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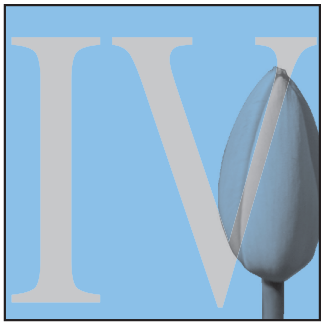

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Articles: All articles published in the *Michigan Defense Quarterly* reflect the views of the individual authors. The *Quarterly* always welcome articles and opinions on any topic that will be of interest to our members in their practices. Although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

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President's Corner

By: Phillip C. Korovesis
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From the President

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"Under democracy one party always devotes its chief energies to trying to prove that the other party is unfit to rule—and both commonly succeed, and are right."

"Democracy is the theory that the people know what they want, and deserve to get it good and hard." — H.L. Mencken

In light of Mr. Mencken's rather dark view of how democracy "works," one might expect that in this column, my last before my term expires later this year, I would be informing the membership of Michigan Defense Trial Counsel that I had declared martial law and that I was positioning myself for "re-election" as president for life. I would then decree that I only be referred to as "Dear Leader." MDTC's riches would then be mine to oversee. Not so. MDTC's "riches," those benefits and attributes that we all enjoy so much, are not mine alone to have and hold. They never will be.

Each of you, as a member of this group of professionals, has an equal and unfettered right to enjoy all that this organization has to offer. Be it collegiality, camaraderie, networking opportunities, professional education, or any of the other attributes of MDTC, no one, not even a Dear Leader, can stand in your way. That is how it is supposed to work—and it does work.

In all of my years in this organization, the last batch of which have been in various leadership roles, I have consistently seen the will of its members reflected in the decisions made by its leadership. The organization goes only where its constituency wants it to go. It has always been that way. When I first became a member, I recall that MDTC leaders would regularly concern themselves with the proper direction of the group and whether they were steering it where the members wished to voyage. Should we grow in this direction or that? What do our members say? Those questions were asked, answered and acted on all with the input of the membership.

I think it worked. From my view in the rank and file membership, I saw the MDTC go in new and challenging directions. It was exciting to see that in action. When I stood in the shoes of the leadership team, I was privy to discussions and then decisions on the kinds of choices that would continue that stewardship. Those who came before me created a thriving group of professionals and kept them focused on moving forward, full steam ahead. It was the foresight and commitment of those leaders that, along with the efforts of their constituents, allowed MDTC to get through the leaner recent years that brought many a challenge to organizations like this one. A lesser professional group might not have survived. This one has. And that is due not just to those who lead, but also due to those who steer the leaders — the members. That sounds a lot like democracy that works. Even H.L. Mencken might be impressed. He should be.

At each stage of my membership in MDTC, I saw impressive people at work unselfishly pushing for success for MDTC. This happened, and continues to happen, at all levels of MDTC. So, in becoming a steward of MDTC as its president, I felt a bit intimidated by those that held the position before me. They are stars of the bar. What huge shoes to fill. As my year as president winds down, I hope you think that

In all of my years in this organization, the last batch of which have been in various leadership roles, I have consistently seen the will of its members reflected in the decisions made by its leadership.

I filled them well. In fact, I hope you will look back at my tenure as president and think that I was a good one.

When I look forward, I see the up and coming lawyer-leaders who will take the helm of MDTC. I see leaders like Tim Diemer, Ray Morganti, Mark Gilchrist and the many more who serve on our board and in other leadership roles that make me feel incredibly positive about the future of the MDTC (including, of course, Madelyne Lawry, our executive director, who makes us all look good). Even more encouraging is the fact that MDTC members are engaged and active in contributing to the success of the organization. That does bode well, very well, indeed.

Supreme Court To Hear Challenges To Health Care Reform Law

By: Johanna M. Novak, *Foster Swift Collins & Smith*

In late 2011, the Supreme Court of the United States announced that it would take up four issues regarding the Patient Protection and Affordable Care Act ("PPACA"). The court is expected to hear oral arguments in late March of 2012 and provide a decision in June of 2012.

Three of the four issues to be reviewed by the court center around PPACA's Individual Mandate. The Individual Mandate (also known as the minimum coverage provision) requires that, beginning in 2014, individuals who fail to maintain a minimum level of health insurance coverage for themselves and their dependents pay a penalty, calculated in part on the basis of the individual's household income as reported on the individual's federal income tax return. This is likely the most controversial provision of PPACA.

The four issues to be considered by the court are as follows:

Anti-Injunction Act Issue

The Anti-Injunction Act issue is expected to be the first issue heard during oral arguments. As stated above, an individual who violates the Individual Mandate beginning in 2014 will be subject to a new penalty, reportable on his or her federal income tax return. The Anti-Injunction Act generally bars legal challenges to new tax law provisions until those tax law provisions have been enforced. The Individual Mandate's penalty provisions will not be enforced against any individual until 2014 at the earliest, but more likely not until 2015. The court will have to determine whether the Individual Mandate's penalty is just that, a penalty, or whether it is really a tax. If the court determines that it is a tax, then a decision on the constitutionality of the Individual Mandate may be delayed until after the Individual Mandate takes effect.

Individual Mandate Issue

Assuming the court determines that the Individual Mandate is not a tax, the next issue before the court is whether congress has the authority to require individuals to buy health insurance. The Obama administration has argued that congress had the authority under the Commerce Clause and the Necessary and Proper Clause of the United States Constitution to enact the Individual Mandate. The administration has also argued that Congress's taxing power provides an independent ground with which to uphold the Individual Mandate. The twenty-six states challenging the constitutionality of the Individual Mandate submit that while the Constitution grants Congress the power to regulate commerce, it does not grant Congress the power to compel individuals to enter into commerce through the requirement to purchase health insurance.

Johanna Novak is a shareholder in Foster Swift Collins & Smith and practices in the areas of health care and employee health benefits. She previously served as the Director of Regulatory Compliance and HIPAA Privacy and Security Officer for a health maintenance organization. Johanna is currently located in the firm's Marquette office. Johanna is also a member of the State Bar of Michigan Health Care Law Section's Substantive Law and Legislation Committees, as well as the American Health Lawyers Association Accountable Care Organization Task Force. Here email address is JNovak@fosterswift.com.

Severability Issue

If the Individual Mandate is deemed unconstitutional, the court will then have to determine whether the unconstitutional mandate can be severed from the rest of PPACA, leaving remaining PPACA provisions in place, or whether PPACA as a whole should be struck down. The Obama administration has argued that even if the court finds the mandate unconstitutional, the entire law should not be invalidated. Challengers to PPACA argue that without the Individual Mandate, Congress would not have enacted many of the other PPACA provisions and that PPACA should be invalid in its entirety.

Medicaid Issue

PPACA amended the Medicaid program to require that states make their Medicaid benefits available to individuals with incomes up to 133% of the federal poverty level. A state that declines to expand its Medicaid program accordingly risks losing all federal Medicaid funding. Prior to this, states had some discretion to determine Medicaid eligibility.

Challengers of the Medicaid eligibility provision have argued that this expansion is unconstitutionally coercive. Conversely, the Obama administration has argued that it is not forcing any state to expand its Medicaid program because a state, at any time, can voluntarily opt out of Medicaid. The last time that the court addressed an issue of this nature was in the 1980s when the Court held that a federal law that required states to raise their legal drinking age to 21 in exchange for continued federal transportation dollars was constitutional.

Conclusion

It remains to be seen how the court will rule on each of these four issues. But even if the court finds in favor of the law in all respects, a Republican victory in the upcoming presidential election would likely place PPACA's future in jeopardy again.

Early Expert Evaluation: ADR In The Context Of Insurance Coverage And Indemnity

By: Mark G. Cooper and Hal O. Carroll

Editor's Note: This article first appeared in the January 2012 issue of the ADR Quarterly and is reprinted with permission.

Executive Summary

Conventional case evaluation does not work well with disputes concerning insurance coverage and contractual indemnity, because contractual and legal issues are controlling, rather tan factual disputes. Early Expert Evaluation can work well for these disputes.

In this process, an evaluator who is both neutral and knowledgeable in these areas takes an active role in evaluating the contract and policy language involved. The evaluator engages each party in a discussion of the strengths and weaknesses of each party's position. If the parties agree, the evaluator can provide a decision or suggest a resolution either at the evaluation session, or in a written report that evaluates each party's position. The result would be early resolution at a substantial savings to all parties.

Mark G. Cooper is a co-founder and the current chair of the Insurance and Indemnity Law Section. Mr. Cooper is a partner at Jaffe, Raitt, Heuer & Weiss, P.C. where he practices in commercial litigation, with emphasis on insurance coverage disputes for both policy holders and insurers. His email address is mcooper@jaffelaw.com.

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Disputes involving insurance coverage and contractual indemnity have seemed resistant to the application of ADR principles and procedures. Traditional case evaluation, for example, works well when the disputes are fact-based, but it's seldom successful with disputes involving insurance coverage and indemnity, where contract issues predominate.

Insurance coverage and indemnity disputes have two characteristics that make it hard to fit them into the traditional ADR mechanism. First, they are heavy on legal issues because they necessarily involve the interpretation of contracts, and the interpretation of a contract is pre-eminently a matter of law. Second, the legal issues relating to insurance coverage and the analysis of indemnity clauses are of a type that many practitioners are not familiar with.

A third characteristic is not present in all such disputes, but it is present in many. This is the multiple party situation. In construction site injury cases, for example, it is common to have more than one indemnity clause, more than one policy and more than one "additional insured" obligation. This leads to a complicated web of obligations with contingencies abounding throughout the resulting matrix of possible payors and payees. If, for example, two (or more) insurers both provide coverage, do they share equally or in some other way? What if there are excess policies, with or without drop-down coverage? If there are two indemnitors, how do they share the obligation? What if one or more of the indemnity clauses is a step-over clause? And how do the indemnity obligations mesh with the insurance obligations?

When this happens, even the best of facilitators can come up short, simply because there are too many "what-ifs" to be resolved, and the principles that govern the resolution of them lie within a narrow specialty of practice. That does not mean that ADR can never succeed, of course. Facilitation can work in some situations, and some form of arbitration may also work.

But we believe there is a form of ADR that can work well for these types of cases, even – perhaps especially – the multiple party case. This is a specialized form of case evaluation – Early Expert Evaluation.

The purpose of the evaluation, as the name suggests, is to get an early evaluation by a neutral expert of the parties' claims of insurance coverage and contractual indemnity. The goal is to obtain an objective, comprehensive and detailed analysis – at the beginning of the dispute – of the issues and arguments with a view to determining the likely result if the insurance coverage and indemnity issues are brought before a court.

In construction site injury cases, for example, it is common to have more than one indemnity clause, more than one policy and more than one "additional insured" obligation. This leads to a complicated web of obligations with contingencies abounding throughout the resulting matrix of possible payors and payees.

The reason for using an expert as a neutral evaluator is not that counsel for the parties are lacking in expertise. On the contrary, attorneys who are experts recognize the benefit of having an expert who is also neutral take an active role in discussions. The points that the evaluator raises in the discussions will focus each party's attention on the strengths and weaknesses of each party's analysis.

What makes early evaluation by an expert more productive in these cases is that so much of the dispute focuses on the documents. The parties dispute the interpretation of the documents and their application to the facts, but the language of the documents and the underlying facts are seldom disputed.

The premise that underlies Early Expert Evaluation is that the evaluator will be someone who (1) is knowledgeable in the substantive law of insurance coverage and indemnity, (2) whose real-world experience in the area includes knowledge of how various arguments are received by the courts, and (3) who can take a neutral position.

The benefit that results from this is a substantial saving to the clients, as well as a result based on an analysis by someone who is familiar with the principles governing the issues, and with the techniques of analysis.

The parties can design the details of the Early Expert Evaluation process in whatever way suits them, ranging from a process that mirrors simple facilitation to a process more akin to arbitration.

- In some cases the evaluator would work much like a facilitator, drawing the parties out in explaining their positions. The difference here would be that the evaluator, based on his or her expertise, would ask pointed questions concerning each party's position. The result would be that each party becomes more aware of the strengths and weaknesses of their analyses, from the perspective of someone who is neutral.

- We think that more often, the process would be more akin to evaluative mediation, where if no compromise is reached during the facilitative process, the neutral evaluator accompanies the analysis with a dollar figure or percentages reflecting each party's responsibility for the ultimate verdict on liability.

- If the parties choose the evaluative mediation model, they can provide for case evaluation sanctions if the recommendation is rejected. More often, we think the parties would prefer the recommendation would be advisory.

- Finally, the parties could choose to be bound by the result, as in arbitration, but we think that in most cases they would prefer the evaluation to be advisory.

What makes this process different from conventional ADR is that it brings the expertise of the evaluator to bear. It is the analysis by an expert, and the evaluator's "hands-on" participation in discussions, that sets this form of evaluation apart from conventional case evaluation or facilitation. The process we propose is much more akin to evaluative mediation – the evaluative mediation model is generally understood to be a process that includes an assessment by the mediator of the strengths and weaknesses of the parties' cases and a prediction of the likely outcome of the case – as opposed to the more common facilitative mediation. In facilitative mediation, the mediator does not make recommendations to the parties, offer an opinion as to the outcome of the case, or even predict what a court would do.

The purpose of the evaluation, as the name suggests, is to get an early evaluation by a neutral expert of the parties' claims of insurance coverage and contractual indemnity. The goal is to obtain an objective, comprehensive and detailed analysis – at the beginning of the dispute – of the issues and arguments with a view to determining the likely result if the insurance coverage and indemnity issues are brought before a court.

We believe there are two scenarios in which this procedure is most likely to be used with respect to indemnity clauses, and in a related way to insurance coverage.

First, Early Expert Evaluation by a neutral expert can be helpful very early in litigation, especially when there are multiple parties, each facing much risk because of the underlying injury, and there is no agreement on the various contract obligations. Experienced attorneys in this area will recognize the value of early guidance, because the underlying

litigation is going to be expensive, and they all understand the value of not litigating among the defendants "in front of the plaintiff," so to speak. This can avoid the risk presented by a situation where each claims handler, often located in a different state and unfamiliar with Michigan law, makes an initial determination, after which defense counsel writes a coverage opinion that largely mirrors the hoped-for outcome, and the parties then dig in and work toward filing a dispositive motion.

If the parties' attorneys are experienced in these areas, an early analysis and evaluation by a neutral expert serves as a catalyst for discussion and a basis for further negotiation. If the parties' attorneys are not experienced in this area, the process will educate them about the strengths and weaknesses of their positions and the other parties' positions, and give each party a better understanding of the likelihood of the outcome it desires.

The second scenario arises later in the case – likely after significant underlying discovery has taken place, a neutral analysis by an expert would be beneficial where the parties and their attorneys and/or claims handlers felt more complete fact development would allow better analysis of the respective contract obligations. Another late-case scenario would be where the attorneys and parties are less knowledgeable in the area of law or where their focus on underlying tort liability issues have let the indemnity and coverage issues just bump along with no clear direction, or perhaps where they have dug in about respect to their positions perhaps without fully appreciating the consequences or impact.

Procedures

The procedure in each particular case can be designed by the parties to suit their needs, so the following descriptions are offered as illustrations of possibilities.

Input. In the simplest case, the parties could provide the evaluator with the underlying facts, the underlying complaint, the relevant contract and policy documents, and the question(s) they would like to be addressed. They would not offer their own analyses for review.

The premise of the Early Expert Evaluation process is that the chosen evaluator is knowledgeable, so it may be possible to do away with the parties' presentations of their own analyses, but more often, each party would also provide its own analysis in written form. The evaluator would then respond to each argument.

Oral Presentation. In most cases though, the parties would present their analyses (with or without prior written presentation) to the evaluator in a meeting. The evaluator would then conduct a discussion much like facilitation, except that the evaluator would be more "hands-on," and probe each party's argument with questions based on the evaluator's expertise.

What makes this process different from conventional ADR is that it brings the expertise of the evaluator to bear. It is the analysis by an expert, and the evaluator's "hands-on" participation in discussions, that sets this form of evaluation apart from conventional case evaluation or facilitation.

The premise of the Early Expert Evaluation process is that the chosen evaluator is knowledgeable, so it may be possible to do away with the parties' presentations of their own analyses, but more often, each party would also provide its own analysis in written form. The evaluator would then respond to each argument.

Output. As is explained above, the evaluator can recommend a resolution amount or percentage, and rejection of that recommendation can be accompanied by case evaluation-type sanctions, if the parties so choose. If the parties choose, the evaluator can provide a written report with a detailed analysis of the contract language and the law supporting the recommendations.

Advisory or Binding? As is mentioned above the result can be binding if the parties prefer, but more often it will serve an advisory function, to give the parties a candid view from a neutral perspective.

Uses of the Report. If the parties ask the evaluator to provide a detailed written report, they would decide in advance what use can be made of the report. It isn't possible to prevent any party from adopting parts of the analysis in any motions that are later filed with the court if the case does not resolve, but the agreement would normally specify that no party may quote from or refer to the report with any form of attribution.

If the case is referred to Early Expert Evaluation by the court, then of course the court would specify what uses will be made of the report, or it may choose to leave that to the parties. The referral agreement, which defines the terms of reference to the evaluator, must specify what uses can and cannot be made. One possibility is to allow the parties to cite the report as persuasive authority for the court, or if the parties later go to some form of facilitation.

Advantages

The system of Early Expert Evaluation offers several advantages.

Cost. Like all ADR, the parties get the benefit of controlled cost. This comes in part from the fact that the evaluation comes early in the litigation, and by avoiding some or most of the preparation that goes into motions, briefs, and reply briefs. The fact that the evaluator is an expert in the field will simplify the presentation of the arguments.

Settlement. The Evaluator's report should provide the parties a better view, from the outside, of their claims and arguments. This can enhance the possibility of settlement in two ways. First, it may give each party a different view of its position. Second, each party will know that the other parties now have the benefit of the report's analysis and can use that if the case goes forward.

Expertise. The factor that underlies these benefits is the expertise of the Evaluator. Insurance coverage and indemnity law are fairly arcane areas, and many judges are not intimately familiar with them. Bringing a complicated set of issues before a court that is unfamiliar with them and must also handle many other cases on a crowded docket can lead to decisions that are less than satisfactory. The expertise that is necessary for Early Expert Evaluation has two components: theory and practice. The Evaluator must be familiar with the details of the law that governs the interpretation of insurance policies and indemnity contracts, but must also be familiar with how cases of this type have been and are litigated and how they are seen by the courts.

The factor that underlies these benefits is the expertise of the Evaluator. Insurance coverage and indemnity law are fairly arcane areas, and many judges are not intimately familiar with them. Bringing a complicated set of issues before a court that is unfamiliar with them and must also handle many other cases on a crowded docket can lead to decisions that are less than satisfactory.

Persuasive Effect. The analysis should be more persuasive than conventional evaluation or facilitation, because of its timing and the expertise of the evaluator. Even if the referring attorneys are themselves experts in the field, an opinion expressed by a neutral expert should have some persuasive effect. Also, if an attorney is having trouble persuading his or her client of weaknesses in the case, a neutral analysis will provide support and perhaps "cover."

Summary

Early Expert Evaluation is different from facilitation and other forms of ADR in that the evaluator is further removed from the process of negotiation. By replicating the adjudicative process, it provides an evaluation that is objective, detailed and supported by analysis. For some cases, this will be sufficiently persuasive that the parties will accept the analysis and resolve the case on that basis. But even if the Evaluator's analysis does not lead directly to settlement, it will focus the argument and give each party a better sense of the strengths and weaknesses of its position. In this way, it will provide a basis for more effective negotiations between or among the parties.

Early Expert Evaluation is not the only form of ADR that can be productive in resolving disputes involving indemnity and insurance contracts, but it is uniquely well adapted to the types of issues that those disputes present.

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E-Discovery Update

By Sarah E. Cochran, *Warner Norcross & Judd LLP*

Executive Summary

E-discovery is becoming an increasingly important and expensive part of litigation, and the increasing cost and complexity are forcing changes in the way discovery is handled by counsel and by the courts. Cooperation between counsel has become an essential component of controlling costs, and courts are increasingly requiring cooperation at an early stage, in defining not only the scope of discovery but the techniques that will be used to handle it. Agreeing on the search terms, for example, can avoid the production of unnecessarily large quantities of documents.

Courts are increasingly encouraging and requiring parties to cooperate in crafting electronic discovery search terms and methods. When the parties fail to agree, they may find that the court steps in to define the search terms, which may leave both parties unhappy with the result. An emerging process is "predictive coding," which aims to make electronic document review exponentially more efficient by organizing documents into topics, weeding out irrelevant documents, prioritizing documents, and even automatically coding most documents based on a reviewer's initial input about the case.

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Introduction

The field of e-discovery is burgeoning as technology advances sweep the ever-growing e-discovery market. Since 2006, when the e-discovery rules were added to the Federal Rules of Civil Procedure, more than half of the states have adopted rules specifically governing electronic discovery. More than ever courts are using these rules to manage the difficulty of ever-increasing databases and data preservation costs. As technology advances, state and federal courts in Michigan and across the country are developing cost-saving approaches to address new challenges in the world of electronic discovery. In this quickly growing area of law, it is important to consider how other jurisdictions address cost-saving methods as courts forge new and increasingly effective approaches to manage electronic discovery.[1]

Despite all of the benefits and efficiencies of e-discovery, few litigants would dispute that e-discovery is a costly endeavor. The amount of electronically stored information (ESI) is ever-increasing and, with the pace of technological advances, this trend will continue. Attorneys and clients, alike, are becoming more and more sensitive to the increasing costs of e-discovery. Over the last year, courts have continued to address the costs of e-discovery in light of unthinkably large databases and complicated factual disputes. Specifically, courts are requiring cooperation and imposing significant control over the e-discovery process in an effort to keep costs down. This update considers ways that courts have intervened to control e-discovery costs and provides suggestions to cost-sensitive practitioners.

Cooperate and Be Practical

As databases grow larger and document storage capabilities increase, parties are struggling to effectively and efficiently cull through enormous amounts of data. For many, the first contentious consideration in the discovery phase of litigation is the scope of information to collect from the client and from the opposing side. The cost of a particular discovery project will largely be determined by the amount of data searched and stored.

Courts are encouraging cooperation between attorneys representing adverse parties and expecting attorneys to have frank discussions about each party's electronic data systems and capabilities. Unsurprisingly, some parties attempt to gather the broadest database possible regardless of the limited issues of the particular case or the cost of collecting, maintaining, and searching this data. Many courts are emphasizing the need for proportional discovery, tailored to the specific needs of a given case, rather than broad demands for a party to search its entire database and email system. When a party attempts to compel information production, the courts will use the language of discovery rules to limit a party's overly broad requests.

In *Thermal Design, Inc. v. Guardian Building Products, Inc.*, the defendant produced 91 gigabytes of data (or 1.46 million pages, in this case), but the plaintiff, unsatisfied, made additional electronic discovery requests based on the fact that defendant had the financial resources to pay for the additional searches.[2] The court refused plaintiff's additional requests, classified them as a fishing expedition, and noted that the defendant already spent $600,000 on electronic discovery production.[3] The court reasoned that a defendant's ability to pay does not qualify as good cause to compel discovery under FRCP 26(b)(2)(C).[4]

Similarly, in *General Steel Domestic Sales, LLC v Chumley*, the defendant requested every recorded sales call on plaintiff's database over a two-year span.[5] The court, in rejecting the defendant's request, held that defendant failed to show good cause for the information.[6] Practical considerations in this realm are highly persuasive. For instance, in *Chumley*, the court noted that it would take defendant nearly four years to listen to all of the calls it requested to identify potentially responsive information.[7] When determining the scope of information to gather in discovery, a party should be mindful of the practicality of its requests. Attorneys should limit electronic discovery requests as much as possible, but must balance this cost-saving endeavor against the potential benefit of obtaining the entire universe of potentially relevant data.

Attorneys and clients alike can rejoice in the cost-saving that results from the fact that courts are increasingly attuned to the practical implications of electronic discovery requests and adept at tailoring targeted document-gathering initiatives. Although a broad database increases a party's likelihood of finding relevant and useful data, it also increases the costs of document collection, production, storage, maintenance, and review. Limiting the scope of documents collected is one way to drastically decrease the costs associated with e-discovery.

Consider Cost-Sharing

Another recent cost savings trend is cost-sharing. It is important to be mindful of the burden of proof and the need for information when proposing such a model. In *Last Atlantis Capital LLC v AGS Specialist Partners*, the plaintiff proposed that defendants pay half of all costs plaintiff incurred while pursuing its own third-party subpoena.[8] The plaintiff attempted to argue that the defendants needed the information as much as plaintiff, so the parties ought to share the costs of gathering that information.[9]

Not persuaded, the court refused plaintiff's request for cost-sharing despite its earlier comment that cost-sharing might be reasonable under the circumstances since this particular information was the "linchpin of this entire matter."[10] In that case, there were multiple defendants who, collectively, had substantially more resources than plaintiff.[11] However, in denying the plaintiff's request, the court reasoned that plaintiff bears the burden of proving the case it alleged against defendants, so it must bear the costs incurred in seeking information to meet that burden.[12]

Although some courts are reluctant to order cost-sharing, this option is viable in cases where the opposing sides agree that a particular set of data is necessary or likely to decide issues in dispute. In these circumstances, attorneys should consider how cost-sharing agreements could benefit clients by decreasing costs associated with data collection and litigating discovery disputes.

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Use Search Terms

Keyword searching is another way parties can limit the costs of document collection, storage, and review, but it requires parties to cooperate with one another. During the beginning stages of discovery, it is important for attorneys to consider all potential issues in a case and determine the universe of possible search terms.

Recently, a plaintiff in California district court attempted to add acronyms and abbreviations that were not part of the parties' original list of search terms.[13] Notably, defendants requested a meeting to discuss search terms, but plaintiffs declined.[14] After the search was completed and during its initial review of the documents, plaintiff suspected the search missed important documents because certain acronyms and abbreviations were not on the original search term list.[15] The court refused the plaintiff's request to add search terms, noting that the plaintiff had plenty of time to gather information about the relevant abbreviations prior to providing its list of search terms to defendants.[16] Holding that the burden of a new search outweighed the benefit to plaintiff, the court stated that it would be "preferable" for parties and their counsel to have a "full and transpar-

ent discussion" of the search terminology beforehand to prevent this issue.[17]

Although seemingly contrary to a traditional, contentious view of litigation, it is becoming not only preferable, but necessary for parties to cooperate in crafting search terms. Courts are increasingly encouraging and requiring parties to cooperate in crafting electronic discovery search terms and methods. This cooperation is necessary in light of the courts' refusal to allow supplemental searches in an effort to keep down costs.
Cooperation in crafting search terms benefits all interested parties considering the expenses each side will likely incur throughout the electronic discovery process. Attorneys should consider relevant issues and possible defenses to create search terms that are broad enough yet narrow enough to capture just the right amount of relevant data without capturing an over-burdensome amount of documents. Attorneys should cooperate with opposing counsel to create these search terms as resulting litigation about discovery disputes is costly and often unnecessarily time-consuming.

In a 2011 case arising out of the Eastern District of Michigan, Magistrate Judge R. Steven Whalen *ordered* the parties to cooperate, specifically to meet and confer in good faith to develop search terms and objective search criteria to identify non-privileged documents.[18] The court granted the defendant's motion to limit the scope of discovery in order to reduce the defendant's burden associated with the 4 terabytes of data identified as potentially relevant to plaintiff's initial and very broad requests.[19] Although the court denied defendant's cost-sharing motion, it noted cost-sharing may be appropriate depending on the volume of data searched and the cost that defendant's incur in providing discovery to plaintiff.[20] The court did not order the parties to share costs of discovery in *McNulty*, but it signaled a willingness to order cost-sharing if the parties' cooperation efforts and discovery requests were unreasonable.[21] This recent case should be a warning to future litigants that broad discovery requests coupled with enormous databases will require, at a minimum, cooperation between opposing counsel. Litigants ought to be ware that failure to convince the court that counsel is cooperating may lead the court to order the parties to share costs associated with discovery requests.

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A Washington district court imposed a creative yet limiting solution to manage e-discovery costs in February of 2011: phased discovery.[22] The court established an initial limit of ten search terms per party. After running the initial search, the court ordered defense counsel to advise plaintiff's counsel whether the search returned a reasonable reviewable list of documents or whether the search returned too many documents such that the plaintiff needed to re-tailor its search terms.[23] Phased discovery may become more common as courts become more comfortable managing e-discovery, attorneys should expect.

Even when parties attempt to cooperate to determine the most appropriate search terms and search methods, sometimes the court must get involved to resolve search-related disputes. *Custom Hardware Eng'g & Consulting, Inc. v. Dowell* involves such a recent dispute.[24] In *Dowell*, the defendant proposed to use a set of search terms that required precise matches between search terms and the electronic databases.[25] The defendant argued that requiring precise matches was the only way to avoid capturing both privileged and irrelevant information.[26] The court summarized case law that considers the efficacy of search terms, noting that search terms are "appropriate and helpful" but also impose "well-known limitations and risks."[27]

Although search terms can help keep costs down by limiting the total number of documents collected, stored, and reviewed, the court acknowledged that search terms can be both under and over inclusive at the same time (e.g., a misspelled word in a database may exclude relevant information from search term results, but may also capture irrelevant information).[28] Ultimately, the court rejected defendant's argument because (1) the proposed search terms were problematic because they would limit the responsive material to exact search term matches including "phrasing, capitalization, or both" and (2) the proposed search terms would have prevented the plaintiff from obtaining discoverable information in contravention of FRCP 26(b)(1).[29] As a result of the parties' inability to agree, the court essentially crafted the search methodology. Parties must cooperate if they wish to maintain control over the search terms and search method, which have an enormous impact on the remainder of the case.

Predictive Coding

After a recent hearing where each party proposed a different search method through presentation of its own e-discovery expert, a New York district court went so far as to order the parties to use predictive coding, as implemented by defendant's chosen e-discovery company, in an effort to keep discovery-related costs down.[30] Predictive coding is a relatively recent technological advance that replaces traditional linear document review. Predictive coding aims to make electronic document review exponentially more efficient by organizing documents into topics, weeding out irrelevant documents, prioritizing documents, and even automatically coding most documents based on a reviewer's initial input about the case.

Regardless of the potential efficiency of predictive coding, many e-discovery companies do not offer this service (note that predictive coding is not just threading or clustering documents, which only address the topical organization issue) and linear review still dominates the field of e-discovery. Moreover, until *Monique*, no federal court had ordered parties to participate in predictive coding. Even so, the court in *Monique* required this search method based on the complexity and size of this employment discrimination class-action, permitting each party to submit a draft protocol for the court's consideration.[31] The ruling came out on February 8, 2012, but the court is expected to issue a written opinion on the issue in the upcoming weeks, which should provide additional guidance. E-discovery companies and attorneys should anticipate an increased use in predictive coding as courts are introduced to this new technology and test its reliability. Only time will tell, but predictive coding is poised to further revolutionize the ever-changing field of e-discovery once a few courts adopt it and, therefore, establish the precedent that predictive coding is a legally reliable and effective search method.

Conclusion

There is little hope that e-discovery will become a cheap endeavor in the near future, but courts are aware of the costs associated with this relatively new area and are constantly adjusting to this reality. As a result, courts are developing new ways to be cost-conscious while still affording litigants their full right to discovery. At a minimum, courts require the parties to cooperate with each other and be practical when crafting search terms and determining the scope of electronic discovery. If parties fail to do so, courts are likely to restrict the parties' control over the e-discovery process and, ultimately may even award sanctions against the unreasonable party. Looking forward, litigants ought to expect the court and the e-discovery market to provide newer and more efficient methods of identifying and searching relevant and responsive documents.

A client-focused and cost-conscious attorney ought to respond to this cost-saving trend in kind. As attorneys, we can take proactive steps to avoid court-mandated cost-saving measures by applying the following to our discovery practice: (1) be practical; (2) cooperate with opposing counsel (within reason and client's best interest); (3) consider whether cost-sharing is appropriate; (4) use search terms to limit the scope of data collected, reviewed, and stored; and (5) consider whether predictive coding is appropriate. By applying these tips, an attorney will be able to save time and money, which ultimately benefits the client. In the event an attorney chooses not to apply these cost-saving measures, the current trend suggests that the court will step in and mandate the cost-saving measures (only after you and your client spend time and money arguing the discovery-related issue, of course).

Endnotes

1. *See, e.g., Brenner v Marathon Oil Co*, 222 Mich App 128, 133; 565 NW2d 1 (1997) ("[I]n the absence of available Michigan precedents, we turn to federal cases construing the similar federal rule for guidance."); *White v Taylor Distrib Co*, 275 Mich App 615, 628 n7; 739 NW2d 132 (2007) (Michigan courts "do[] not lightly adopt a position at odds with the federal rules, after which our rules are patterned").
2. No. 08-C-828, 2011 WL 1527025, *1 (E.D. Wis. Apr. 20, 2011).
3. *Id.*
4. *Id.*
5. No. 10-cv-01398, 2011 WL 2415715, *1 (D. Colo. Jun. 15, 2011).
6. *Id.* at *2.
7. *Id.*
8. No. 04 C 0397, 2011 WL 6097769, *1 (N.D. Ill. Dec. 5, 2011).
9. *Id.*
10. *Id.* at *2.
11. *Id.*
12. *Id.*
13. 2011 U.S. Dist. LEXIS 145804, *21-24 (S.D. Cal. 2011).
14. *Id.* at *20.
15. *Id.* at *22.
16. *Id.* at *23.
17. *Id.* (citing *In re Seroquel Products Liability Litigation*, 244 F.R.D. 650, 662 (M.D. Fla. 2007).
18. *McNulty v. Reddy Ice Holdings, Inc., et al.*, 271 F.R.D. 569 (E.D. Mich. Jan. 13, 2011).
19. *Id.* at n.1 (noting that "one terabyte is one trillion bytes of information, which would be the equivalent of approximately 220 million pages of printed text").
20. *Id.* at 570-71.
21. *Id.*
22. *Doyle v. Gonzales, et al.*, No. 2:10-cv-00030-EFS, 2011 WL 611825 (E.D. Wash. Feb. 10, 2011); *see also Barrera v. Boughton*, 2010 U.S. Dist. LEXIS 103491 (D. Conn. 2010).
23. *Doyle*, 2011 WL 611825, *2-3.
24. 2012 U.S. Dist. LEXIS 146 (E.D. Mo. Jan. 3, 2012).
25. *Id.*
26. *Id.*
27. *Id.* (citing *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260 (D. Md. 2008).
28. *Id.* at *7-8.
29. *Id.* at *12-13.
30. *Monique Da Silva Moore, et al., v. Publicis Groupe and MSL Group*, 11-cv-1279 (S.D.N.Y.) (hearing held on February 8, 2012, transcript available at http://pdfserver.amlaw.com/legaltechnology/Da_Silva_Moore_v_Publicis_Groupe_Order_20120208.pdf).
31. *Id.*

New Attendant Care Trend: The Attendant Care Processing Company

By: Paul A. McDonald, *Magdich & Associates, PC*

Executive Summary

No-Fault benefits provide a tempting target for persons seeking compensation and the attendant care benefit is no exception. No-fault practitioners should be aware of the latest trend affecting the world of attendant care. The "attendant care processing company" recruits a relative or friend of the injured person to provide attendant care. In exchange for the processing company's "expertise" in submitting attendant care claims, the relative or friend agrees to provide attendant care to the injured person at a set rate per hour or per day. The relative or friend is never told how much the processing company is actually charging the no-fault insurer or that he or she is entitled to submit the attendant care claims on his or her own. The relative or friend simply submits attendant care logs to the processing company, which in turn submits the logs to the insurer. Once the processing company receives payment for the services provided, only a small portion of the proceeds is typically forwarded to the relative or friend.

Counsel should be careful to watch for this new tactic and be ready to respond with counterclaims based on theories of fraud and unjust enrichment.

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One of the biggest issues at the center of recent efforts to reform the No-Fault Act is the need to curb inflated attendant care costs. At present, there is a tangled web of attorneys, transportation companies, and medical providers that try to recruit those on the lower end of the socio-economic spectrum with the intent of squeezing the maximum amount of benefits out of no-fault insurers.

The typical fact pattern includes scores of unnecessary testing, inflated transportation fees, and questionable claims for replacement services. As it relates to attendant care, the question almost always focuses on the rate being charged and/or whether services have in fact been rendered. The purpose of this article is to bring awareness to the latest scheme with respect to attendant care – a problem that takes the form of what I will refer to as the "attendant care processing company."

The Processing Company

Unlike home health aide companies that actually employ individuals trained in providing attendant care services, the "attendant care processing company" usually seeks out a close family member or friend of the injured insured to serve as what is claimed to be an independent contractor. It is explained to the close family member or friend that the attendant care processing company is needed in order to ensure that payment is properly secured from the no-fault insurer for the attendant care services that will be provided by the family member or friend.

In exchange for the processing company's efforts processing the underlying attendant care claim, the prospective service provider is asked to agree to a certain rate per day or per hour for their services. Once the processing company receives payment from the insurer, the agreed upon rate is to be forwarded to the provider. Of course, the processing company never explains to the prospective service provider that he or she is entitled to submit their attendant care claim directly to the insurer or what rate the processing company is actually charging the insurer for said attendant care.

How the Prototypical Processing Company Operates – A Real Life Example

The new trend of cases involving attendant care processing companies can best be illustrated by an actual case that shows how the prototypical attendant care processing company operates. The case was brought solely for reimbursement of attendant care services allegedly provided to the insured. During discovery, it came to light that the attendant care company had contracted with two separate service providers

to provide attendant care services to the injured insured. These contracts were for different dates of service. No attendant care was provided concurrently.

In exchange for the company's "expertise" in submitting attendant care claims to no-fault insurers, both providers agreed to render services at a rate of approximately $100 per day. The only training the providers received from the company as it relates to attendant care was how to "properly" fill out the attendant care logs that would be submitted to the insurance company. No medical or attendant care training was ever provided.

Once the attendant care company secured the attendant care logs and the 24/7 prescription for attendant care, it proceeded to submit attendant care claims to the insurance company at a rate of $298 per day. The company's submissions were presented in such a way to lead the insurer to believe that the entire $298 per day was for attendant care services. In fact, the attendant care company was reaping a sizeable gross profit of approximately $198 per day for doing nothing more than submitting attendant care paperwork. Neither provider knew the amount the company was charging the insurer or was ever informed that he or she could present attendant care claims on their own.

In an effort to make it look like some sort of medical expertise was actually being provided by the attendant care company, said company had various "nursing assessments" performed on the insured by a registered nurse. These assessments were then allegedly given to the providers to assist them in providing attendant care to the injured insured. The nursing assessments were neither reasonable nor necessary. They were nothing more than a redundancy of the assessments provided by the doctor who prescribed the attendant care. Consequently, these assessments themselves were not compensable under the No-Fault Act.

In exchange for the company's "expertise" in submitting attendant care claims to no-fault insurers, both providers agreed to render services at a rate of approximately $100 per day. The only training the providers received from the company as it relates to attendant care was how to "properly" fill out the attendant care logs that would be submitted to the insurance company. No medical or attendant care training was ever provided.

Potential Effects of the Processing Company on the No-Fault System

The trend toward attendant care processing companies has serious and far-reaching implications. Processing companies seek to take advantage of a serious weakness in the current no-fault system – a system that has no real checks and balances as it relates to attendant care. Many of the individuals starting these companies have no pertinent medical or attendant care related training. They simply see an opportunity to game the system at the expense of everyone who pays into the system.

The insurer pays based on the processing company's arguably fraudulent misrepresentations. The insurer is then forced to pass this cost onto its insureds by way of higher premiums. The biggest price is paid by the provider who actually renders the care being claimed, because these individuals are providing services to a close family member or friend. They are the ones actually spending several hours a day helping their loved one while they attempt to rehabilitate their injuries. Instead of getting paid what they are entitled to under the No-Fault Act, they are paid only a small fraction of what the processing company receives.

Another issue that arises is whether the processing company ever actually forwards the contracted rate to the provider. In the case described above, the processing company represented that the providers had been fully reimbursed. Both providers testified that they still had balances outstanding with the processing company.

One of the central tenets of Michigan's no-fault system is cost containment. Accordingly, insurers are given great latitude when it comes to determining whether a particular expense is reasonable, necessary, and has actually been incurred. Any attorney who is presented with a claim from a company holding itself out as an attendant care provider should proceed cautiously.

Identifying Suspicious Claims

Pertinent questions to ask include, but are not limited to, all of the following:

- Is the attendant care company actually responsible for the attendant care being provided or is it merely submitting the claim on behalf of the provider?
- What is the rate being charged?
- Does the rate being charged relate solely to the care being provided to the insured?
- Is the provider an employee of the attendant care company or an independent contractor?
- Is there any type of agreement between the provider and the company as it relates the rate the provider will be paid?

- Was it explained to the provider that they are entitled to submit attendant care claims without using the attendant care company?
- Was any type of medical or attendant care training provided to the attendant care provider?
- Who was responsible for filling out the attendant care logs that were submitted?
- How often were these logs filled out?
- Do the logs accurately reflect the services actually being rendered?
- Is the service provider receiving any benefit from the attendant care processing company, by way of replacement worker, workers compensation insurance, commercial general liability insurance, paid time off, or other benefits that would justify the existence of the attendant care processing company?

When counsel suspects that attendant care benefits have been paid to an attendant care company that is nothing more than a processing company, there are potential avenues for recourse. One is to file a counter-claim against the processing company based on theories of fraud and unjust enrichment.

Conclusion

It is important to stay on top of the trends currently facing no-fault insurers. The emergence of the attendant care processing company is just another example of the efforts individuals will make to take advantage of the current no-fault system. A proactive yet cautious approach to these claims will ensure that these companies are not allowed to profit at the expense of the system as a whole.

Young Lawyers Section

VI. Trial Tips, Techniques & Strategies Part 2: Opening, Direct and Cross Examination, and Closing

By Scott S. Holmes, *Foley & Mansfield, P.L.L.P., Board Member of the Michigan Defense Trial Counsel*

Executive Summary

This article is the seventh 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 and tricks for raising cross claims, third party claims, and pursuing indemnity. In the third article, we addressed seeking discovery and responding to discovery-related issues. The fourth article focused on dispositive motions while the fifth article outlined trial preparation. Part one of this two-part article provided tips, techniques, and strategies for trial advocacy. Part two walks through the basics of each stage of trial.

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I. OPENING STATEMENT

Cut to the Chase

Surprisingly, many trial attorneys regularly break a common rule when speaking to a jury: do not waste time thanking jurors for their service. Attorneys sometimes spend up to three minutes discussing the commitment a jury makes, the difficulty of serving, and the appreciation he or she has for each and every juror.

Those who study and teach trial advocacy will tell you that research indicates jurors are not swayed by these comments and that the time is much better spent diving straight into your opening or closing. People have a tendency to remember the first and last things you say, so do not waste these precious opportunities. It's fine to thank them at the end of your comments if you wish, but it should never take more than five words: "Thank you for your service."

The Roadmap

The opening statement is ideally used as an outline or "roadmap" for your case presentation. As a result, it takes its form quite easily by simply taking each part of the trial and providing a brief summary of it. As you become more experienced, you will undoubtedly develop your own style for giving an opening statement. For now, just follow this simple roadmap.

Start by stating your theme and giving a brief introduction of your version of the facts of the case. Follow that by naming each witness you will present and identifying the one or two key points each will testify to. After you have discussed the witnesses, proceed to a small closing where you inform the jury of what you think the verdict will be after all the evidence is considered. This brief closing should relate back to your theme if possible as it is important to reiterate it often. (For the basics of creating a theme for your case, see Part One of this article in the previous issue of the *Quarterly).*

Remember, the opening statement is not a time to **argue** your case, it is a time to tell the jury what the evidence will show. As a result, you can avoid possible objections and, even worse, admonishments from the judge, by beginning most statements with, "The evidence will show . . . ." It's a simple trick and may not always work, but it is usually enough to deter the opposing counsel from objecting. Just be sure that you have the evidence you are referring to and that it will be entered in trial (a "good-faith" belief is all that is necessary), otherwise, your opposing counsel will point out your broken promise to the jury.

What to Avoid

Avoid discussing your opponent's case if you can. It is always presumptuous to make assumptions about what evidence and theories they may present, but as a defense attorney, you have the luxury of hearing their opening statement before giving yours. If you feel you must address the plaintiff's case, stick to the basic theory and disputed facts. Avoid discrediting their witnesses' testimony. At this point they have yet to testify and you are treading on thin ice when you begin suggesting that you know what your opponent's witnesses will say (even if you are relatively certain).

What Not to Do

Never, under any circumstances, promise to prove or provide something you are not absolutely certain you can honor. Attorneys around the world shuddered at one famous attorney's bold proclamation during his opening statement in defense of accused wife murderer Scott Peterson, "The evidence is going to show clearly, beyond any doubt, that not only was Scott not guilty, but stone-cold innocent." Just over five months later, both legal analysts and the jury agreed that quite the opposite was proven.

The opening statement is a powerful introduction to your case, and the statements you make should carry through to your closing argument. For this reason, you do not want to put yourself in the position of having to explain why you failed to meet your self-imposed obligation. If, by luck, the jury does not remember your unfulfilled promise, rest assured that your opposing counsel will bring it to their attention. One of the best techniques to use in your closing argument is to remind the jury of each of the promises you made in your opening statement and how the evidence and testimony presented during trial have supported them. Successfully employing this technique, however, starts with your opening statement.

Overall

Keep in mind that this is your first of only two opportunities to speak directly to the jury. Do not overlook it. Consider it as a five to thirty minute summary of your case and why the jury should ultimately decide in your client's favor.

II. DIRECT-EXAMINATION

Know your Witness

Begin preparing for direct examinations by understanding who your witness is and what factual points he or she must establish. Write those points on a sheet of paper and list the foundational information under them that must be testified to in order to reach each of the points. This will help avoid annoying, embarrassing, and sometimes confidence shattering speed bumps (a/k/a objections) at trial. There really is no excuse for a sustained foundational objection on direct examination because sufficient preparation should alert you to any inadequacies.

The opening statement is a powerful introduction to your case, and the statements you make should carry through to your closing argument. For this reason, you do not want to put yourself in the position of having to explain why you failed to meet your self-imposed obligation. If, by luck, the jury does not remember your unfulfilled promise, rest assured that your opposing counsel will bring it to their attention.

Preparation

Prepare your witness by discussing the topics you will question him or her about and even by practicing a mock examination. An excellent way to do this is to go over the background information which typically introduces your witness to the jury (e.g. name, education, employment, etc.). This will familiarize the witness with the flow of the questioning and give you an opportunity to discuss the adequacy of the responses. Are they too short? Too long? Too wordy? Too loud? Too quiet? Rushed? Non-responsive?

Also, take this opportunity to examine how the witness appears while testifying. Notice the body language (slouching? stiff? eye contact?) and direct the witness to look at you when being questioned but to turn towards the jury when answering. Eye contact is important in establishing credibility. Practice the questioning multiple times to get a feel for whether the witness will remember to maintain eye contact with the jury. If not, develop discreet signals you can give that will remind him when answering.

It is also crucial for your witness to remember to maintain eye contact during cross-examination. The confrontational nature of this type of questioning makes it difficult for many witnesses to keep focused on the jury. Because you should not be signaling your witness during cross, make sure he or she remembers that the primary duty of a witness is to tell the story to the **jury**, not the **attorneys**.

Organization

Presenting a clear and understandable story from each witness is as much about your organization of the information as it is about the witness' ability to convey it. Break the examination up into what are called "chapters." Each chapter should represent a significant and distinct part of the story. As you proceed from one chapter to the next, note this transition to the jury by leading with, "Now, Mrs. Jones, let's turn to what you did after the accident." Or, "I now want

to discuss any actions you may have taken after receiving Mr. Stewart's complaints."

Headers such as these keep the story organized in the minds of the jurors as they are bombarded with information. Remember, you have likely lived your case for up to two years by the time it goes to trial while your jurors likely became aware of it during voir dire just hours before your witnesses' testimony. No matter how simple you think the story is, it is still an abundance of information which needs to be heard, remembered, and considered in a very short time. Organization is your best technique for assuring a smooth transition from your witnesses' mouth to the jurors' deliberation.

Another technique for assuring both understandable and memorable testimony is to repeat key statements from your witness in the form of a subsequent question. An example is, "Mrs. Brown, after you saw the plaintiff pull out into the street without looking both ways, what happened next?" Note that this is not the same as simply repeating witnesses' answers (which is a bad habit that takes practice to eliminate). Use this technique only with key facts. Be careful not to abuse this technique or you will certainly draw an objection from opposing counsel. However, you may also attract an unsolicited admonition from the judge and strange looks from the jury. But used properly, it is an excellent way to reiterate your witnesses' key testimony.

Most attorneys take direct examination witnesses through their testimony chronologically. It is not a rule that will apply in all circumstances, but generally provides for the clearest and simplest presentation. As with all other stages of the trial, maintain a checklist for each witness detailing the specific information you must elicit before concluding your examination. Mark these off as each is testified to during your questioning. Again, remember your theme and try to incorporate similar language into your questions.

It is also crucial for your witness to remember to maintain eye contact during cross-examination. The confrontational nature of this type of questioning makes it difficult for many witnesses to keep focused on the jury. Because you should not be signaling your witness during cross, make sure he or she remembers that the primary duty of a witness is to tell the story to the **jury**, not the **attorneys**.

III. CROSS-EXAMINATION

Although immortalized in books, film, and television, the cross-examination is rarely the case-cracking turning point in the trial. Without proper preparation, you are more likely to recreate the glove fiasco from the O.J. Simpson trial than the prideful admission from *A Few Good Men*. A good cross-examination is based more on drawing out the essential facts you need from that witness. These facts come out not due to fancy lawyer tricks, but rather due to carefully worded questioning which backs the witness into a corner – a corner where he or she can only truthfully respond with the key answer you want the jury to hear.

Organization

Cross-examination experts typically rely on the "chapter method" of organizing the questioning. As discussed earlier, this method generally breaks the questioning down into separate and distinct "chapters" which are designed to elicit one key part of your case per chapter. Although also used in direct examination, cross-examination is where this method is particularly important. Many resources can be found in books and online which examine this method in great detail, so it will not be discussed in this article other than it is an excellent technique and is recommended for you to learn and use.

Key Pointers

The most widely recognized rule for cross-examination is (say it aloud): **Never ask a question you do not know the answer to.** The reason for this is because you obviously have no idea what the witness will say. If you do not know what the witness will say, then you likely will have no support to impeach the witness's credibility or point out weaknesses in his answer if he or she offers damaging testimony.

Know when to stop. Many attorneys are caught off guard when the witness provides an answer they were seeking before they were expecting it. When this happens, move on! Check this fact off in your notes and move on to the next topic. It is common to feel the need to bolster the answer when it surprises you. Resist this urge, a fact is a fact and you risk the witness qualifying or contradicting it if you continue to press it.

Knowing when to stop also applies when the witness has responded with damaging or un-anticipated testimony. In this situation, do not end your examination! Even if you have no other questions or topics to discuss, find a safe question to ask which will distract attention from the witness' previous answer. This rule also applies to sustained objections on your final questions. Make sure you do not sit back down without getting at least one safe question to the witness. The appearance of defeat when ending the examination immediately after a damaging answer can actually be worse than the answer itself.

The other stone-etched rule of cross-examination is to **always ask leading questions**. You know the answer you want, so phrase the question so that answer is the only possible one they can give. Also, ask "one-fact questions." In

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other words, do not try to pack more than one important fact into each question. Cross-examination should be a very paced and methodic question and answer setting. If you try to establish multiple facts in each question, you are welcoming confusion by the witness and jury, as well as objections from opposing counsel.

Avoid at all costs asking questions that start with, "Wouldn't you agree…?" or "Isn't it fair to say…?" Many witnesses, especially well prepared or experienced witnesses, would gladly sit in silence for as long as it takes to think of a way to disagree with you rather than give you the answer you are expecting. The basic adversarial nature of a cross-examination is usually enough to put witnesses in the mindset that they should not agree with the opposing attorney. So, do not give them this opportunity.

Stick to the "Yes or No" questions. It is much safer, simpler, and will give you the same result you are seeking. Finally, under no circumstances should you be asking a question that starts with "Why…" Again, even if you know why the witness did or said something, even if she already admitted to it in a deposition, do not give her the opportunity to give inconsistent testimony or to soften or explain her answer.

IV. CLOSING

Now for the fun part. The closing is when the leash is taken off. No longer bound by many of the formal rules of the opening statement and direct and cross examinations, you now have the opportunity to *argue* your case directly to the fact finder. Barring any rare objections, it is your turn to take center stage.

Begin with a clever reminder or even just a word-for-word repeating of your theme from your opening statement. A simple yet effective way to do this is to simply say, "At the beginning of this trial I stood here and told you that this case was about broken promises [or failing to look both ways before you cross]. Now, after six hours [or six days or six months] of testimony and evidence, we are left with just that: broken promises."

As a defense attorney, one method of arguing your case in the closing is to simply discuss each of the claims raised in the complaint. By this time, you should have referred to your checklist prior to your closing to verify that you established all the key facts and elements necessary to your case. Also, identify any (hopefully many) facts and elements your opponent has failed to establish. Proceed through the claims and make reference to each of these elements. Remind the jury how the testimony and evidence presented proved or disproved individual elements, thus establishing or negating each claim.

There are many methods for making a closing argument. Much of it comes down to organization and comfort in the presentation. Practice is really the only way for you to determine if your method works for you. Recruit friends, family, or co-workers to listen to your closing and offer advice.

Avoid at all costs asking questions that start with, "Wouldn't you agree…?" or "Isn't it fair to say…?" Many witnesses, especially well prepared or experienced witnesses, would gladly sit in silence for as long as it takes to think of a way to disagree with you rather than give you the answer you are expecting.

There are many methods for making a closing argument. Much of it comes down to organization and comfort in the presentation. Practice is really the only way for you to determine if your method works for you. Recruit friends, family, or co-workers to listen to your closing and offer advice.

The Verdict Form

Finally, do not overlook the verdict form in preparing for your closing argument. Many verdict forms are confusing to jurors (and even attorneys!) and can lead to unintended or inconsistent verdicts. No matter how simple or complex you think it is, trial advocacy instructors will tell you that spending just thirty seconds explaining the form can prevent confusion and errors in filling it out. An excellent way to accomplish this is to make an easily readable poster-sized board of the verdict form. Show it to the jury and go through each question telling them exactly what you want them to do when they fill out the verdict form. Tell them explicitly, "for question number one, XYZ Company wants you to mark 'No'," or "for question number twelve, the plaintiff John Smith wants you to write $40,000." Once you have done this, you can rest assured that the jurors have no doubt what they need to do if they agree with your client's position.

GOOD LUCK AT TRIAL!

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.*

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By: Graham K. Crabtree, *Fraser, Trebilcock, Davis & Dunlap*
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MDTC Legislative Report

In the first months of 2012, our state government has continued on the course set last year by Governor Snyder and the Republican-controlled Legislature while the political drama in Lansing has been overshadowed by the national contest to choose the Republican presidential nominee. But although our attention has been diverted by that riveting spectacle, the political controversies in Lansing have continued to smolder under the radar. The small bit of good news is that the always-painful process of crafting a budget for the next fiscal year may be a little easier this year due to modest improvements in the economy which have produced modest amounts of additional revenue. Still, it may be expected that there will be plenty of controversy and disagreement in the months leading up to the November election.

There is a great deal at stake in this election year. As I've mentioned in my recent reports, much of what has been accomplished in the last fourteen months has been done without input from the minority party, and over its strongly-voiced objections. The Democrats have been frustrated by the feeling that their views are not being considered, and are hoping to soothe that frustration by reclaiming control of the House of Representatives and the Supreme Court in November. They will be aided in their attempt by organized labor, which has actively portrayed many of the recent Republican initiatives as attacks on the middle class – a charge which has been fueled by renewed discussions of right to work legislation prompted by the recent enactment of legislation making Indiana a right to work state. It has been suggested, by some, that Michigan's competitive standing will be diminished, and its economic recovery thwarted, if it does not follow Indiana's example.

Governor Snyder has said that right to work legislation is not on his agenda, and has expressed concern that the issue will be unduly divisive if pursued. But Mr. Snyder has not said that he would not sign a bill making Michigan a right to work state if such a bill should land on his desk, and thus, the discussion is likely to continue. A coalition of labor unions has recently reacted to this potential, and other key elements of the Republican agenda, by crafting a proposed constitutional amendment which would drastically limit the Legislature's authority to impose restrictions on collective bargaining. If ultimately approved by the voters, this proposed amendment would prevent the adoption of right to work legislation in Michigan, and could also be used as a basis to challenge several of the laws previously enacted in this session. And whether approved by the voters or not, this proposal is sure to benefit President Obama in November by bringing large numbers of Democratic voters to the polls if it should ultimately make its way onto the ballot.

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.

NEW PUBLIC ACTS

Public Acts of 2011

There were 323 **Public Acts of 2011**. The most recent of these include, most notably:

2011 PA 269 – Senate Bill 806 (Brandenburg – R) This act has amended the Michigan Employment Security Act, to effect a variety of **mostly employer-friendly changes**.

2011 PA 266 – House Bill 5002 (Jacobsen – R) This act has amended the Workers Disability Compensation Act to **limit eligibility for Worker's Compensation benefits** and implement a variety of additional reforms.

2011 PA 297 – House Bill 4770 (Agema – R) This new "Public employee domestic partner benefit restriction act" prohibits public employers from providing medical benefits or other fringe benefits to domestic partners of employees other than lawfully married spouses.

2011 PA 300 – House Bill 5105 (Cotter – R) This act amends the Revised Judicature Act to **consolidate certain district and probate court operations** and eliminate a number of trial court judgeships in accordance with the recommendations of Chief Justice Young.

Public Acts of 2012

As of this writing (March 13, 2012), there are 52 **Public Acts of 2012.** They include:

2012 PA 4 – House Bill 4893 (Callton – R) – This act has amended the Public Health Code, MCL 333.16164 and 333.16185, to allow retired optometrists to provide uncompensated **optometric services to medically indigent persons** under a special volunteer license, with the same immunity from liability that is currently provided under

As I've mentioned in my recent reports, much of what has been accomplished in the last fourteen months has been done without input from the minority party, and over its strongly-voiced objections.

section 16185 to physicians and dentists providing such uncompensated care.

2012 PA Nos. 16-23 and 33-38 (House Bills 5071 – 5073 – 5075, 5093 – 5095, 5101-5104, 5106 – 5107) These acts amend the Revised Judicature Act to provide for additional **consolidation of court operations and elimination of trial court judgeships** in accordance with the recommendations of the Chief Justice

2012 PA 40 – Senate Bill 849 (Hune – R) This act will amend the Revised Judicature Act to **redefine the election districts for the Court of Appeals** and **reduce the number of its judges** from 28 to 24 by attrition in accordance with the recommendations of the Chief Justice and Governor Snyder. To obtain the support needed for this reduction in the number of judgeships, Mr. Snyder has agreed to fill the two currently vacant judgeships by appointment – an agreement which has drawn sharp criticism from the minority party.

2012 PA Nos. 30-31 – House Bill 5085 (Shirkey – R) and House Bill 5086 (Opsommer – R) These acts amend 1978 PA 390 and the Michigan Campaign Finance Act to **prohibit public employers from making payroll deductions for contributions to political action committees.**

2012 PA 45 – House Bill 4246 (Pscholka – R) This act has amended the Public Employment Relations Act, MCL 423.201, to exclude individuals serving as **graduate student research assistants** from the Acts' definition of "public employee," thereby denying those individuals the protections afforded to public employees under the Act. The final passage of this Bill on March 7, 2012, featured a very creative parliamentary maneuver which secured the immediate effect desired by the Republican leadership without the record roll call vote demanded by the minority party – a move which generated a firestorm of angry protest and charges of foul play from the Democratic side of the aisle. The Democrats have pledged to retaliate by demanding a roll call vote on every future request for immediate effect. We will watch with keen interest to see whether this incident has caused irreparable damage.

2012 PA 50 – HB 4589 (Somerville – R) This act has amended the Governmental Immunity Act to c**larify the responsibility of municipal corporations for maintenance of sidewalks adjacent to highways within their jurisdiction.** The act will require municipal corporations to maintain sidewalks adjacent to municipal, county, or state highways, but a municipal corporation will not be liable for a failure to do so

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).*

Jenny Zavadil, of Bowman and Brooke LLP, and husband Matt welcomed a new baby girl in September. Corinne, future president of MDTC, joins brother Cole, 6.

David L. Campbell has been named a partner in Bowman and Brooke LLP. Dave is licensed in both Michigan and Ontario. He has grown his cross-border practice to include the defense of corporate clients in the areas of product liability, toxic tort, and commercial litigation.

Jana Berger and a team from Foley & Mansfield have returned from a week-long service trip to Durazno, Guatemala. The original mission was to build and repair latrines for this community, but on arrival, the greater need was for smokeless stoves. The F&M team constructed ten new stoves and supplied the community with materials to complete another 30 smokeless stoves

As I've mentioned before, all of the Legislature's bills, journals and analyses are available for viewing and downloading on the Legislature's very excellent website – **www.legislature.mi.gov.**

unless the plaintiff is able to prove that the municipal corporation knew, or should have known of the defect causing the injury at least 30 days before the occurrence. A municipal corporation will be presumed to have maintained the sidewalk in reasonable repair in the absence of specific facts proving that the injury at issue was proximately caused by a vertical discontinuity defect of two inches or more, or another "dangerous condition in the sidewalk itself." The question of whether this presumption has been rebutted will be a question of law for the court, allowing for disposition of many claims by summary disposition.

WHAT'S NEXT?

There are a variety of interesting issues awaiting final passage or approval by the Governor. These include:

House Bill 4929 (Haveman – R) proposes an amendment of the Public Employment Relations Act which would **prohibit payroll deductions of union dues by public school employers.** This bill has been passed by both Houses over the strenuous objections of the minority party, and was presented to Governor Snyder for his signature on March 9, 2012. The animosity generated by the passage of this legislation has been further enhanced by the inclusion of a small appropriation designed to insulate this act from challenge by referendum.

House Bill 4936 (Lund – R), proposing **amendments to no-fault automobile insurance** provisions (most notably, caps on Personal Protection Insurance (PIP) medical coverage and caps for PIP benefits paid for attendant care or nursing services provided in an injured person's home) **remains in limbo** as discussions with interested parties continue. Senate Bill 291 (Pavlov – R), proposing **elimination of the motorcycle helmet law**, also remains in limbo in deference to Governor Snyder's desire to address that issue in conjunction with any no-fault reforms.

House Bill 4647 (Heise – R) would amend the Revised Judicature Act to add a new section MCL 600 2164a, which would allow the presentation of **expert testimony at trial** by the use of **interactive video communication equipment**, with the consent of all parties. This Bill was passed by the House on December 14, 2011, and now awaits final passage in the Senate on the third reading calendar.

WHERE DO YOU STAND?

As I've mentioned before, all of the Legislature's bills, journals and analyses are available for viewing and downloading on the Legislature's very excellent website – **www.legislature.mi.gov.** The MDTC Board of Directors regularly discusses pending legislation and positions to be taken on bills and resolutions of interest. Your comments and suggestions are appreciated, and may be submitted to the Board through any Officer, Board Member, Regional Chairperson or Committee Chair.

MDTC Welcomes New Chair of the General Liability Section

Tom Aycock is a defense lawyer in Grand Rapids, Michigan with extensive experience defending clients before judges and juries around the country. He represents clients in the areas of corporate insurance litigation, insurance coverage defense, business litigation, professional liability, and personal civil litigation. Tom's past and present clients include international corporations, national, regional and local business entities, and insurance companies throughout North America and Europe.

Trial Experience

Tom has achieved successful results for his clients in high damage cases including dismissals and favorable settlements in areas such as first and third party no-fault litigation, premises liability, breach of contract, noncompete agreement disputes, general negligence, and insurance coverage actions. He has participated in multiple jury trials, bench trials, mediations, and hundreds of depositions. Prior to joining Smith Haughey, Tom was a trial defense attorney in Baton Rouge and New Orleans, Louisiana in the practice of defending corporations, their executive officers and insurers in complex asbestos and silica exposure personal injury suits. In addition, Tom regularly provides customized, in-house seminars for his organizational clients.

"My practice revolves around three main standards: setting goals, achieving those goals, and building successful relationships. Each standard is set with an individual client and their unique challenge in mind. In order to achieve mutual success, I work to get to the heart of the problem, then continue to work to overcome every unique challenge and to acquire a cost-effective resolution in their favor." -Tom Aycock

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No-Fault Report

Susan Leigh Brown is an attorney with Schwartz Law Firm in Farmington Hills. She specializes in insurance defense, employment law, tort defense, credit union law and commercial litigation. Ms. Brown has over 20 years of experience in No Fault and Insurance law, including counseling, coverage disputes, litigation, and appeals, and is a regular contributor to the *Michigan Defense Quarterly*. She has lectured to trade groups on insurance law, employment law and credit union law. Ms. Brown is a member of MDTC as well as the Labor and Employment and Insurance and Indemnity Law Sections of the State Bar and the Oakland County and Detroit Bar Associations. Her email address is sbrown@schwartzlawfirm-pc.com

Supreme Court 'curbs' PIP benefits for slip and fall

***Frazier v Allstate,* Michigan Supreme Court, December 21, 2011**

Jury verdict for Plaintiff reversed by Court of Appeals. Supreme Court affirmed the reversal.

Plaintiff slipped and fell on ice while closing the passenger door of her car after having placed items in the passenger seat. The Supreme Court ruled that she was not "alighting" from or entering her car so that exception to the exclusion from PIP benefits related to park cars did not apply. MCL 500.3106. The Supreme Court also ruled that the "equipment" exception to the exclusion from PIP coverage of injuries related to a parked vehicle did not apply either. Components of the vehicle itself, such as a door, do not constitute "equipment mounted on a vehicle".

Agency rates relevant but not dispositive on question of reasonable rates for family provided attendant care

***Hardrick v ACIA*, Court of Appeals (published) December 1, 2011**

The opinion rendered, insofar as it discusses the relevant evidence for determining "reasonable" rates for family provided attendant care, was by way of instruction to the lower court on remand for trial.

The court performed a detailed analysis and determined that several types of evidence could be relevant to a jury in deciding what a reasonable rate for attendant care would be. Those types of evidence include rates charged by agencies for attendant care although such rates build in factors not present when the provider is a family member such as overhead, employment benefits, social security contributions, malpractice insurance, clerical staff expenses, rent, legal fees, accounting costs, office supply costs and workers compensation insurance premiums.

Also relevant is the amount agencies actually pay to the individual providers and defendants are free to introduce evidence of that as well as other factors, not relevant to family provided care, which are components of agency rates. Also relevant is "opportunity cost", in other words, economic opportunities a family member forgoes in order to provide attendant care services. The court rejected the dissent's suggestion that the proper measure of reasonable rates would be the "market rate" approach determined by what the family member could receive in the open market for providing similar services.

Underinsured Motorist Carrier not bound by verdict amount in suit against at fault driver

***Dawson v Farm* Bureau Court of Appeals (published) August 16, 2011**

After the at-fault driver failed to vigorously defend liability and stipulated to damages in the underlying suit, Plaintiff attempted to hold underinsured motorist carrier liable for the amount of the verdict which exceeded the tortfeasor's coverage limit. Farm Bureau, the UIM carrier, had not participated in the trial, having been dismissed based on a policy provision which precluded suit against it for UIM benefits until the insured had exhausted all other available judgments or settlements. The policy also prevented Plaintiff from settling with the tortfeasor absent Farm Bureau's approval of the settlement. Farm Bureau did not approve a proposed settlement.

Plaintiff argued that the verdict against the tortfeasor had *res judicata* effect on Farm Bureau, precluding re-trial of the amount of damages. The trial court agreed and entered summary judgment in favor of Plaintiff but the Court of Appeals reversed. The Court of Appeals held that the express terms of the policy which stated that Farm Bureau "will not be bound by any judgments for damages or settlements made without [Farm Bureau's] written consent," were controlling since UIM coverage is not compulsory under the No Fault Act leaving the 'rights and limitations of such coverage…purely contractual."

By: Geoffrey M. Brown
Collins, Einhorn, Farrell & Ulanoff

Medical Malpractice Report

Geoffrey M. Brown is an associate in the appellate department at Collins, Einhorn, Farrell & Ulanoff, PC, in Southfield. His focus is primarily on the appellate defense of medical-malpractice claims, and he has substantial experience in defending appeals in legal-malpractice and other professional-liability claims. His email address is Geoffrey.Brown@ceflawyers.com.

Sufficiency of Affidavits of Merit

***Kalaj v Khan*, ___ Mich App ___ (2012) (Published, Docket No. 298852).**

The facts: Plaintiff suffered head and neck injuries in a diving accident, and his treating physician referred him to the defendant diagnostic radiologist for cervical-spine x-rays. The defendant radiologist concluded that there was no spinal fracture. The plaintiff later treated with a chiropractor, who took an additional set of x-rays and concluded that they were consistent with a "C5 fracture." The chiropractor referred the plaintiff for a neurosurgical consult at William Beaumont Hospital. X-rays and CT scans done at Beaumont revealed that there was, in fact, a spinal fracture.

Plaintiff sued the defendant diagnostic radiologist for malpractice. In support of the claim, plaintiff submitted an affidavit of merit from a diagnostic radiologist who concluded that the defendant was negligent in failing to diagnose the fracture. It turned out, however, that the films the expert thought were the ones taken and interpreted by defendant were actually the ones taken later by the chiropractor; the films taken by the defendant were unable to be located by either party.

The defendant moved to strike the affidavit of merit, arguing that because the expert did not review the films the defendant interpreted, it would be impossible to opine that the defendant misinterpreted them. The trial court agreed, concluding that without the films the defendant actually interpreted, testimony from the expert that the defendant was negligent in failing to diagnose the fracture would be "pure speculation" and the jury would be forced to "guess" if the expert was right. The trial court therefore struck the affidavit and dismissed without prejudice. The plaintiffs appealed.

The ruling: The Court of Appeals reversed. The Court noted that the affidavit contained all of the elements required by MCL 600.2912d(a) through (d), and that no one asserted that the affidavit failed to meet those requirements. The court stressed that the statute requires only that the expert review all medical records supplied by the plaintiff's attorney—it does not provide **which** medical records are required to be the basis of the expert's opinion, nor does it even require the expert to specify which records formed the basis of the opinion. Instead, it is merely enough for the expert to say that he or she reviewed the records and that based on the records, he or she opines that the defendant breached the standard of care. Since the expert in this case did that, the affidavit is sufficient. The court emphasized that "whether the assertions in the affidavit of merit are ultimately proven to be true is not at issue when evaluating whether the affidavit complies with MCL 600.2912d," and held that the trial court erred in striking the affidavit and dismissing the case.

Practice tip: This opinion emphasizes that the only issue in determining whether an affidavit of merit is compliant with the statute is whether the affidavit contains all of the information required by MCL 600.2912d(a) through (d). A challenge to the accuracy of the expert's conclusion will not result in a ruling that the affidavit is invalid. Presumably, the accuracy of the expert's opinion will be tested either at a motion for summary disposition or at trial. "'To rule otherwise,'" the Court of Appeals explained, "'would allow for battles to erupt or minitrials to take place merely over the issue concerning the validity of an affidavit or merit, necessitating production of [ ] documents . . . and the taking of testimony.'" (Quoting *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484, 493; 708 NW2d 453 (2005).)

Expert-Witness Qualifications

***Gay v Select Specialty Hosp*, ___ Mich App ___ (2012) (Published, Docket No. 301064).**

The facts: The plaintiff's decedent died after sustaining injuries to her head and shoulder when she fell off of a toilet. A nurse had helped her to the toilet, but then left her unattended while using it. The phone rang, and the decedent fell when reaching to answer it.

The plaintiff submitted an affidavit from a proposed nursing expert who opined that the defendant hospital's nursing staff committed negligence by leaving the decedent unattended in the bathroom. The hospital sought to strike the proposed nursing expert's affidavit of merit arguing that the nurse didn't spend a majority of her professional time in the

The Court of Appeals majority rejected the defendant's argument that this was not the "active clinical practice of nursing" because the expert wasn't directly caring for patients.

active clinical practice of nursing or in the instruction of students in an accredited health professional school or residency, as required under MCL 600.2169(1)(b). The defendant argued that the expert spent most of her time in an administrative capacity. The trial court agreed, struck the nurse as an expert witness, and dismissed the case with prejudice since the plaintiff did not timely propose an alternate expert

The ruling: The Court of Appeals reversed in a 2-1 opinion. The expert testified that as a hospital's director of education, she spent 25 percent of her time doing on-the-job-training with new nurses. The Court of Appeals majority rejected the defendant's argument that this was not the "active clinical practice of nursing" because the expert wasn't directly caring for patients. The court instead held that the supervising of new nurses involved in patient care was sufficient, and that the statute didn't require an expert to be directly caring for patients to be involved in "active clinical practice." When added to the fifty percent of her time she testified she devoted to teaching at the hospital, the Court of Appeals held that the expert met the qualifications of MCL 600.2169(1)(b). The court therefore reversed the trial court's order striking her as a witness and dismissing the case, and remanded for further proceedings.

The dissenting judge agreed with the defendant that the 25 percent of time spent supervising new nurses as they learned patient care did not constitute

The court instead held that the supervising of new nurses involved in patient care was sufficient, and that the statute didn't require an expert to be directly caring for patients to be involved in "active clinical practice."

"active clinical practice." The judge also concluded that time spent in various committees and administrative tasks left the expert with, at best, only 45 percent of her time spent in the required activities.

Practice tip: Most practitioners are familiar with MCL 600.2169(1)(a)'s "matching" provision, which requires an expert to "match" specialties with the defendant the expert is testifying against. Sometimes, though, practitioners overlook MCL 600.2169(1)(b)'s requirement that the expert spend most of his or her professional time either practicing or teaching in that specialty. But this opinion appears to broaden the concept of what constitutes the "active clinical practice" of a given specialty. An expert who engages in what seem to be administrative tasks that are nevertheless connected to overseeing the active clinical practice of a given specialty may be enough to qualify an expert under subsection (1)(b).

By: Phillip J. DeRosier and Trent B. Collier, *Dickinson Wright*
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Appellate Practice Report

Effect Of A Stipulated Dismissal "Without Prejudice" On The Court Of Appeals' Jurisdiction

On occasion, a party faced with the dismissal of one or more, but not all, of its claims may wish to pursue an immediate appeal without losing the ability to pursue its remaining claims later on. A similar situation arises when a court dismisses a plaintiff's claims in their entirety, but the defendant has counterclaims that remain pending. Since an order dismissing less than all of the claims of all of the parties is not a "final order" for the purpose of bringing an appeal as of right,[1] it is tempting to consider stipulating to the dismissal of the remaining claims or counterclaims "without prejudice" or with some other language preserving the ability to reinstate those claims in the event of an appellate reversal.

However, there is established precedent from the Court of Appeals cautioning against such a practice on the ground that the dismissal of one or more claims "without prejudice" deprives an order dismissing other claims involuntarily of its finality for purposes of appeal. As the Court of Appeals explained in *City of Detroit v Michigan*, 262 Mich App 542, 545; 686 NW2d 514 (2004), dismissing claims without prejudice creates the possibility of "piecemeal" appeals, which the court rules are designed to prevent:

> The parties' stipulation to dismiss the remaining claims without prejudice is not a final order that may be appealed as of right; it does not resolve the merits of the remaining claims and, as such, those claims are "not barred from being resurrected on that docket at some future date." *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 136; 624 NW2d 197 (2000). The parties' stipulation to dismiss the remaining claims was clearly designed to circumvent trial procedures and court rules and obtain appellate review of one of the trial court's initial determinations without precluding further substantive proceedings on the remaining claims. This method of appealing trial court decisions piecemeal is exactly what our Supreme Court attempted to eliminate through the "final judgment" rule.

Although there are undoubtedly instances where the Court of Appeals has permitted such an appeal to go forward, these should be considered the exception and not the rule. See, e.g., *Williamson v Munger*, unpublished opinion per curiam of the Court of Appeals, issued Feb 9, 2010; 2010 Mich App LEXIS 293, *2 n 1 (Docket No. 287586) (finding *City of Detroit* to be distinguishable because although the parties stipulated to the dismissal of the plaintiff's excess economic damages claims under the no-fault act without prejudice, they agreed at oral argument that the claims were "not going to be tried, despite their dismissal without prejudice"); *Grand/Sakawa Macomb Airport, LLC v Twp of Macomb*, unpublished opinion per curiam of the Court of Appeals, issued June 7, 2005; 2005 Mich App LEXIS 1398, *12 (Docket No. 256013) (entertaining the defendant county's appeal from a judgment approving the plaintiffs' proposed land use even though the plaintiffs' damages claims were dismissed without prejudice); *Richfield Landfill, Inc v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued Jan 26, 2001; 2001 Mich App LEXIS 503, *8 (Docket Nos. 202774, 202777, 202775) ("For purposes of arriving at a final order that could be appealed, the parties and the court signed a final judgment and stipulated order, staying the order granting the operating license, dismissing count II of the 1991 suit without prejudice, and dismissing the DNR's counterclaim without prejudice.").

What's Left Of *Fultz* After *Loweke?*

Mark Twain once quipped that reports of his death had been greatly exaggerated. The same might be said of *Fultz v Union-Commerce Association,* 470 Mich 460; 683 NW2d 587 (2004). The argument that *Loweke v Ann Arbor Ceiling & Partition Co, LLC,* 489 Mich 157; ___ NW2d ___ (2011), overruled *Fultz* has been raised in many quarters since *Loweke* was issued last summer. But this position—that *Fultz* is now dead letter—is difficult to square with *Loweke* itself.

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Trent B. Collier is a member in the Detroit office of Dickinson Wright PLLC, and specializes in the areas of commercial litigation, bankruptcy law, and appellate advocacy. Prior to joining Dickinson Wright, he served as a law clerk for Michigan Supreme Court Justice Robert P. Young, Jr. His email address is tcollier@dickinsonwright.com.

However, there is established precedent from the Court of Appeals cautioning against such a practice on the ground that the dismissal of one or more claims "without prejudice" deprives an order dismissing other claims involuntarily of its finality for purposes of appeal.

In order to appreciate the import of *Loweke*, it is necessary to begin with the facts of *Fultz*. *Fultz* was a classic "slip and fall" case. The plaintiff fell on a portion of a snow-and-ice-covered parking lot that evidently had been left unplowed. She obtained a default judgment against the premises owner and a jury awarded her a verdict against the company that had been hired to plow the parking lot. On appeal, the Michigan Supreme Court held that the plaintiff had not established that the plow company owed her a legally cognizable duty. The plow company had no duty to her at common law or under governing statutes. It was not the premises owner and had no obligation to clear that particular parking lot, absent its contract with the premises owner.

Thus, the only duty alleged by the plaintiff arose out of the plow company's contract with the premises owner. This contractual duty, the *Fultz* court held, was insufficient to support a third-party tort claim. The plow company's duties under the contract were owed only to the other contracting party. The plaintiff had to allege a duty "separate and distinct" from the plow company's contractual obligations in order to state a tort claim, and she was unable to do so.

Fultz, according to *Loweke,* was prone to misconstruction. Its "separate and distinct" analysis was taken for a kind of tort immunity that a defendant could assert by establishing that its conduct was governed by contract. Part of lower courts' confusion on this point, according to the *Loweke* court, stemmed from the Michigan Supreme Court's own orders in *Mierzejewski v Torre & Bruglio, Inc,* 477 Mich 1087; 729 NW2d 225 (2007), and *Banaszak v Northwest Airlines, Inc,* 477 Mich 895; 722 NW2d 433 (2006).

In *Banaszak,* the Court held that the plaintiff had not identified a duty "separate and distinct" from the defendant's contractual obligations where the defendant insufficiently covered a hole in a walkway after installing machinery there. In *Mierzejewski,* the defendant piled snow into large piles, the runoff from which pooled and formed into ice on which the plaintiff slipped. Both *Banaszak* and *Mierzejewski* could be read, not as products of the court's skepticism that the defendants had created new hazards, but suggestions that *Fultz* granted defendants a sort of immunity when acting pursuant to a contract.

The Michigan Supreme Court clarified in *Loweke* that it had not intended for *Fultz* to be read in this way. *Fultz* had been misconstrued—thanks "in part," the Court explained, to its orders in *Banaszak* and *Mierzejewski*. *Loweke, supra* at 5. But instead of overruling *Fultz,* the *Loweke* court "clarified" it. *Id.* According to *Loweke, Fultz* does not require courts to look through contracts and jettison any third-party claims that are based on injuries contemplated in some fashion by the relevant contract. Rather, *Loweke* stresses that the court's inquiry into the existence of a duty begins *outside* of the relevant contract and asks whether there is a basis in Michigan's statutory or common law for imposing a duty on the defendant. *Id.* If the plaintiff can establish a duty existing under the common law or by statute, then the plaintiff has alleged a proper duty—even if this duty *also* arises from the defendant's contract. If the plaintiff attempts to base a tort claim on a duty that arises *solely* under contract, however, then the plaintiff has not alleged a duty that can support a third-party tort claim. *Id.*

Loweke calls for a change in analysis, not a change in the governing legal rule. Under both *Loweke* and *Fultz,* the plaintiff bears the burden of establishing that the defendant owed a duty apart from its contractual obligations. *Loweke* holds that a court's inquiry should begin in the legal opinions and statutes that impose legal duties under Michigan law, not in the defendant's contractual obligations. *Loweke, supra* at *7.

Loweke also clarifies that one of these common law duties—one that applies even in the performance of contractual obligations—is the "duty to use ordinary care in order to avoid physical harm to foreseeable persons and property in the execution of its undertakings." *Id.* In *Loweke,* for example, the employee of one subcontractor at a worksite piled concrete beams in an unsafe manner. These beams fell on the employee of another subcontractor and injured him. The negligent subcontractor may have been working pursuant to his employer's agreement with the general contractor but the plaintiff had no need to resort to the subcontractor's agreement in order to establish a legal duty. In performing his contractual obligations, the negligent employee had a common law duty to use ordinary care. It was his breach of that duty—not his breach of contract—that established the plaintiff's claim.

The "separate and distinct" rule, therefore, lives on. But *Loweke* makes it clear that a court's inquiry must begin with the common law and governing statutes, and that the existence of a contractual duty does not obviate other duties imposed by law.

Fultz, according to *Loweke*, was prone to misconstruction. Its "separate and distinct" analysis was taken for a kind of tort immunity that a defendant could assert by establishing that its conduct was governed by contract.

Reply Briefs In Support Of Applications For Leave To Appeal

Most attorneys practicing in Michigan's circuit courts are familiar with the Michigan Court Rules' failure to address reply briefs in support of motions for summary disposition. *See* MCR 2.116. The rules neither allow the filing of reply briefs nor prohibit them. Some circuit courts remedy this omission by issuing scheduling orders that expressly address the timing of reply briefs. And many lawyers take the absence of any rule prohibiting reply briefs as an invitation to file them.

It may be surprising that the rules governing applications for leave to appeal before the Michigan Court of Appeals feature a similar omission. Although the rules allow for an application and a response, they make no provision for a reply brief in support of an application for leave to appeal. *See* MCR 7.205. In fact, the Court of Appeals' Internal Operating Procedures indicate that the clerk's office will return any reply brief "unaccompanied by a motion for leave to file it" to the sender. COA IOP 7.205(C)-3.

This IOP provides a roadmap for successfully filing a reply brief in support of an application for leave to appeal, should an appellant deem it necessary. An appellant must file the reply brief with a motion for leave to file a reply brief, including the reply brief itself as an exhibit to the motion. This motion is governed by MCR 7.211, which describes the general procedures for motions in the Court of Appeals.

The best practice in filing a motion for leave to file a reply brief, of course, is to give the Court of Appeals a sound rationale for granting leave to file a reply brief. The most common reasons are the need to address unanticipated arguments raised by the appellee or to distinguish case law cited for the first time in the appellee's brief.

Unlike the Court of Appeals, the rules governing practice before the Michigan Supreme Court *do* allow for reply briefs in support of applications for leave to appeal. *See* MCR 7.302(E). The form of these reply briefs is governed by MCR 7.2.212(G): they must be limited to rebuttal of the appellee's arguments and may not exceed 10 pages in length. Recently, the State Bar's Appellate Practice Section recommended that the Supreme Court amend MCR 7.205 to adopt a similar provision for reply briefs in support of applications for leave to appeal in the Court of Appeals.

This issue is another reminder that, when practicing before Michigan's appellate courts, it is important to examine both the Michigan Court Rules *and* the Court's Internal Operating Procedures. Although lawyers may not meet much resistance when filing a reply brief in support of a summary disposition motion, the Court of Appeals' Internal Operating Procedures indicate that appellate counsel would be ill-advised to adopt the same strategy when supporting an application for leave to appeal before the Michigan Court of Appeals. A motion—and a persuasive rationale for allowing a reply brief—are necessary.

Necessity Of Bringing A Cross-Appeal To Advance Alternative Grounds For Dismissal

The Supreme Court has long held that, although an appellee cannot obtain a more favorable outcome on appeal without filing a cross-appeal, *Middlebrooks v Wayne County*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994), "an appellee is not required to file a cross-appeal to advance arguments in support of a judgment on appeal that were rejected by the lower court." *Cacevic v Simplimatic Eng'g Co*, 467 Mich 997; 625 NW2d 784 (2001). Applying that rationale in *Cacevic*, the Supreme Court vacated footnote 2 of the Court of Appeals' opinion in that case, in which the Court of Appeals reversed a judgment on a jury verdict in the defendant's favor but, because the defendant did not file a cross-appeal, declined to address the defendant's alternative argument that the trial court should have granted its motion for a direct verdict. The Supreme Court found that this was error, and remanded the case to the Court of Appeals to consider the defendant's alternative argument.

In addition to being binding precedent, the Supreme Court's decision in *Cacevic* makes sense: since the defendant received a favorable judgment and thus was in no way aggrieved by it, why should the defendant have been required to file a cross-appeal in order to preserve the ability to rely on an alternative argument in support of that judgment?

Unfortunately, a recent unpublished decision from the Court of Appeals has muddied the waters. In *Robbins v Village Crest Condominium Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued Feb 7, 2012; 2012 Mich App LEXIS 213 (Docket No. 300842), the trial court dismissed the plaintiff's premises liability claim arising from her slip and fall on black ice, finding that the condition was open and obvious. The Court of Appeals, however, reversed, concluding that there was a "material question of fact regarding whether there were indicia of a potentially hazardous condition." *Id*. at *7.

In support of its argument that the circuit court correctly granted summary disposition in its favor, defendant argues that plaintiff's theory, i.e., that black ice caused her to fall, is not supported by the record.

In an attempt to offer an alternative basis for affirming the trial court's dismissal of the case, the defendant in *Robbins* argued that the plaintiff had failed to provide any evidence that the black ice caused her to fall in the first place. The defendant made this argument in the trial court, but the court did not address it – presumably because it found the condition to be open and obvious in any event. Although the Court of Appeals eventually addressed the argument, it was not before stating that it could have "refuse[d] to consider the issue" because the defendant did not file a cross-appeal. In support of that position, the Court of Appeals stated:

In support of its argument that the circuit court correctly granted summary disposition in its favor, defendant argues that plaintiff's theory, i.e., that black ice caused her to fall, is not supported by the record. Specifically, defendant argues that plaintiff offered nothing more than mere speculation and conjecture to establish that she slipped and fell on black ice. Defendant argued below that plaintiff's causation theory was mere conjecture, but the circuit court failed to address or decide the issue below. "Although filing a cross-appeal is not necessary to argue an alternative basis for affirming the [circuit] court's decision, the failure to do so generally precludes an appellee from raising an issue not appealed by the appellant." *Turcheck v Amerifund Financial, Inc*, 272 Mich App 341, 351; 725 NW2d 684 (2006), citing *Kosmyna v Botsford Community Hosp*, 238 Mich App 694, 696; 607 NW2d 134 (1999). While we could refuse to consider the issue because defendant has not filed a cross-appeal, we will address the issue because it involves a question of law for which all necessary facts have been presented. . . . *Id*. at *8-9.

The Court's assertion that the defendant was required to file a cross-appeal in order to argue lack of causation is impossible to square with the Supreme Court's instruction in *Cacevic*, under which the defendant in *Robbins* was free to defend the trial court's decision on any grounds it wished (assuming they were properly raised below, of course) – without the need for a cross-appeal.

In addition, the *Robbins* Court's analysis finds no support in the decision it cited. In *Turcheck*, the Court of Appeals did say that the failure to file a cross-appeal "generally precludes an appellee from raising an issue not appealed by the appellant." *Turcheck*, 272 Mich App at 351. However, *Turcheck* did not involve a defendant seeking to advance an alternative basis for upholding a favorable decision. Rather, the "issue" that the *Turcheck* Court found to require a cross-appeal – whether the trial court properly denied the defendant's request for attorney fees – involved a challenge by the defendant to an entirely separate order than the one being appealed – an order dismissing the plaintiff's breach of contract action. Thus, the *Turcheck* Court properly determined that the defendant's "failure to file a cross-appeal from the trial court's denial of its request for attorney fees precludes it from now attempting to obtain a decision more favorable than that rendered below," i.e., dismissal of the plaintiff's case. *Id*.

The *Turcheck* Court, in turn, cited *Kosmyna v Botsford Community Hosp*, 238 Mich App 694; 607 NW2d 134 (1999), which further undermines *Robbins*. In *Kosmyna*, the defendants appealed the trial court's order denying their motion to compel arbitration. In denying the motion, the trial court found that the defendants had waived their right to arbitration. On appeal, the Court of Appeals agreed that this was error, but nevertheless affirmed on the alternate ground that the arbitration agreement was unenforceable because it "[did] not comply with statutory requirements." *Id*. at 696. Rejecting the defendant's argument that the issue was not properly before the Court because the plaintiff "ha[d] not filed a cross appeal," the *Kosmyna* Court explained that a cross-appeal was not required "in order to argue an alternative basis for affirming the trial court's decision, even if that argument was considered and rejected by the trial court." *Id*.

In light of the Supreme Court's decisions in *Middlebrooks* and *Cacevic*, as well as the Court of Appeals' own decisions in *Turcheck* and *Kosmyna*, it appears that the *Robbins* panel was mistaken in suggesting that the defendant's failure to file a cross-appeal in that case meant that it did not properly preserve its alternative argument for affirming the trial court's summary disposition order. Although the *Robbins* decision is unpublished, and is thus not precedentially binding, practitioners should be aware of it and should assist clients in making an informed decision about whether to file a cross-appeal as a precautionary measure to preserve alternate arguments.

Endnotes

1. See MCR 7.203(A)(1) (providing that the Court of Appeals has jurisdiction over an appeal as of right filed from a "final judgment or final order"); MCR 7.202(6)(a)(i) (defining "'final judgment' or 'final order'" as the "first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties").

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Legal Malpractice Update

DEFAULT JUDGMENT IN SUIT TO COLLECT FEES IS RES JUDICATA IN MALPRACTICE ACTION

"Do you promise to pay the bill, the whole bill, and nothing but the bill?" *Anderson v Lawyer Defendant*, No. 300459, 2011 WL 6268195 (December 2011) (unpublished)

The Facts: Defendants represented certain of the plaintiffs in defense of a 2007 civil suit filed by Daimler Chrysler. In 2008, defendants withdrew from representation in the Daimler Chrysler lawsuit, and sued plaintiffs for unpaid fees. A default judgment was entered against the Plaintiffs in that action. Plaintiffs filed a motion to set aside default, arguing that defendants' alleged malpractice precluded awarding fees. The trial court, however, rejected Plaintiffs' motion to set aside default. Lisa Anderson, one of the instant plaintiffs, was not a party in the action by Daimler Chrysler or in the suit for legal fees.

Subsequently, in 2009, Plaintiffs, including Lisa Anderson, filed the underlying action against defendants for legal malpractice and unjust enrichment. Defendants contended that Plaintiffs' claims were barred by res judicata, and that Lisa lacked standing. The trial court agreed with defendants' arguments, and granted defendants' motion for summary disposition.

The Ruling: The Court of Appeals affirmed summary disposition, finding that the claims were barred by res judicata. The first element for res judicata requires that the first action be decided on the merits. The court stated that a default judgment is treated as a ruling on the merits. Therefore, the 2008 action by Defendants for attorney fees satisfied the first element.

Second, res judicata requires that the instant action could have been resolved in the preceding action. The court found that the first action for legal fees and the current action relied on the same facts and evidence, because both were focused on defendants' legal services in the Daimler Chrysler lawsuit. Moreover, plaintiffs' motion to set aside default in the first action addressed allegations of malpractice. Accordingly, the court stated that the malpractice allegations could have been brought as a counterclaim or affirmative defense to the lawyer's suit for fees. Thus, the court found that the second element of res judicata was satisfied.

The final res judicata requirement is that the separate actions involved the same parties or privies. Plaintiffs contended that Lisa was not a privy. However, Plaintiffs also acknowledged that Lisa was a guarantor to one of the plaintiffs' obligations. Thus, the court determined that as a guarantor, Lisa was also in privity with the Plaintiffs from the original action. As a result, the three requirements of res judicata were met, and the court affirmed summary disposition.

The Court of Appeals also agreed that plaintiff Lisa lacked standing to sue for malpractice. Lisa was not a named party in the Daimler Chrysler law suit, or in the defendants' action for legal fees. Nor was Lisa a party to the legal representation agreement with defendants. The plaintiffs contended that there was an attorney-client relationship between Lisa and defendants based on her being a guarantor to one of the plaintiffs. However, the court rejected this argument for not being substanti-

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ated by legal authority. Rather, the court cited authority holding that legal malpractice claims can only accrue to the attorney's client.

Practice Tip: While the lawyer defendants in this case ultimately won on all issues, lawyers with unpaid legal fees should consider waiting until the two-year statute of limitations on legal malpractice claims has expired before filing a lawsuit for unpaid fees against their former client.

DISMISSAL OF CLIENT'S COUNTERCLAIM FOR MALPRACTICE WAS PROPER WHERE CLAIM WAS TIME-BARRED

***Lawyer Plaintiff v Kloian*, No. 300122, 2011 WL 6464045 (December 2011) (unpublished)**

The Facts: Plaintiff sued the defendant to recover fees for legal services. Defendant counterclaimed for legal malpractice, breach of contract, and recoupment. The counterclaims, however, were time-barred, and accordingly plaintiff filed a motion for summary disposition. Defendant did not file a response to the motion, instead filing a motion for adjournment on the day of the scheduled hearing. The trial court denied defendant's motion to adjourn.

At the hearing on the motion for summary disposition, plaintiff stated that if the defendant's counterclaim was dismissed, that plaintiff would voluntarily dismiss its own complaint. The trial court granted plaintiff's motion for summary disposition as to the counterclaim on statute of limitations grounds. Further, the trial court granted plaintiff's request to voluntarily dismiss its own complaint.

The Ruling: The Court of Appeals affirmed. On appeal, defendant argued that it was improper to dismiss the counterclaim because it was done through "bargaining" between the court and plaintiff. The court rejected this argument. First, the counterclaim was clearly time-barred. Second, despite it being time-barred, the defendant would still be able to allege legal malpractice as a defense to plaintiff's claim for legal fees. Plaintiff agreed with this latter point: the recoupment counterclaim might allow the defendant to recover the same amount that plaintiff recovered from its claim under MCL 600.5823. As a result, the court found no illegitimate purpose for plaintiff's agreement to voluntarily dismiss its own claim upon grant of summary disposition on the counterclaim. The defendant's counterclaim would have been dismissed anyway based on the statute of limitations, and, as such, it was considered adjudicated on its merits. It was only after the counterclaim was dismissed that plaintiff requested to voluntarily dismiss its case against defendant.

Practice Tip: Given the voluntary dismissal of plaintiff's claim for fees, plaintiff did not assert the argument that defendant's counterclaims would have barred by the doctrine of res judicata, which would have likely won the day.

Notice to Members

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Meeting of the Active Members of the MDTC

The Annual Meeting of the MDTC will be held on May 11, 2012 at 7:50 am. At which time the organization will elect the leaders of the MDTC for the fiscal year July 1–June 30, 2013.

The meeting will be held at the The Westin Book Cadillac, Detroit, MI

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Supreme Court

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Supreme Court Update

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"Alighting" From a Parked Vehicle Ends When Both Feet Are Planted Firmly on the Ground

On December 21, 2011, in a 4-3 decision, the Michigan Supreme Court held that no-fault personal protection insurance benefits are not recoverable when a plaintiff slips and falls after fully exiting a parked vehicle, even if the injury occurs while the plaintiff is closing the vehicle's door. *Frazier v Allstate Insurance Company*, 490 Mich 381; ___ NW2d ___ (2011).

Facts: The plaintiff filed this first-party no-fault insurance action, seeking personal protection insurance ("PIP") benefits as a result of injuries she sustained when she slipped and fell on ice outside of her parked vehicle. After placing items in the passenger side of her vehicle, the plaintiff stood up, stepped back and slipped on a patch of ice while closing the passenger door of her vehicle. The plaintiff claimed she was entitled to PIP benefits because her injuries arose out of the "ownership, operation, maintenance or use of a motor vehicle," as provided for in MCL 500.3105(1) and 500.3106(1).

Under MCL 500.3106(1), when injuries result when a vehicle is parked, an insurer is liable for PIP benefits only if: 1) the vehicle was parked in such a way as to cause unreasonable risk of injury; 2) if the injury resulted as "a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used," or 3) if the injury occurred while the insured was "occupying, entering into, or alighting from the vehicle."

At trial, the plaintiff testified that she slipped and fell as she stepped aside to close the passenger door of her vehicle. She testified that she was touching the passenger door when she fell. The defendant insurer argued that none of the exceptions to the parked vehicle exclusion of the no-fault act applied. At the conclusion of a jury trial, the trial court entered judgment in the plaintiff's favor. The Court of Appeals affirmed the jury verdict in favor of the plaintiff and held, in part, that the plaintiff was in the process of "alighting" from the vehicle when she slipped and fell.

Ruling: The Michigan Supreme Court reversed and held that none of the exceptions to the parked vehicle exclusion under the no-fault act applied.

The Supreme Court explained that for the "alighting" from a parked vehicle exception (MCL 500.3106(1)(c)) to apply, the injury must be sustained "while" the insured is in the process of alighting from the vehicle. The process of alighting from a vehicle "begins when a person initiates the descent from a vehicle and is completed when an individual has effectively 'descended from a vehicle' and has come to rest …." This typically occurs when "both feet are planted firmly on the ground." At the time of her injuries, the plaintiff was standing outside the vehicle with both feet planted firmly on the ground, was in control of her body's movement and was not reliant upon the vehicle. Given these facts, the court held that the plaintiff was not in the process of "alighting from" the vehicle when she fell and, therefore, was not entitled to PIP benefits.

The court also held that PIP benefits were not recoverable because her injury did not directly result from physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, as provided for by MCL 500.3106(1)(b). Because the plaintiff was in contact with the "vehicle" itself when she fell and not any particular piece of "equipment" mounted to the vehicle, the exception was inapplicable. The court concluded that a car door is not "equipment" as that term is used under MCL 500.3106(1)(b).

Justice Marilyn Kelly issued a dissenting opinion, in which she noted that she would have denied leave to appeal because sufficient evidence existed for a reasonable jury to have determined that the plaintiff sustained her injuries while she was alighting from the vehicle. Justice Kelly reasoned that the process of alighting from a vehicle "may or may not be completed when a person has both feet on the ground," but includes the process of opening or closing a car door. Because the plaintiff partially entered her vehicle while placing items inside the passenger compartment, Justice Kelly believed the plaintiff remained in the process of alighting from the vehicle when she fell while closing the passenger door.

Significance: The court's decision

The Supreme Court explained that for the "alighting" from a parked vehicle exception (MCL 500.3106(1)(c)) to apply, the injury must be sustained "while" the insured is in the process of alighting from the vehicle. The process of alighting from a vehicle "begins when a person initiates the descent from a vehicle and is completed when an individual has effectively 'descended from a vehicle' and has come to rest …." This typically occurs when "both feet are planted firmly on the ground."

clarifies the requirements necessary to invoke the "alighting from" and "equipment" exceptions to the parked vehicle exclusion under the no-fault act. Because prior cases typically turned on whether the plaintiff was in contact with any part of the vehicle when they sustained injury, this opinion will likely reduce the number of insureds who qualify for PIP benefits for injuries they sustain outside of their vehicles.

No Governmental Liability Where Hazardous Conditions in and Near Public Sidewalk Were Not "Defects" in the Sidewalk Itself

In an order in lieu of granting leave to appeal, the Michigan Supreme Court reversed the decision of the Court of Appeals and held that summary disposition should have been granted in the public defendant's favor for the reasons stated in the Court of Appeals dissent because the guy wire and anchor crossing through a public sidewalk did not constitute "defects" for purposes of the public highway exception to governmental immunity. *LaMeau v City of Royal Oak*, 490 Mich 949; 805 NW2d 841 (2011).

Facts: In May 2006, after a night of drinking and ingesting marijuana, John Crnkovich road his motorized scooter along a sidewalk in Royal Oak and struck a guy wire that crossed over the sidewalk to support a nearby utility pole. The accident severed Crnkovich's spinal cord, killing him.

The plaintiff, personal representative of Crnkovich's estate, filed a wrongful death action against the City of Royal Oak, two city employees, Detroit Edison Company and Gaglio PR Cement, as a result of the accident. Among his claims, the plaintiff alleged that the city breached its duty to maintain the sidewalk in reasonable repair and that the individual city employees were grossly negligent in planning and constructing the sidewalk.

The city contracted Gaglio PR Cement to construct the sidewalk. The city engineer designed the sidewalk and the city's construction project field manager worked directly with Gaglio. During construction, Gaglio warned the project manager that the sidewalk, as planned, ran through two guy wires and anchors used to support nearby utility poles owned by Ameritech and Detroit Edison. Although Ameritech eventually moved its guy wire out of the path of the sidewalk, Detroit Edison made no effort to remove its guy wire. The project manager instructed Gaglio to complete construction of the sidewalk and to barricade the sidewalk until the remaining guy wire could be relocated. The barricade was routinely removed by members of the public and, twice in 2006, bicyclists complained of sustaining injuries after striking the wire while riding on the sidewalk. Despite these complaints, the wire remained across the sidewalk until the time of the decedent's fatal accident.

The city and the individual defendants sought summary disposition of the plaintiff's claims based on governmental immunity. The city argued that the wire and anchor were part of the utility pole owned by Detroit Edison and, as a result, did not constitute a defect in the sidewalk as necessary to fall within the public highway exception to governmental immunity under MCL 691.1402 and 1402a. The individual defendants argued that they were not grossly negligent and that their conduct was not "the" proximate cause of the plaintiff's injuries as required under MCL 691.1407(2)(c).

The trial court denied the motions for summary disposition. On appeal, the Court of Appeals affirmed the trial court's denial of summary disposition, holding that the wire and anchor were part of the sidewalk, which was open to the public based on the routine removal of the barricades, and that questions of fact existed as to whether the individual defendants were grossly negligent based on the repeated warnings they had received about the dangerous condition prior to the incident.

Judge Talbot issued a dissenting opinion, in which he noted his view that the trial court erred in failing to grant the municipal defendants summary disposition because the plaintiff's claim was barred by governmental immunity. Judge Talbot's dissent explained that, although an exception to governmental immunity exists with respect to public sidewalks, that exception does not apply to utility poles. Because the guy wire was an integral part of the utility pole that it was attached to, it could not have constituted a "defect" in the sidewalk that falls within the exception to governmental immunity under MCL 691.1402a.

Judge Talbot also disagreed with the majority's implication that the sidewalk's

. Judge Talbot's dissent explained that, although an exception to governmental immunity exists with respect to public sidewalks, that exception does not apply to utility poles. Because the guy wire was an integral part of the utility pole that it was attached to, it could not have constituted a "defect" in the sidewalk that falls within the exception to governmental immunity under MCL 691.1402a.

design, running in the path of the guy wire, precluded the application of governmental immunity. Relying on prior case law, Judge Talbot noted that both the Court of Appeals and the Supreme Court have held that the public highway exception to governmental immunity does not apply to design defects.

With respect to the individual defendants, Judge Talbot explained that even if evidence supported a finding that the individual defendants were grossly negligent, no evidence existed on which a reasonable jury could conclude that the defendants' gross negligence was "the" proximate cause of the plaintiff's injuries. While the individual defendants' conduct in designing and constructing the sidewalk through an area where guy wires were located and failure to ensure that the guy wire and anchor were timely removed may have contributed to the accident, thereby constituting "a" proximate cause of the injuries, their conduct was "simply too remote" to create a question of fact as to whether it constituted "the" proximate cause of the injuries. Rather, Judge Talbot explained that the decedent's own behavior in riding his scooter while intoxicated and without safety gear, combined with Detroit Edison's failure to remove its guy wire and anchor, "comprised a more direct and immediate cause of the injuries …."

Ruling: In an order in lieu of granting leave to appeal, the Michigan Supreme Court reversed the Court of Appeals decision and held, without further discussion, that summary disposition should have been granted in the municipal defendants' favor for the reasons stated in the Court of Appeals dissenting opinion. As noted, the Court of Appeals dissent explained that City of Royal Oak was entitled to summary disposition because the guy wire and anchor were not a part of the public sidewalk and, accordingly, were not "defects" under the public highway exception to governmental immunity. The Court of Appeals dissenting opinion also reasoned that summary disposition was proper in favor of the individual defendants because their conduct, whether or not grossly negligent, was not "the" proximate cause of the plaintiff's injuries.

Justice Marilyn Kelly dissented and expressed her frustration with the majority's mere reliance on and "rubberstamping" of the Court of Appeals dissenting opinion without writing an opinion that would provide "comprehensive legal analysis to support its conclusion." To Justice Kelly, the Court of Appeals dissent was an "inadequate substitute." Justice Kelly, instead, would have affirmed the trial court and the Court of Appeals majority because the city, by leaving the wire embedded in the sidewalk, breached its duty to maintain and keep the sidewalk in reasonable repair. Justice Kelly also held that ample evidence supported a finding that the individual defendants were grossly negligent.

Significance: Without providing independent analysis and relying exclusively on the reasoning within the Court of Appeals dissent opinion, this order demonstrates that dangerous conditions within public right-of-ways will not automatically qualify as "defects" under the public highway exception to governmental immunity. This decision also clarified that public highway exception to governmental immunity does not apply to design defects.

Private Parties Owe No Duty to Maintain or Repair Public Rights-Of-Way

On December 16, 2011, in a 4-3 decision, the Michigan Supreme Court reversed the Court of Appeals decision and reinstated the trial court's order granting summary disposition, holding that private parties owe no duty to maintain or repair public highways. *McCue v O-N Minerals Co*, 490 Mich 946; 805 NW2d 837 (2011).

Facts: On a bicycle tour in the Upper Peninsula, the plaintiff's wife sustained serious permanent injuries when she struck an extensively damaged portion of state highway M-134 and was thrown from her bicycle. The plaintiff filed suit against a private mining company that owned land on both sides of the highway, claiming negligence and public nuisance as a result of the mining company's use of the highway. The mining company frequently drove heavy equipment over the portion of the highway at issue, causing the highway to become damaged. Although that portion of the highway was paved with concrete and reinforced with railroad rails, the concrete surrounding the rails had deteriorated and left divots in the roadway.

In his complaint, the plaintiff alleged that, given the mining companies signifi-

The mining company frequently drove heavy equipment over the portion of the highway at issue, causing the highway to become damaged. Although that portion of the highway was paved with concrete and reinforced with railroad rails, the concrete surrounding the rails had deteriorated and left divots in the roadway.

cant use of a portion of the state highway, it had a duty to maintain that portion in reasonable repair. The plaintiff also alleged that the mining company created a hazardous condition in the highway that constituted a public nuisance.

The mining company sought summary disposition, arguing that it owed no duty to maintain the state highway because the highway was under the exclusive jurisdiction of the Michigan Department of Transportation. The mining company also argued that, because MDOT had exclusive jurisdiction over the highway, only MDOT could be held liable on the plaintiff's nuisance claim. The plaintiff argued in response that a duty to maintain may arise where an adjacent landowner creates a new hazard, increases an existing hazard, or has a servitude through physical intrusion onto the right-of-way.

The trial court granted summary disposition for the mining company and held that nothing in the record supported a finding that the mining company, rather than MDOT, owed a duty to maintain the state highway. Thus, the mining company could not be held liable for negligence or nuisance in relation to the deteriorated portion of the highway at issue.

The Court of Appeals reversed, holding that a question of fact existed as to whether the mining company created or increased the hazardous condition at issue. The Court of Appeals explained that landowners typically owe no duty to maintain or repair adjacent public right-of-ways, but may be held liable for a condition in a right-of-way if they "physically intruded upon the area in some manner" or did "some act which either increased an existing hazard or created a new hazard." Because the plaintiff presented evidence that the mining company's use of the highway created or increased an existing hazard, the Court of Appeals concluded that summary disposition was improper.

Holding: The Michigan Supreme Court, in a 4-3 decision, reversed the Court of Appeals decision and reinstated the trial court's order granting summary disposition in favor of the mining company. In its order, comprising just three sentences, the Supreme Court held: "The plaintiff's claim of negligence failed because the plaintiff did not demonstrate that the defendant, rather than [MDOT], owed the plaintiff and his spouse a duty to maintain or repair the State highway in question." The court further held that the plaintiff's nuisance claim failed because the plaintiff did not demonstrate that the defendant unreasonably interfered with a common right enjoyed by the public or that the plaintiff's spouse's injury was different from the type of harm that a member of the general public could have sustained.

Justice Cavanagh issued a dissenting opinion stating that he believes genuine issues of material fact exist regarding whether the mining company owed a duty to maintain the state highway and whether its use of the highway created a public nuisance. Justice Cavanagh further reasoned: "Even if the majority is correct that defendant had no duty to maintain or repair the state highway in question, I think that defendant arguably had a duty to inform [MDOT] of the damage apparently caused by defendant's unusual use of the highway." According to Justice Cavanagh, this duty arises because the mining company's use of the highway was "highly intense and fundamentally different from the public's use …."

Justices Marilyn Kelly and Hathaway joined Justice Cavanagh's dissent. Justice Kelly added, however, that she believes a duty may have also arisen based on an easement agreement between MDOT and the mining company, through which the mining company reserved the right to maintain the portion of the state highway at issue.

Significance: The court's order, though terse, clarifies that private parties owe no duty to maintain or repair public right-of-ways, even if those parties created or increased a hazardous condition within the right-of-way. While Justice Cavanagh suggests imposing a duty to inform MDOT as a "fair balancing" of competing policy considerations, the majority gave no consideration to such a duty and no indication that it would entertain such a compromise in the future.

Court Finds Former Jackson County District Court Judge "Unworthy of Holding Judicial Office"

On January 27, 2012, the Michigan Supreme Court ordered the removal of Jackson County District Judge, James M. Justin, and held that his "multitudinous acts of proved misconduct sketch a common theme: respondent failed to follow

The Michigan Supreme Court, in a 4-3 decision, reversed the Court of Appeals decision and reinstated the trial court's order granting summary disposition in favor of the mining company. In its order, comprising just three sentences, the Supreme Court held: "The plaintiff's claim of negligence failed because the plaintiff did not demonstrate that the defendant, rather than [MDOT], owed the plaintiff and his spouse a duty to maintain or repair the State highway in question."

the law, apparently believing that it simply did not apply to him." *In re Honorable James M Justin*, 490 Mich 394; ___ NW2d ___ (2012).

Facts: In November 2010, the Judicial Tenure Commission ("JTC") filed a formal complaint against Judge Justin, alleging that he committed eight counts of judicial misconduct while sitting as a District Court Judge in Jackson County. Those counts included: 1) inappropriate dismissal of cases, including cases against himself and his wife; 2) falsification of and interference with court records; 3) ex parte discussions with criminal defendants; 4) failure to follow plea agreements; 5) inappropriate delays in pending case; 6) failure to follow proper procedures in imposing peace bonds; 7) improper interference with a case assigned to another judge; and 8) making misrepresentations to the JTC.

The JTC appointed Judge Pamela McCabe as master to hear the case. The master held a hearing, during which Justin testified in defense of his conduct. At the conclusion of the hearing, the master issued her report, finding seven of the eight counts of judicial misconduct alleged in the complaint had been proved by a preponderance of the evidence. The master noted numerous instances of Justin's misconduct. Among those instances, the master found that Justin had dismissed, without hearing or involvement of the prosecutor, four traffic citations issued to himself, five citations issued to his wife, and citations issued to his court officer and court reporter. Justin also dismissed or reduced many charges against criminal defendants without the knowledge or approval of the prosecutor. The master also concluded that, among his other misgivings, Justin made several misrepresentations to the JTC through his written responses and answers and at the hearing.

Of the eight counts alleged against Justin, the master found only one had not been proved by a preponderance of the evidence. That count alleged that Justin had failed to follow proper procedures in imposing peace bonds. The master found that, despite Justin's failure to know the law regarding peace bonds, there was no evidence of misconduct.

After oral argument, the JTC adopted the master's findings in their entirety and determined that Justin was "unfit to sit as a judge." The JTC requested that Justin be removed from office and be assessed costs in the amount of $24,934.19.

Holding: The Michigan Supreme Court adopted the findings of the master and the JTC and ordered that Justin be removed from office. The court, likewise, ordered the JTC to submit a bill of costs to assessed against Justin under MCR 7.317(C)(3). The Supreme Court chastised Justin for his "pervasive pattern of misconduct and his calculated disregard for the law," which rendered him "unworthy of holding judicial office." The court acknowledged the importance of ensuring that judicial officers engage in ethical and honest behavior, and concluded that Justin's actions were "completely antithetical to the privilege of being a judge and more than adequately justify his removal from office."

Justices Cavanagh, Marilyn Kelly and Hathaway concurred in the result only.

Significance: Although extreme cases of this sort of rare, the court's opinion demonstrates that even relatively minor abuses of judicial power should not be taken lightly.

New Membership Benefit

The on-line Membership Directory is now available to everyone — attorneys, non-attorneys, and the general public.

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** MDTC staff will verify any and all requests to update member's contact information.

MDTC Amicus Committee Report

By: Hilary A. Ballentine
Plunkett Cooney
Co-Chair, MDTC Amicus Committtee

MDTC Amicus Activity in the Michigan Supreme Court

An asterisk (*) after the case name denotes a case in which the Michigan Supreme Court expressly invited MDTC to file an amicus curiae brief.

The Michigan appellate courts have recently rendered several favorable rulings in cases the MDTC has briefed.

Medical Malpractice – Standard of Care. The Michigan Supreme Court, in lieu of granting leave to appeal, issued an order peremptorily reversing the Court of Appeals' decision in *Jilek v Stockson* (No. 141727). In *Jilek*, a medical malpractice case involving standard of care issues, the Court found that the trial court's decision to wait to establish the standard of care until after the proofs at trial had closed was not "inconsistent with substantial justice" so as to warrant the grant of a new trial.

Municipal Liability. The court also issued an order in lieu of granting leave in *LaMeau v City of Royal Oak* (No. 141559-60). *LaMeau* sounded a victory for the municipal defendants, who were sued for failing to keep a guy wire and anchor in "reasonable repair."

Medical Malpractice – Proximate Cause. In *Jones v DMC* (No. 141624), a medical malpractice case involving issues of proximate cause, the Supreme Court issued an order reversing the Court of Appeals' decision and remanding to the trial court for further proceedings. *Jones* raised the issue of whether the development of Stevens-Johnson syndrome after prescribing Tegretol is foreseeable. The *Jones* court held that the lower courts erred by granting partial summary disposition to the plaintiffs on proximate causation, reasoning that the fact that development of the syndrome is a known risk is not enough, by itself, to establish proximate causation. Justices Hathaway, Cavanagh, and Marilyn Kelly dissented.

Discovery – Facebook Records. Finally, in *Anderson v MG Trucking, Inc* (MCOA No. 306709), the Michigan Court of Appeals issued a favorable order vacating the circuit court's determination that the plaintiff's Facebook records were not relevant and thus not discoverable. The *Anderson* Court directed the trial court on remand to augment its order to address whether it considered the extent to which the social media entries were relevant to the plaintiff's allegations that she suffered from social isolation, memory problems, and high levels of pain following the automobile accident.

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.

By: Edward Perdue, DRI State of Michigan Representative
Dickinson Wright PLLC

DRI Report: March 2012

This quarter I want to expand on my previous discussion of one of the primary benefits of DRI membership — networking opportunities engendered through committee participation. Those of us who have enjoyed an expansion of business opportunities from DRI often obtain referrals from those we work with on one of DRI's many substantive law committees. Joining a committee is also a great way to participate in DRI activities and rise in the leadership ranks. DRI Committees provide numerous networking opportunities, though seminars, with members often participating as speakers and producing DRI Defense Library Series reference books, Committee Newsletters and articles in DRI's *For The Defense* and *In-House Defense Quarterly* magazines. There is no additional cost to belong to a committee. To join, indicate your choices from the list below, include your name and address, and mail or fax it to DRI, or submit the convenient online Committee Membership Form available at http://www.dri.org.

Aerospace Law
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Diversity
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Fidelity and Surety
Government Enforcement and Corporate Compliance
Governmental Liability
Insurance Law
Law Practice Management
Lawyers' Professionalism and Ethics
Life, Health and Disability
Medical Liability and Health Care Law
Product Liability
Professional Liability
Retail and Hospitality
Technology
Toxic Torts and Environmental Law
Trial Tactics
Trucking Law
Veterans' Network
Women in the Law
Workers' Compensation
Young Lawyers (open to those in practice 10 years or less)

Another way to make the most out of your DRI membership is to attend one of its many professional development seminars. Upcoming events include the following:

March 28-30	Insurance Coverage and Claims Institute	Chicago, IL
April 11-13	Product Liability Conference	Las Vegas, NV
April 25-27	Life Health Disability and ERISA Claims	Chicago, IL
May 2-4	Employment Law	Chicago, IL
May 10-11	Drug and Medical Device	New Orleans, LA
May 10-11	Retail and Hospitality	Chicago, IL
May 17-18	Commercial Litigation	New York, NY

As always, feel free to contact me if you have any questions about DRI or if I can be of any assistance. eperdue@dickinsonwright.com 616-336-1038.

Ed Perdue is a member of Dickinson Wright PLLC and practices out of its Grand Rapids office. He specializes in complex commercial litigation and assumed the position of DRI representative in October, 2011. He can be reached at 616-336-1038 or at eperdue@dickinsonwright.coms

Court Rules Update

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

Michigan Court Rules Adopted and Proposed Amendments

For additional information on these and other amendments, visit http://michlaw.net/courtrules.html and the Court's official site at http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm

ADOPTED

2010-12 – Jurors

Rule amended: MRE 606
Issued: 12-22-11
Effective: 1-1-12

Added a new subparaph (b) to specify the circumstances under which a juror may and may not be asked to testify about deliberations or events in the jury room. The new amendment conforms to Rule 606 of the Federal Rules of Evidence.

Note: the accompanying proposal to add language to MCR 2.512 to prohibit attorney from "interrogating" jurors after a trial is over, without permission from the court, was not adopted.

2005-05 and 2006-20 – Case evaluation

Rules affected: several
Issued: 12-21-11
Effective: 5-1-12
Several changes, including

- The court's power to exempt a claim as inappropriate for case evaluation is limited to claims seeking equitable relief.
- Payment of fees may now be made directly to panel members.
- The provision for treating multiple injuries to members of a single family as one claim has been removed.
- The $150 penalty for late filing will apply if any supplementary materials are served within 14 days of the hearing.
- Summaries are limited to 20 pages, double spaced, and must be printed in 12 point type or larger.
- Claims for PIP benefits - acceptance will not be deemed to include any benefits accruing after the date of the case evaluation hearing.
- The court may order a second case evaluation hearing if a first results in a non-unanimous evaluation.
- Case evaluation panels are to be selected at random. The court may normally not appoint or recommend a particular member.

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

2010-11 - Selection of jurors

Rule affected: MCR 2.511

Issued: 10-6-11

Effective: 1-1-12

The proposal as announced in May 2011 was to add the following language to Rule 2.511(C):

When the court finds that a person in attendance at court as a juror is not qualified to serve as a juror, the court shall discharge him or her from further attendance and service as a juror. Exemption from jury service is the privilege of the person exempt, not a ground for challenge.

As adopted, the first sentence remains but the second sentence has been removed. Nonetheless, the statement is still accurate even if it will not be enshrined in a court rule. The only exemption from jury service provided under law is for persons aged 70 or older. No party should be able to challenge a juror on the basis of his age alone if the juror has not elected to exercise that exemption.

Civil Jury Instructions

Modified and new "jury reform" jury instructions have been adopted by the Committee on Model Civil Jury Instructions, to provide direction in light of the recent amendment of the Michigan Court Rules enacting wide-ranging changes in jury trials. Effective October 4, 2011.

PROPOSED

2010-25 - Exhibits pending appeal

Rule affected: 7.210

Issued: 10-10-11

Would amend rule 7.210(C) provide that exhibits and proposed exhibits be retained by the trial court for 21 days after a trial. If no appeal is filed, they may then be returned to the parties.

The current rule is based on the presumption that parties or their attorneys may choose to take exhibits with them after the trial is completed, but then are required to file them as part of the record if an appeal is filed.

2010-26 - Record on appeal

Rules 7.210 and 7.212

Order dated 11-10-11

Would add a new requirement that the trial court "settle the record" for use on appeal, including a statement of facts. Motions, proposed statements, and counter-statements would be required.

"The certified settled statement of facts must concisely set forth the substance of the testimony, or the oral proceedings before the trial court or tribunal if no testimony was taken, in sufficient detail to provide for appellate review."

2006-47 – Records and documents

Several rules

Order dated 12-21-11

Would amend several rules in order to ensure that references to "documents" are interpreted to encompass electronic as well as paper files. A new Rule 1.109(D) would cover electronic signatures of attorneys.

MDTC

The Age of
ELECTRONIC
DATA IN THE LAW

Annual Meeting & Conference·
The Westin Book Cadillac · May 10-11, 2012

Program Schedule

THURSDAY May 10

1:00 pm
Opening Remarks and Welcome
Phillip C. Korovesis, MDTC President, Butzel Long
Program Chair - Richard Joppich, Kitch Drutchas Wagner Vallitutti & Sherbrook

1:10 pm
Overview of Electronic Data in Law
Claudia Rast, Butzel Long

2:00 pm
Title and speaker - TBA

2:50 pm
Break

3:00 pm
Electronic Data in the Courthouse
Matthew Schneider, Michigan Supreme Court, Chief of Staff

3:30 pm
Legislative Perspectives on E-data in the Law
Rep. Kurt Heise, (Judiciary Committee) State Representative 20th House District

4:00 pm
Judicial Perspectives in the Courtroom, Judicial Panel
US Magistrate Hon. Mona Mazjoub, US District Court / **Chief Judge Jonathan E. Lauderbach**, Midland County Circuit Court / **Hon. Michael Talbot**, Michigan Court of Appeals

5:00 pm
Judges' Reception

FRIDAY May 11

7:50 am–8:00 am
Annual Meeting

8:00 am
Impacts of Social Media in Litigation
Michael St. John,
Kitch Drutchas Wagner Vallitutti & Sherbrook

8:50 am
MDTC Amicus Team on Social Media Results
Tim Diemer, Jacob & Diemer, **Eric Conn**, Segal, McCambridge, Singer and Maloney, and **Hilary Ballentine**, Plunkett Cooney

9:00 am
Summary of State Bar Programs & Initiatives
Julie I. Fershtman, President State Bar of Michigan, Foster Swift Collins & Smith, PC

9:30 am
Advising the Client in E-discovery and Security Breach Issues
Carol Romej,
Hall Render Killian Health and Lyman

10:00 am
Break

10:15 am
Law Firm Data Security
Brian Gawne, Stout, Risius and Ross

11:00 am
Ethical Use of Cloud Servers by Attorneys
Randy Juip, The Juip Richtarcik Law Firm

11:40 am
eDiscovery Legal Updates and Issues on the Horizon
Scott Holmes, Foley & Mansfield, PLLP and **Joshua Richardson**, Foster Swift Collins & Smith, PC

12:00 noon
Closing and Thank You
Richard Joppich,
Kitch Drutchas Wagner Vallitutti & Sherbrook

MDTC Registration Form

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Spouse/Guest Full Name _____ Badge Name _____

Company or Firm Name _____

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City _____ State _____ Zip _____ Fax _____

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Emergency Contact _____ Phone Number _____

Is this your first time attending? ❑ Yes ❑ No _____
Special diet requests?

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* non -members who register at this rate will be invoiced the difference between a member/non-member rate

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Optional Activities - Charges for these activities are in addition to Registration Fees

Annual Fun/Walk/Talk/Run (Friday May 11, 2012) # of persons _____ x FREE= $ _____

Banquet (Friday, May 11, 2012) # of persons _____ x $65.00 = $ _____

Judges' Reception (Thursday May 10, 2012) # of persons _____ x $65.00 = $ _____

Total $ _____

If taking this class for **CLE**, please indicate the states in which you will be applying for credit:

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MDTC Annual Meeting
May 10 & 11, 2012
The Westin Book Cadillac
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MDTC Schedule of Events 2012–2013

2012

April 27 & 28	DRI Central Regional Meeting – Greenbrier, West Virginia
May 10	Board Meeting, The Westin Book Cadillac Detroit
May 10–11	Annual Meeting, The Westin Book Cadillac - Detroit
September 14	16th Annual MDTC Open Golf tournament – Mystic Creek
October 4	Meet the Judges – Bi-Annual – Hotel Baronette, Novi
November 1	Annual Past Presidents Dinner – Hotel Baronette, Novi
November 2	Winter Meeting – Hotel Baronette, Novi

2013

June 20–23	Summer Conference – Crystal Mountain

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.