions on an opposing party's argument, Judge Kethledge's opinion in *Bennett* should be Exhibit A in support of your decision to stick to the high road. Plus, as *Bennett* suggests, writing off an opposing party's argument as **ridiculous** could be a sign that you've misunderstood it.

3. Use some synonyms for "misrepresents"

Misrepresenting facts or law to the court is a serious matter; it can be a violation of the Michigan Rules of Professional Conduct. Yet lawyers regularly accuse each other of being "disingenuous" and offering "misleading" arguments. These terms are so ubiquitous that they have little power to shock or sway a judge. They're like cries of "wolf" in a village where people greet each other by yelling "Wolf!" And that means every use of disingenuous or misleading is a missed opportunity to make your point in a way that actually has a chance of catching a judge's attention.

Instead of accusing an opponent of being disingenuous or of misleading the court, try a less loaded word—misstated or misunderstood usually work—and add a succinct explanation of your opponent's error. If the error is really disingenuous or deceptive, the court should pick that up from your description of the error. And, by framing that error with understatement, you've put the focus where it belongs: on **showing** the court that the other side was deceptive rather than just **telling** the court. Your less accusatory tone may even lend an air of credibility.

Sic, ridiculous, and misleading are more than canaries in the coalmine of incivility. Each is a red flag that highlights a missed opportunity for better advocacy.

Effect of Post-Judgment Motions on the Time to Appeal

There a number of reasons why parties in a civil case might consider filing a post-judgment motion before appealing an adverse decision. In fact, sometimes a post-judgment motion is required to preserve an issue for appeal. For example, in both Michigan and federal courts, a party must file a motion for judgment notwithstanding the verdict (renewed motion for judgment as a matter of law in federal parlance) if it wishes to challenge the sufficiency of the evidence supporting a jury verdict.[1] It is important to know how such motions impact the applicable appeal deadline.

State Court

As a general matter, an appeal of right in a civil case must be filed within 21 days of the entry of judgment in a Michigan court. MCR 7.204(A)(1)(a). That deadline, however, is tolled by the timely filing of a "motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed." MCR 7.204(A)(1)(b). If one of these motions is filed, the 21-day appeal period begins to run "after the entry of an order" deciding it. *Id.*

Note that not every post-judgment motion will toll the time to appeal. It must be a motion seeking "relief from the order or judgment appealed." Thus, a motion for case-evaluation sanctions would not affect the running of the 21-day appeal period.[2]

Federal Court

The Federal Rules of Appellate Procedure similarly provide for tolling of the usual 30-day appeal period in civil cases upon the filing of certain post-judgment motions. FR App P 4(a)(1)(A). Rule 4(A)(4) identifies six such motions:

- Motions "for judgment under Rule 50(b)" (i.e., renewed motion for judgment as a matter of law following a jury trial);
- Motions "to amend or make additional factual findings under Rule 52(b)" (for cases tried by the court; can be combined with a Rule 59 motion for new trial);
- Motions "for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;"
- Motions "to alter or amend the judgment under Rule 59" (often used to seek reconsideration of a decision made on summary judgment or after a bench trial);
- Motions "for a new trial under Rule 59;" and
- Motions "for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered."

Plus, as *Bennett* suggests, writing off an opposing party's argument as **ridiculous** could be a sign that you've misunderstood it.

As in state court, a post-judgment motion for attorney fees does not prevent the judgment on the merits from being final. See *Ray Haluch Gravel Co v Central Pension Fund of the Int'l Union of Operating Eng'rs,* ___ US ___; 134 S Ct 773 (2014).

Premature appeal filings

Although the filing of a timely post-judgment motion will serve to toll the time for appealing, it does not preclude a party from filing an appeal anyway. The Michigan Court of Appeals had previously concluded that it lacked jurisdiction to hear an appeal in a case in which a post-judgment motion remained pending.[3] But in *Nordstrom v Auto-Owners Insurance Co*, 486 Mich 962; 782 NW2d 779 (2010), the Supreme Court clarified that a pending post-judgment motion does *not* "operate to divest the Court of Appeals of jurisdiction."[4]

Premature notices of appeal in federal court are handled in a similar fashion. Federal Rule of Appellate Procedure 4(a)(4)(B)(i) provides that "[i]f a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered." In other words, the appeal is suspended until such time as the post-judgment motion is resolved.

Conclusion

Aside from being important for issue-preservation purposes, post-judgment motions can serve strategic goals, such as providing leverage in settlement discussions or offering a trial court the opportunity to take a "second look" at a decision entered pursuant to summary judgment or summary disposition. Practitioners just need to keep in mind how these motions will affect the time to appeal.

Endnotes

1 See *Napier v Jacobs*, 429 Mich 222, 230; 414 NW2d 862 (1987) (holding that a party cannot challenge a jury verdict on sufficiency-of-the-evidence grounds for the first time on appeal); *Yazdianpour v Safeblood Techs, Inc*, 779 F3d 530, 538 (CA 8, 2015) (refusing to review sufficiency-of-the-evidence argument because the defendants did not renew their motions for judgment as a matter of law after trial).

2 See, e.g., *Jenkins v James F Altman & Nativity Ctr, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2005 (Docket No. 256144) ; 2005 WL 1278478, *3 (holding that the plaintiffs could not challenge the trial court's summary disposition decision because they did not timely appeal; although they did timely appeal from the trial court's post-judgment order awarding attorney fees and costs, the Court of Appeals held that its jurisdiction was limited to the post-judgment order). Post-judgment orders "awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule" are separately appealable. MCR 7.202(6)(a)(iv).

3 See, e.g., *Krywy v State Farm Mutual Automobile Insurance Co*, unpublished opinion per curiam of the Court of Appeals, issued April 24, 2008 (Docket Nos. 274663, 277313); 2008 WL 1836385, *1 ("The record reflects that defendant filed its claim of appeal on the same day that plaintiff moved for reconsideration. If defendant filed first, then plaintiff's motion for reconsideration was not properly before the trial court, **but if plaintiff filed first, then defendant's claim of appeal was premature**.") (emphasis added).

4 Presumably the filing of an appeal would deprive the trial court of jurisdiction to actually decide the post-judgment motion, in accordance with MCR 7.208(A): "After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order . . . ."

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Young Lawyers

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Legal Malpractice Update

It's Not Malpractice to be Wrong.

Kirk v Defendant-Attorney, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2017; 2017 WL 603571 (Docket No. 329377), lv app pending, Supreme Court No. 155529.

Facts: In August 1994, plaintiff and William Kirk were divorced pursuant to a Consent Judgment of Divorce. The consent judgment did not contain any language specifically granting plaintiff survivor benefits in William's pension. A year after the entry of the consent judgment, the Court entered a qualified domestic relations order ("QDRO"), requiring Ford Motor Company to pay a portion of William's pension benefits to plaintiff. The QDRO further provided that plaintiff would be treated as the surviving spouse under the pension in the event of William's death.

In April of 2005, William remarried. In 2007, William retired and on his retirement application, he designated his new wife to receive 65% of his surviving pension benefits for her lifetime. On June 29, 2011, William died and plaintiff, pursuant to the QDRO, began receiving monthly survivor income benefits from William's pension. William's widow filed a motion to amend the QDRO, asserting that she, and not plaintiff, was entitled to the survivor benefits. Plaintiff retained defendant-attorney to represent her against the widow's motion.

In support of her motion to amend the QDRO, the widow argued that Michigan case law provides that the right of survivorship in a pension does not extend to a divorced spouse unless it is specifically awarded in the judgment of divorce. The widow relied on *Quade v Quade*, 238 Mich App 22 (1999) and *Roth v Roth*, 201 Mich App 563 (1993). The defendant-attorney, on behalf of the plaintiff, responded by arguing that the QDRO reflected the parties' intent for plaintiff to receive the survivor's benefits in William's pension, and thus the consent judgment of divorce should be amended, in equity, to comport with the QDRO.

Relying on *Quade* and *Roth*, the trial court granted the widow's motion to amend the QDRO, finding that "the Consent Judgment of Divorce is silent as to surviving spouse benefits in the pension award section," and thus, those rights could not be extended to plaintiff as a divorced spouse as part of the QDRO.

Through subsequently retained counsel, plaintiff filed a motion for reconsideration of the trial court ruling. Plaintiff's new lawyer relied on *Neville v Neville*, 295 Mich App 460 (2012) and *Thornton v Thornton*, 277 Mich App 453 (2008), which held that a QDRO is properly treated as part of the consent judgment of divorce and that the parties were free to modify the terms of their property settlement by entering a consensual QDRO. The trial court denied the plaintiff's motion for reconsideration and found that *Thornton* and *Neville* were factually distinguishable from the instant case.

Plaintiff appealed. The Court of Appeals reversed the trial court, concluding that the holding in *Neville* was controlling and, thus, the QDRO was properly treated as part of the divorce judgment.

Following her successful appeal, plaintiff brought this case of alleged malpractice against her former attorney. Plaintiff alleged that her former attorney was negligent

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Plaintiff claimed that her former attorney "squandered the initial opportunity for the trial court to be properly informed and provided with access to the correct legal citations of Michigan authority"

in formulating a response to the motion to amend the QDRO by failing to rely on *Neville* and *Thornton* in the initial response. Plaintiff claimed that her former attorney "squandered the initial opportunity for the trial court to be properly informed and provided with access to the correct legal citations of Michigan authority" and, had the former attorney properly represented her by arguing *Thornton* and *Neville* in her initial response, plaintiff would have avoided the additional legal fees she incurred to obtain the correct result, as well as the "extreme" emotional distress she suffered due to the deprivation of her benefits.

The defendant-attorney moved for summary disposition principally based on a lack of causation argument. The defendant-attorney argued that plaintiff could not establish cause in fact to support her claim because plaintiff could not prove that the trial court would have reached a different result had the defendant-attorney initially relied on *Thornton* and *Neville* to defend against the widow's motion to amend the QDRO since the trial court specifically found those cases to be factually distinguishable from the instant case. The defendant-attorney further argued that plaintiff could not establish that she breached the duty owed because the attorney-judgment rule protected her decision to rely on a legal theory other than the theory that was ultimately successful on appeal.

The trial court granted defendant-attorney's motion for summary disposition.

Ruling: The Court of Appeals affirmed, concluding that plaintiff could not establish causation, as a matter of law. The appellate court noted that a plaintiff must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit. Plaintiff must present "substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injury would not have occurred. *Id.* at *3, quoting *Pontiac School District v Miller Canfield Paddock and Stone*, 221 Mich App 602, 614 (1997). "The crux of plaintiff's malpractice claim is that [defendant-attorney] failed to formulate a proper response to the motion to amend the QDRO by presenting the appropriate law, *Thornton* and *Neville*." *Id*. at *4. However, the appellate court held that because the trial court "ultimately rejected the applicability of those cases, plaintiff cannot establish that she would have been successful in the trial court and avoided the cost of an appeal, as well as the emotional distress caused by the loss of her survivor benefits, but for [defendant-attorney's] failure to argue *Thornton* and *Neville* in the initial response" to the widow's motion to amend the QDRO.

Practice Note: The fact that a lawyer is ultimately wrong, does not necessarily support a legal-malpractice claim. An attorney owes a duty to her client "to act as would an attorney of ordinary learning, judgment, or skill under the same or similar circumstances." *Simko v Blake*, 448 Mich App 648, 658 (1995). An attorney is not required to provide perfect representation.

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Medical Malpractice Report

Clarity and Caution: An Update and Prospective on Medicare Medical Set-Asides in Liability Cases

History of Medicare Lien Enforcement

If you've been doing defense work for at least a decade, you likely remember the turmoil that rippled through the insurance industry and defense bar in 2007 and 2008. That's when the Centers for Medicare & Medicaid Services ("CMS") announced enhanced implementation and enforcement of the Medicare Secondary Payer Act and SCHIP Extension Act of 2007. Under the new federal regulations, liability insurance companies became "responsible reporting entities." Attorneys and parties on both sides of a case were going to be held accountable for failure to notify Medicare of settlements and satisfy Medicare liens. Numerous seminars were conducted, articles written, in-service presentations made, and directives issued, addressing the new regulations. In reality, Medicare did not start implementing the new procedures until 2011.

Medicare liens were around long before 2007. In 1980, Congress passed the Medicare Secondary Payer Act (42 USC 1395y(b)), in order to shift costs from the government-funded Medicare program to private payers. The Act provided that Medicare would no longer be the primary payer for medical expenses and instead, Medicare would be secondary to any insurance plan with potential responsibility for the expenses incurred.[1] Under the Secondary Payer Act, primary payers include tortfeasors and their private insurers. Severe penalties of up to $1,000 per day, per claim, and "super-penalties" can result from failure to recognize Medicare's interests.

Medicare lien considerations arise in liability cases when a plaintiff is a Medicare beneficiary at the time of the award or settlement. Prior to 2007, handling a Medicare lien in a Michigan case typically involved the plaintiff's attorney sending a letter or making a phone call to a CMS office in Chicago, evaluating a Medicare claims detail (or not) and negotiating a resolution or waiver of the lien. Often, defense counsel never inquired about the specifics of healthcare liens. From the defense's perspective, liens were the plaintiff's responsibility alone. That landscape changed dramatically.

One aspect of Medicare lien enforcement, which was discussed during the transition to our current reality, was the Medicare Medical Set-Aside Arrangement, or MSA, for future medical expenses. Under an MSA, a portion of the award or settlement funds is segregated into a special account in anticipation of future expenses, intended to avoid Medicare incurring liability as primary payer. Implementation of MSAs has been in place for some time in workers' compensation cases. Consequently, MSAs are not new to Medicare.

During the initial period of transition, there was much debate about whether Medicare would require MSAs in liability cases under the new enforcement protocols. CMS proposed some regulations in 2012, and then withdrew them in 2014. The proposed regulations fueled the debate a bit further. At the conservative

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Third, consider the input of Medicare counsel in more complex cases or if you need guidance with reference to adequate funding for those cases in which an MSA is to be established.

end, the argument was that if MSAs were required in workers' compensation cases, it was best to err on the side of caution. Under appropriate circumstances, some liability insurers requested that plaintiffs agree to set up an MSA as part of the settlement agreement. Those at the other end of the debate pointed out that the CMS itself had not issued any guidelines, rules, or regulations regarding Medicare's future interests, and that it was unnecessary "overkill" to consider an MSA in a liability case.

Currently, many insurance carriers require language in a release and settlement agreement to address MSAs in the context of a plaintiff's responsibility to consider Medicare's interests. That language typically includes what decision was reached regarding an MSA and the basis for that decision. Other insurance carriers currently don't require any specific MSA language. In the context of liability cases, Medicare is already empowered by statute to request that money be set aside for future expenses from settlement proceeds, but no rules or guidelines exist to implement enforcement.

Predicting the Future

We anticipate that MSA requirements will be implemented in liability cases in the not-too-distant future. The next wave of Medicare transition may be upon us. This expected transition is evidenced by the implementation in February 2017 of technical changes and updates to accommodate processing of claims to include liability and No-Fault MSAs, or "LMSAs." At this time, the changes consist of IT and programming requirements of the computer systems used by the government and Medicare contractors to implement future enforcement of reimbursement, first from an LMSA account where one exists. The new guidelines are instructive on what Medicare's position may be with reference to future medical expenses and the requirements surrounding establishing a set-aside account. Recognizing this now, we can better prepare to handle the issue of liability MSAs effectively.

The internal publication issued by CMS provides a definition of liability and No-Fault set-aside arrangements as follows:

> [A]n allocation of funds from a liability or an auto/no-fault related settlement, judgment, award, or other payment that is used to pay for an individual's future medical and/or future prescription drug treatment expenses that would otherwise be reimbursable by Medicare.[2]

The initial technical implementation focuses on the processing of claims by providers seeking reimbursement of expenses incurred by Medicare beneficiaries. It will allow Medicare to reject expenses related to an injury for which an LMSA exists, and to continue coverage for injury-related medical expenses when no LMSA has been set up. This two-tiered future claims processing system is noteworthy since it recognizes Medicare's responsibility to continue coverage for accidental injuries when no MSA exists. This, in turn, at least implies that CMS may not require a set-aside account in all cases, even when future injury-related expenses are anticipated.

The limited nature of these new guidelines and their focus on technical claims processing requirements doesn't lend itself to analysis of important issues such as determining whether an LMSA is appropriate and if so, how much money should be set aside. Likewise, it is unknown at this time whether CMS will be involved in reviewing or approving set-aside accounts in liability cases. Given the wide-ranging enforcement provisions of the current law, the best future course of action is likely exactly the same as the current best course of action: consider Medicare's interests from the onset of settlement discussions and, if necessary, involve them in the negotiating process.

The Bureaucracy's Current Position on MSAs

Since implementing the new lien enforcement regulations, the federal government has issued several policy statements on how Medicare's interests must be protected in liability cases. In 2011, CMS issued a 3-page handout with internal guidance addressing liability settlements and MSAs where future injury-related care was required. Although not legal authority, it provided some guidance when dealing with the parties' respective responsibilities. As to the obligations of the plaintiff's counsel, the handout advises that when a plaintiff's attorney determines that a settlement is intended to pay for future medicals, he or she should see to it that funds are used to pay for otherwise Medicare-covered services related to what is claimed and/or released in the settlement.

In 2011, two high-ranking government officials made published

In cases involving an objectively verifiable permanent injury, plaintiff should strongly consider establishing an MSA.

policy statements pertaining to Medicare Medical Set-Asides in liability cases. According to Medicare Regional Coordinator Sally Stalcup:

> There is no formal CMS review process in the liability area as there is for Workers' Compensation, however Regional Offices do review a number of submitted set-aside proposals. * * * If there was/is funding for otherwise covered and reimbursable future medical services related to what was claimed/released, the Medicare Trust Funds must be protected. If there was/is no such funding, there is no expectation of 3rd party funds with which to protect the Trust Funds. Each attorney is going to have to decide, based on the specific facts of each of their cases, whether or not there is funding for future medicals and if so, a need to protect the Trust Funds.
>
> If the answer for defense counsel or the insurer is yes, they should make sure their records contain documentation of their notification to plaintiff's counsel and the Medicare beneficiary that the settlement does fund future medicals which obligates them to protect the Medicare Trust Funds. It will also be part of their report to Medicare in compliance with Section 111, Mandatory Insurer Reporting requirements.

On September 30, 2011, CMS Acting Director Charlotte Benson issued a policy memorandum outlining the possible requirement of MSA funds in liability cases. It provided further guidance related to liability insurance settlements, judgments, awards, or other payments:

> Where the beneficiary's treating physician certifies in writing that treatment for the alleged injury related to the liability insurance 'settlement' has been completed as of the date of the 'settlement,' and that future medical items and/or services for that injury will not be required, Medicare considers its interest, with respect to future medicals for that particular 'settlement,' satisfied. If the beneficiary receives additional 'settlements' related to the underlying injury or illness, he/she must obtain a separate physician certification for those additional 'settlements'.

In late 2014, the United States Department of Health & Human Services issued the following statement:

> The Centers for Medicare & Medicaid Services (CMS) has no current plans for a formal process for reviewing and approving Liability Medicare Set-Aside Arrangements. However, even though no formal process exists, there is an obligation to inform CMS when future medicals were a consideration in reaching the Liability Settlement, judgment, or award as well as any instances where a liability judgment or award specifically provides for medicals in general or future medicals.

The federal government has expressed its position on future medical expenses and MSAs in at least one official communication from the US Department of Health & Human Services Office of General Counsel to the plaintiff's counsel in response to specific inquiries. In 2015, that position was expressed in pertinent part, as follows:

> We expect that [plaintiff] will release [defendants] from any obligation to pay future medical care in the settlement agreement. Under those circumstances, for purposes of the MSP statute, the settlement will compensate [plaintiff] for such medical
> care. * * *
>
> Consequently [plaintiff] should not submit claims to Medicare for ongoing medical care related to the accident. Should [plaintiff] or his health care providers submit claims for future accident-related care to Medicare (even as a secondary payer) and Medicare pays those claims, such payment would create a Medicare overpayment which Medicare could recover from [plaintiff] or the provider.
>
> While federal law prohibits Medicare from paying for future accident-related medical care [plaintiff] may require, it does not dictate the method the parties must use to ensure that Medicare is not billed for related services. In other words, federal law does not require the parties to create a set-aside; but it does require that Medicare be reimbursed for any medical payments it may make that [defendant] already made through the settlement.

This position is significant in clarifying Medicare's position on MSAs. It is also significant in that Medicare

Don't assume that a plaintiff's statement made during discovery that he or she is not a Medicare beneficiary is still valid. Update the information to confirm the plaintiff's status.

recognizes that a release alleviates a defendant's obligation with reference to **future** medical expenses. This is contrary to how Medicare views past/paid medical expenses. Abundant position statements and court decisions universally express the position that settlement documents cannot be drafted to exclude recovery for past expenses. Even when the settlement documents directly state that no consideration is paid for past medical expenses, Medicare can enforce its lien rights under the Secondary Payer Act with reference to past expenses it paid. That enforcement applies to all parties, all counsel, and insurance carriers (as "responsible reporting entities") and carries significant penalties.

None of the government's policy statements on MSAs are binding precedent, but may be useful in establishing the basis to consider and, in some cases, establish, a Medicare MSA. In cases involving a resolved injury, plaintiff's counsel should obtain physician certification that no future treatment is anticipated. When ongoing sequelae is alleged but not borne out by the evidence, physician certification will help protect the plaintiff and plaintiff's counsel, as will clarification in the settlement documents that no future medical expenses were considered in reaching the settlement. In cases involving an objectively verifiable permanent injury, plaintiff should strongly consider establishing an MSA.

The Courts' Positions on MSAs

Various state and federal courts, which have interpreted the Medicare Secondary Payer Act and SCHIP Extension Act, have also provided some insight with reference to the issue of MSAs in liability cases. One constant in the opinions is the conclusion that there are no federal regulations in place requiring the establishment of MSAs in those cases. Thus, it's safe to assume that once there are such regulations, the courts will rely upon and enforce them.

The 2014 Ohio case of *Tye v Upper Valley Medical Center*[3] was a medical-malpractice action involving care in 2009 for a spinal epidural abscess. The plaintiff had primary private health insurance that had paid the majority of his incident-related medical expenses. The Medicare lien was resolved for approximately $1,800. Months after the case settled through private mediation, defendants sought an expert opinion from an experienced workers' compensation attorney who concluded that an MSA was necessary. The defendants' expert reached this conclusion based solely on his experience in workers' compensation and admitted in his written opinion that he had not been provided any medical records or billings. Before entering into settlement negotiations, the plaintiff had retained an expert Medicare attorney who negotiated the lien resolution. That attorney concluded that the plaintiff:

> [I]s not recognized as an MSA candidate since a permanent burden shift of the responsibility to pay for future injury-related medical expenses from the tortfeasor to Medicare is not expected.

The issue went before the trial court, which determined that the parties were not required to set aside any portion of the settlement proceeds for future benefits which may be paid or payable by Medicare based upon the following findings:

> The Court did not proceed with the hearing until 10:30 a.m. By that time no representative from the U.S. Attorney's office or Medicare, made an appearance. In addition, no pleading, or other response to Defendants' Motion, had been submitted, filed or docketed with this Court by an attorney or representative for the Medicare Coordination of Benefits Contractor, Social Security Administration or the Centers for Medicare and Medicaid Services.
>
> The Court further finds that on or about October 15, 2012, U.S. Attorney's office, as the representative of the Medicare Coordination of Benefits Contractor was served, by certified mail, a copy of the Defendants' Joint Motion. And, attached to the motion was a Notice of Hearing for the motion before this court.
>
> The Court finds that the undisputed evidence in this matter is that the Plaintiffs, Scott Tye and Barbara Tye are husband and wife and they have entered into a Settlement Agreement with the Defendants, for injuries, some of which are permanent in nature. And, that the Defendant, Scott Tye will require medical treatment for those injuries.
>
> Second, that Scott Tye became eligible for Medicare Benefits in September, 2004.
>
> Third, that at the present time Scott

The Court of Appeals also distinguished the *Figurski* and *Elher* cases, in upholding its prior decision that Dr. Crawford's opinions and theories should not be excluded.

> Tye's medical expenses, including those arising from injuries sustained in this matter, have been paid by a private health insurance carrier as a benefit of his wife's employment.
>
> Fourth, there is reason to believe that the private health insurance carrier will continue to pay Scott Tye's future medical expenses in the foreseeable future.
>
> Fifth, that Medicare does not currently have an established policy or procedure in effect for reviewing or providing an opinion regarding the adequacy of the future medical aspect of a liability settlement or recovery of future medical expenses incurred in liability cases such as this case.
>
> Sixth, that the Plaintiffs are aware of their obligations to reimburse Medicare for all conditional payments made by Medicare and Plaintiffs have agreed to extinguish, out of the settlement proceeds, any and all additional medical liens currently existing, including any conditional payment already made by Medicare for injuries sustained by Plaintiff in this case.

The Ohio Court of Appeals concluded that the defendants' arguments regarding the MSA were disingenuous. Their conclusion was supported by the fact that the plaintiffs sought an opinion from a neutral expert regarding the MSA issue ahead of the settlement date. The defendants acted on the issue only after settlement, and the moving party defendants merely joined the motion filed by other defendants ten days after it was filed.

The appellate court remarked that the outside consultant relied upon by the defendants clearly lacked information about the case, and his correspondence was dated three months after the settlement date. Significantly, the court did not believe that the authority attached to the defendants' motion supported the motion; rather, it supported the conclusion that an MSA is not required in personal-injury cases. The appellate court also noted that a representative for Medicare received notice of the MSA hearing and declined to appear.

In early 2015, the U.S. District Court for the Western District of Louisiana issued its opinion in *Berry v Toyota Motor Sales,*[4] concluding that no MSA was required in that products-liability matter. That court based its decision on information provided by CMS as well as opinions of the plaintiff's treating physicians. The court concluded that no future medical care was necessary, related to the incident at issue. The court also found that Medicare's interests had been adequately protected in the settlement negotiations. With reference to protection of Medicare's future interests, the court made this observation:

> [T]he government itself provides no procedure by which to determine the adequacy of protecting Medicare's interests with reference to future medical expenses in conjunction with the settlement of third party claims.

Finally, the court was compelled to its decision by the strong public interest in resolving lawsuits through settlement.[5]

In the medical-malpractice case of *Aranki v Burwell,*[6] the state court judge who approved the settlement, ordered the plaintiff to file a declaratory judgment action in federal court on the MSA issue. The federal court declined to enter judgment on the basis that there was no justiciable case or controversy ripe for review. Consequently, the court did not have subject-matter jurisdiction:

> This case is not ripe for review because no federal law mandates CMS to decide whether Plaintiff is required to create a MSA. That CMS has not responded to Plaintiff's petitions on the issue, is not reason enough for this Court to step in and determine the propriety of its actions. There may be a day when CMS requires the creation of MSA's in personal injury cases, but that day has not arrived. Because the first prong in the declaratory judgment analysis is not met here, the Court need not examine the second.

The courts have also made the distinction between personal injury and workers' compensation settlements. As one court noted, in contrast to the workers' compensation scheme that "generally determines recovery on the basis of a rigid formula, often with a statutory maximum," tort cases involve noneconomic damages not available in workers' compensation cases, and a victim's damages are not determined by an established formula. *Sipler v Trans Am Trucking, Inc*, 881 F Supp 2d 635, 638 (D. NJ, 2012), citing *Zinman v Shalala,* 67 F3d 841, 846 (CA 9, 1995). This distinction doesn't mean attorneys can ignore this issue and plead ignorance in liability cases. Medicare's interests must

First, confirm whether the plaintiff is a Medicare beneficiary.

still be protected, which may involve setting up an MSA.

Further Guidance on Whether to Set Up An MSA

First, confirm whether the plaintiff is a Medicare beneficiary. Don't assume based on age that the plaintiff is not a beneficiary. Recipients of Social Security Disability or who are awarded a combination of SSD and SSI benefits are automatically enrolled in Medicare 24 months after the award is made, regardless of their age. If the award is retroactive, the 24-month period may start on the retroactive date, not on the date plaintiff was notified of the disability award. Don't assume that a plaintiff's statement made during discovery that he or she is not a Medicare beneficiary is still valid. Update the information to confirm the plaintiff's status.

Second, carefully analyze the issue of whether future care is anticipated, related to the underlying injury. Typically, unless it's obvious that future care is needed, a physician certification that treatment has concluded should be obtained. Otherwise, it seems prudent to create an MSA in any case that involves a reasonable likelihood of future injury-related medical care arising out of the injury giving rise to the case.

Third, consider the input of Medicare counsel in more complex cases or if you need guidance with reference to adequate funding for those cases in which an MSA is to be established. Some insurance carriers have Medicare counsel available to consult when resolving cases involving beneficiaries. While it is important to know at least the basics when it comes to Medicare, CMS, and the Secondary Payer Act, don't hesitate to call on the experts when needed.

There are several national firms that specialize in Medicare resolutions. We will undoubtedly be hearing from them as the liability MSA issue "amps up" and we need to learn more about the specifics of future enforcement. Most of the specialty firms also offer custodial account services to hold the MSA funds and ensure Medicare is not billed until the MSA is exhausted. These firms also have online resources available, which can be invaluable in determining how to proceed in a particular case.

Current practices may certainly be continued until further information and directives are provided by the Centers for Medicare and Medicaid Services. When settling a case with a Medicare beneficiary, future medical costs should probably be addressed via some language in the release and settlement agreement. The statement can be as brief as simply acknowledging that Medicare's interests were considered. In those specific instances when an MSA is appropriate to protect the plaintiff from incurring future out-of-pocket expenses or reimbursement claims by CMS, the establishment of the MSA should be described in the release and settlement agreement.

Conclusion

It took three or four years for the turmoil of 2007-2008 to morph into a normal part of our everyday practice. We don't anticipate that it will take that long for the Medicare Medical Set-Aside in liability cases (or, the "LMSA") to become a routine matter. Some practitioners are predicting that enforcement procedures will be in place as early as the end of 2017. The more prudent prediction is some time in 2018. The more we know ahead of time, the easier this next transition will be.

Endnotes

1 Prior to 1980, Medicare was primary payer for all covered services, except workers' compensation insurance.

2 Publication #100-20 One-Time Notification (CMS Internet-Only Manuals, 02/03/17).

3 *Tye v Upper Valley Med Ctr*, unpublished opinion of the Ohio Court of Appeals, Second District, issued June 27, 2014 (Docket No. 25997); 2014 WL 2957037.

4 *Berry v Toyota Motor Sales, USA, Inc*, unpublished ruling and order of the United States District Court for the Western District of Louisiana, issued Jan. 12, 2015 (Docket No. 1:11-cv-01611); 2015 WL 158889.

5 It's notable that the federal district courts in Louisiana had a history of reaching inconsistent decisions on Medicare MSAs before *Berry*. See, e.g., *Big R Towing, Inc v Benoit*, unpublished opinion of the United States District Court for the Western District of Louisiana, issued Jan. 5, 2011 (Docket No. 10-538); 2011 WL 43219; *Frank v Gateway Ins Co*, unpublished opinion of the United States District Court for the Western District of Louisiana, issued Mar. 13, 2012 (Docket No. 6:11-0121); 2012 WL 868872.

6 *Aranki v Burwell,* 151 F Supp 3d 1038 (D Ariz, 2015).

Sources

1 Garretson Resolution Group; Client Alert: Medicare Begins System Preparation for Liability MSAs: Only a Matter of Time; February 2017.

2 Williams, RM and Cameriengo, K.; Medicare Set-Aside Accounts for Future Medical Expenses in Personal Injury Claims; Claims Journal, May 2016.

3 Correspondence (redacted) from US Department of Health & Human Services Office of General Counsel Region III Assistant Regional Counsel, 2015.

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No-Fault Report

Killing the Goose That Laid the Golden Egg –*Bahri* Effectively Gutted by Court of Appeals

In our last article, we discussed at some length the import of the Court of Appeals' decision in *Bahri v IDS Property Casualty Ins Co*, 308 Mich App 420; 864 NW2d 609 (2014), and why it provided insurance companies and their defense counsel with a powerful weapon to root out fraudulent claims, which, unfortunately, those of us who practice in this area see all too often. However, as with any powerful weapon, we cautioned that such weapons should be used judiciously.

In particular, we urged insurers and defense counsel to utilize *Bahri* only in cases where the insurance company had evidence that "directly and specifically contradicted" a particular claim presented by the plaintiff, whether at the claims stage or during the course of litigation. In the absence of admissible evidence that "directly and specifically contradicted" a claim for no-fault benefits, plaintiffs may be able to survive a motion for summary disposition based on *Bahri*. Compare *Thomas v Frankenmuth Mut Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued July 12, 2016 (Docket No. 326744); 2016 WL 3718352 (finding that insurer presented evidence that "directly and specifically contradicted" a specific claim, where the plaintiff was observed driving an automobile despite his use of non-emergency medical transportation earlier in the day, and despite doctor's orders prohibiting him from driving) with *Sampson v Jefferson,* unpublished opinion per curiam of the Court of Appeals, issued July 14, 2016 (Docket No. 326561); 2016 WL 3855882 (same panel determining that the insurer failed to present evidence that "directly and specifically" contradicted a claim for no-fault benefits because the insurer was unable to prove that household-service claims were false as calendars describing the services were not dated.)

The author certainly acknowledges the pressures facing defense counsel from clients who may have unrealistic expectations about what is or is not a "fraudulent" claim. However, we as defense counsel need to be cognizant of the fact that overly aggressive use of *Bahri* motions could lead to a backlash in the appellate courts, which could effectively "kill the goose that laid the golden egg." In other words, we as defense counsel need to advise our clients that on occasion, "hard cases make bad law." See *Morales v Auto-Owners Ins Co,* 458 Mich 288, 305; 582 NW2d 776 (1998) (Taylor, J. dissenting).

Unfortunately, the Court of Appeals recently issued its published opinion in *Shelton v Auto-Owners Ins Co,* __ Mich App __; __ NW2d __; 2017 WL 603591 (2017) (Docket No. 328473), which exemplifies this old adage. *Shelton* effectively wipes out the ability of an insurer to utilize its fraud exclusion in cases where the plaintiff is not the actual policyholder, his or her spouse, or a relative domiciled in the same household.

As shown below, it did not have to be this way. The Court of Appeals could have easily based its decision on the fact that the evidence presented by the insurer (which may not have been admissible anyway) simply did not "directly and specifically contradict" an actual claim that had been presented by the plaintiff. The panel could

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However, the Court of Appeals went further and, as noted above, effectively limited the impact of fraud exclusions only to those claimants who are actually the named insured under the policy, their spouses, or relatives domiciled in the same household.

have even limited its decision to the wording of the actual fraud exclusion, which made no reference to a fraudulent-claim submission, but only to a fraud in the procurement of the policy, or fraud with regard to the actual occurrence. Unfortunately, the Court of Appeals' holding is very broad and, because it is a published opinion, it remains the controlling legal authority on this issue until such time as it is modified or overruled by the Michigan Supreme Court.

In *Shelton*, the plaintiff was a passenger in an automobile owned and operated by Timothy Williams and insured with Auto-Owners Insurance Company. Shelton did not own a motor vehicle. She was not married and did not reside with a relative who owned an automobile. Therefore, Auto-Owners Insurance Company occupied the highest order of priority for payment of her no-fault benefits pursuant to MCL 500.3114(4)(a), as the insurer of the owner or registrant of the motor vehicle she was occupying at the time of the accident.

The accident itself occurred on January 22, 2013.The plaintiff submitted a claim for household-replacement-service expenses, which was denied by the insurer. The reasons behind the denial of the household-replacement-service-expense claim were not at all clear. The defendant claimed that it was because the claims were fraudulent. The plaintiff claimed that the claims were dismissed "based on a lack of proofs for the replacement services claim." Unfortunately, the trial court made no specific finding as to whether or not those claims were fraudulent, and no appeal was taken from the dismissal of the household-service claim.

The defendant then moved for a dismissal of the medical-expense claims, based upon the purportedly false household-replacement-service claim. According to the Court of Appeals' opinion, the insurer offered the following "evidence" as proof of a fraudulent claim:

- Investigative reports and "some photographs" that were taken by the investigator on June 1, 2013, where "many of the photographs are so blurred and distant that it is impossible to determine who is being photographed and what they were doing."
- Investigator's report of June 1, 2013, references the "Claimant" as being "Timothy Williams" and not the plaintiff (a female); pronouns used in the report reference "he," not "she."
- The investigator noted that the plaintiff "appears to be wringing it out," referring to a shirt; however, "there is no reference to any photographs or videotape to confirm even this self-serving statement."

The plaintiff was observed walking without a visible brace and was observed to bend on two occasions, even though the plaintiff acknowledged, at deposition, that she was able to walk, and that even though she always wore a back brace, she sometimes wore it under her clothing and sometimes over.

Again, the circuit court ruled that this evidence was insufficient to support a motion for summary disposition under *Bahri*, presumably because it did not "directly and specifically contradict" a claim that had been presented by the plaintiff. The defendant filed an application for leave to appeal with the Court of Appeals, which the Court granted.

The Court of Appeals affirmed the lower court's decision to deny the insurer's motion for summary disposition under *Bahri*. The lead opinion was authored by Judge Douglas Shapiro, and he was joined by Judge Elizabeth Gleicher. (Judge Kirsten Frank Kelly concurred in the result, only.) In his opinion, Judge Shapiro compared the facts involved in *Shelton* with the facts involved in *Bahri* (which involved surveillance conducted periodically over the course of seven weeks) and noted:

> While such repeated activities are sufficient to establish the elements of fraud beyond a question of fact, a single episode of wringing out a shirt does not; nor do isolated examples of an injured person participating in simple physical actions such as bending, modest lifting, or other basic physical movements that they testify are painful or difficult. These type of inconsistencies with a claimant's statements are not sufficient to establish any of the elements of fraud beyond a question of fact. [*Shelton,* slip op at p 7.]

The Court of Appeals even noted some of the evidentiary problems with the proofs offered by the insurer:

> While not raised in the briefing, based on the record before us, it appears that many of the documents on which defendant relies, including the three surveillance reports and the photographs do not meet the evidentiary requirements of MCR 2.116(G)(6) and should not have been considered. That rule

However, we as defense counsel need to be cognizant of the fact that overly aggressive use of *Bahri* motions could lead to a backlash in the appellate courts, which could effectively "kill the goose that laid the golden egg." In other words, we as defense counsel need to advise our clients that on occasion, "hard cases make bad law."

> provides that "affidavits, depositions, admissions and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) **shall only be considered to the extent that the content or substance would be admissible as evidence**." (emphasis added). The relied upon reports appear to be hearsay. Their ostensible author did not testify and has not provided an affidavit that the statements in his reports are true and that he will so testify at trial. The same is true of the photographs on which defendant relies. [*Shelton,* slip op at p 6, n 7.]

In the opinion of the author, if the Court of Appeals had simply stopped its analysis at this point, the Court of Appeals would have sent a message to insurers and the circuit courts of this state that in order to prevail on a *Bahri* motion, the insurer must present evidence which "directly and specifically contradicts" a claim that was made by the plaintiff, and in this case, just as in *Sampson, supra,* the insurer simply failed to do so.

The Court of Appeals then examined the actual fraud language that was at issue in *Shelton* and compared it to the fraud exclusion set forth in the *Bahri* policy. The exclusion at issue in *Bahri* provided:

> We do not provide coverage for any insured who has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy.

By contrast, the Auto-Owners exclusion at issue in *Shelton* provided:

> We will not cover any person seeking coverage under this policy who has made fraudulent statements or engaged in fraudulent conduct **with respect to procurement of this policy or to any OCCURRENCE** for which coverage is sought. [Emphasis added].

The Court of Appeals noted that there was nothing in the fraud exclusion that referenced claims that were presented as the result of an "occurrence" and specifically noted the following:

> Defendant has not provided us with the policy definition of "occurrence," but in all cases dealing with that term, it has been defined as the accident or event during which the injury occurs. See e.g., *Frankenmuth Mut Ins Co v Masters,* 460 Mich 105, 112-113; 595 NW2d 832 (1999) (stating that the applicable insurance policy defined the term "occurrence" as "an accident, … which occurs during the policy period"), *Group Ins Co v Czopek,* 440 Mich 590, 597-598; 489 NW2d 444 (1992) (stating that the term "occurrence" was defined in the policy as "an accident, … which results, during the policy term, in bodily injury or property damage."), and *Michigan Basic Property Ins Ass'n v Wasarovich,* 214 Mich App 319, 327-328; 5421 NW2d 367 (1995) (finding that the definition of "occurrence" in the policy included an accident that resulted in personal injury during the policy period). Defendant has not alleged any fraud "with respect to the procurement of the policy" nor with respect to the "occurrence." The claimed fraud was in the reporting of services later provided, an event not referenced in the provision. [*Shelton,* slip op at p 5, n 6.]

However, because the issue of the wording of the fraud exclusion was not raised in the lower court, the Court of Appeals declined to base its ruling on this ground. Again, if the Court of Appeals had simply stopped its analysis at this point, a message would have been sent to insurers and their counsel that before you can rely on a fraud exclusion, the insurer needs to have language in the fraud exclusion that actually references fraudulent claims – not just fraud in the procurement of a policy or fraud regarding the actual accident that gives rise to a claim for no-fault benefits.

However, the Court of Appeals went further and, as noted above, effectively limited the impact of fraud exclusions only to those claimants who are actually the named insured under the policy, their spouses, or relatives domiciled in the same household. In the Court's view, this is because MCL 500.3114(1), which is the "general rule" regarding priority, provides that an insurance policy "**applies** to the person named in the policy, the person's spouse and relatives of either domiciled in the same household." *Shelton,* slip op at p 4 (emphasis in original). In this case, Shelton was neither the named insured, the spouse of the named insured, nor a relative of either the named insured or his spouse. Therefore, the Auto-Owners policy, issued to Timothy Williams, simply did not "apply" to the plaintiff. *Id.* Instead, Shelton's ability to recover benefits from Auto-Owners Insurance Company derives from operation of law, i.e., MCL 500.3114(4)(a), which

In the opinion of the author, if the Court of Appeals had simply stopped its analysis at this point, the Court of Appeals would have sent a message to insurers and the circuit courts of this state that in order to prevail on a *Bahri* motion, the insurer must present evidence which "directly and specifically contradicts" a claim that was made by the plaintiff, and in this case, just as in *Sampson, supra,* the insurer simply failed to do so.

references "the insurer of the owner or registrant of the vehicle occupied." The Court also noted that, in *Rohlman v Hawkeye Security Ins Co,* 442 Mich 520; 502 NW2d 310 (1993) and *Harris v ACIA,* 494 Mich 462; 835 NW2d 356 (2013), the ability of the plaintiffs in those cases to recover no-fault benefits arose "solely by statute," which is "the 'rule book' for deciding the issues involved in questions regarding" no-fault insurance benefits. As noted by the Court of Appeals:

> Defendant's argument is directly contrary to the grounds for the holdings in both *Rohlman* and *Harris*. Here, as in those cases, plaintiff's no-fault benefits are governed 'solely by statute.' **Thus, the exclusionary provision in defendant's no-fault policy does not apply to plaintiff and cannot operate to bar Plaintiff's claim.** [*Shelton*, slip op at p 3 (emphasis added).]

In other words, fraud exclusions do not apply to those individuals who are "strangers to the insurance contract," such as motorcyclists who are injured as the result of the involvement of a motor vehicle (see MCL 500.3114(5)), employees who are occupying employer-furnished vehicles (see MCL 500.3114(3)), pedestrians who are injured in motor vehicle accidents and do not have policies of their own available in their household (see MCL 500.3115(1)) and those individuals, like the plaintiff in *Shelton*, who are occupying another person's motor vehicle and who do not have policies of their own available in their household (see MCL 500.3114(4)). Obviously, this is a rather large group of individuals who are no longer bound by the fraud exclusion under the policy under which they are claiming benefits.

In response to the insurer's "public policy" arguments, the Court of Appeals threw out the following "bone" to insurers and their counsel:

> Defendant argues that as a matter of public policy we should depart from the statute because if we do not, no-fault insurers will lose the ability to deny fraudulent no-fault claims. This argument is meritless. As always, if an insurer concludes that a claim is fraudulent, it may deny the claim. Should the Claimant then file suit, the burden is on the Claimant to prove that he is entitled to his claimed benefits, a burden that is highly unlikely to be met if the factfinder concludes that the claim is fraudulent. And insurers can obtain attorney fees for having to litigate any claims that are determined to be fraudulent. MCL 500.3148. [*Id.*, slip op at p 4.]

Obviously, it is far more expensive to litigate and try claims, even those that are potentially fraudulent, as opposed to securing an order granting a summary-disposition motion under *Bahri*. Because the insurer has now lost the ability to summarily dismiss fraudulent claims where the claimant is not the named insured, his or her spouse or a relative domiciled in the same household, an insurer will now be forced to make an economic decision to possibly settle a fraudulent claim, as opposed to taking the claim through trial.

At this point, it is unclear if the insurer will file an application for leave to appeal with the Michigan Supreme Court. A Legislative fix would also appear to be warranted. For example, expanding the scope of MCL 500.3173a(2) to all insurers, not just those insurers adjusting MACP claims, would go a long way toward curbing the number of potentially fraudulent claims that a no-fault insurer is forced to defend while, at the same time, preserving the requirement that, in order to prevail on a fraud defense, the insurer would still need to present admissible evidence that "directly and specifically contradicts" a specific claim presented by the plaintiff. As matters now stand, however, a no-fault insurer's ability to utilize a fraud exclusion contained in its policy, has been severely curtailed by the Court of Appeals' decision in *Shelton*. In the author's opinion, *Shelton* is another clear example of where "hard cases make bad law."

MDTC Schedule of Events

2017

June 22-24	Annual Meeting & Conference – Shanty Creek, Bellaire
September 8	Golf Outing - Mystic Creek Golf Club
Sept 27-29	SBM – Annual Meeting – Cobo Hall, Detroit
October 4-7	DRI Annual Meeting – Sheraton, Chicago
November 9	Past Presidents Dinner – Sheraton, Novi
November 10	Winter Conference – Sheraton, Novi

2018

May 10-11	Annual Meeting & Conference – Soaring Eagle, Mt. Pleasant
October 4	Meet the Judges - Sheraton Detroit Novi, Novi, Michiagn
October 17-21	DRI Annual Meeting - Marriott, San Francisco
November 8	Past Presidents Dinner – Sheraton, Novi
November 9	Winter Conference – Sheraton, Novi

2019

June 20-22	Annual Meeting & Conference – Shanty Creek, Bellaire

Supreme Court

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Supreme Court Update

A Defendant Is Not Required to Go Any Further Than Showing the Insufficiency of a Plaintiff's Evidence to Succeed on a (C)(10) Motion.

On December 13, 2016, the Michigan Supreme Court held that a premises owner was entitled to summary disposition on a premises-liability claim where the plaintiff failed to present sufficient evidence that the owner had actual or constructive notice of the hazard on the premises, despite the fact that the owner did not present any evidence itself of lack of knowledge. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1; 890 NW2d 344 (2016).

Facts: After a night out with friends drinking in celebration of St. Patrick's Day at Woody's Diner, the plaintiff exited the diner and promptly slipped on an allegedly wet step. She fell and broke a tibia and fibula. The plaintiff sued the diner, alleging negligence. Specifically, the plaintiff alleged that the diner knew or should have known of the allegedly hazardous condition of the stairs and failed to fix, guard against, or warn patrons of the condition. The plaintiff admitted that she did not see any liquid on the stairs, but stated that she assumed there was liquid because her backside was wet following the fall and a person "can't just slip on nothing." The diner moved for summary disposition pursuant to MCR 2.116(C)(10). Oakland County Circuit Court (Honorable Rudy J. Nichols) granted summary disposition in favor of the diner, finding that the plaintiff failed to present sufficient evidence that the diner had actual or constructive knowledge of any hazard on the stairs, or alternatively, that the hazardous condition was open and obvious.

In a published opinion, the Michigan Court of Appeals reversed. The Court of Appeals stated that, "[w]hen the defendant is convinced that the plaintiff will be unable to support an element of the claim at trial, but is unwilling or unable to marshal his or her own proofs to support a motion under MCR 2.116(C)(10), the defendant's recourse is to wait for trial and move for directed verdict after the close of the plaintiff's proofs." As such, the Court of Appeals held that the diner was not entitled to summary disposition because it failed to present evidence that it did not have actual or constructive notice of the slippery condition of the stairs. Specifically, the diner failed to show that a reasonable inspection of the premises would not have revealed the hazard.

Ruling: In a unanimous opinion, the Michigan Supreme Court reversed the controversial Court of Appeals' judgment and reinstated the trial court's order granting summary disposition in favor of the diner. The Supreme Court explained that the Court of Appeals applied an incorrect standard in ruling on a (C)(10) motion. In order to survive the diner's motion for summary disposition under MCR 2.116(C)(10), the plaintiff was required to present sufficient evidence to create a genuine issue of material fact regarding whether the diner had actual or constructive notice of the slippery condition of the stairs. Only if the plaintiff met this burden could the diner have been required to present evidence negating the allegation that it had actual or constructive knowledge.

The Court of Appeals' requirement that the diner show that a reasonable

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In order to survive the diner's motion for summary disposition under MCR 2.116(C)(10), the plaintiff was required to present sufficient evidence to create a genuine issue of material fact regarding whether the diner had actual or constructive notice of the slippery condition of the stairs.

inspection would not have revealed the slippery condition was inconsistent with the aforementioned standard, and imposed a new element in proving notice or a lack thereof. First, the Court explained that it "has never required a defendant to present evidence of a routine or reasonable inspection under the instant circumstances to prove a premises owner's lack of constructive notice of a dangerous condition on its property. The Court of Appeals erred when it imposed this new condition on premises owners seeking summary disposition." Second, requiring the diner to present such evidence or any other evidence disproving actual or constructive knowledge improperly shifted the burden to the diner to prove its lack of notice where the plaintiff did not present sufficient evidence to establish that the diner had actual or constructive knowledge of the slippery condition of the stairs.

Practice Note: The Supreme Court made it abundantly clear that a defendant can establish entitlement to summary disposition pursuant to MCR 2.116(C)(10) by showing that the plaintiff has failed to proffer evidence sufficient to establish one or more of the elements of the plaintiff's claim. Moreover, the Court did away with the short-lived requirement that a defendant premises owner seeking summary disposition based on a lack of constructive notice affirmatively prove that it lacked notice. Such a requirement was inconsistent with the standard for MCR 2.116(C)(10), and inconsistent with prior case law stating that a defendant could succeed on a (C)(10) motion without affirmatively negating an element of the plaintiff's claim, if the defendant showed that the plaintiff failed to present sufficient evidence to establish their claim.

A Police Officer's Reassignment to an Undesirable Shift and an Undesirable Location Could Constitute an Adverse Employment Action under the Whistleblower Protection Act.

On February 3, 2017, the Michigan Supreme Court held that a police officer's reassignment to patrol an undesirable area of the city during undesirable hours created an issue of fact as to whether an adverse employment action under Michigan's Whistleblower Protection Act, such that summary disposition in favor of the employer was inappropriate. *Smith v City of Flint*, 889 NW2d 507; 2017 Mich LEXIS 274 (2017) (Docket No. 152844).

Facts: The plaintiff was a police officer with the City of Flint and president of the City of Flint Police Officers Union. His scheduled shift was from 8:00 a.m. until 4:00 p.m. In November 2012, the City passed a millage to collect funds from citizens for public safety. After the millage passed, the plaintiff publicly complained that the funds were not being used to hire as many police officers as possible. In March 2013, the police chief reassigned the plaintiff to road patrol during the night shift, in Flint's north end.

The plaintiff sued, alleging violation of the Whistleblower Protection Act ("WPA"), MCL 15.361 *et seq*. Specifically, the plaintiff alleged that he was reassigned to the most dangerous part of the city during hours that prevented him from performing his union duties, in retaliation for his public complaints about use of the millage funds. He asserted that he was the only officer assigned exclusively to one area, and was told that he would not be allowed to work in the safer south end. The City moved for summary disposition under MCR 2.116(C)(8), arguing that the plaintiff's reassignment was not an adverse employment action. The Genessee County Circuit Court agreed, granting summary disposition in favor of the City.

In a published split opinion, the Court of Appeals affirmed. The majority held that the plaintiff's reassignment was not an "adverse employment action" under the WPA. The majority explained that "adverse employment action" under the WPA has a different meaning than under federal anti-discrimination statutes. Specifically, the majority explained that "in order to establish an adverse employment action under the WPA, a plaintiff has to show that he was discharged, threatened, or otherwise discriminated against, in a manner that affected his **compensation, terms, conditions, location, or privileges of employment**." (Emphasis original). According to the majority, the effect on an employee's location or other privileges of employment must be more than a mere inconvenience or alteration of job responsibilities. There must be some objective basis for concluding that the change is adverse. Moreover, while retaliation related to an employee's "location" is expressly covered by the WPA, a change in location contemplates a significant, objective change, such as a move from one city to another.

[T]he Court did away with the short-lived requirement that a defendant premises owner seeking summary disposition based on a lack of constructive notice affirmatively prove that it lacked notice.

The majority did not see any objective basis for the plaintiff's claim that his reassignment was adverse. Nor was the change viewed as significant. The plaintiff was still assigned within the same city as he was sworn to protect. Thus, the majority concluded that the plaintiff suffered no adverse employment action and summary disposition for the City was warranted.

The Honorable Karen Fort Hood dissented, agreeing with the majority's determinations regarding the applicable law, but disagreeing with the majority's analysis. Judge Fort Hood stated that, "[v]iewing the complaint in a light most favorable to plaintiff, […] I believe that plaintiff has established a question of fact whether these actions could be objectively and materially adverse to a reasonable person." Specifically, Judge Fort Hood opined that altering the plaintiff's work hours related to a term of his employment, and his assigned location related to the terms and location of his employment.

Ruling: In lieu of granting leave to appeal, the Michigan Supreme Court reversed the judgment of the Court of Appeals. The Supreme Court did not provide any detailed discussion, but merely stated that the Court agreed with Judge Fort Hood's dissenting opinion. Specifically, the Court agreed with Judge Fort Hood's opinion that "the plaintiff's complaint sufficiently alleged discrimination under the [WPA] on the basis of a job reassignment unique to the plaintiff during undesirable hours at an undesirable location." In other words, there was a question of fact as to whether the plaintiff suffered an adverse employment action when he was reassigned. The case was remanded to the trial court for further proceedings.

The Court also vacated as premature a *sua sponte* ruling by the Court of Appeals that the WPA claim should be dismissed for failure to properly plead participation in a protected activity. The Court vacated that ruling because the issue had not been raised by either party or reached by the trial court.

Practice Note: Adverse employment action under the WPA is often incorrectly equated to adverse employment action under federal anti-discrimination statutes. Indeed, adverse employment action under the WPA is a stricter standard than typically employed regarding federal anti-discrimination statutes. As such, the Court of Appeals again explained that such equation is at times inappropriate. Nonetheless, this ruling expands the definition of adverse action under the WPA. Thus, plaintiffs will have an easier time alleging that changes in terms or conditions of their employment constitute adverse employment actions under the WPA.

Court Rules Update

By: M. Sean Fosmire, *Garan Lucow Miller, P.C.*
sfosmire@garanlucow.com

Michigan Court Rules Adopted and Rejected Amendments

For additional information on these and other amendments, visit the Court's official site at

http://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Pages/default.aspx

Sean Fosmire is a 1976 graduate of Michigan State University's James Madison College and received his J.D. from American University, Washington College of Law in 1980. He is a partner with Garan Lucow Miller, P.C., manning its Upper Peninsula office.

PROPOSED AMENDMENTS

2015-24 - Reply briefs

Rule affected: 2.116 and 2.119
Issued: January 25, 2017
Comments by: May 1, 2017

Would prohibit reply briefs for any motion other than a summary disposition motion. For those motions, a reply brief must be confined to rebuttal of the opposition, be limited to five pages, and be served at least three days before the hearing.

MDTC Member Victories

MDTC members are among the best and most talented attorneys in Michigan. In this section, we highlight significant victories and outstanding results that our members have obtained for their clients. We encourage you to share your achievements. From no-cause verdicts to favorable appellate decisions and everything in between, you and your achievements deserve to be recognized by your fellow MDTC members and all of the *Michigan Defense Quarterly*'s readers.

No-Cause Verdict—Kyle N. Smith, *Collins Einhorn Farrell PC*

A Wayne County jury returned a no-cause-of-action verdict in favor of a no-fault insurer on January 19, 2017. In the case of *Patillo v Great Lakes Casualty Ins Co*, the plaintiff was an occupant of an automobile insured by the defendant that was involved in an accident on May 14, 2014. The plaintiff claimed to be entitled to $567,027.04 in medical expenses, $40,800 in lost wages, and $18,060 in household-replacement services, i.e., a total of $625,887.04 in first-party no-fault benefits. In related suits pending in various circuit and district courts, numerous medical providers claimed to be entitled to an additional $775,997.81 in medical expenses for services provided to the plaintiff allegedly arising out of the accident, bringing the total medical expenses incurred by the plaintiff to $1,343,024.85.

The defendant, represented by **Collins Einhorn Farrell PC** attorney **Kyle Smith**, argued that the expenses and benefits claimed by the plaintiff were not related to the automobile accident. The plaintiff claimed to have sustained injuries to his neck, lower back, and left shoulder as a result of the accident, and ultimately underwent left shoulder surgery. Additionally, he underwent numerous injections in his left shoulder and lumbar spine. However, the defendant argued that these injuries were not caused by the May 14, 2014 automobile accident, but instead, were caused by a subsequent bicycle accident that the plaintiff was involved in on June 20, 2014.

The policy of insurance issued by the defendant under which the plaintiff claimed benefits contained a fraud provision that provided, in pertinent part, that the defendant would not provide coverage for any insured who made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage was sought under the policy. The defendant introduced evidence and testimony that the plaintiff worked after the accident and was able to perform household-replacement services during the period of time that he claimed such benefits. Regarding the plaintiff's claimed injuries, the defendant introduced evidence and testimony demonstrating that the injuries the plaintiff claimed to have incurred as a result of the automobile accident were instead caused by the subsequent bicycle accident.

After almost two hours of deliberation, the jury returned its verdict. The jury found that the plaintiff (1) made a false statement about a material fact, (2) knew that the statement was false at the time it was made or made it recklessly without any knowledge of the truth, and (3) made the material misrepresentation with the intention that the defendant would act upon it. Accordingly, the defendant's policy did not provide coverage for any first-party no-fault benefits claimed by the plaintiff or any of his privies or providers and a no-cause-of-action verdict was rendered in favor of the defendant.

To share an MDTC Member Victory, send a summary to Michael Cook (Michael.Cook@ceflawyers.com).

MDTC Member Profiles

MEET: Matt Cross
Law Firm: *Cummings, McClorey, Davis & Acho, P.L.C.*

Q: *Why did you become a lawyer?*
A: There are two reasons I wanted to become a lawyer. First, I wanted a career that would not put me in physical danger. Aside from the health risks associated with sitting for long hours and the occasional deranged client, the practice of law is relatively safe—at least as compared to my first career as a firefighter. Second, I wanted to work in a profession that would challenge me. Perhaps it's a reflection of where I'm at in my career, but I always feel like there is more to learn and room for me to grow professionally.

Q: *What is the nature of your practice?*
A: Presently, the majority of my practice is made up of work for municipal clients (FOIA, OMA, police misconduct, constitutional claims, etc.). I also have a handful of small business and entertainment clients.

Q: *Tell us something you're passionate about (personal or professional).*
A: I am very passionate about dogs. I have two American Bulldog rescues that take up most of my free time and I wouldn't have it any other way.

Q: *What do you like about practicing law?*
A: I really enjoy legal research and writing. Writing has always been a passion of mine and while legal writing is a completely different animal than my recreational writing, I still enjoy it.

Q: *What don't you like about practicing law?*
A: Sitting behind a desk when it's beautiful out. I had the same problem in school. I catch myself looking longingly out the window at least 5 times per day during the spring and summer—that number decreases to once per day during the winter.

Q: *What has been your greatest challenge or reward in your practice?*
A: The greatest challenge thus far has been attempting to learn everything I need to learn to be successful, but it has been very rewarding learning from those who have been doing this far longer than I have.

Q: *What has been one of your most significant accomplishments (personal or professional)?*
A: I was a gigantic slacker throughout high school—more interested in chasing girls and playing baseball, in that order. Finally taking my education seriously led me to my most significant personal accomplishments—graduating from law school and passing the bar. I'm the only one of my four siblings to graduate from college and the only lawyer in the family—although I'm not sure if being the only lawyer in the family is a point of pride or shame for my parents.

Q: *What are your hobbies and interests outside of work?*
A: Playing with my dogs, playing baseball, listening to music, enjoying beautiful northern Michigan and trying to stay in shape.

MEET: Name: Robert (Drew) Jordan.
Law Firm: *O'Neill, Wallace and Doyle, P.C.*

Q: Why did you become a lawyer?
A: I became a lawyer because the practice of law has fascinated me since I was in middle school during the OJ Simpson criminal trial. Additionally, I always love to argue, so why not get paid to do it for a living.

Q: What is the nature of your practice?
A: The majority of my practice is litigation at both the trial and appellate levels with a primary focus on insurance defense. I am also starting to do more transactional work with commercial property development, as well as corporate formation and internal governance for non-profit organizations.

Q: Tell us something that you are passionate about (personal or professional).
A: I am passionate about the outdoors, the National Park System and any activity having to do with a body of water.

Q: What do you like about practicing law?
A: I like the strategy, argument and problem solving that is inherent to litigation. I also enjoy the fact that I am always doing different things in my job. For example, one day I could be arguing in court, and the next day I could be inspecting brake pads under a truck.

Q: What don't you like about practicing law?
A: My only criticism about the law practice is that young attorneys do not get the same structure and guidance that doctors get when first starting out as residents. There is a lot that a young lawyer needs to learn about a law practice that is not taught in law school and young lawyers rarely get the mentorship needed unless they are initially employed by a big firm that offers mentor programs.

Q: What has been your greatest challenge or reward in your practice?
A: My greatest challenge was initially adjusting to the work load and long hours. My greatest reward is the satisfaction of my clients for a job well-done.

Q: What has been one of your most significant accomplishments (personal or professional)?
A: My most significant professional accomplishment was getting an Application for Leave to Appeal granted by the Michigan Supreme Court, and then arguing and winning in front of the Supreme Court. My personal accomplishments, which I think are more significant than my professional, are marrying my wife and the birth of our son.

Q: What are your hobbies and interests outside of work?
A: I love any water related activity (e.g. fishing, swimming, SCUBA diving, etc.). I also enjoy watching movies.

MDTC Member Profiles continued

Victoria L. Convertino is an Associate in the Lansing office of Johnson, Rosati, Schultz & Joppich. She focuses primarily on federal and state litigation, handling matters involving municipal liability, labor and employment claims, and civil rights issues. Ms. Convertino graduated from Michigan State University College of Law in 2016, where she was a competitive member of the Moot Court & Trial Advocacy Board. She received specialized training in trial advocacy and legal technology from the Trial Practice Institute, a two-year intensive litigation certificate program.

As an AmeriCorps alumna with a public policy background, Ms. Convertino is a passionate supporter of public service. During law school, she clerked for a public-sector law firm, gaining invaluable experience in the areas of education, labor, and municipal law. Ms. Convertino also worked as a student lawyer for the Washtenaw County Public Defender.

Due to her involvement and commitment to the legal community, Ms. Convertino was the only student selected to serve on the hiring committee for the new Dean of MSU Law. Recently, Ms. Convertino was elected to the Board of Directors for the MSU College of Law Alumni Association. She is also an active member of the Women Lawyers Association of Michigan and the Ingham County Bar Association.

Vendor Profile

Legal Copy Services

Nate Kadau
Sales Representative
3280 N. Evergreen Drive N.E.
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nkadau@legalcopyservices.com

1. Where are you originally from?
Grand Rapids, Michigan

2. What was your motivation for your profession?
To provide personalized, innovative, and cost-effective record retrieval services geared toward legal, medical, and insurance communities.

3. What is your educational background?
Bachelors of Business Administration, Western Michigan University

4. How long have you been with your current company and what is the nature of your business?
I have been with Legal Copy Services (LCS) for almost eight years. We offer nationwide record retrieval with personalized service to our clients.

5. What are some of the greatest challenges/rewards in your business?
The most rewarding aspect of our business is the ability to provide services customized to meet the needs of each individual client. Providing these personalized services, as well as, being able to deliver the information requested in a timely manner, is truly gratifying.

One of the biggest challenges we face involves working with non-responsive facilities when following up on record requests. We rely on relationships that we have built with the various healthcare providers to resolve these situations when they occur and to keep these occurrences to a minimum.

6. Describe some of the most significant accomplishments of your career:
I have been fortunate enough to be a part of LCS for a long period of time. Throughout my career with LCS, I have worked in almost every department. This time has also allowed me to build a thorough understanding of the record retrieval industry. I wanted to utilize my knowledge and experience in more impactful ways for the growth and excellence of LCS. This resulted in my transition to the positon of Sales Representative, the goal for my career with my ideal company.

7. How did you become involved with the MDTC ?
Legal Copy Services has been a partner with the MDTC for many years. As my role grew within LCS, I became the liaison who would represent our company at the different MDTC outings and functions.

8. What do you feel the MDTC provides to Michigan lawyers?
The MDTC is an exceptional organization for attorneys to network and share best practices with one another. It also provides numerous education opportunities for its members to stay up-to-date on current events within the industry.

9. What do you feel the greatest benefit has been to you in becoming involved with the MDTC ?
The greatest benefit to me has been the relationships that I have been able to build with our clients and other vendors within the industry. Partnering with these prestigious groups allows me additional opportunities to learn how LCS can continue to grow and excel in our services for our clients' benefit.

10. Why would you encourage others to become involved with MDTC ?
Being involved with the MDTC is a great opportunity to connect with others within the legal community and learn the newest information litigating within the State of Michigan.

11. What are some of your hobbies and interests outside of work?
When the weather allows it, I enjoy golfing, fishing, and spending time outdoors. I am also a big sports fan and follow all of the major Detroit teams each season.

MDTC ANNUAL MEETING

Saturday, June 24, 2017
8:30 – a.m.

Shanty Creek Resorts
5780 Shanty Creek Rd
Bellaire, MI 49615

Officers and board members will be nominated to serve the MDTC

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This section is reserved for the use of MDTC members who wish to make services available to other members.
The cost is $75 for one entry or $200 for four entries. **To advertise, call (517) 627-3745 or email Michael.Cook@ceflawyers.com**.

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Thomas M. Peters has the experience, background and ability to assist you in the arbitration, mediation and resolution of your litigation or claim disputes.

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- Trucking
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APPELLATE PRACTICE

I am one of six Michigan members of the American Academy of Appellate Lawyers, and have litigated more than 500 appeals. I am available to consult (formally or informally) or to participate in appeals in Michigan and federal courts.

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Only members. Notices must identify an individual who is a member of MDTC. No notices relating only to firms, and membership in MDTC by one person in the same firm to place a notice. This is intended to be a members-only benefit.

2. ***What does it cost?***

$75 for a single entry; $200 for four consecutive entries.

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We are aiming for 9 per page, so the notice at right will provide a guideline. For now, size is strictly limited. Use 11 point Times New Roman font and set your margins to equal the size of the box.

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Photos are allowed; digital format.

INDEMNITY AND INSURANCE ISSUES

Author of numerous articles on indemnity and coverage issues and chapter in ICLE book *Insurance Law in Michigan*, veteran of many declaratory judgement actions, is available to consult on cases involving complex issues of insurance and indemnity or to serve as mediator or facilitator.

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