MICHIGAN DEFENSE
QUARTERLY

Volume 27, No. 3 January 2011

IN THIS ISSUE:

MDTC
MICHIGAN DEFENSE TRIAL COUNSEL, INC.

THE STATEWIDE ASSOCIATION OF ATTORNEYS REPRESENTING THE DEFENSE IN CIVIL LITIGATION

MDTC

Michigan Defense Trial Counsel, Inc
The Statewide Association of Attorneys Representing the Defense in Civil Litigation

P.O. Box 66
Grand Ledge, Michigan 48837
Phone: 517-627-3745
Fax: 517-627-3950
www.mdtc.org • info@mdtc.org

Publication Schedule:

Publication Date	*Copy Deadline*
January	December 1
April	March 1
July	June 1
October	September 1

For information on article requirements, please contact: Hal O. Carroll, Editor hcarroll@vgpclaw.com or Jenny Zavadil, Assistant Editor, jenny.zavadil@bowmanandbrooke.com.

Editor's Notes

Editor:
Hal O. Carroll
hcarroll@VGpcLAW.com

Assistant Editor: Jenny Zavadil
jenny.zavadil@bowmanandbrooke.com

Articles: All articles published in the *Quarterly* reflect the views of the individual authors. We always welcome articles and opinions on any topic that will be of interest to our members in their practices. Although we are 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 the editor (hcarroll@VGpcLAW.com) or the assistant editor, Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).

MICHIGAN DEFENSE QUARTERLY

Vol. 27 No. 3 • January 2011

Cite this publication as Volume 27 Number 3 Michigan Defense Quarterly.

Michigan Defense Quarterly is a publication of the Michigan Defense Trial Counsel, Inc. All inquiries should be directed to Madelyne Lawry, 517-627-3745.

President's Corner

By: Lori A. Ittner
Garan, Lucow, Miller PC

Lori A. Ittner
Garan Lucow Miller, PC
300 Ottawa Ave., NW, 8th Floor
Grand Rapids, MI 49503
616-742-5500 • 616-742-5566
littner@garanlucow.com

As the old year comes to a close and the new one begins, it is time to reflect on the progressive re-thinking and re-tooling underway for MDTC. It is also time to look at future events and plans that are underway to continue what we have begun in the hopes of better serving our members. In fact, this effort has been underway for many years. It is with great excitement and thanks that I bring to you our year end (and new year) address.

It is important to recognize our many volunteers and sponsors who have helped to make this a successful year and to help make the years to come equally successful. They have all worked tirelessly to contribute to the growth and innovative changes. It is through this combined effort that we are able to offer such increased privileges that come from being a member of this wonderful organization.

I want to take this opportunity to highlight these changes and events, and solicit suggestions from our members.

Future Planning Meeting

In January of each year we hold a Future Planning Meeting where we try to look ahead and find ways to make MDTC more valuable for the members. At the meeting, MDTC's leaders come together to discuss events of the past year and brainstorm on new and more advanced activities. Since the purpose of this planning is to decide how MDTC can better serve the members, it follows that hearing from the members what they think MDTC is doing right (or should do more of) or doing wrong (or should do less of) is pivotal. I would like to request feedback from the membership as to what you would like to see this organization do for its' members. We would ask that your suggestions be sent to our Executive Director, Madelyne Lawry, at info@mdtc.org, before January 20, 2011.

E-Publications

Members' input is especially vital this year given changes that are being made not only within this organization but with others. As the march of technology changes the landscape in which we all practice, it becomes of great value to explore new innovative changes. For example, at least one State Bar Section, the Negligence Law section, has made its quarterly publication exclusively as an e-copy. It is certainly a possibility that MDTC will follow this trend. In the past, we have viewed the written format of our quarterly publication to still be appropriate. Certainly, we strive to provide legal information and analysis that is of lasting value.

But, as many other organizations turn to a non-written format, it raises the question whether the *Quarterly* should follow this path. The *Quarterly* is already archived on MDTC's website and each publication can be accessed and printed by members. Instead of mailing hard copies, we could simply attach the Quarterly as a link to an email, as the Negligence Law Section plans to do. The important question, though, is what our members want. We would like to hear from you about this.

We must go beyond that which has already been done for our members. In this regard, we would like your feedback as to whether there is anything our membership would like to see included as a regular feature in the e-newsletter.

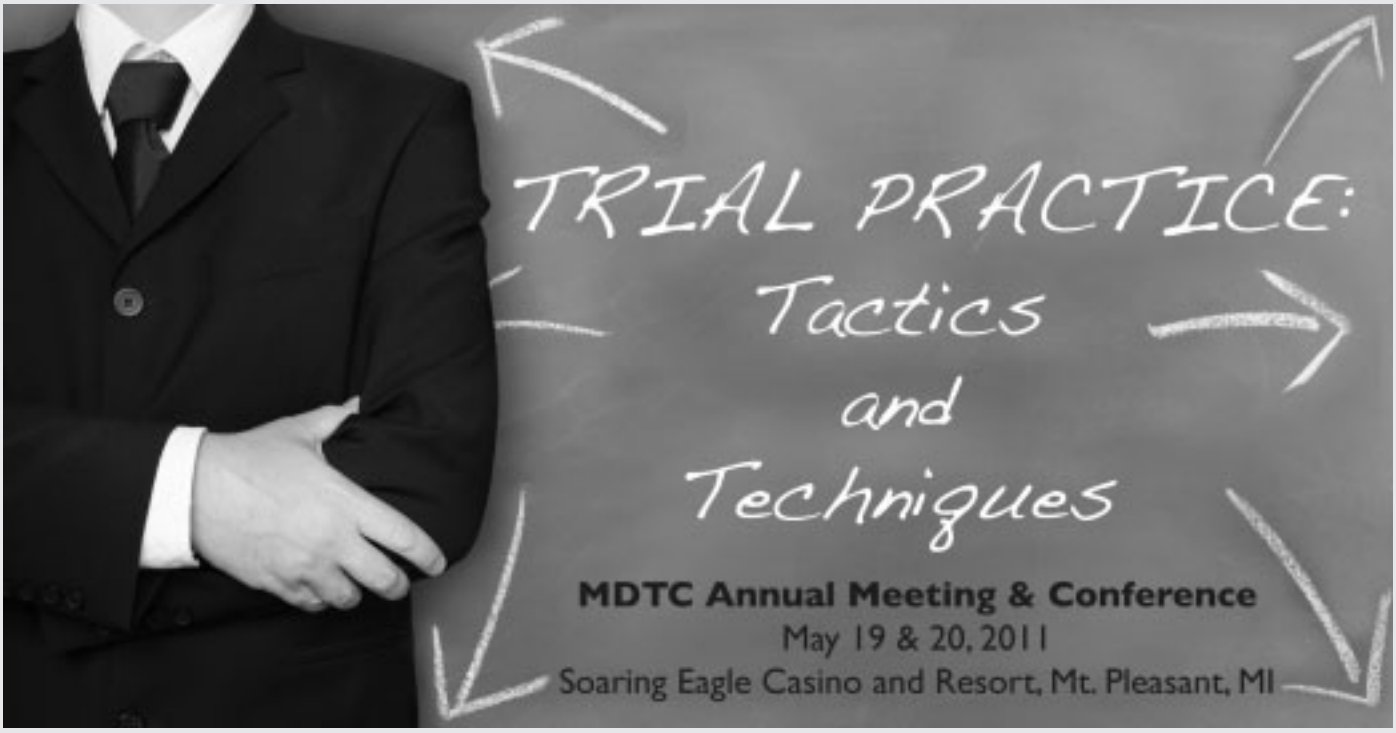
We have entered the "e-world" in another way with our launch of the E-Newsletter. The feedback on this publication as well as the advanced changes made to our website this year, has been overwhelming. Certainly, the membership seems to desire a more technical form of information. Our desire to continue to improve both forms of e-information does not stop at the feedback received thus far. We must go beyond that which has already been done for our members. In this regard, we would like your feedback as to whether there is anything our membership would like to see included as a regular feature in the e-newsletter. Please provide your input to our Executive Director, Madelyne Lawry, at info@mdtc.org before January 20, 2011, the date set for our Future Planning Meeting.

Programs and Teleconferences

As far as programs are concerned, we have also been rethinking and reworking those. As you know, we have held two teleconferences this year. In addition to responding to changes in the law of great importance, such as *McCormick,* teleconferences can also be used for exchange of information of importance for each of our sections. In the coming year, MDTC will also be exploring Webinars in an effort to provide more accessible programming for our members. In doing so, we have looked at existing programs in an effort to determine what is providing benefit to our members.

In this regard, we would like to know whether our traditional two major programs in the spring/summer and the winter, are still programs that our membership want. We believe that these two on-site programs provide valuable opportunities not only to learn, but also to meet experts, judges and other lawyers. We would like to know what our membership thinks about our present programming and conferences. What suggestions might you have? Again, we are seeking your input before to January 20, 2011 via email to Ms. Lawry at info@mdtc.org

You can rely on MDTC's leadership to continue to seek new and innovative ways to provide value to our members. You can help with this by providing feedback. We welcome your suggestions and appreciate the opportunity to serve you.



Discovery Of Successor Counsel Materials In Defending A Legal Malpractice Case

By: Mark Gilchrist and Charissa Huang, *Smith, Haughey, Rice & Roegge*

Executive Summary

When a client discharges an attorney and hires a new attorney and later sues the first attorney, the question arises whether information in the possession of the substitute attorney can be discovered by the first attorney in the course of defending the malpractice claim, or whether the attorney-client privilege or work product privilege will bar the discovery of such information.

While Michigan's courts have not directly addressed the issue, Michigan's principles that define the limits of the privilege strongly support the conclusion that the cases in other jurisdictions that find an implied waiver of the privilege would be applied in Michigan as well. Thus, where the conduct and decisions of the substitute attorney are relevant to the defense of the first attorney in justifying his or her decisions, they should be discoverable in Michigan's courts..

Mark Gilchrist is a partner in the Grand Rapids office of Smith, Haughey, Rice & Roegge. He specializes in commercial litigation and malpractice defense. His email address is mgilchrist@shrr.com.

Charissa Huang is a law student at Northwestern University School of Law. She was a summer associate at Smith, Haughey, Rice & Roegge and will join the firm upon graduation.

It is well settled in Michigan, and most courts, that a client impliedly waives the attorney-client privilege when the client files a legal malpractice lawsuit against the attorney.[1] In addition, under Michigan law attorney work product is discoverable when a party shows adequate reasons for discovery of relevant, non-privileged facts, or extraordinary justification for discovery of opinions, judgments, and mental processes of counsel.[2]

But consider the following situation: a client files a legal malpractice lawsuit against an attorney alleging violations of the standard of care. However, in the underlying matter the client replaced the accused attorney with successor counsel to represent the client in that same matter. The defendant attorney in the underlying legal malpractice case prepares its defense. Does the client impliedly waive the attorney-client privilege for successor counsel on the matter which also forms the basis of the legal malpractice suit? And is the work product of a successor attorney discoverable?

Michigan courts have yet to answer these questions. Yet, the situation is not uncommon. For attorneys facing legal malpractice suits, the privileged communications and work product of successor counsel from the underlying case may likely include information that implicates the standard of care and proximate cause in the malpractice case.

For example, a successor counsel may have chosen to act or not act in a manner similar to the attorney sued for malpractice. A successor counsel also may have had the opportunity to mitigate a client's damages that are claimed to be a result of the alleged legal malpractice. In such cases, communications that would otherwise be privileged and work product of successor counsel are likely critical to the defense of the legal malpractice claim. For these reasons, the arguments for waiver of attorney-client and work product privileges with respect to a successor attorney are worthy of a closer look.

Attorney-Client Privilege and the Successor Attorney

Although Michigan courts have not squarely addressed the topic, a majority rule on the issue has emerged since the 1975 decision in *Hearn v Rhay*.[3] In that case, a federal court in the state of Washington held that the privilege was impliedly waived when three requirements were met:

(i) assertion of the privilege was the result of some affirmative act, such as filing a suit, by the asserting party;

Does the client impliedly waive the attorney-client privilege for successor counsel on the matter which also forms the basis of the legal malpractice suit?

(ii) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and

(iii) application of the privilege would have denied the opposing party access to information vital to the defense.

Several jurisdictions have either adopted or cited the *Hearn* standard approvingly, including United States Courts of Appeals for the Fifth, Seventh, and Eleventh Circuits, and courts in California, New York, Arizona, Illinois, Wisconsin, Texas, and Florida.[4]

Thus, the *Hearn* standard is employed as the overwhelming majority rule that if the three part test is met, the attorney-client privilege that would otherwise protect communications between a client and successor counsel is waived when such communications are implicated in the legal malpractice suit. This rule accords with the basic premise that a client cannot use the advice of a professional as a sword to prove the client's case against former counsel while at the same time asserting the privilege as a shield to prevent disclosing harmful information.[5]

The absence of Michigan authority specific to the context of successor counsel may not bar the application of implied waiver of privilege to a successor attorney. In Michigan, courts have found implied waiver where there is evidence sufficient to demonstrate an intent to waive or lack of intent to preserve a privilege.[6]

The Michigan Supreme Court has acknowledged a "fairness waiver" which means a privilege can be waived through conduct that would make it unfair for the holder to insist on the privilege thereafter.[7] Michigan courts have also recognized "at issue" waiver where a party impliedly waives his or her privilege by injecting issues into litigation.[8] Thus, Michigan jurisprudence, despite its silence with regard to the majority rule, has not turned a blind eye to the discovery problems that may underlie a situation where otherwise valid privileges impede a party's ability to defend their case.

In the 1992 case of *Howe v Detroit Free Press, Inc.*,[9] the Michigan Supreme Court examined waiver with respect to a statutory privilege for probation reports in a defamation action. The court opined that "fairness requires that the privilege holder surrender the privilege to the extent that it will weaken, in a meaningful way, the defendant's ability to defend."

Finding that the statutory privilege for probation reports is not absolute, the Michigan court stated that "privilege ends at the point where the defendant can show that the plaintiff's civil claim, and the probable defenses thereto, are enmeshed in important evidence that will be unavailable to the defendant if the privilege prevails." In its reasoning, the court established several key principles:

1. A court should begin its analysis with a presumption in favor of preserving the privilege.
2. The burden of establishing a waiver rests on the party seeking discovery.
3. Discovery, if allowed, should be narrowly limited to those portions of the privileged material that bear directly on the issues at hand.
4. The interests to be balanced include:

   (a) The rule favoring broad discovery;

   (b) The importance of the issue to the litigation;

   (c) The impact of disclosure on the rationale for the privilege;

Ultimately, the *Hearn* and *Howe* tests are quite similar. Whether a court applies the *Hearn* or the *Howe* test, the end result remains the same: where a party asserts a privilege which precludes access to information vital to the defense, a party who is sued should have access to otherwise privileged communications which would ordinarily be shielded by attorney-client privilege.

The *Hearn* standard is employed as the overwhelming majority rule that if the three part test is met, the attorney-client privilege that would otherwise protect communications between a client and successor counsel is waived when such communications are implicated in the legal malpractice suit.

The Michigan court stated that "privilege ends at the point where the defendant can show that the plaintiff's civil claim, and the probable defenses thereto, are enmeshed in important evidence that will be unavailable to the defendant if the privilege prevails."

Work product that contains relevant, non-privileged facts requires that a party seeking discovery show "adequate reasons" for discovery, while work product that reveals opinions, judgment, and thought processes of counsel requires that a party show "extraordinary justification" for discovery.

Work Product Privilege and the Successor Attorney

Under Michigan law, work product that contains relevant, non-privileged facts requires that a party seeking discovery show "adequate reasons" for discovery, while work product that reveals opinions, judgment, and thought processes of counsel requires that a party show "extraordinary justification" for discovery.[10] In general, Michigan courts have found that only upon a showing of "substantial need for the material sought plus inability to obtain the information without undue hardship," does the balancing of policy between complete discovery of attorney work product and preservation of attorney-client confidences weigh in favor of a party seeking discovery.[11]

The requirements of substantial need plus a showing of hardship for discovery of attorney work product are not unique to Michigan. In *Pappas v Holloway*,[12] an attorney who sued his former client was counter-claimed for malpractice. In response, the attorney filed third-party complaints against all of the other attorneys who represented the client in the underlying litigation.

In ordering the production of documents that would otherwise have been shielded by work product privilege, the Washington Supreme Court reasoned that "the clearest case for ordering production is when crucial information is in the exclusive control of the opposing party." Regarding the successor attorney's mental processes, thoughts and opinions, the court held that the mental impressions and opinions of attorneys who had represented the client during the underlying action were an "integral part" of the relevant malpractice issue, and that inquiry into the mental impressions of attorneys during the underlying action was "crucial" to the defense of the malpractice case.

The Kentucky Supreme Court has expressed a similar sentiment, opining that "a per se rule that opinion work product may never be discovered . . . creates too great of an impediment to the proper functioning of the legal process."[13] Furthermore, the United States District Court for the Southern District of California found a "substantial need" for disclosure of successor counsel's work product documents where a defendant attorney needed access to materials from an underlying case to defend against the allegations that his alleged negligence was the proximate cause of plaintiff's damages, and where the successor attorney's files were the only source of this information.[14]

These cases highlight recognition by the courts that situations may arise where disclosure of a successor attorney's work product is necessary. Moreover, reading these out-of-state rulings that apply specifically to successor counsel in the underlying matter which forms the basis of the legal malpractice case as supplemental to Michigan law does not change Michigan law.

Michigan's requirements for substantial need and hardship for the disclosure of work product in general do not conflict with the specific proposition that the work product of a successor attorney should be disclosed where the material is integral to the defense of a malpractice suit, and where a defendant attorney in the suit is unable to obtain the information elsewhere without undue hardship.

Consideration of the fundamental legal principles underlying the doctrine of work product disclosure supports to the conclusion that… disclosure of a successor attorney's work product is the only avenue through which an attorney sued for malpractice can defend the malpractice case.

Ultimately, consideration of the fundamental legal principles underlying the doctrine of work product disclosure supports to the conclusion that in certain situations, including the context described above, disclosure of a successor attorney's work product is the only avenue through which an attorney sued for malpractice can defend the malpractice case.

Conclusion

Although Michigan courts have not addressed waiver of attorney-client and work product privileges specifically in regard to successor counsel, the weight of authority across the nation coupled with Michigan law examining these subjects in general suggests that materials of successor counsel are discoverable. Whether we look to the majority rule derived from *Hearn*, or the key principles established by the Michigan Supreme Court in *Howe*, a successor attorney's communications that would otherwise be privileged should be discoverable when a client places the subject of an attorney's representation of him or her at issue by filing a legal malpractice claim.

In addition, a showing of substantial need for successor counsel's materials plus an inability to obtain the information without undue hardship should warrant disclosure of a successor attorney's work product. Thus, while legal malpractice defense practitioners still await a decision from Michigan courts directly on point, the majority rules coupled with Michigan precedent would necessitate discovery of the otherwise privileged documents.

Endnotes

1. See *Everett v Everett*, 319 Mich 475, 483, 29 NW2d 919 (1947); *Leverich v Leverich*, 340 Mich 133, 64 NW2d 567 (1954).
2. *Messenger v Ingham County Prosecutor*, 232 Mich App 633, 639, 591 NW2d 393 (1998).
3. 68 FRD 574, 581 (ED Wash 1975).
4. See *Conkling v Turner,* 883 F2d 431, 434 (5th Cir 1989); *Lorenz v Valley Forge Ins Co,* 815 F2d 1095, 1099 (7th Cir 1987); *GAB Business Servs, Inc v Syndicate* 627, 809 F2d 755, 762 n 11 (11th Cir 1987); *Fox v California Sierra Fin Servs,* 120 FRD 520, 530 n 2 (ND Cal 1988); *In re Consol Litig Concerning Int'l Harvester's Disposition of Wis Steel,* 666 F Supp 1148, 1150-51 (ND Ill 1987); *Research Inst for Medicine & Chemistry, Inc v Wisconsin Alumni Research Found,* 114 FRD 672, 679 (WD Wis 1987); *United States v Hooker Chems & Plastics Corp,* 112 FRD 325, 329 (WDNY 1986); *Standard Chartered Bank PLC v Ayala Int'l Holdings (US), Inc,* 111 FRD 76, 80-81 (SDNY 1986); *United States v Exxon Corp,* 94 FRD 246, 248 (1981); *Russell v Curtin Matheson Scientific, Inc,* 493 F Supp 456, 458 (SD Tex 1980); *Pitney-Bowes, Inc v Mestre,* 86 FRD 444, 447 (SD Fla 1980); *Mountain States Tel & Tel Co v DiFede,* 780 P2d 533, 543-44 (Colo 1989).
5. See *Parler & Wobber v Miles & Stockbridge, PC*, 359 Md 671, 693, 756 A2d 526 (2000).
6. *Co-Jo, Inc v Strand*, 226 Mich App 108, 253, 572 NW2d 251 (1998); *Sterling v Keidan*, 162 Mich App 88, 96, 412 NW2d 255 (1987).
7. *Howe v Detroit Free Press, Inc*, 440 Mich 203, 214 (1992).
8. *City of Farmington Hills v Farmington Hills Police Officers Ass'n*, 79 Mich App 581, 262 NW2d 866 (1977).
9. *Howe*, supra.
10. *Messenger*, supra.
11. *Id* at 638; *Powers v City of Troy*, 28 Mich App 24, 29, 184 NW2d 340 (1970).
12. *Pappas v Holloway*, 114 Wash 2d 198, 787 P2d 30 (1990).
13. *Morrow v Brown, Todd and Heyburn*, 957 SW2d 722, 726 (KY 1997).
14. *Rutgard v Haynes*, 185 FRD 596, 601 (SD Cal 1999).

Data Dumps: The Bane Of E-Discovery

By Sharon D. Nelson, Esq. and John W. Simek

Everyone **knows** you're not supposed to do a data dump in e-discovery. But oh boy, is there a temptation to drown the other side in a case with an avalanche of useless data. Too often, law firms and their clients succumb to this temptation.

In *SEC v. Collins & Aikman Corp*. (S.D.N.Y. 2009), the SEC dumped 1.7 million records (10.6 million pages) on the defendant saying that the defendant could search them for the relevant evidence and asserting that it didn't maintain a document collection relating specifically to the subjects addressed. As the court correctly noted, Rule 34 of the Federal Rules of Civil Procedure prohibit, "simply dumping large quantities of unrequested materials onto the discovering party along with the items actually sought." The court also found that asking the defendant to do the plaintiff's work involving a huge of outlay of time and money constituted "undue hardship by any definition." The Court ordered the SEC to perform its e-discovery duties in accordance with the rules.

More recently, in *Felman Prod. V. Indus. Risk Insurers (*S.D. W.Va. July 23, 2010), Plaintiffs admitted that nearly 30% of their production was irrelevant. As the court noted without humor, the production included "car and camera manuals, personal photographs, and other plainly irrelevant documents, including offensive materials." So the judge took the Plaintiffs to the woodshed. Having produced thousands of attorney-client documents inadvertently in what the judge called a "ridiculous" production, he found that Plaintiff's review and production methodology was not reasonable and that the attorney-client privilege had therefore been waived. As an added bonus for Defendants, the production was so sloppy that there were a couple of real gold nuggets in the now non-privileged attorney-client e-mails. We are quick to note that a software glitch may have caused some of the problems in this case, though proper review should have caught it – and some experts have challenged the judge's math, but clearly this was not a case in which all the rules were followed. The judge's irritation with over-production is consistent with the mood we have seen on the bench.

It is fairly common to hear complaints about federal government data dumps. In *U.S. v. Stevens* (D.C.C., Defendant's Motion to Compel Discovery, Sep. 2, 2008), the Defendant complained that the government had produced thousands of documents in an unusable format that "appeared to be an undifferentiated mass, with no discernible beginning or end of any given document." As courts tackle this issue, it is becoming clear that litigants must label the documents produced in response to requested subject areas. Data must be organized, searchable and indexed. Obfuscation is not acceptable production.

In criminal law, attorneys frequently report to us that the prosecution will do a data dump on defense counsel, effectively burying any exculpatory information in a sea of data. Several courts have noted that a deliberate data dump, done for the pur-

Sharon D. Nelson, Esq. and John W. Simek are the President and Vice President of Sensei Enterprises, Inc., a legal technology, information security and computer forensics firm based in Fairfax, VA. 703-359-0700 (phone) www.senseient.com

In criminal law, attorneys frequently report to us that the prosecution will do a data dump on defense counsel, effectively burying any exculpatory information in a sea of data.

pose of avoiding adherence to *Brady* obligations, would not be permitted. This is an area ripe for clarification, as many defense lawyers have reported that prosecutors are "opening their files" to the defense rather than specifically providing exculpatory information.

Most of the buzz is in the civil world where it is widely alleged that large law firms use data dumps to overwhelm small law firms. And perhaps so. But the real question is: How do we prevent this abuse of the e-discovery process?

For one thing, the Meet and Confer happens way too late. That's why everyone is turning to "early case assessment" which has become a buzz phrase. The minute you know you're involved in litigation (or likely to be), you're under a litigation hold. Now you have to decide what to preserve, preservation being broader than production. Already you need to do three things:

1. Retain an e-evidence expert (we wish they would, but often they hire an expert much later, when everything is now an emergency and cost-saving advice is coming very late in the game, after way too much has been spent already).

2. Talk to your opponent and start getting consensus about the scope of preservation on both sides (which means the exchange of a lot of info)

3. Within the litigation hold team, begin early case assessment.

Who are your key players and what sources of data do they have (workstations, laptops, home machines, smartphones, voicemail, flash drives, etc?) What other data may be relevant? Do third parties hold data? What's the likely volume of data that will be preserved? How can it be winnowed down?

It is never too early to talk to the other side about the format of data to be produced or to begin talking about search methodologies, although that often occurs at the Meet and Confer. From early case assessment through the Meet and Confer, the ways to reduce data volume should be at the forefront.

Native format is both cheaper and the "best evidence." You often need searchable PDF (or TIFF with load files) in order to redact/Bates stamp. Requesting a "mixed" production (primarily native) is perfectly acceptable. You can agree on rolling productions if there's a lot of evidence.

As for the snake pit that is "searching", we often see attorneys trying to construct searches themselves and the results are always deplorable. As judges have said, this is an area "where angels fear to tread." In order to keep costs down, you need search methodologies constructed by searching experts. And, even then, studies have shown that they will retrieve only 20-22% of the relevant data on the first pass, no matter what methodology they use (keywords or concept searching). You therefore "learn" from the first pass and then do iterative searches. This is the appropriate approach for the producing party, which will comply with both the letter and the spirit of the federal rules.

Clearly, this process would be for a larger case, and less will done in a smaller case because proportionality (every judge's darling these days) will come into play, as well it should. The smaller the case, the less e-discovery.

The larger the haystack, the harder it is to find the needle. This is the danger of data dumps. And very few recipients are sophisticated enough to find the needle in a data dump. Searching will invariably result in a lot of "false positives," all of which need to be reviewed for relevance and privilege. Attorney review is ALWAYS the most expensive part (by a huge factor) in e-discovery. This is another reason for getting the original volume of data to be searched reduced. 20-22% of 10 GBs will result in much less to be reviewed than 20-22% of a terabyte. And that's the other part of the equation. In the old days (sadly, only five years ago) we were rarely dealing with anything more than gigabytes. Now we deal in terabytes on a regular basis and are anticipating petabyes of data in the near future. The universe of ESI expands daily.

Part of the solution is to have counsel cooperate. This may be wishful thinking, no matter how many judges preach cooperation. More often than not, one

Searching will invariably result in a lot of "false positives," all of which need to be reviewed for relevance and privilege.

side or both are on the warpath and have arrows drawn on a regular basis. Most of the time, if they let their experts talk to one another, the experts will agree on how to proceed (assuming competent experts on both side who want to do a good job for their clients AND hold the costs down). A regular problem is that EDD companies and lawyers both

make more money if the volume of responsive data remains large. Processing (by volume) charges and attorney review fees are much higher. So when we see sloppy work or advice, is it due to incompetence or greed? Our anecdotal sense from being involved in so many cases (nothing to back this up with other than our now finely-honed radar) is that it is about 50-50.

All good experts will tell you that they have tried in many cases to steer the client down the right, and cost-efficient path, only to have their advice ignored. It can be very trying - and you worry that the judge in the case will never know that you tried to get the client to do the "right" and cost-efficient thing only to be blown off for reasons that the expert generally can only guess at. When this happens to us, our staff has clear instructions to document the advice given, so that nothing will come back to bite us.

Data dumps are just another way to "hide the ball" which judges uniformly hate. Counsel would be well-advised to avoid this practice, but as the old saying goes, "The easiest way to get rid of temptation is to succumb to it." We predict that sanctions for data dumps are going to spike in the very near future – hopefully, that will impress upon attorneys that courts intend to curb data dumps and punish those who do not honorably discharge their e-discovery duties.

JOIN AN MDTC SECTION

At right is a list of the sections, with the names of their chairpersons. All MDTC members are invited to join one or more sections. If you are interested in joining a section, just contact the section chair.

Every section has a discussion list so that the members can discuss issues that they have in common. See the email address below each section's name to contact all the members in that area of practice. The discussion list can help facilitate discussion among section members and has the potential to become a great resource for you in your practice.

Common uses for the discussion lists include:

- *Finding and recommending experts,*
- *Exchanging useful articles or documents,*
- *Sharing tips and case strategies,*
- *Staying abreast of legal issues.*

Appellate Practice ***appellate@mdtc.org***	Beth A. Wittman bethwittman@kitch.com Matthew T. Nelson mnelson@wnj.com
Labor and Employment ***labor@mdtc.org***	Barbara E. Buchanan beb@kellerthoma.com
Professional Liability & Health Care ***profliab@mdtc.org***	Terence P. Durkin terence.durkin@kitch.com
Young Lawyers ***younglaw@mdtc.org***	David L. Campbell david.campbell@bowmanandbrooke.com Robert Paul Vance pvance@ccglawyers.com
Insurance Law ***insurance@mdtc.org***	Hal O. Carroll hcarroll@VGpcLAW.com
Municipal and Government Liability ***munigov@mdtc.org***	Kari Boylan kboylan@co.wayne.mi.us
Law Practice Management ***pracmgt@mdtc.org***	Thaddeus E. Morgan tmorgan@fraserlawfirm.com
Trial Practice ***trialprac@mdtc.org***	David Ottenwess dottenwess@ottenwesslaw.com
General Liability ***genliab@mdtc.org***	David Couch dcouch@garanlucow.com
Commercial Litigation ***comlit@mdtc.org***	Edward Perdue eperdue@dickinson-wright.com

Editor's Note: *This article discusses issues that were addressed in a teleconference, "Fraud Prevention and Investigation Issues," presented on September 16, 2010 by MDTC's Commercial Litigation Section.*

Responding to Workplace Embezzlement and Asset Misappropriation –

A Legal and Forensic Accounting Guide

By: Edward P. Perdue, and Christina K. McDonald, Dickinson Wright PLLC

The authors acknowledge and thank Jeffrey L. Johnston and Robert J. Wagman, Jr. for their expertise and input with this article.

Executive Summary

Workplace fraud is a common occurrence and employers must exercise care both to prevent it and to properly investigate it when it does happen. The most important prevention tool is to set a "tone at the top" that unethical conduct will not be tolerated and that encourages employees to report improper conduct.

When fraud occurs, the company should move quickly, under the supervision of an investigating attorney, to preserve the evidence relating to the fraud, and may also want to involve a forensic accountant in the investigation. The investigation must be conducted in such a way as to avoid impairing coverage under any applicable insurance policies. If the fraud is financial the company should also retain an independent examiner to conduct the investigation, because a government investigation is almost certain to follow.

Edward Perdue is a partner in the Grand Rapids office of Dickinson Wright. He focuses his practice on sales disputes and also has extensive experience with commercial fraud and embezzlement cases. His email address is eperdue@dickinson-wright.com.

Christina McDonald is an associate in the Grand Rapids office of Dickinson Wright. Her practice areas include commercial and business litigation with a focus on real estate and construction. Her email address is cmcdonald@dickinson-wright.com.

Introduction

As the national economy continues to suffer, business owners have taken drastic actions to keep their doors open; job cuts, salary and benefit reductions, and cost controls are only a few of the options business owners must consider to succeed in the current economic climate. These conditions create an environment conducive to increased employee theft and fraud in the workplace. There is a basic explanation for this – employees have lost hours and benefits (and their spouses have lost jobs) and they are under financial pressure. This creates strong incentives for employees to make up these losses by taking cash and other assets from their employers.

The typical business organization loses 5% of its annual revenue to employee fraud. That equates to roughly $2.9 trillion per year on a global basis.[1] Asset misappropriation is the most common type of workplace fraud, making up about 90% of cases.[2] According to one source, a shocking 75% (yes, three out of every four employees) of the global workforce will commit workplace fraud at least once, and of those who do steal from their employers, half will steal repeatedly.[3]

The term "employee fraud" encompasses two[4] basic types of theft committed by employees: financial statement fraud and asset misappropriation.[5] In the post-Enron era, financial fraud (so-called "cooking the books" or corruption) spurred the implementation of new reporting and financial compliance requirements and other prevention measures. Asset misappropriation, on the other hand, occurs when an employee steals a company's cash or non-cash assets for the employee's own personal use. While asset misappropriation is less costly per instance than financial fraud,[6] the sheer number of instances of asset misappropriation makes it severely damaging to business organizations of all sizes.

A business is at the greatest risk of employee fraud when three conditions are present: motivation, opportunity, and rationalization.[7] When employers are forced to make the workplace a less pleasant place because of economic constraints, employees are faced with the motivation and rationalization needed to commit workplace theft. Given the opportunity, a jilted employee is more likely than not to commit fraud. Small firms and organizations are the most susceptible to workplace fraud because the opportunity to commit fraud is more prevalent.[8] No matter the size of the organization, employee fraud occurs at all levels—from the CEO to the hourly employee. Losses are generally commensurate with the employee's level of pay and responsibility.

While asset misappropriation is less costly per instance than financial fraud, the sheer number of instances of asset misappropriation makes it severely damaging to business organizations of all sizes.

In this article, we address how to deal with workplace fraud when it happens: how to investigate instances of employee fraud and how to prevent it from occurring in the first place.

Prevention

Benjamin Franklin coined the famous phrase "an ounce of prevention is worth a pound of cure."[9] That phrase absolutely rings true when it comes to preventing employee theft. By spending time and resources to prevent fraud up front, businesses can avoid huge future losses. Forensic accountants can help implement specific measures to prevent misappropriation and fraud by examining a business's processes and procedures (*e.g.*, conduct periodic inventories of high-value items frequently, investigate financial discrepancies, invest in software security, and the like), but perhaps the most important measure that can be taken to prevent occupational fraud is the "tone at the top" set by business directors and managers in the workplace.

When management promotes ethical awareness at the workplace and deals with instances of fraud and misconduct quickly and directly, employees will know that misappropriation of corporate assets is not tolerated and will be encouraged to report instances of suspected fraudulent conduct. In fact, the most common way that employee fraud is detected and discovered is through reports by co-employees (49.2% of discovered thefts are uncovered through employee tips).[10] Hotlines, management review, internal and external audits, and communication with customers and vendors are all good ways to detect and prevent fraud from occurring.

Another way to minimize the effect of workplace fraud is to be aware of common indications that employee theft may be occurring and practicing early intervention. Signs that an employee may be committing fraud include: living beyond their means; experiencing known financial difficulties; unusual control issues including an unwillingness to share duties and working nights and weekends; not allowing co-employees to process work for them; exhibiting unusually close associations with vendors or customers; suffering from severe divorce or other family problems; and having a bad attitude toward their supervisors and management.[11] In addition to implementing procedural safeguards, advising businesses to watch out for these signs may help to minimize employee theft.

Employee theft will occur in almost every business. The ability of a business to prevent and detect fraud is greatly enhanced when the company's principals provide active oversight. At the most fundamental level, a small business owner should receive unopened bank statements so he or she can review them for suspicious transactions. Moreover, the principals need to ensure that they understand the company's revenue and expense streams so they have the ability to detect unusual trends. Business owners should be advised to carry adequate theft protection insurance and to consult with their accountants on a regular basis to implement internal mechanisms designed to avoid fraud.

Perhaps the most important measure that can be taken to prevent occupational fraud is the "tone at the top" set by business directors and managers in the workplace.

Preserving the evidence of potential employee theft is a critical first step in any investigation.

Investigation

When a business owner or manager learns that one of her employees may be stealing from the business, one of her first calls made should be to the business's attorney. When an attorney becomes involved after an asset misappropriation allegation is made, he should ensure that the business properly preserves all evidence, prepares for and assists in the investigation, and knows when to contact the appropriate authorities.

Preserving the Evidence

Preserving the evidence of potential employee theft is a critical first step in any investigation. The investigating attorney should work directly with the accused employee's supervisor or the business's management team to determine who has control of the information sources that will be examined during the investigation. The second step is to determine who within the business is in the best position to be in control of the investigation internally; this requires making a list of all persons with administrative control over documents, hardware, software, video monitoring, e-mail communications, and telephone records. An employee's supervisor may be in control of the investigation, but should not investigate the claim if the supervisor detected or discovered the theft (i.e. if the supervisor is also the accusing party).

Once the appropriate investigation team is assembled, it is essential to implement a system for preserving documents, records, and internal business processes. This may require moving files for safekeeping, locking e-mail accounts and electronic document storage files, and the like. Every internal process that could potentially be affected by the theft should be documented for a more in-depth examination to be conducted after all evidence has been preserved. Businesses must quickly preserve evidence to maintain the integrity of the evidence, prevent the destruction of evidence, and to prepare for further investigation to follow as soon after the theft as possible.

After vital information has been preserved, the attorney should contact the business's theft insurance agency or insurance representative. No action should be taken in the investigation until it is clear that the company's rights to receive reimbursement under any applicable insurance policy will be preserved. Often agencies require specific procedures for dealing with instances of employee theft, and counsel should carefully review the notice and reporting procedures set forth in all applicable policies.

Next, the investigating attorney should identify potential witnesses. The investigating attorney and internal investigator should speak with the manager who is directly impacted by the loss as soon as possible. The investigating attorney should stress the need for privacy and confidentiality during the early stages of the investigation. The manager should be able to help identify the employees at every level of the company who had access and an opportunity to commit the theft as well as those employees who may have known about the theft but did not report it. Witnesses who may be unavailable later or who are at risk of forgetting important information should be interviewed as soon as possible.

If a particular employee is targeted during the preparation phase, it may be advisable to put the accused employee on administrative leave during the investigation. This further ensures that all vital documents and evidence, including electronic files, will be preserved. It also helps maintain employee morale and prevents unnecessary and undesirable social effects on the accused.

Businesses must quickly preserve evidence to maintain the integrity of the evidence, prevent the destruction of evidence, and to prepare for further investigation to follow as soon after the theft as possible.

Preparing for the Investigation

After the necessary information has been preserved, the investigating attorney should prepare for the investigation. First, a reporting relationship with the company needs to be established. If the attorney is conducting the investigation, the attorney needs to know to whom information should be reported. The investigating team member may be the contact, but often it is advisable to have a special investigation committee established to handle internal fraud investigations. If financial fraud is suspected, the company or board of directors should immediately retain an independent examiner to conduct the investigation and prepare for the government investigation, which will almost certainly follow.

If financial fraud is suspected, the company or board of directors should immediately retain an independent examiner to conduct the investigation and prepare for the government investigation, which will almost certainly follow.

Depending on the nature of the fraud, the attorney should consider whether to call the company's Certified Professional Accountant ("CPA") or an outside forensic accounting specialist to assist with the investigation. The company's CPA could potentially have exposure even though an annual financial statement audit or review is not primarily designed to detect fraud. Moreover, traditional CPAs do not necessarily possess the analytical and forensic skills required to perform a proper fraud investigation. These skills involve forensic procedures to systematically gather evidentiary data through the use of recognized investigation techniques that can be presented in a court of law, if necessary. Depending upon the circumstances of the asset misappropriation, it may also be appropriate to hire an outside investigator or even an undercover investigator.

An investigating attorney must be involved in preparing for the investigation of the asset misappropriation. First, attorney involvement affords a corporate client the protections of the attorney-client privilege. Second, the attorney is in the best position to map out the investigation process using the information that has been preserved. Before information is lost or handled, the investigating attorney should review the evidence the client has gathered at the close of the preparation phase. Without a plan, potential witnesses and evidence can be lost, obstructing the company's potential recovery.

After preparing a plan, an investigating attorney will conduct interviews and, if the situation warrants, contact the appropriate law enforcement officials.

Employee Interviews

Employee interviews are critical when investigating workplace theft. However,

employee interviews come with their own set of stumbling blocks and should not be conducted without an understanding of applicable employment law principles.

All employees have a reasonable expectation of privacy in the workplace. In an employment setting, what constitutes a "reasonable" expectation depends upon the workplace environment and the policies in place in an employee handbook or elsewhere. Invasion of an employee's reasonable expectation of privacy can leave the company liable to a civil lawsuit. For example, if an employee has a locker at the workplace and supplies his or her own lock, that employee has a greater expectation of privacy with respect to the contents of the locker than would an employee whose lock and combination are supplied by the employer. In a public employment setting in which an employee has a reasonable expectation of privacy in their work area, the internal investigating team should contact law enforcement officials and obtain a search warrant prior to making a physical investigation of the employee's work space. Privacy factors should be assessed anytime a company wants to make a physical investigation of the employee or his or her work area.

When conducting a sit-down interview of an employee, an attorney, especially in-house counsel, should always warn the employee that the company does not, and in-house counsel cannot, represent individual employees. The investigating attorney may choose to advise the employee who is being investigated for allegations of theft of the right to retain his or her own counsel.

In union work settings, it is especially important to adhere to employee rights when conducting an interview. Collective bargaining agreement procedures must be followed. Union members are often allowed to have another union member or co-employee present during any interview at which evidence may be discovered that could potentially lead to a reprimand or termination. Even in non-union work settings, it may be advisable to have a co-employee present during any informal investigations. If a second employee is not present (which may be a more prudent option in some circumstances), it may be advisable to have a paralegal, second attorney, or other member of the investigating team present. The presence of paralegals and multiple attorneys serves to protect privilege.

Employee interviews come with their own set of stumbling blocks and should not be conducted without an understanding of applicable employment law principles.

An attorney conducting an interview should also be mindful not to create an intimidating situation that could lead an employee to feel trapped. Allegations of false imprisonment can be avoided by having a co-employee present during the investigation, having the investigation in an open-door setting, and advising the employee that he or she is free to terminate the interview at any point. Again, the employee should always be advised that they have a right to have legal counsel present during an investigation interview.

At the close of the interview, it is recommended to obtain the employee's signed, written statement if at all possible. The signed statement has the advantage of being one of the statements made closest in time to the actual incident. It serves as a record in light of relevant questions. However, it's important to assess the likelihood that the witness' statement may be discoverable in any future litigation. If there's a possibility that the company may also be accused of fraud, obtaining a witness statement later in time (after more facts have been developed) may be a safer course of conduct. Generally, fact witness statements are extremely helpful during any potential prosecution or reprimand of the offending employee.

Even in non-union work settings, it may be advisable to have a co-employee present during any informal investigations.

Follow-Up

When an employee investigation reveals that a particular employee has misappropriated company assets, the company must decide how handle the theft. A company could issue an internal reprimand, file a civil suit for damages, or contact law enforcement officials to conduct a criminal investigation and prosecution.

Internal employee reprimands must be consistent with stated company policies and cannot violate any applicable laws. Depending on the severity of the misappropriation, the company may choose to terminate the employee. A company may also file a civil suit for damages, including restitution, of the amounts stolen.

Involving law enforcement officials can also be a good way to handle asset misappropriation. Law enforcement officials can be contacted at any time to take over an investigation, but it may be helpful to wait and present law enforcement officials with evidence of embezzlement so that they can proceed appropriately. As a part of any criminal investigation, prosecution and sentencing, the company should seek restitution of the amounts stolen, including in any plea bargains that are offered to an accused employee.

The company may also want to consider creating an internal press release. Corporate action to thwart and handle instances of employee theft can serve as

an effective deterrent. Employees who know their employer is serious about handling fraud are less likely to commit it.

After any instance of employee fraud, the company should consult with their accountant on maintaining and improving best practices in the future to avoid more instances of fraud and misconduct.

Conclusion

The best way to handle employee theft in the workplace is to prevent its occurrence. When it does occur, enlisting the help of a forensic accountant and an attorney can help a company navigate through the investigation and punishment of an offending employee and help obviate the opportunity for a second occurrence.

Endnotes

1. Association of Certified Fraud Examiners, *2010 Report to the Nations on Occupational Fraud and Abuse* (2010), *available at* http://www.acfe.com/rttn/rttn-2010.pdf [hereinafter "*Report*"].
2. *Id*. at 4.
3. *Id*.
4. There are other types of workplace fraud, but those (including corporate corruption) are beyond the purview of this article.
5. *Report* at 4.
6. The median loss per instance of asset misappropriation is $135,000. *See id*.
7. Sometimes the formula is delineated as pressure, opportunity, and rationalization. *See, e.g., Navigating the Minefield in the Economic Downturn: Financial and Legal Lessons from the Trenches*, Metropolitan Corporate Counsel (Northeast Ed., Jan. 2009).
8. *Report*, at 5.
9. http://www.ushistory.org/franklin/quotable/quote67.htm.
10. *Employee Theft: 10 Strategies to Help You Thwart Fraud Schemes*, 10 Institute of Management & Administration: Security Director's Report (Oct. 2008)
11. *Report* at 73.

The New York VideoConference Center

WON'T TAKE YOU FOR A RIDE

Connect with over 10,000 cities around the world

We are available 24/7

NYVC

NEW YORK
VIDEOCONFERENCE CENTER
39 WEST 37TH STREET
NEW YORK, NY 10018

1-888-666-1776
1-212-840-7700
1-877-FAX-FINK

Contact: Jane Tremper, Coordinator
jane@nyvideoconference.com
www.nyvideoconference.com

We Are A Proud Corporate Sponsor

Fink & Carney WORLDWIDE®

MDTC Insurance Law Section

The Case Of The Multiple Indemnitors

By: Hal O. Carroll

Executive Summary

When two or more indemnitors, typically subcontractors, owe a contractual indemnity obligation to the general contractor or owner, they sometimes try to outmaneuver each other, on the principle that if one accepts its obligation to provide indemnity, the others are relieved of their obligation because one the indemnitee is ensured of receiving indemnity, it will thereafter not suffer a loss. In this situation an indemnitor that accepts its obligation can protect itself by means of a crossclaim or third party claim based on the theory of equitable subrogation. Equitable subrogation is most commonly applied as between insurers, but also applies to indemnity claims.

Hal Carroll is the chair of MDTC's Insurance Section and serves on MDTC's board of directors. He is also a founder and the first chairperson of the Insurance and Indemnity Law Section of the State Bar of Michigan. Mr. Carroll represents both insureds and insurers on matters of coverage, and consults with law firms on coverage issues. His email address is hcarroll@VGpcLAW.com.

Indemnity law can be a little arcane and confusing. Even attorneys who are comfortable with insurance coverage can find indemnity law difficult to deal with. For starters, there are three kinds of indemnity, and each proceeds from principles that are completely distinct from the other two.

Common law indemnity is an equitable concept, much like contribution. But contribution is governed by statute while common law indemnity is still a creature of the common law. The underlying principle of common law indemnity is that a person who has been made liable because of the negligence of another should be able to look to the negligent person to reimburse what the vicariously liable defendant had to pay.

Implied contractual indemnity is completely different. The official statement is:

> An implied contract to indemnify arises only if there is a "special relationship between the parties or a course of conduct whereby one party undertakes to perform a certain service and impliedly assures indemnification."[1]

But if you look at the cases where implied contractual indemnity has been applied, it is limited to a very narrow set of situations. A manufacturer buys a piece of equipment and tells the seller to leave off the safety device because the manufacturer-purchaser will take separate steps (such as positioning it in an alcove) to prevent injury. The seller leaves off the part, the purchaser does not take the promised steps, the employee gets injured, the employee sues the seller, and the seller gets indemnity from the purchaser. That's fair, although it might be better to describe the theory as promissory estoppel, and no one knows what the phrase "special relationship" means.

The third form of indemnity is the one that comes up most frequently. This is express contractual indemnity. Here, of course, the contract language plays a central part, and the client could do a lot to protect itself by carefully choosing the language. But they almost never do, or don't have a choice, so lawyers who practice in this area are kept busy trying to make sense of the contract language.

But there is one situation that sometimes causes confusion. This is the case of the two co-indemnitors. There is a general contractor who has two (or more) subcontractors. The general contractor uses a standard contract, so each subcontractor's duty to indemnify is the same as the others. The general tenders the defense and indemnity to all three. Subcontractor A reads the clause, concludes that it owes indemnity, and acknowledges its obligation.

Subcontractors B and C then say, in effect: "We don't owe you any indemnity, because you are only entitled to indemnity if you suffer a loss, and since Subcontractor A has agreed to indemnify you, you will not a suffer a loss, so our indemnity obligation cannot be triggered."

Does this sound like a strange argument? It ought to, for more than one reason,

yet the argument has been made and continues to be made from time to time. One problem with the argument is that it is illogical. If the language of the indemnity clauses is identical, the result cannot be to impose the obligation on one indemnitor and excuse the obligation of the others.

Another problem with the argument is fairness, which does actually play a role in indemnity law, at least sometimes. It is not fair to one indemnitor that by honoring its contract obligation, it puts itself at a disadvantage.

A third problem is the practical one. If this were the rule, then each subcontractor, knowing that the act of a naïve and honest co-indemnitor would relieve it of its obligation to perform the contract, would try to duck out. The race for the exits would be more than a little unseemly.

This third problem leads to a fourth, which is an ethical problem. What is the lawyer to do, under such a rule? If the lawyer advises the client to perform its contract obligation, then the lawyer is violating the first principle of "non nocere," do no harm. So to protect the client's interest, the lawyer would advise the client to duck out.

Any one of these problems should be sufficient, without more, to dissuade an attorney from making this argument, and even cause embarrassment. But the argument keeps popping up from time to time. Perhaps it is because it is a simple one that looks like a logical syllogism: (1) indemnity is for a loss; (2) if the indemnitee gets indemnity from someone else, it has suffered no loss; (3) therefore my client is released from its contract.

Perhaps, as the preceding syllogism demonstrates, so much of what passes for legal analysis is mere wordplay. The problem of confusing words with analysis is not new, but the use of computer-based research may exacerbate the problem. When research consists of searching for the right combinations of words, it can become second nature to confuse the phrases with the actual law. This is what has been called "phrase mining." The goal here is not to come up with a comprehensive analysis of how certain sets of facts have led to certain results, but to find a fetching phrase and make it the linchpin of the argument.

In any event, the argument that the act of one co-indemnitor absolves the others has been made and still comes up from time to time. The short answer is one that has long been accepted in the context of competing insurance policies: equitable subrogation. The leading case, in the context of insurance, is *Commercial Union v Medical Protective Co.*[2] The Supreme Court stated that "Equitable subrogation is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other." *Id.* at 117.

Equitable subrogation is a flexible, elastic doctrine of equity.[3] Its application is to be determined on a case-by-case basis.[4] For example, it has been applied to allow a no-fault insurance company to collect worker's compensation benefits from a self-insured employer,[5] to allow a surety to assert a contractor's right to payment,[6] , and to allow a security company's insurance carrier to assert a legal malpractice claim against the security company's attorney.[7] and in other situations. "The mere fact that the doctrine of subrogation has not been previously invoked in a particular situation is not a prima facie bar to its applicability."[8]

The Court of Appeals has said, of equitable subrogation between insurers,

> Where two or more insurance companies are in the same tier of priority—for example, both are primarily liable or both contain irreconcilable escape clauses--an insured's loss is to be apportioned or prorated among the insurance companies on the basis of policy limits.[9]

The Court of Appeals went on to hold that the same applies by analogy to con-indemnitors.

> By analogy, it follows that where [two con-indemnitors] signed identical indemnity provisions, both are equally liable to indemnify [the indemnite] as provided in the agreements, and the cost of doing so should be shared equally by both.[10]

The same concept applies in cases involving indemnity contracts because "[t]he contract of indemnity is one of insurance."[11] Equitable subrogation, being equitable in nature, is a broad concept. It has been applied to allow an insurer to sue an attorney for malpractice,[12] and by an insurer to collect mediation sanctions from an opposite party.[13]

The co-indemnitor who is seeking to escape its obligation may invoke procedural defenses. If the indemnitee has sued the absconding indemnitor, but the indemnitor that honored its obligation never filed a crossclaim, would this bar equitable subrogation? The Court of Appeals has held that it does not. The essence of equitable subrogation is that it transfers the right that the indemnitee against the defaulting indemnitor to the indemnitor that honored its obligation, and the court rules deal with the transfers of interest that can occur during multiparty litigation.

> If there is a change or transfer of interest, the action may be continued by or against the original party in his or her original capacity, unless the court, on motion supported by affidavit, directs that the person to whom the interest is transferred be substituted for or joined with the original party, or directs that the original party be made a party in another capacity.[14]

In short the court can order a formal substitution of parties if it desires but is not required to do so.

The defaulting indemnitor also loses the ability to question the fault that was allocated to the indemnitee.[15] The indemnitor that believes the clause does not require it to indemnify the indemnitee can participate in the defense of the liability case under a reservation of rights. If it chooses, instead, simply to walk away, it cannot come back later and relitigate the loss that it is required to indemnify. "[A]n indemnitor is bound by a judgment against its indemnitee if it has notice and an opportunity to participate."[16]

Endnotes

1. *Skinner v D-M-E Corporation,* 124 Mich App 580, 585; 335 NW2d 90 585 (1983), quoting from *Palomba v City of East Detroit,* 112 Mich App 209, 217; 35 NW2d 898 (1982).
2. 426 Mich 109; 393 NW2d 479 (1986).
3. *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999).
4. *Id.*
5. *Auto-Owners Ins Co v Amoco Production Co*, 468 Mich 53, 55; 658 NW2d 460 (2003)
6. *Old Kent Bank-Southeast v Detroit*, 178 Mich. App. 416, 418, 420-421; 444 N.W.2d 162 (1989).
7. *Atlanta Int'l Ins Co v Bell*, 438 Mich 512, 521-524; 475 NW2d 294 (1991).
8. *Hartford Accident & Indemnity Co*, *supra* at 216.
9. *Eller v Metro Industrial Contracting, Inc,* 261 Mich App 569, 572; 683 NW2d 242 (2004).
10. *Id*.
11. *Moore v Capital National Bank,* 274 Mich 56, 61; 264 NW 288 (1936).
12. *Atlanta International Insurance Co v Bell,* 438 Mich 512; 475 NW2d 294 (1991).
13. *Neal v Neal,* 219 Mich App 490; 557 NW2d 133 (1996).
14. MCR 2.202(B).
15. *Eller, supra,* at 575.
16. *Eller, supra* at 575.

New Young Lawyer Section Chair

R. Paul Vance
Cline Cline & Griffin, PC
Flint Office
1000 Mott Foundation Bldg.
503 S. Saginaw Street
Flint, MI 48502
Tel: (810) 232-3141
Fax: (810) 232-1079
pvance@ccglawyers.com

Mr. Vance was born in Flint, Michigan, April 29, 1978. He is a 2001 graduate of Michigan State University and a 2005 graduate of the Michigan State University College of Law. Mr. Vance maintains memberships in the Genesee County Bar Association, State Bar of Michigan, Michigan Defense Trial Counsel, Sports Lawyers Association, and is a certified NFLPA Contract Advisor.

Mr. Vance is a Player Agent for Major League Soccer and the United Soccer League; Appointed, Flint Community Schools Athletic (Ad Hoc Committee, 2009); President, Ancient Order of Hibernians, Genesee County Division (2009 – present); Speaker, "Risk Management in High School Sports", Vehicle City Soccer Officials Association (2007); Law Clerk to Honorable Richard B. Yuille, Genesee County Circuit Court (2005-2006); Recipient, Jurisprudence Achievement Award, Labor Arbitration, Michigan State University College of Law (2005).

Mr. Vance maintains a general practice, including medical malpractice defense, insurance defense, personal injury law, labor and employment, contracts, criminal law, and sports and entertainment law.

Young Lawyers Section
The Young Lawyers Section is devoted to issues and concerns of the young defense attorneys comprised of attorneys with seven years and less experience in the specialty of defending civil litigation.The mission of the Young Lawyers Section is:

1. To increase membership of young defense lawyers;
2. To educate young defense lawyers through committee sponsored seminars and publications;
3. To help develop comrade and networking opportunities between and among young defense lawyers;
4. To assist in the development of speaking, writing, and leadership skills by recruiting young lawyers as authors of articles and active participants in the organization.

Young Lawyers Series

III. BUILDING THE CASE — DISCOVERY

By Scott S. Holmes, *Foley & Mansfield, P.L.L.P.*

This article is the third installment in our series providing an introduction to the basics of litigation from a defense perspective. In the first article, we discussed pleading and responding to a cause of action. In the second article, we offered tips for raising cross claims, third party claims, and pursuing indemnity. This article focuses on the basics of interrogatories and deposition practice.

I. INTERROGATORIES

A. General Pointers

1. Remember who you represent! When answering interrogatories, draft your response in a manner which makes your client comfortable to sign his or her name to it. It will save valuable time and costs. Also, make sure you have written confirmation from the signer that the answers are approved for filing and serving. This will protect the client from undesirable admissions and protect you from undesirable (is there any other kind?) malpractice suits.

2. Remember your audience! When answering interrogatories, ask yourself if you would be comfortable having your response enlarged and high-lighted for a judge, jury, or witness to read at the time of trial.

3. Remember your position! Never answer a question for which a privilege is asserted. The privilege is then waived.

4. Remember the Alamo! If the time comes where you are cornered and must take a stand against a motion to compel, you should be confident that the responses you provided are truthful and complete.

B. Out of State Certification of Documents

The issue of verification of out of state notarial acts is of particular importance to the medical malpractice field, but serves as a caution to all areas of practice. In *Apsey v Memorial Hospital* 26 Mich App 666 (2005), the Michigan Court of Appeals ruled that affidavits of merit acknowledged by an out-of-state notary must be certified consistent with MCL 600.2102. The requirement hinges on the interpretation of the language covering affidavits which are "received in judicial proceedings," as described in the statute. Despite argument that the language implicates only those materials which will be offered into evidence, the court ruled that the language is properly interpreted as including any materials, "acknowledged and considered by the court, not necessarily read into evidence." *Apsey* at 674.

Of great concern now is to what extent this requirement now applies. Although specifically addressing affidavits of merit in medical malpractice cases, the *Apsey* court indicated that the certification requirement applies generally to all notarial acts. *Id*. at 676. Practitioners would be wise to consider this when filing any out of state notarial document, including answers to interrogatories. Such procedural requirements are easily overlooked and may result in increased costs or outright dismissal.

Scott Holmes is an attorney in the Detroit office of Foley & Mansfield, PLLP where he focuses his practice on commercial litigation, construction litigation, employment law, insurance defense and products liability defense. His email address issholmes@foleymansfield.com

C. Objections to Requests for Production and Privileges

In a deposition scenario, if a party wishes to protect specific information that is believed to be privileged, that privilege must be asserted at the time of the deposition or it is lost forever. MCR 2.306(D)(4). As a result, knowing what privileges may be relevant to your case is essential when preparing for and participating in a deposition. When reviewing key information or weaknesses in your case, consider the type of information it is and the means by which it was created. Ask yourself if it falls under any privileges and be prepared to explain the basis for your assertion of that privilege, both to opposing counsel and the presiding judge.

D. Motions to Compel

Do not use the courts as a means of negotiating discovery requests. Many attorneys fall into the habit of issuing overbroad discovery requests or resisting reasonable discovery requests before actually considering whether the information should be produced. Judges' dockets are overwhelmingly filled with various discovery related disputes which are usually resolved by the parties shortly before the hearing date or immediately prior to the actual hearing. If the issue can be resolved by the parties prior to the hearing, then it can be resolved without filing a motion with the court, and with considerable savings to your calendar and client.

II. DEPOSITIONS

A. Preparing

Deposition testimony can make or break your case at trial. As a result, it is essential to be prepared. "Prepping" the witness is an often over-looked and rushed part of the deposition process. Prepping is important to keep your witness informed and to put him or her at ease before deposition time. Although prepping your witness is essential to further your factual theories and trial strategy, it is also an important part of the attorney-client relationship. Let your witness know exactly what to do and expect by telling her all the seemingly "minor" details such as where to park, what to wear, who will be in the room, how much time it should take, and the likely demeanor or personalities of those who will be asking questions. When you are dealing with a witness, particularly one who has never participated in a deposition before, no detail is too insignificant to discuss. Proper preparation puts your witness at ease which will likely lead to successful deposition testimony (and an extremely grateful witness!).

B. Objections

Making and responding to objections can be an exciting and challenging part of practicing the law. However, at depositions, not all objections are equal. Objections to the form of the question must be made at the time the issue is raised. Form objections include questions that are: leading, compound, ambiguous, speculative, argumentative, compound, cumulative or repetitive, assume facts not yet established, and improperly characterize the witness' testimony. Objections to the admissibility of evidence or testimony need not be made during depositions. They are issues properly addressed to the presiding judge and raising them during the deposition may tip off opposing counsel as to your strategy at trial. *See also Trial Techniques* (4th Ed.) by Thomas Mauet, at p. 426.

C. Deposition Time

Before cross-examining a witness, develop a strategy for what you believe will be the most effective examination style. Different witnesses respond to different types of examination styles, and the proper style may be the key to eliciting the testimony most beneficial to your case. Age, education, and health are just some of the factors to be considered before asking your first question.

A common mistake made by inexperienced attorneys is also one of the most basic – failing to listen to the answers provided. It is easy for young attorneys to get wrapped up in their notes and prepared questions causing them to miss important admissions or other facts that may require follow-up questions. Another important tip for examining attorneys is to know when to move on to another question or topic. Often, attorneys do not notice when they have received an answer that is beneficial to their case, particularly when they are expecting difficulty in reaching that answer. When you get the answer you are looking for, move on! Continuing to address the topic rarely improves the substance of the answer and can give the witness or opposing counsel the opportunity to contradict or "fix" the testimony.

Finally, remember to relax and take your time during the deposition. You usually only get one opportunity to depose a witness, so make sure you address all the topics necessary to your case. If you need a moment to look over your notes, take it. Do not rush from one question or topic to another. If you are feeling confused or overwhelmed, take a five or ten minute break to clear your mind. You have an obligation to your client and employer to perform your best and simply remembering to take your time can go a long way towards successfully deposing a witness. However, remember that there is no substitute for proper preparation.

The author acknowledges and thanks Gary Sharp, John Mark Mooney and Jana Berger for their assistance in preparing this article.

MDTC Legislative Section

By: Graham K. Crabtree, *Fraser, Trebilcock, Davis & Dunlap*
gcrabtree@fraserlawfirm.com

MDTC Legislative Report

In the week after the Thanksgiving holiday, the Legislature returned to complete a short and unremarkable "lame duck" session. This came as no surprise. With the Republicans poised to assume complete control of the state government on January 1st, it had been predicted early on that the lame duck session would not amount to much this time around. The brief flurry of activity in the final week cleared the decks of uncontroversial matters, sending 137 Bills for enrollment and presentation to outgoing Governor Granholm. Agreement was reached on a small handful of pressing issues, including an adjusted appropriation of federal funds for K-12 education, approval of capital outlay funding for construction projects at public universities and community colleges, an appropriation of $10,000,000 for continuation of the "Pure Michigan" marketing program, and a new approval of Sunday morning liquor sales. Other more complicated and/or controversial bills were addressed, but failed to gain final approval; or as one commentator has aptly put it, they "quacked and died." The failed initiatives which will likely be reintroduced for further discussion in the next session include proposals for a new international bridge on the Detroit River, required payment of health benefits for diagnosis and treatment of autism, and reform of the teacher tenure laws.

Apart from the anticipation that customarily surrounds the lame duck session, much of the recent discussion in Lansing has focused upon the Republican "Grand Slam" and the transition which will install Rick Snyder as our new Governor. Mr. Snyder is to be congratulated for his great accomplishment, but in many ways, he is not to be envied. He has set for himself a Herculean task of reinventing Michigan's government and reinvigorating its sagging economy. All eyes will be upon him, and he will certainly be reminded later of anything that he has promised but failed to deliver. Accomplishment of his mission will require painful sacrifices which will be very unpopular, and it is safe to assume that the necessary adjustments will be made without additional tax revenues. Most of us would not wish to find ourselves in his shoes.

Astutely mindful of the public's mounting dissatisfaction with partisan gridlocked politics-as-usual, Mr. Snyder has pledged a new era of bipartisan cooperation, and has wisely prepared to compensate for his own lack of political experience by surrounding himself with a somewhat politically-balanced group of competent and well-respected advisors who know the ropes in Lansing. To do what must be done, he will be aided, and perhaps frustrated, by a new Legislature fully controlled by members of his Republican party. The GOP will command a very comfortable 63 to 47 vote majority in the House of Representatives and a supermajority of 26 to 12 in the Senate. With this great disparity of numbers, the Legislature will have the power to accomplish whatever Mr. Snyder will support, and the Democrats will be relegated, for the next two years at least, to the status of loyal opposition, having power only to prevent the approval of matters requiring a supermajority vote.

With this new strength, there will inevitably be a desire among many Republicans to lead in the style of the 800-pound Gorilla. There is a great deal of "pent-up

Graham K. Crabtree is a Shareholder and appellate specialist in the Lansing office of Fraser Trebilcock Davis & Dunlap, P.C.. Before joining the Fraser firm, he served as Majority Counsel and Policy Advisor to the Judiciary Committee of the Michigan Senate from 1991 to 1996, and as an Assistant Prosecuting Attorney in the Appellate Division of the Oakland County Prosecutor's Office from 1980 to 1991. He can be reached at gcrabtree@fraserlawfirm.com or (517) 377-0895.

With this great disparity of numbers, the Legislature will have the power to accomplish whatever Mr. Snyder will support, and the Democrats will be relegated, for the next two years at least, to the status of loyal opposition.

demand," as I have recently heard one prominent Republican lobbyist say, and thus, it is safe to assume that legislative wish lists are now being busily compiled by those seeking the advancement of conservative agendas. Can it be that we will soon see some new and forcefully presented requests for anti-abortion legislation and additional tort reform measures? Regardless of what may be coming, we should expect that all proposals will be carefully scrutinized in terms of their potential impact upon the economy, with especially close attention being given to the manner in which they might advance or hinder achievement of the new administration's overarching goal of preserving and creating jobs. But if Mr. Snyder is to make his mark as a new Milliken-style statesman and deliver on his promise to take a more balanced approach to governing, he must learn to firmly say "no, thank you" to unreasonable or unbalanced requests from special interests, and especially those which will be coming to him from the extreme fringes of his own party. Mr. Snyder may find that this will be more easily said than done.

I have high hopes for Rick Snyder and his new administration because they seem to present a real potential for successful implementation of some very badly needed changes. I am pleased to welcome Mr. Snyder and all of our new policymakers to Lansing, and wish them the very best of luck as they tackle the difficult tasks that lie ahead.

By: Phillip J. DeRosier and Toby A. White, *Dickinson Wright*
pderosier@dickinsonwright.com; twhite@dickinsonwright.com

Appellate Practice Report

APPELLATE PRACTICE
Do Peremptory Supreme Court Orders Constitute Binding Precedent?

Recently on the State Bar of Michigan Appellate Practice Section's listserv, a question came up concerning the extent to which peremptory orders issued by the Supreme Court constitute binding precedent. The answer depends on whether such orders contain a rationale that can be understood.

Const 1963, art 6, § 6 provides that "[d]ecisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision." The seminal Supreme Court decision construing this provision is *People v Crall*.[1] In *Crall*, the Supreme Court held that the Court of Appeals erred in rejecting a Supreme Court order as "not binding precedent."[2] The order, issued in *People v Bailey*,[3] found that "[t]he defendant waived the issue of entrapment by not raising it prior to sentencing." Finding "no basis" for the Court of Appeals' conclusion that the order in *Bailey* was not binding precedent, the Supreme Court in *Crall* observed that "[t]he order in *Bailey* was a final Supreme Court disposition of an application, and the order contains a concise statement of the applicable facts and the reason for the decision."[4] Thus, the *Crall* Court held that the Court of Appeals should have followed *Bailey* and rejected a similarly unpreserved entrapment issue.[5]

Numerous Court of Appeals decisions since *Crall* have variously stated that a peremptory Supreme Court order constitutes binding precedent if the Court of Appeals "can determine the applicable facts and the reason for the decision,"[6] if the order "can be understood,"[7] or if the order contains "an understandable rationale."[8]

This also includes situations where the Supreme Court's "rationale" is actually contained in *another* decision incorporated into the order by reference. In *Mullins v St Joseph Mercy Hosp*,[9] the Court of Appeals observed that it "consistently has adhered to the principle that the Michigan Supreme Court's summary disposition orders constitute binding precedent when they finally dispose of an application and are capable of being understood, even by reference to other published decisions."[10]

Sometimes a Supreme Court order may even reference a Court of Appeals dissenting opinion. For example, in *Evans & Luptak, PLC v Lizza*,[11] the Court of Appeals relied on an analysis of an ethical rule contained in a Court of Appeals dissent because the Supreme Court's order reversing the Court of Appeals majority's decision expressly stated that it "agree[d] with the Court of Appeals dissent's discussion of [the] principles pertaining to [the ethical rule]."[12]

In sum, whether a peremptory Supreme Court order may properly be relied on as binding precedent essentially turns on whether the Court's rationale for its decision can be understood and applied beyond the circumstances of the particular case.

ISSUES PENDING IN THE SUPREME COURT
Does MCL 500.3174 Extend the "One-Year-Back" Rule for Claims

Phillip J. DeRosier is a member in the Detroit office of Dickinson Wright PLLC, and specializes in the area of appellate litigation. Prior to joining Dickinson Wright, he served as a law clerk for Michigan Supreme Court Justice Robert P. Young, Jr. He serves as Secretary for the State Bar of Michigan's Appellate Practice Section Council, and is the chair of the Appellate Practice Section of the Detroit Metropolitan Bar Association. He can be reached at pderosier@dickinsonwright.com or 313-223-3866.

Toby A. White is an associate in the Detroit office of Dickinson Wright PLLC, and specializes in the areas of civil appeals and commercial litigation. He is a graduate of Columbia University School of Law and a member of the Appellate Practice Section of the State Bar of Michigan. He can be reached at twhite@dickinsonwright.com or 313-223-3098.

A peremptory Supreme Court order constitutes binding precedent if the Court of Appeals "can determine the applicable facts and the reason for the decision,"[6] if the order "can be understood,"[7] or if the order contains "an understandable rationale."

Filed Through the Michigan Assigned Claims Facility?

***Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219; 779 NW2d 304 (2009), lv gtd ___ Mich ___ (Docket No. 140301, October 27, 2010)**

In a case involving the recovery limitation provision contained in the Michigan no-fault insurance act (the "one-year-back" rule), the Michigan Supreme Court recently granted leave to decide whether MCL 500.3174, the assigned claims plan notice and commencement section of the no-fault act, extends the recovery limitation as it applies to claims filed through the Michigan Assigned Claims Facility ("MACF").[13] .

Bronson Methodist Hospital provided medical treatment to an uninsured driver from December 30, 2006 through January 5, 2007. On December 14, 2007, Bronson Methodist Hospital submitted an application to the MACF seeking recovery of the expenses. The MACF assigned the claim to Allstate Insurance Company on January 7, 2008. When Allstate refused to pay the claim, Bronson Methodist Hospital filed suit on February 6, 2008.

The trial court, however, granted summary disposition to Allstate, concluding that Bronson Methodist Hospital's claim was precluded by the no-fault act's one-year-back-rule, which provides that a claimant "may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced."[14] The trial court reasoned that under a strict application of the one-year-back rule, none of the expenses incurred by Bronson Methodist Hospital could be recovered because all of the medical services were performed more than one year before the action was commenced.

On appeal, Bronson Methodist Hospital argued that MCL 500.3174, which governs notice to the MACF and commencement of actions against insurers to whom claims have been assigned, extended the recovery limitation with respect to assigned claims. MCL 500.3174 provides:

> A person claiming through an assigned claims plan shall notify the facility of his claim within the time that would have been allowed for filing an action for personal protection insurance benefits if identifiable coverage applicable to the claim had been in effect. The facility shall promptly assign the claim in accordance with the plan and notify the claimant of the identity and address of the insurer to which the claim is assigned, or of the facility if the claim is assigned to it. *An action by the claimant shall not be commenced more than 30 days after receipt of notice of the assignment or the last date on which the action could have been commenced against an insurer of identifiable coverage applicable to the claim, whichever is later.* [Emphasis added.]

Relying on MCL 500.3174, Bronson Methodist Hospital argued that because it filed suit (February 6, 2008) within 30 days of when the claim was assigned to Allstate (January 7, 2008), it was not precluded from recovering the medical expenses it incurred.

The Court of Appeals, however, agreed with the trial court that "MCL 500.3174 does not extend the recovery limitation found in MCL 500.3145(1)." The Court observed that MCL 600.3145(1) contains both a one-year statute of limitations period (generally requiring an action to be commenced "within 1 year after the most recent allowable expense . . . has been incurred") and a recovery limitation (providing that a claimaint "may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced"). The Court reasoned that although MCL 500.3174 extends the statute of limitations period for assigned claims to "30 days after receipt of notice of the assignment" such that Bronson Methodist Hospital's action was *timely commenced*, the "recovery of benefits remains subject to the one-year-back rule." The Court explained:

> In sum, MCL 500.3174 does not extend the recovery limitation found in MCL 500.3145(1), because the language used by the Legislature in MCL 500.3174 unambiguously describes only an extension of the statute of limitations period.
>
> The application of the recovery limitation therefore precludes Bronson Methodist Hospital's claim. The one-year-back rule draws a strict line, which must be followed even with unfair results. Because Bronson Methodist Hospital commenced this action on February 6, 2008, it was precluded from recovering any benefits for treatment occurring before

The Michigan Supreme Court recently granted leave to decide whether MCL 500.3174, the assigned claims plan notice and commencement section of the no-fault act, extends the recovery limitation as it applies to claims filed through the Michigan Assigned Claims Facility.

> February 6, 2007. Bronson Methodist Hospital last treated Brown on January 5, 2007. Thus, Bronson Methodist Hospital is no longer entitled to recover any of the medical expenses it provided to Brown.

In response to the Court of Appeals' decision, Bronson Methodist Hospital filed an application for leave to appeal with the Supreme Court on January 4, 2010. After initially holding the case in abeyance pending its decision in *Univ of Mich Regents v Titan Ins Co*, 487 Mich ___ (2010), which addressed the extent to which certain state entities are exempt from the one-year-back rule, the Supreme Court granted leave to appeal in an order entered on October 27, 2010.

The *Bronson* case is significant not only because it involves an issue of first impression concerning the interplay between MCL 500.3145(1) and MCL 500.3174, but because it will require the new Supreme Court majority to decide whether, as the Court of Appeals held, the statutory language is plain and unambiguous, or whether there is room for an interpretation that would avoid what the Court of Appeals suggested is an "unfair result[]."

COURT OF APPEALS
Mootness Doctrine – Did the Michigan Court of Appeals Expand the Ability of a Party to Satisfy a Judgment and Yet Still Pursue an Appeal?

***Michigan's Adventure, Inc v Dalton Twp*, ___ Mich App ___; ___ NW2d ___ (2010) (Docket No. 292148) (October 21, 2010)**

Michigan has long recognized the "general rule" that "a satisfaction of judgment is the end of proceedings and bars any further effort to alter or amend the final judgment."[15] This principal operates to render any appeal from a voluntarily satisfied judgment moot. In *Horowitz v Rott*,[16] when "confronted with the question whether [it] may review a judgment which has been satisfied and no longer exists," the Court concluded:

> [w]hen the judgment was rendered, two courses were open to defendant. He could satisfy the judgment or review it in this court; he could not do both. He chose by his voluntary act to satisfy it. When the judgment was satisfied, the case was at an end. [*Id*. at 372.]

Subsequent Michigan decisions have identified at least two exceptions to this general rule. First, while the mootness rule applies "as long as the appeal or review might result in putting at issue the right to the relief already received . . . there is no waiver of appeal where the appeal addresses an issue collateral to the benefits already accepted."[17] .

Second, Michigan courts have differentiated between voluntary and involuntary satisfactions of a judgment. Where a party satisfies a judgment "by his voluntary act," any subsequent appeal of the judgment is moot.[18] By contrast, where a judgment is "involuntarily satisfied," a party does "not waive [its] right to appeal," and any such "appeal is not moot."[19]

Most commonly, "involuntary" satisfaction of a judgment is accomplished by means of garnishment.[20]

Involuntary satisfaction has also been found to exist where a third party satisfies a judgment and the party against whom judgment has been rendered did not consent to the third party's satisfaction of the judgment.[21] Therefore, outside of involuntarily satisfaction of a judgment due to garnishment, or satisfaction by a third party to which was not consented to, it has generally been the case that any other satisfaction of a judgment renders moot an appeal by the party against whom the judgment was rendered.

However, in *Michigan's Adventure, Inc v Dalton Twp*,[22] the Court of Appeals appears to have broken from this general rule. There, Dalton Township appealed an order of the Michigan Tax Tribunal vacating the Township's special assessment against Michigan's Adventure, Inc. Michigan's Adventure argued that Dalton Township's appeal was moot "on the ground that [the Township] satisfied the judgment ordered by the [Michigan Tax Tribunal]."[23] The Court of Appeals rejected this argument in a footnote, holding:

> [B]ecause neither the tribunal nor the Court of Appeals granted a stay, [Dalton Township] was obligated to comply with the tribunal's judgment. MCR 7.209(A)(1). The fact of compliance does not render moot an appeal of the substantive issue.[24]

In support of its conclusion, the Court of Appeals relied solely on MCR 7.209(A)(1), which provides in relevant part that "[e]xcept for an automatic stay pursuant to MCR 2.614(D), an appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders."

This holding appears to run counter to the "voluntary/involuntary satisfac-

Where a judgment is "involuntarily satisfied," a party does "not waive [its] right to appeal," and any such "appeal is not moot."

tion" dichotomy set forth by previous cases, such as *Kusmierz*. Those cases imply that compliance with or satisfaction of a judgment, even one which has not been stayed pending appeal, is considered "voluntary" and renders any subsequent appeal moot. The contary holding in *Michigan's Adventure*, which does not address those longstanding cases, appears to stand for the proposition that where a party seeks a stay of a judgment which is not granted by the trial court or Court of Appeals, its subsequent satisfaction of, or compliance with, the judgment does not preclude the party from pursuing an appeal.

Endnotes

1. 444 Mich 463; 510 NW2d 182 (1993).
2. *Id*. at 464, n 8.
3. 439 Mich 897; 478 NW2d 480 (1991).
4. *Crall*, 444 Mich at 464, n 8.
5. *Id*.
6. *Weschler v Wayne Co Road Comm'n*, 215 Mich App 579, 591 n 9; 546 NW2d 690 (1996), remanded on other grounds 455 Mich 863 (1997). See also *Dykes v William Beaumont Hospital*, 246 Mich 471, 483; 633 NW2d 440 (2001) ("An order that is a final Supreme Court disposition of an application and that contains a concise statement of the applicable facts and reasons for the decision is binding precedent.").
7. *People v Edgett*, 220 Mich App 686, 693 n 7; 560 NW2d 360 (1996). See also *People v Phillips (After Second Remand)*, 227 Mich App 28, 38 n 11; 575 NW2d 784 (1997) ("Supreme Court peremptory orders are binding precedent when they can be understood."); *Brooks v Engine Power Components, Inc*, 241 Mich App 56, 61; 613 NW2d 733 (2000) (same), overruled on other grounds *Kurtz v Faygo Beverages, Inc*, 466 Mich 186; 644 NW2d 710 (2002).
8. *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006) (rejecting reliance on a Supreme Court order because it could not be "understood as expressing an opinion on how the issue should be decided").
9. 271 Mich App 503; 722 NW2d 666 (2006), rev'd on other grounds 480 Mich 948 (2007).
10. *Id*. at 508.
11. 251 Mich App 187; 650 NW2d 364 (2002).
12. See *Abrams v Susan Feldstein, PC*, 456 Mich 857 (1997). See also *Love v City of Detroit*, 270 Mich App 563, 566; 716 NW2d 604 (2006) (relying on a peremptory Supreme Court order that in turn had adopted the Court of Appeals dissent).
13. *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219; 779 NW2d 304 (2009), lv gtd ___ Mich ___ (Docket No. 140301, October 27, 2010)
14. MCL 500.3145(1).
15. *Becker v Halladay*, 218 Mich App 576, 578; 554 NW2d 67 (1996) (citing *Ideal Furnace Co v Int'l Molders' Union of North America*, 204 Mich 311; 169 NW 946 (1918)).
16. 235 Mich 369, 370; 209 NW 131 (1926).
17. *Becker*, 218 Mich App at 578 (citing *Wohlfert v Kresge*, 120 Mich App 178; 327 NW2d 427 (1982)).
18. *Horowitz*, 235 Mich at 372.
19. *Kusmierz v Schmitt*, 268 Mich App 731, 740 n 3; 708 NW2d 151 (2005), rev'd on other grounds 477 Mich 934 (2006).
20. *Id*. See also *Robbins v Sault Ste Marie Tribe of Chippewa Indians*, unpublished per curiam opinion of the Court of Appeals, Docket No. 290321 (May 20, 2010) (Slip Op at 2) ("An involuntary satisfaction by means of garnishment does not render an appeal moot, or waive a party's right to appeal.").
21. See *Hillsdale Community Health Ctr v Pioneer State Mut Ins Co*, unpublished per curiam opinion of the Court of Appeals, Docket Nos. 285681, 287126) (September 8, 2009) (Slip Op at 4) ("Here, [the appealing party] did not satisfy the judgment; rather, it was Pioneer who voluntarily satisfied the judgment. [The appealing party] chose to appeal the judgment. Thus, as to [the appealing party], the judgment was involuntarily satisfied.").
22. ___ Mich App ___; ___ NW2d ___ (2010) (Docket No. 292148) (October 21, 2010).
23. Slip Op at 1 n 2.
24. [*Id*. at 1-2, n 2.].

MDTC Amicus Committee Report

By: Hilary A. Ballentine
Plunkett Cooney

MDTC Amicus Activity

Hilary A. Ballentine is a member of the firm's Detroit office who specializes in appellate law. Her practice includes general liability and municipal appeals focusing on claims involving the Michigan Consumer Protection Act, the Open Meetings Act, Section 1983 Civil Rights litigation, among others. She can be reached at hballentine@plunkettcooney.com or 313-983-4419.

Attorney Fees

After hearing oral argument in *Singer v Sreenivasan* in October, the Michigan Supreme Court has issued an order vacating the Court's prior grant of leave and denying leave to appeal on the basis that it was "no longer persuaded that the questions presented should be reviewed by this Court." Then-Justice Alton Davis recused himself given his participation in *Singer* at the Court of Appeals' level. The Court's order in *Singer* is considered a victory for MDTC, which authored an amicus brief urging the Court to uphold the trial court's decision to award a "reasonable" attorney fee that was based on a rate higher than the actual rate charged. That amicus brief was authored by **Michael F. Smith** of **The Smith Appellate Law Firm**.

Consumer Protection Act

On October 29, 2010, the Michigan Supreme Court issued an order denying Defendant's application for leave to appeal in *Edwards v Cape to Cairo*. Defendant was a tour operator which received prepayment for trip expenses, including airline tickets, from Plaintiff for a trip to Africa. After Plaintiff subsequently cancelled the trip and sought refund of his payments to Defendant, the lower courts required Defendant to provide a full refund and pay attorney fees under the Michigan Consumer Protection Act. MDTC submitted an amicus brief, authored by **Anthony F. Caffrey** of **Cardelli Lafear & Buikema PC**, urging the Court to peremptorily reverse or grant leave to consider the Court of Appeals' opinion. Justice Markman dissented to the Court's order denying leave, concluding that he would reverse that portion of the Court of Appeals' opinion that did not require the plaintiff to pay the defendant's cancelled ticket fee. Justice Markman noted that nothing in the contract between the plaintiff and the defendant predicated imposition of the cancelled ticket fee on the airline also charging a fee.

In related matters, the Michigan Supreme Court held oral argument on *Colaianni v Stuart Frankel Development Corp* on October 7, 2010. That decision remains pending. The MDTC has also recently filed an amicus brief in *Hamed v Wayne County*. The amicus brief was authored by **Marcelyn Stepanski** of **Johnson, Rosati, LaBarge, Aseltyne & Field, P.C.**

New Members

MDTC Welcomes These New Members

Melissa Melshenker Ackerman
Kopka Pinkus Dolin & Eads PLC, Farmington Hills

Michael J. Asher
Sullivan Ward Asher & Patten, P.C., Southfield

Matthew Brooks
Kitch Drutchas Wagner Valitutti & Sherbrook, Detroit

Emily Coyle
Plunkett Cooney, Bloomfield Hills

Allison M. Ensch
Riley & Hurley, P.C., Dearborn

Bernard J. Fuhs
Butzel Long, Detroit

Christina Ginter
Kitch Drutchas Wagner Valitutti & Sherbrook, P.C., Detroit

James F. Hunt
Johnston Sztykiel Hunt Goldstein Fitzgibbons & Clifford, P.C., Troy

Christopher LeVasseur
Stark Reagan, Troy

Gregory Michael
Meihn Foley & Mansfield, PLLP, Ferndale

Raymond L. Morrow
Kemp Klein Law Firm, Troy

Larry E. Powe
Keller Thoma, P.C., Detroit

Jennifer D. Rupert
Keller Thoma, P.C., Detroit

Michael Whiting
Stark Reagan, Troy

Susan Healy Zitterman
Kitch, Drutchas, Wagner, Valitutti & Sherbrook P.C., Detroit

Rules Update

By: M. Sean Fosmire
Garan Lucow Miller, P.C., Marquette, Michigan

For additional information on these and other amendments, visit http://michcourts.blogspot.com/

Michigan Court Rules Amendments and Proposed Amendments

Comments on all proposals are due by March 1, 2011.

Note regarding number 2010-30: one of the important changes is a provision that the confidentiality of proceedings in mediation extends to case evaluation hearings. The new Rule 2.412 would specify a number of new exceptions to the confidentiality rule:

(C) Disclosure in Proceedings; Exceptions. Mediation communications shall not be disclosed in any proceeding, except when disclosure of the communication is

(4) a report, the subject of a report, or is sought or offered to prove or disprove a threat, act, or part of a plan to inflict bodily injury or commit a crime or is used to plan, attempt, or commit a crime, or to conceal a crime or criminal activity;

(5) a report, the subject of a report, or is sought or offered to prove or disprove a claim of abuse or neglect of a child, or a protected or vulnerable adult;

(6) the subject of a report of professional misconduct filed against a mediation participant;

(7) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation participant in a matter from which the claim of misconduct or malpractice arose; or

(8) considered by a court in a proceeding to enforce, rescind, reform, or avoid liability on a document signed by the mediation parties or acknowledged by the parties on an audio or video recording that arose out of mediation if there is a finding, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available and that the need for evidence substantially outweighs the interest in protecting confidentiality and the integrity of the mediation process.

Sean 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.

ADOPTED

Date: 10-26-10 **Number:** 2009-06
Rules: MRPC **Subject:** Professional conduct
Description: A number of new rules and modifications. Many of the changes are changes to the commentary.

Date: 9-21-10 **Number:** 2009-30
Rules: 1.108 **Subject:** Time
Description: Changed the word "holiday" to "day"

PROPOSED

Date: 11-1-10 **Number:** 2006-38
Rules: several **Subject:** Grievance proceedings
Description: An extensive overhaul. See http://goo.gl/OriDT for more information, including links to the documents .

Date: 11-23-10 **Number:** 2007-18
Rules: 2.117 **Subject:** Attorney
Description: Would provide that the attorney-client relationship continues until the expiration of the period for appeal.

Date: 11-23-10 **Number:** 2008-11
Rules: 2.507 **Subject:** Settlements
Description: Would provide that only settlement agreements in writing or made on the record are enforceable.

Date: 11-23-10 **Number:** 2008-32
Rules: 2.203 **Subject:** Pleadings
Description: Would require issuance of summons for counterclaim or cross-claim when a new party is added.

Date: 11-23-10 **Number:** 2010-30
Rules: several **Subject:** Mediation
Description: Would consolidate rules on confidentiality in mediation into a new Rule 2.412.

Date: 9-21-10 **Number:** 2008-12
Rules: 2.002 **Subject:** Indigents
Description: Would permit a court to deny indigency status to persons filing vexatious lawsuits.

By:Michael J. Sullivan and David C. Anderson, *Collins Einhorn Farrell & Ulanoff P.C.*,
Michael.Sullivan@ceflawyers.com; David.Anderson@ceflawyers.com

Case Reports: Legal Malpractice Update

DEFENSIVE COLLATERAL ESTOPPEL, ATTORNEY JUDGMENT RULE, and REDUNDANT CLAIMS

Taylor v Lawyer Defendant, 2010 Mich App Lexis 1320 (July 2010) (unpublished)

The Facts: Defendant represented plaintiff in a patent infringement claim against both DaimlerChrysler and Reitter & Schefenacker USA, LP ("Reitter"). Plaintiff obtained a patent in 1989 for a lighted rearview mirror, and approached Chrysler Corporation with his idea. Chrysler then referred plaintiff to its parts supplier – Reitter – but plaintiff failed to come to an agreement related to the lighted rearview mirror. After DaimlerChrysler acquired Chrysler, plaintiff met with Reitter again and learned that it was already manufacturing lighted rearview mirrors.

In the underlying litigation, plaintiff voluntarily dismissed Reitter and the federal court found that DaimlerChrysler's mirror assembly did not literally infringe on plaintiff's patent when it granted DaimlerChrysler's motion for summary judgment. In plaintiff's action against defendant attorneys, he alleged breach of fiduciary duty, fraud, and legal malpractice related to defendant's advice to voluntarily dismiss Reitter and the adequacy of defendant's presentation in the patent infringement claim.

Defendant moved for summary disposition under MCR 2.116(C)(7) asserting that the claim was barred under collateral estoppel, (C)(8), and (C)(10). The trial court determined that the plaintiff was collaterally estopped from prevailing on his claim based on the federal court's finding that there was no patent infringement.

The Ruling: The Court held that defendant may assert collateral estoppel defensively against plaintiff related to the patent infringement claim against Reitter because the issue was fully litigated in connection with plaintiff's claim against DaimlerChrysler. The Court also held that plaintiff's legal malpractice claim related to defendant attorney's recommendation to dismiss Reitter should be dismissed under the attorney judgment rule. The Court relied heavily on the attorney-judgment rule discussion in *Mitchell v Dougherty*, 249 Mich App 668 (2002). The Court also held that the trial court did not err when it dismissed the breach of fiduciary duty claim as a mirror image of the legal malpractice claim.

Practice Tip: Collateral estoppel may be used defensively in a legal malpractice action "against a party who had a full and fair opportunity to litigate the issue, mutuality is not required."

INFORM CLIENTS OF FORESEEABLE RISKS

***Williamson v Lawyer Defendant*, 2010 Mich App LEXIS 1972 (October, 2010) (unpublished)**

The Facts: Plaintiff, who was employed by the City of Livonia Fire Department, filed a petition for workers' compensation benefits alleging a psychological disability. The magistrate ultimately granted plaintiff a closed award for a temporary (eight-month) psychological disability.

Michael J. Sullivan and David C. Anderson are partners at Collins, Einhorn, Farrell & Ulanoff P.C. in Southfield. They specialize in the defense of professional liability claims against lawyers, insurance brokers, real estate professionals, accountants, architects, and other professionals. They also have substantial experience in product and premises liability litigation. Their email addresses are: Michael.Sullivan@ceflawyers.com and David.Anderson@ceflawyers.com.

The Court held that defendant may assert collateral estoppel defensively against plaintiff related to the patent infringement claim against Reitter because the issue was fully litigated in connection with plaintiff's claim against DaimlerChrysler.

Plaintiff later filed a second petition for workers' compensation benefits, this time alleging permanent and total disability due to hypertension. The petition was dismissed on res judicata grounds. According to the magistrate, plaintiff had been aware, even before the filing of the initial petition for benefits, that he suffered from hypertension and that it might be work-related; therefore, the doctrine of res judicata required plaintiff to bring a claim based on hypertension in the initial proceedings.

Plaintiff appealed that dismissal. The Court of Appeals reversed, but the Michigan Supreme Court reinstated the dismissal. As a result, plaintiff received no worker's compensation benefits on his second petition for benefits based on hypertension.

Plaintiff had different counsel for each of his two worker's compensation petitions. Plaintiff's counsel for the first petition had advised plaintiff that the second claim would have to be merged with the first claim to avoid res judicata. Defendant, plaintiff's counsel for the second, unsuccessful petition, told plaintiff that he "did not agree with [the first attorney] at all" and advised plaintiff against filing the second worker's compensation claim before the first claim was adjudicated.

When the second petition was dismissed due to res judicata, plaintiff filed the instant malpractice action against defendant. Defendant contended that he had relied on a case in which the claimant sought total and permanent disability in his first claim and then sought total and permanent disability in a second claim on the same set of facts. The court in that case held that both claims arose out of the same transaction or occurrence and therefore should have been merged. In the present case, it was Defendant's opinion that plaintiff's situation was distinguishable. He opined that plaintiff's second claim seeking total and permanent disability – based on hypertension – arose out of a different set of facts from the first claim for a closed period – based on a psychological disability. For that reason, defendant maintained that his advice was based in the law. Defendant further argued that his legal opinion was rational based on the conflict that the magistrate, Court of Appeals, and Supreme Court eventually had about the application of res judicata in this case.

The Ruling: The court held that defendant violated his duty to exercise reasonable skill, care, discretion, and judgment when he failed inform plaintiff that the law about which he was providing advice was open to various interpretations. The Court reasoned that, when plaintiff told defendant about the first attorney's opinion that the claims must be merged to avoid res judicata, that put defendant on notice that there were different interpretations of the law. The Court also noted that Defendant admitted in his brief that the law on res judicata was subject to different interpretations. Therefore, defendant was negligent when he concretely advised plaintiff to hold off on filing the second claim without advising him of the risks involved. Accordingly, there was sufficient evidence to support the jury's finding of negligence. Defendant was not entitled to JNOV.

Practice Tip: Be sure to advise your clients, preferably in writing, of any foreseeable risks and that they may not ultimately succeed in the litigation.

Supreme Court

By: Joshua K. Richardson
Foster, Swift, Collins & Smith, P.C.
jrichardson@fosterswift.com

Supreme Court Update

Joshua K. Richardson graduated from Indiana University School of Law, 2007. His areas of practice include; Commercial Litigation, Construction Law, IT, Insurance Defense and Litigation. He can be reached at jrichardson@fosterswift.com or 517-371-8303.

Relatives Do Not Have A Property Interest In Any Portion Of The Decedent's Body That Is Retained By The Medical Examiner For Purposes Of Detecting Crimes

On October 29, 2010, the Michigan Supreme Court held that a decedent's next of kin do not have rights under Michigan law to possess a part of the decedent's body that was removed by a medical examiner during an investigation into the decedent's cause of death. *In Re Certified Question (Waeschle v Oakland Co Medical Examiner)*, ___ Mich ___; ___ NW2d ___ (2010).

Facts: This certified question from the United State District Court for the Eastern District of Michigan, asked: "Assuming that a decedent's brain has been removed by a medical examiner in order to conduct a lawful investigation into the decedent's cause of death, do the decedent's next-of-kin have a right under Michigan law to possess the brain in order to properly bury or cremate the same after the brain is no longer needed for forensic examination?"

The underlying District Court case involved due process violation claims brought by the daughter of a deceased nursing home resident. Shortly after the nursing home resident's death, the Oakland County Medical Examiner performed an autopsy to determine the cause of death. Without informing the decedent's daughter, the Medical Examiner removed the decedent's brain for further examination, but otherwise returned the decedent's remains to the daughter. Upon concluding her examination, the Medical Examiner incinerated the decedent's brain. The decedent's daughter then sued Oakland County and the Oakland County Medical Examiner, claiming that the incineration of the decedent's brain constituted medical waste and violated the decedent's daughter's due process rights "by depriving her of the right to dispose of her mother's brain."

Deciding that the merits of the decedent's daughter's claim, though initially raised as a federal cause of action, "depend primarily on whether, under Michigan law, she had a property interest in her deceased mother's brain," the Sixth Circuit Court of Appeals directed the District Court to certify the present question to the Michigan Supreme Court.

Holding: In answering the certified question in the negative, the Supreme Court held that where "a decedent's brain was removed by a medical examiner to conduct a lawful investigation into the decedent's cause of death, the decedent's next of kin does not have a right under Michigan law to possess the brain in order to properly bury or cremate the same after the brain is no longer needed for forensic examination." The court noted that MCL 52.205, which requires county medical examiners to return the "body" of a decedent to the decedent's relatives, but allows medical examiners to retain portions of the decedent's body as necessary for the detection of crimes, does not provide a decedent's relatives with any property interests in portions of the decedent's body that are lawfully removed to detect crime.

Justices Robert Young and Alton Davis filed separate dissenting opinions, noting that they would decline to answer the certified question. Though Justice Davis did not elaborate, Justice Young wrote that he continues "to adhere to [his] stated position in *In re Certified Question (Wayne Co v Philip Morris Inc)*, 622 NW2d 518 (Mich, 2001), that this Court lacks the authority under state law to answer certified questions."

Significance: In response to this case, the Legislature amended MCL 52.205, effective July 1, 2010, to address "medical examiners' duties to next of kin." Specifically, MCL 52.205(6) now requires medical examiners to return the "body" and "any portion of the body" to the decedent's relatives, unless the medical examiner deems it necessary to retain a portion of the body to "establish the cause of death, the conditions contributing to death, or the manner of death, or as evidence of any crime."

The Risk Of Carbon Monoxide Poisoning Associated With Running Motor Vehicle Engines In Enclosed Spaces Is An Obvious Danger Of Which A Product Liability Defendant Need Not Warn Product Users

On September 29, 2010, in lieu of granting leave to appeal, the Michigan Supreme Court reversed the decision of the Court of Appeals and reinstated the trial court's summary disposition order

The Supreme Court held that where "a decedent's brain was removed by a medical examiner to conduct a lawful investigation into the decedent's cause of death, the decedent's next of kin does not have a right under Michigan law to possess the brain in order to properly bury or cremate the same after the brain is no longer needed for forensic examination."

in this product liability case. *White v Victor Automotive Product, Inc*, ___ Mich ___; ___ NW2d ___ (2010).

Facts: The plaintiff's decedent, a self-employed mechanic, purchased an automobile muffler repair kit manufactured and marketed by the defendants. The repair kit's instructions noted that after applying the repair kit, users were to start the automobile and run it for at least ten minutes to allow the kit to adhere to the muffler. The plaintiff's decedent began using the repair kit in his driveway, but was later found dead in his enclosed garage with his automobile running and the repair kit attached to the automobile's muffler. An autopsy revealed that the plaintiff's decedent's death was caused by asphyxiation from carbon monoxide. Though the repair kit's instructions warned users to wear safety gear and to avoid swallowing the product, the instructions did not warn users of the risks associated with carbon monoxide poisoning.

The plaintiff filed suit, alleging that the defendants breached their duty of care by "failing to include an instruction with the product that vehicles should not be run in an enclosed space or must be moved outside before starting the engine as directed," and by "failing to warn of the dangers of carbon monoxide poisoning." The defendants relied on MCL 600.2948(2) in moving for summary disposition prior to the conclusion of discovery. MCL 600.2948(2) provides: "A defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action."

The trial court granted summary disposition for the defendants, holding that it is "clear that the material risk of death due to carbon monoxide poisoning as a result of running a car in an enclosed garage would be obvious to the reasonably prudent user of a muffler repair kit." The plaintiff appealed. On appeal, the Court of Appeals majority reversed the trial court's decision and held that a question of fact existed as to whether a reasonably prudent person would recognize the danger of exposure to automobile exhaust in enclosed areas. The defendants filed an application for leave to appeal to the Michigan Supreme Court.

Holding: The Michigan Supreme Court, in lieu of granting leave to appeal, reversed the Court of Appeals decision and reinstated the trial court's order granting summary disposition in favor of the defendants for the reasons stated in the Court of Appeals dissenting opinion. The Court of Appeals dissenting opinion, authored by Judge Kirsten Kelly, stated that the majority incorrectly determined that a genuine issue of material fact existed because there was no question that "[t]he risk of carbon monoxide poisoning resulting from running a car's engine in an enclosed space is obvious to a reasonably prudent user of a car." Accordingly, Judge Kelly determined that the trial court properly granted summary disposition in favor of the defendants. Judge Kelly further noted, as an aside, that the plaintiff's decedent died as a result of running the vehicle in an enclosed space, not from using the defendants' product or following the product's instructions. Because the law "does not impose upon manufacturers a duty to warn of the hazards of using products manufactured by someone else," Judge Kelly reasoned that summary disposition would also have been proper under this analysis.

Significance: In reversing the Court of Appeals decision, the Michigan Supreme Court demonstrated that common dangers must, to a certain extent, be viewed as obvious to reasonably prudent product users. Product manufacturers and marketers need not warn product users of such common dangers.

Supreme Court Vacates Court Of Appeals Decision And Reinstates Trial Court's Assessment Of Attorney Fees Based On Party's "Frivolous" Claim

In *Auto-Owners Ins Co v Ferwerda Enterprises, Inc*, ___ Mich ___; 789 NW2d 491 (2010), the Michigan Supreme Court, in lieu of granting leave to appeal, vacated the Court of Appeals decision and reinstated the trial court's grant of attorney fees based on its finding that, "under MCL 600.2591(3)(a)(ii) and (iii), the plaintiff's arguments were inappropriate and devoid of arguable legal merit."

Facts: A family suffered personal injuries after inhaling gases caused by a buildup of chlorine and muriatic acid at a pool operated by the Holiday Inn Express Ludington, after a maintenance worker failed to turn off a pool chemical feeder system while making repairs to the pool's heating components. The Holiday Inn Express' insurance company, Auto-Owners Insurance Company ("Auto-Owners"), initially paid benefits

There was no question that "[t]he risk of carbon monoxide poisoning resulting from running a car's engine in an enclosed space is obvious to a reasonably prudent user of a car."

to the family, but then filed a declaratory judgment action arguing that it owed no duty to defend or indemnify Holiday Inn Express in the family's action against the hotel because the family's claim fell under a pollution exclusion within the insurance policy. Holiday Inn Express filed a counter-claim, alleging breach of contract, estoppel and waiver, and sought attorneys fees and penalty interest.

Auto-Owners filed a motion for summary disposition and argued that there was no genuine issue of material fact that the family's claim fell under the pollution exclusion in the insurance policy. In turn, Holiday Inn Express filed a cross-motion for summary disposition, arguing that the policy's "heating equipment exception" endorsement expressly provided coverage for claims of injuries caused by fumes or vapors from the hotel's heating equipment. The trial court granted Holiday Inn Express' cross-motion, finding that heating equipment exception applied and that Auto-Owners was required to defend and indemnify Holiday Inn Express with respect to the family's claims against the hotel. Though the trial court rejected Holiday Inn Express' assertion that Auto-Owner's claim was entirely without merit, the trial court nonetheless granted Holiday Inn Express' request for attorney fees.

After a jury trial on the family's claim against Holiday Inn Express, the trial court entered judgment for the family in the amount of $528,935.91, plus interest. Holiday Inn Express filed a motion seeking attorney fees and penalty interest after Auto-Owners refused to pay the jury verdict. The trial court ultimately found in favor of Holiday Inn Express and granted it $186,127.44 in attorney fees and costs and $528,935.91 for breach of contract. The trial court also awarded the family $71,365.72 in attorney fees and costs. Auto-Owners appealed.

The Court of Appeals initially held that the trial court erred in finding that the heating equipment exception applied and in awarding attorney fees to Holiday Inn Express and the family. The Michigan Supreme Court reversed the Court of Appeals decision with respect to the heating equipment exception, and remanded to the Court of Appeals for further determination as to whether the trial court properly assessed attorney fees and penalty interest against Auto-Owners. On remand, the Court of Appeals held that the trial court erred in assessing attorney fees and penalty interest against Auto-Owners because Auto-Owners' claim against Holiday Inn Express was reasonably in dispute and not frivolous. Applications for leave to appeal to the Michigan Supreme Court were subsequently filed.

Holding: In lieu of granting leave to appeal, the Michigan Supreme Court ordered, on July 15, 2010, that the trial court file with the court a clarification of its assessment of attorney fees against Auto-Owners. The Supreme Court directed the trial court to "refer specifically to, and base its findings and rulings specifically upon, the provisions of MCR 2.625(A)(2) and MCL 600.2591, and, in particular, on the definitions of 'frivolous' contained in MCL 600.2591(3)(a)(i) through (iii)." Upon the trial court filing a satisfactory clarification, the Supreme Court ordered, again in lieu of granting leave to appeal, that the Court of Appeals decision be vacated and the trial court's assessment of attorney fees against Auto-Owners be reinstated because the trial court properly found that Auto-Owners' claim regarding the pollution exclusion in the insurance policy was "inappropriate and devoid of arguable legal merit."

Significance: Through its orders in this action, the Michigan Supreme Court demonstrated that a trial court must properly support and clarify its reasoning in deciding to assess attorney fees against a party for asserting a frivolous claim or defense and that, in making its decision, the trial court should consider the definitions of "frivolous" under MCL 600.2591(3)(a)(i) through (iii).

Cases To Watch

In a portion of his dissenting opinion in *McCormick v Carrier*, 487 Mich 180; ___ NW2d ___ (2010), entitled "Reversals Of Precedent To Come," Justice Markman prophesied that the court's then majority was likely to overrule several of the court's prior decisions that the majority had "teed up" for review in various pending appeals. Following the recent re-election of Justice Robert Young and the election of Mary Beth Kelly to the bench, however, it remains to be seen whether these reversals of precedent are as imminent as Justice Markman once predicted. Nonetheless, the following cases scheduled for review by the Supreme Court are worthy of attention.

***Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 283 Mich App 115; 770 NW2d 359 (2009):** Reviewing whether *Michigan Citizens v Nestle Waters*, 479 Mich 280; 737 NW2d 447

The Supreme Court ordered, again in lieu of granting leave to appeal, that the Court of Appeals decision be vacated and the trial court's assessment of attorney fees against Auto-Owners be reinstated because the trial court properly found that Auto-Owners' claim regarding the pollution exclusion in the insurance policy was "inappropriate and devoid of arguable legal merit."

(2007), and *Preserve the Dunes v DEQ*, 471 Mich 508; 684 NW2d 847 (2004), were correctly decided.

***Colaianni v Stuart Frankel Dev Corp*, unpublished opinion per curiam of the Court of Appeals, issued June 18, 2009 (Docket No 282587):** Reviewing whether *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007), was correctly decided.

***Idalski v Schwedt*, unpublished opinion per curiam of the Court of Appeals, issued September 29, 2009 (Docket No 287279):** Reviewing whether *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), should be reconsidered.

***Pollard v Suburban Mobility Authority for Regional Transp*, unpublished opinion per curiam of the Court of Appeals, issued November 24, 2009 (Docket No 288851):** Reviewing whether *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), should be reconsidered.

By: Todd W. Millar, DRI State of Michigan Representative
Smith Haughey Rice & Roegge

DRI Report: July 2010

Todd W. Millar is a shareholder in the Traverse City office of Smith, Haughey, Rice & Roegge. Mr. Millar graduated from Purdue University with a Bachelors of Science in agricultural education in 1988 and an Masters of Science in agricultural economics in 1990. He earned his Doctor of Jurisprudence from Indiana State University in 1993, earning the Order of the Barrister. His areas of practice include insurance defense, commercial and general civil litigation. He can be reached at tmillar@shrr.com, or 231-929-4878.

DRI's New Online Legal Portal

In an effort to continually improve its value to members, DRI has launched a customizable online legal portal, DRI Today. DRI Today is a one-stop online information portal for the legal community. The site offers lawyers and others interested in civil litigation direct access to practice-specific content and emerging developments affecting the business arena. In addition to industry news, DRI Today provides information for the civil defense professional, including links to recent *amicus* filings, legal resource sites, and direct access to DRI's searchable member database. The portal is updated throughout the day with breaking news and features breaking news and timely information for legal professionals. "We couldn't be more excited about DRI Today and what it offers the legal community as a resource and Internet home page," said Pittsburgh attorney Henry Sneath, DRI First Vice President and partner at Picadio Sneath Miller & Norton, P.C. "The portal is a unique resource for defense attorneys seeking the most up-to-date information on diverse legal issues, news, politics, market news and emerging issues. DRI Today demonstrates the value DRI information to our members and non-members." DRI blog posts and publications round out the portal. I encourage you to visit www.dritoday.org for more information and to access the site.

Mary Massaron Ross Elected First Vice President

There is also some exciting news to report from the DRI Annual Meeting: MDTC's own Mary Massaron Ross, one of Michigan's top appellate lawyers, was elected First Vice President. She previously served as Second Vice-President of the 22,500-member organization and is co-editor of DRI's *A Defense Lawyer's Guide to Appellate Practice*. "Mary's expertise in appellate law is unparalleled, and we welcome her continued leadership on behalf of our thousands of DRI members" said John Kouris, DRI's Executive Director. "In the coming year, Mary will help the defense bar stay at the forefront of legal issues that affect our members and their clients."

Member News

Work, Life, and All that Matters

Member News is a member-to member exchange of news of **work** (a good verdict, a promotion, or a move to a new firm), **life** (a new member of the family, an engagement, or a death) and **all that matters** (a ski trip to Colorado, a hole in one, or excellent food at a local restaurant).

Send your member news item to the editor, Hal Carroll (hcarroll@VGpcLAW.com) or the Assistant Editor, Jenny Zavadil (Jenny.Zavadil@det.bowmanandbrooke.com).

Mary Massaron Ross, a member of the board of directors of Plunkett Cooney, has been named as First Vice President of DRI.

Madelyn Rose Reuter, born 10-14-2010 daughter of board member **Allison Reuter.**

Michigan Defense Quarterly Publication Schedule

Publication Date	Copy Deadline
January	December 1
April	March 1
July	June 1
October	September 1

For information on article requirements, please contact:

Hal O. Carroll, Editor
hcarroll@vgpclaw.com

Jenny Zavadil, Assistant Editor
jenny.zavadil@bowmanandbrooke.com

MEMBER TO MEMBER SERVICES

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 hcarroll@VGpcLAW.com.**

ALTERNATIVE DISPUTE RESOLUTION

- Negligence
- Professional Liability
- Commercial
- Contract Disputes

Peter Dunlap, PC
4332 Barton Road
Lansing, MI 48917
Phone: 517-321-6198
Fax: 517-482-0887
email: pdunlap65@gmail.com

ADR ARBITRATION/MEDIATION

JOHN J. LYNCH has over 30 years' experience in all types of civil litigation. He has served as a mediator, evaluator and arbitrator in hundreds of cases, is certified on the SCAO list of approved mediators and has extensive experience with

- Complex Multi-Party Actions
- Negligence and Product Liability
- Construction
- Commercial & Contract Disputes

John J. Lynch
Vandeveer Garzia, P.C.
1450 West Long Lake Road
Troy, MI 48098
(248) 312-2800
jlynch@VGpcLAW.com

APPELLATE PRACTICE

I am one of eight Michigan members of the American Academy of Appellate Lawyers, and have litigated 400-500 appeals. I am available to consult (formally or informally) or to participate in appeals in Michigan and federal courts.

James G. Gross
Gross & Nemeth, P.L.C.
615 Griswold, Suite 1305
Detroit, MI 48226
(313) 963-8200
jgross@gnsappeals.com

INDEMNITY AND INSURANCE ISSUES

Co-Founder and first Chairperson of the **Insurance and Indemnity Law Section** of the State Bar is available to consult for insureds or insurers on cases involving complex issues of insurance and indemnity or to serve as mediator or facilitator.

Hal O. Carroll
Vandeveer Garzia, P.C.
1450 West Long Lake Road
Troy, MI 48098
(248) 312-2909
hcarroll@VGpcLAW.com

MUNICIPAL & EMPLOYMENT LITIGATION: ZONING; LAND USE

Over 20 years litigation experience.

Employment: ELCRA, Title VII, Whistleblower, PWDCRA.

Land Use Litigation: Zoning; Takings; Section 1983 Claims.

Thomas R. Meagher
Foster, Swift, Collins & Smith, PC
313 S. Washington Square
Lansing MI 48933
(517) 371-8100
tmeagher@fosterswift.com

FACILITATED MEDIATION

Trained at the University of Windsor Faculty of Law/Stitt Feld Handy Group in facilitated mediation. Certified by the U. S. District Court for the Western District of Michigan. Available to conduct facilitated mediation in the Upper Peninsula and the Northern half of the Lower Peninsula.

Keith E. Swanson
Swanson & Dettmann, P.C.
419 W. Washington St
Marquette, MI 49855
(906) 228-7355
keswanson@charterinternet.com

ADR - ARBITRATION/ MEDIATION/FACILITATION

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

- Indemnity and insurance
- Construction
- Trucking
- Commercial and contract disputes
- Employment

Thomas M. Peters
Vandeveer Garzia, P.C.
1450 West Long Lake Road
Troy, MI 48098
(248) 312-2800
tmp-group@VGPCLaw.com

2010 Winter Meeting

Friday, November 5, 2010 • Troy Marriott

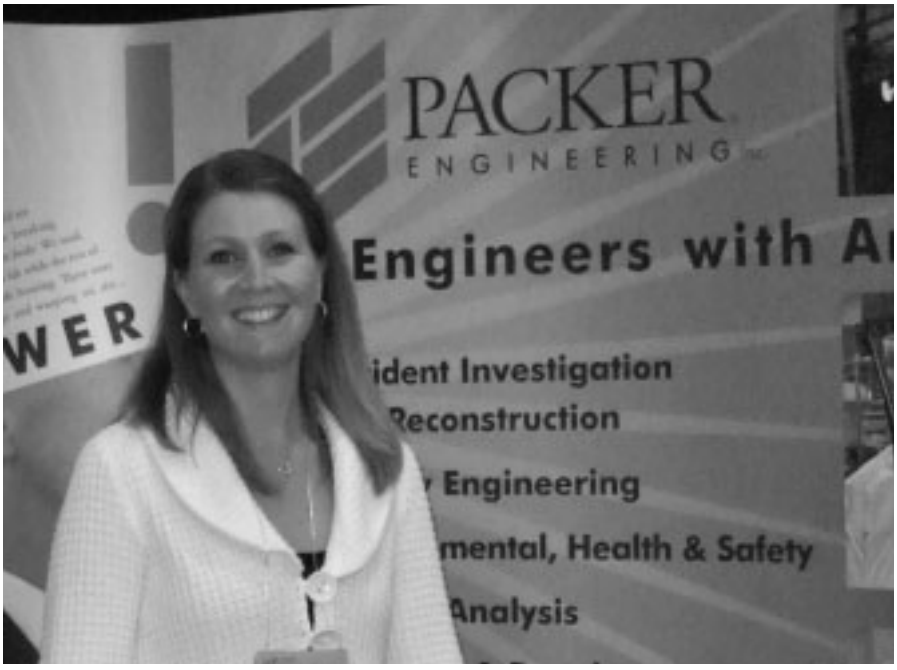
Defending Damages in 2010 Emerging Issues and Effective Techniques

Winter Meeting Sponsors
American Settlement Centers, Inc.
Donan Engineering Co., Inc.
Exponent
Forcon International - Michigan, Ltd
Leading Technologies, LLC,
Legal Copy Services, Inc.
Michigan Financial Companies
Packer Engineering, Inc.
ProAssurance Casualty Company
Ringler Associates
SEA Limited
The Rehmann Group
Tri-County Court Reporters, Inc.

D. James Papageorgiou, Steve Johnston & Neil Steinkamp

Guy Hostetler, Ray Morganti & Anne Randall

Larry Campbell, Bob Krause and Jim Lozier



Rebecca Bommarito

Marty Reisig & Jim Derian

David Christensen & Lori Ittner

Past Presidents Dinner

Thrusday, November 4, 2010 • Troy Marriott

Sponsors:
Legal Copy Services
Conway MacKenzie
Dunleavy & Associates

Mike Fordney, Walt Griffin, Larry Donaldson & Jim Kohl

Raymond Morganti, Bob Krause & Mike Malloy

Margret Kronk, Ed Kronk, John Jacobs & Linda Jacobs

Scott Holmes, Lori Ittner, Phil Korovesis

Pete Dunlap & Jim Bodary

Meet The Judges

Thursday, October 14, 2010 • Baronette Renaissance

Justices of the Supreme Court, and the Judges of the Court of Appeals, Macomb, Oakland and Wayne County Circuit Courts, and U.S. District Courts for the Western and Eastern Districts were invited to attend this event.

Lee Khachaturian, Philip DeRosier, Ed Perdue

Jana Berger, Linda Foster-Wells, David Saperstein

Judge Doug Shapiro, Michigan Court of Appeals, John Eads, & Melissa Ackerman

Lori Ittner, Hal Carroll and Raymond Morganti

Meet The Judges Event Sponsors: *Dickinson Wright, PLLC, Foster Swift Collins & Smith, PC, Johnston, Sztykiel Hunt Goldstein Fitzgibbons & Clifford, P.C., Keller Thoma, P.C., Kitch, Drutchas, Wagner, Valitutti & Sherbrook, Legal Copy Services, Inc., Ottenwess Allman & Taweel, PLC, Plunkett Cooney.*

Christina Ginter, Lee Khachaturian, Justice Mary Beth Kelly, Christina McDonald, and Philip DeRosier

Terry Miglio, Barbara Buchanan & Robert Schaffer

Marc Lipton & James Thome

Larry Campbell, Judge Pat Donofrio, Michigan Court of Appeals

Judge Karen Fort Hood and Judge Kirsten Frank Kelly, Michigan Court of Appeals

MDTC LEADER CONTACT INFORMATION

Officers

Lori A. Ittner
President
Garan Lucow Miller, PC
300 Ottawa Ave., NW, 8th Floor
Grand Rapids, MI 49503
616-742-5500 • 616-742-5566
littner@garanlucow.com

Phillip C. Korovesis
Vice President
Butzel Long
150 W. Jefferson Ste 900
Detroit, MI 48226
313-983-7458 • 313-225-7080
korovesis@butzel.com

Timothy A. Diemer
Treasurer
Jacobs & Diemer P.C.
500 Griswold St. Ste 2825
The Guardian Building
Detroit, MI 48226
313-965-1900 • 313-965-1919
tad@jacobsdiemer.com

Raymond Morganti
Secretary
Siemion Huckabay, P.C
One Towne Square Ste 1400
Southfield, MI 48076
248-357-1400 • 248-357-3343
rmorganti@siemion-huckabay.com

J. Steven Johnston
Immediate Past President
Berry, Johnston, Sztykiel & Hunt, P.C.
1301 West Long Lake Rd Ste 250
Troy, MI 48098
248-641-1800 • 248-641-3845
sjohnston@berryjohnstonlaw.com

Board

Jana M. Berger
jberger@foleymansfield.com
248-721-4200 • 248-721-4201
Foley & Mansfield PLLP
130 East Nine Mile Road
Ferndale, MI 48220

Lawrence G. Campbell
lcampbell@dickinsonwright.com
313-223-3703 • 313-223-3598
Dickinson Wright P.L.L.C.
500 Woodward Ave., Ste 4000
Detroit, MI 48226

Hal O. Carroll
HCarroll@VGpcLAW.com
248-312-2800 • 248-267-1242
Vandeveer Garzia, P.C.
1450 W Long Lake Rd, Ste 100
Troy, MI 48098

Jeffrey C. Collison
jcc@saginaw-law.com
989-799-3033 • 989-799-2969
Collison & Collison PC
5811 Colony Dr N, PO Box 6010
Saginaw, MI 48608

Linda M. Foster-Wells
lmf@kellerthoma.com
313-965-7610 • 313-965-4480
Keller Thoma PC
440 E. Congress St. Fl 5
Detroit, MI 48226

Mark A. Gilchrist
mgilchrist@shrr.com
616-774-8000 • 616-774-2461
Smith Haughey Rice & Roegge
250 Monroe Ave., NW, Ste. 200
Grand Rapids, MI 49503

Catherine D. Jasinski
cdj@runningwise.com
231-946-2700 • 231-946-0857
Running Wise & Ford PLC
326 E. State Street
Traverse City, MI 49684

Richard J. Joppich
richard.joppich@kitch.com
517-381-7196 • 517-381-4427
Kitch Drutchas Wagner Valitutti & Sherbrook
2379 Woodlake Dr., Suite 400
Okemos, MI 48864-6032

Diana Lee Khachaturian
dkhachaturian@dickinsonwright.com
313-223-3128 • 313-223-3598
Dickinson Wright PLLC
500 Woodward Ave., Ste 4000
Detroit, MI 48226

Scott L. Mandel
smandel@fosterswift.com
517-371-8185 • 517-371-8200
Foster Swift Collins & Smith PC
313 South Washington Square
Lansing, MI 48933

Dean F. Pacific
dpacific@wnj.com
616-752-2424 • 616-752-2500
Warner, Norcross & Judd LLP
111 Lyon St NW Ste 900
Grand Rapids, MI 49503

Allison C. Reuter
areuter@hopenetwork.org
616-301-8000 • 616-301-8010
General Counsel, Hope Network
P.O. Box 890, 755 36th St., SE
Grand Rapids, MI 49518-0890

MDTC LEADER CONTACT INFORMATION

Section Chairs

Appellate Practice:
Matthew T Nelson, Co-Chair
mnelson@wnj.com
616-752-2539 • 616-222-2539
Warner Norcross & Judd LLP
900 Fifth Third Center, 111 Lyon Street NW
Grand Rapids, MI 49503

Beth A. Wittmann, Co-Chair
beth.wittmann@kitch.com
313-965-7405 • 313-965-7403
Kitch Drutchas Wagner Valitutti & Sherbrook, PC
One Woodward Ave, Ste. 2400
Detroit, MI 48226

Commercial Litigation: Edward P. Perdue
eperdue@dickinsonwright.com
616-458-1300 • 616.458.6753
Dickinson Wright PLLC
200 Ottawa Avenue, N.W. Suite 1000
Grand Rapids, MI 49503

General Liability: David A. Couch
dcouch@garanlucow.com
616-742-5500 • 616-742-5566
Garan Lucow Miller PC
300 Ottawa Ave NW, 8th Floor
Grand Rapids, MI 49503

Insurance: Hal O. Carroll
HCarroll@VGpcLAW.com
248-312-2800 • 248-267-1242
Vandeveer Garzia, P.C.
1450 W Long Lake Rd, Ste 100
Troy, MI 48098

Labor & Employment:
Barbara Eckert Buchanan
beb@kellerthoma.com
313-965-7610 • 313-965-4480
Keller Thoma PC
440 East Congress, 5th Floor
Detroit, MI 48226

Law Practice Management:
Thaddeus E. Morgan
tmorgan@fraserlawfirm.com
517-482-5800 • 517-482-0887
Fraser, Trebilcock, Davis & Dunlap PC
124 W. Allegan, Ste 1000
Lansing, MI 48933

Municipal & Governmental Liability:
Karie H. Boylan
kboylan@co.wayne.mi.us
313-224-8577 • 313-967-3532
Wayne County Corporation Counsel
600 Randolph 2nd Floor
Detroit, MI 48226

Professional Liability & Health Care:
Terence P. Durkin
terence.durkin@kitch.com
313-965-6971 • 313-965-7403
Kitch, Drutchas, Wagner, Valitutti & Sherbrook
1 Woodward Ave., Ste. 2400
Detroit, MI 48226

Trial Practice: David M. Ottenwess
dottenwess@ottenwesslaw.com
313-965-2121 x 211 • 313-965-7680
Ottenwess Allman & Taweel PLC
535 Griswold St., Ste 850
Detroit, MI 48226

Young Lawyers: David L. Campbell
david.campbell@det.bowmanandbrooke.com
248-687-5300 • 248-743-0422
Bowman and Brooke LLP
50 W. Big Beaver Rd., Ste 600
Troy, MI 48084

Regional Chairs

Flint: Ridley S. Nimmo, II
Plunkett Cooney
111 E. Court St. Ste 1B
Flint, MI 48502
810-342-7010 • 810-232-3159
rnimmo@plunkettcooney.com

Grand Rapids: Michael D. Wade
Garan Lucow Miller, P.C.
300 Ottawa Avenue, NW Avenue, Flr 8
Grand Rapids, MI 49503
616-742-5500 • 616-742-5566
mwade@garanlucow.com

Kalamazoo: Tyren R. Cudney
Lennon, Miller, O'Connor & Bartosiewicz PLC
900 Comerica Bldg.
Kalamazoo, MI 49007
269-381-8844 • 269-381-8822
cudney@lennonmiller.com

Marquette: Keith E. Swanson
Swanson & Dettmann, P.C.
148 West Washington Street,
Marquette, MI 49855
906-228-7355 • 906-228-7357
keswanson@chartermi.net

Saginaw / Bay City: David Carbajal
O'Neill Wallace & Doyle PC
300 Saint Andrews Rd Ste 302, PO Box 1966
Saginaw, MI 48605
989-790-0960 • 989-790-6902
dcarbajal@owdpc.com

Southeast Michigan: Scott S. Holmes
Foley & Mansfield PLLP
130 East Nine Mile Road
Ferndale, MI 48220
248-721-4200 • 248-721-4201
sholmes@foleymansfield.com

Traverse City / Petoskey: John Patrick Deegan
Plunkett Cooney
303 Howard Street
Petosky, MI 49770
231-348-6435 • 231-347-2949
jdeegan@plunkettcooney.com

MDTC 2010–2011 Committees

Golf Outing Committee
Jim Gross & Mark Gilchrist

Awards Committee
Chair Jeff Collison,
with Mark Gilchrist, Phillip Korovesis
& Timothy Diemer

Winter Meeting Committee
Chair Richard Paul, Linda Foster-Wells
Raymond Morganti & Larry Campbell

Annual Meeting Commttee
Chair Lee Khachaturian,
with Mark Gilchrist/Jeff Collison

Editor, *MDTC Quarterly*
Hal Carroll

Asst. Editor, *MDTC Quarterly*
Jenny Zavadil

Nominating Committee
Steve Johnston

Supreme Court Update Committee
Scott Mandel

Technology Committee
Alan Couture
Scott Holmes
Erin Kerber

Section Chair Liaison
Raymond Morganti

Regional Chair Liaison
Timothy Diemer

Government Relations
Graham K. Crabtree — Government Affairs Chair

Membership Committee
Dean Pacific & Richard Joppich

Future Planning Committee Chair
Phillip Korovesis

MAJ Liaison Chair
Terry Miglio

Past Presidents Committee
John P. Jacobs

Judicial Relations Committee
Larry Campbell

Amicus Committee
Hillary Balentine & James Brenner

Sponsorship Committee
Linda Foster-Wells & Nicole DiNardo

Political Advisory Committee
Mark Gilchrist

Judicial Advisory Committee
Terry Miglio & Jim Gross

DRI State Representative
Todd Millar

Michigan Defense Trial Counsel, Inc.
P.O. Box 66
Grand Ledge, MI 48837

Schedule of Events

2011

January 11	Excellence in Defense Nomination Deadline
January 11	Young Lawyers Golden Gavel Award Nomination Deadline
January 21	Future Planning, City Flats Hotel, Holland MI
January 22	Board Meeting, City Flats Hotel, Holland, MI
February TBA	Bi-annual Movie Night (date/location TBA)
March 16	Board Meeting, Okemos Holiday Inn Express
May 18–20	Annual Meeting, Soaring Eagle Casino & Resort

MDTC is an association of the leading lawyers in the State of Michigan dedicated to representing individuals and corporations in civil litigation. As the State's premier organization of civil litigators, the impact of MDTC Members is felt through its Amicus Briefs, often filed by express invitation of the Supreme Court, through its far reaching and well respected Quarterly publication and through its timely and well received seminars. Membership in MDTC also provides exceptional opportunities for networking with fellow lawyers, but also with potential clients and members of the judiciary.