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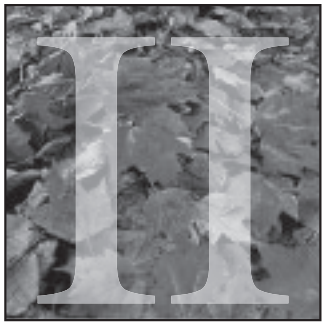

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President's Corner

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From the President

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"If you want to make God laugh, tell him about your plans."
— Woody Allen

When tabbed for the Executive Committee back in 2009, I envisioned my future term as President of the Michigan Defense Trial Counsel being shaped by a push for mandatory continuing legal education in our state. Frankly, with the overall economy in Michigan improving while the legal economy is generously being described as stagnant at best, I sincerely doubt that required seminar attendance is on any member's radar at the moment.

Instead of my premonitions from 2009 of what would be important to the membership of MDTC in 2012, the immediate press of other unforeseen external realities has pushed the priority level of mandatory CLE not just to the back burner but out the kitchen window.

About a week before the MDTC Annual Meeting in May, word leaked that the Legislature was considering passage of yet another round of Tort Reform legislation, collectively referred to as the "Patients First Reform Package," proposing sweeping changes to Medical Malpractice Litigation in Michigan, the bread and butter of so many of our members. This flurry of pre-presidency legislative activity compelled the Executive Committee to feverishly attempt to quickly discern the ramifications of these bills and evaluate the underlying rationales advanced to justify the need for their passage.

Rigorous study of the reform package began, literally, on day one. MDTC Vice President Ray Morganti, Treasurer Mark Gilchrist, and the newest addition to the Executive Committee, Secretary Lee Khachaturian, and I were immediately called into action to distill each of these five bills and their many subparts in an attempt to assess their collective effects on the civil justice system, if adopted. Members of the Executive Committee attended the Hearings of the Senate Insurance Committee tasked with the initial digestion of these bills. MDTC Past President Jim Bodary volunteered to offer testimony to the Committee on behalf of the organization. To advocate the views of the MDTC, members of the Executive Committee have met with the legislators at the core of this latest round of Tort Reform efforts, including the Senator whose office drafted the bills, sponsors of the bills, and members of the Insurance Committee playing a central role in the initial fate of the legislation.

After countless hours of careful study, analysis, research, meetings and debate, we concluded that many of the proposals would be welcome changes to the law, rectifying inequities that struck us as dissonant with the fair administration of civil justice. These fair and reasonable changes have garnered our public approval. On the other hand were proposals we simply could not support, including two new immunity bills cloaked as reforms, that either sought to remedy non-existent problems or unfairly crimped access to the courts.

The end result of these efforts was the MDTC's Executive Committee's drafting of the Position Statement on the "Patients First Reform Package," a document that painstakingly outlines our opinions on each bill, spelling out which proposals we

The end result of these efforts was the MDTC's Executive Committee's drafting of the Position Statement on the "Patients First Reform Package," a document that painstakingly outlines our opinions on each bill, spelling out which proposals we favor, which proposals we feel are unnecessary and which proposals we do not view as good public policy.

favor, which proposals we feel are unnecessary and which proposals we do not view as good public policy. We have provided this Position Statement to the members of the Senate Insurance Committee, the House Judiciary Committee, as well as other legislators who have played a role in drafting or sponsoring these bills.

A PDF of the Position Statement we crafted can be found at http://www.mdtc.org/mdtc_member_update_june_2012. I encourage you to read the Position Statement as well as the draft bills, themselves. If there is anything we missed or other angles to consider, we welcome all commentary, input or criticism.

These first few weeks on the job have been eye-opening, to put it mildly, but also rewarding. I am encouraged by the responsiveness of our elected officials who have opened their doors at the State Capitol to the MDTC and have been genuinely interested in our analyses. Our comments (sometimes critical) on the bills have not been met with obstinance or arrogance. To the exact contrary: We have been encouraged to provide input and our views have been actively solicited.

Our present efforts have not only been bolstered by the tireless work of the Executive Committee and our Executive Director, Madelyne Lawry. In addition to MDTC Past President Bodary's testimony before the Insurance Committee, this brave new world of political engagement for the MDTC has been years in the making, most recently realized during the tenure of my predecessor, Phil Korovesis, who successfully mobilized the Board of Directors and Executive Committee to engage in the political process on issues of importance to membership. Little did anyone know just how quickly a pressing legislative assignment would pop.

And even now, after all of the meetings, phone calls, letters, e-mails, facsimiles, legal research, study, drafts, re-workings and revisions of the Position Statement, we are still in no position to consider whether we should actively seek to usher in mandatory continuing legal education: Up next, developing an official position on the Report of the Michigan Judicial Selection Taskforce, which has considered and issued a number of recommendations on our state's method of selecting our judges. Stay tuned.

Terminated For Tweeting?

Reexamining Employers' Internet Use Policies in Light of Recent NLRB Social Media Decisions

By: Kimberly Paulson, *Keller Thoma, P.C.*

Executive Summary

An employer must take care to avoid having its Internet Use Policy ("IUP") run afoul of the National Labor Relations Act. Employees have the right "to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." An employee's activity is a concerted activity if the activity is engaged in with or on the authority of other employees. An employer's IUP runs afoul of the act if (a) it explicitly restricts protected activities; or (b) it does not explicitly restrict protected activities but (1) employees would reasonably construe it to prohibit protected activities, (2) the rule was created in response to union activity, or (3) the employer applies the rule to restrict the exercise of protected rights.

To avoid a finding that IUP provisions are unlawful, an employer should (1) draft prohibitions as narrowly as possible using clear, defined terms; (2) avoid subjective terms that can lead to ambiguity; (3) eliminate duplicative prohibitions; (4) include a "Section 7 carve out"; (5) provide examples of prohibited activity and protected activity; and (6) pay attention to timing. To avoid a finding that IUP enforcement is unlawful, an employer should (1) educate supervisors and human resource staff; (2) investigate thoroughly; (3) not be hasty; and (4) seek guidance when uncertain.

Kimberly Paulson is an associate in the firm of Keller Thoma, P.C. Her practice is concentrated in employment litigation as well as commercial litigation, intellectual property litigation and e-commerce and IT law.

It used to be that an employer's greatest concern about employees' use of social media was its detrimental effect on employee productivity. Internet Use Policies ("IUPs")[1] commonly addressed this time-wasting concern by limiting use of the employer's IT network to work-related activity and warning employees that disciplinary action could be taken against an employee who violated that policy.

Employers have discovered, though, that limiting employees' internet activity at work is not enough. As time and technology have progressed, employees have taken to the internet, especially social media sites, to air their grievances and discuss their workplaces. The internet provides an easy, and very public, forum for disgruntled employees. The water cooler conversations have gone high-tech and are, problematically, accessible by an exponentially greater audience. As a result, employers now often include in their IUPs general limitations on what information employees can share on the internet, even from the privacy of their own homes. For instance, some policies prohibit employees from publishing disparaging information about the employer, its employees, or its products or services. Some policies even prohibit employees from depicting the employer in any manner without the employer's permission. Some specifically address social media and some do not. The employer's general goal is to retain control over its image, information, and reputation in the "Wild West" that is the internet.

Recently, the National Labor Relations Board ("NLRB") has taken a special interest in employers' IUPs and disciplinary actions taken against employees for comments they have made on social media sites. It is important to note that the NLRB's actions are directed in large part to non-unionized workplaces. Central to most of these decisions are Sections 7 and 8 of the National Labor Relations Act ("NLRA"). Section 7 of the NLRA provides, in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and ***to engage in other concerted activities*** for the purpose of collective bargaining or other mutual aid or protection . . . .[2]

To constitute protected activity, the "concerted activity" must relate to the employees' "terms and conditions" of employment. Under Section 8, an employer may not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." [3]

In light of Sections 7 and 8 of the NLRA, attorneys should advise their employer clients to reexamine not only the text of their IUPs but also the manner in which the

In light of Sections 7 and 8 of the NLRA, attorneys should advise their employer clients to reexamine not only the text of their IUPs but also the manner in which the provisions are enforced.

provisions are enforced. After all, the NLRB is unlikely to take interest in an employer's IUP until a disciplinary action taken pursuant to the IUP is brought to its attention. A look at the NLRB's recent social media decisions provides some guidance to lawyers as to how to assist employer clients in reworking their policies and practices so as to not run afoul of Section 8.

NLRB Social Media Cases: NLRB Applies Well-Established Precedent to a New Media

In most of the NLRB's recent social media cases, the NLRB applied well-established precedent to reach its decisions. What makes these social media cases significant is not the law applied by the NLRB, but the nature of social media and the habits of those who use it. Social media posts are usually short, informal comments that sometimes use short-hand references and may include profanity and name-calling. It may be difficult to find legitimate Section 7 activity among the muckraking. But what an employer perceives as childish and malicious disparagement may appear as something much more meaningful to the NLRB. The key to determining whether an employee's post may implicate Section 7 is to wade through the rhetoric and determine whether any part of the post concerns a legitimate term or condition of employment.

There are a number of principles that can be derived from the NLRB's recent social media decisions that provide guidance to employment lawyers in drafting and reexamining IUPs. First, the NLRB continues to rely upon its definition of concerted activity as announced in *Meyers Industries*[4]:

> In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in ***with or on the authority of other employees***, and not solely by and on behalf of the employee himself.

Thus, in the context of social media, an employee simply venting personal frustrations or making derogatory comments about an employer, its customers, or its policies will generally not be found to have engaged in concerted activity. The NLRB social media decisions are consistent with this holding. For instance, in one case, the NLRB determined that a bartender's gripes on Facebook about his employer's tip-sharing policy concerned his terms and conditions of employment but did not constitute concerted activity because (a) he only exchanged comments with a relative, not a fellow employee; (b) he did not solicit comments from other employees; and (c) his comments did not stem from a meeting or conversation with coworkers or any other attempt to initiate group action concerning the tip-

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As a result, if the social media posting seems like the sole action of one employee but turns out to be only one part of a larger concerted activity to air grievances or otherwise address work-related issues, it may still be protected activity.

ping policy. In another case, the NLRB found that a retail employee who made disparaging comments on his Facebook page about his employer and his manager was not engaged in concerted activity where his co-workers did not comment about the employer or any of the complained-of issues but instead asked personal questions about why the employee was so upset and gave him moral support, such as telling him to "hang in there."

However, the NLRB decisions also make clear that the concerted activity at issue need not necessarily all take place on the internet. The NLRB determined that a luxury car salesman's complaints on Facebook about a sales promotional event sponsored by his employer that he believed detrimentally affected the reputation of the dealership and negatively impacted the salesmen's commissions constituted concerted activity. Although the employer's coworkers did not join in on the "conversation" or add posts of their own, the NLRB noted that the employee's postings were only one part of an ongoing discussion among the sales employees that had begun when the sales people had raised their concerns at a staff meeting and that the employee expressed the sentiments on behalf of the group. As a result, if the social media posting seems like the sole action of one employee but turns out to be only one part of a larger concerted activity to air grievances or otherwise

address work-related issues, it may still be protected activity. It is therefore important that an employer thoroughly investigate and understand the full scope of an employee's activity before imposing discipline.

The NLRB also continues to apply the *Lutheran Heritage*[5] two-part test to determine the lawfulness of employers' rules. Under that test, the fact finder must first inquire whether the rule "explicitly restricts activities protected by Section 7." If so, the rule is unlawful. If the restriction is not explicit, then the rule may still be unlawful if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Thus, employers should strive to avoid overbroad or ambiguous language and focus as much on the enforcement of an IUP as on the drafting.

Finally, the NLRB continues to apply the *Atlantic Steel*[6] and *Jefferson Standard*[7] rules to social media cases.[8] These precedents require a high level of offensiveness before stripping profane or disparaging comments of their protected status. In its social media cases, the NLRB repeatedly found that the employees' use of profanity and personal attacks did not rise to the level necessary to render the comments unprotected.[9] Thus, employees' use of profanities or seemingly defamatory language will not necessarily remove their comments from the scope of Section 7.

Examples of Unlawful Provisions

Applying the *Lutheran Heritage* test to these social media cases, the NLRB found that numerous policies violated Section 8. The most common fault found with IUP provisions was the use of broad undefined terms that could reasonably be construed to prohibit protected criticism of the employer's labor practices as well as discussion of other terms and conditions of employment. For example, the NLRB found unlawful the following types of provisions:

> Prohibition on using any social media that may violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity;
>
> Prohibition on any communication or post that may cause embarrassment, harassment or defamation of the employer or of any employee, officer, board member, representative, or staff member or may damage the employer's reputation or goodwill;

The most common fault found with IUP provisions was the use of broad undefined terms that could reasonably be construed to prohibit protected criticism of the employer's labor practices as well as discussion of other terms and conditions of employment.

- Prohibition on making disparaging comments about the company or its products/services;
- Prohibition on using any micro-blogging features to talk about company business on employees' personal accounts, even on their own time;
- Prohibition on publishing any representation about the employer without prior approval;
- Prohibition on disclosing inappropriate, non-public, or sensitive information about the employer;
- Requirement that social networking site communications be made in an honest, professional, and appropriate manner;
- Prohibition on revealing personal information regarding coworkers, company clients, partners, or customers without their consent, including posting of pictures; and
- Prohibition on disrespectful conduct and inappropriate conversations.

Although the employers' motives in promulgating these policies were lawful, these policies were written so broadly and included such ambiguous terms that the NLRB concluded employees could reasonably construe them as prohibiting employees from discussing wages, benefits, work schedules or other topics commonly understood to be terms and conditions of employment.

In addition, the NLRB found a prohibition on using the employer's name, address, or other information on employees' personal profiles on social media sites to be unlawful because such information in individuals' profiles served the important purpose of allowing co-workers to find one another and engage in concerted activity. The NLRB also found that a prohibition on using the employer's logos or photographs of the employer's store, brand, or product without written authorization was overly broad because it would, for example, unlawfully prohibit an employee from posting pictures of striking or protesting employees wearing clothing or carrying signs with the employer's logo and standing on store property.

Examples of Lawful Provisions

The NLRB has explained that "a rule's context provides the key to the 'reasonableness' of a particular construction." Thus, rules that are included as part of a broader, legitimate policy are more likely to be found lawful.

For instance, while an employer cannot completely prohibit employees from making statements about the company, an employer can prohibit employees from making statements ***on behalf of*** the company as part of a general rule designating those employees and/or agents who are authorized to speak for the employer. Also, an employer cannot broadly prohibit "discriminatory, defamatory, or harassing web entries about specific employees, work environment, or work-related issues on social media sites" but can prohibit the use of social media to post comments that constitute a violation of the employer's anti-discrimination or anti-harassment policies. Employers can also prohibit employees from pressuring other employees to be "friends" on social networks when it is included in the context of an anti-harassment policy.

Otherwise broad restrictions may also be lawful when they contain clarifying examples or are included under a heading that clarifies the narrow intent of the restriction. For example, the NLRB upheld a policy that gave the employer the right to request employees to confine their social networking to matters unrelated to the company under certain circumstances. Because the designated circumstances included narrowly defined situations, such as "confidential/proprietary information, including personal health information about customers or patients" and "embargoed information" such as launch and release dates and pending reorganizations, the NLRB found that an employee would understand that the restriction only applied to "communications that could implicate security regulations."

The NLRB also found lawful a rule that (a) required employees to indicate that their views did not reflect those of their employer, and (b) prohibited employees from referring to the employer by name or publishing any promotion content. Although seemingly overbroad, the NLRB found that because it was contained in a section entitled "Promotional Content" with a description of the type of conduct to which that restriction was intended to apply, employees would not interpret that rule as prohibiting Section 7 activity.

Recommendations for "Fixing" IUPs

The NLRB has put employers on notice that their IUPs, and the manner in which they enforce them, really do matter. Attorneys should assist their employer clients in reevaluating their IUPs in light of these guidelines.

Before taking any action against an employee, the supervisor must fully understand the extent of the employee's actions and the context. Supervisors must be instructed to follow a specified investigatory procedure.

Text of IUPs

Take a fresh look at the IUP. Have the employer identify the primary goals it hopes to achieve with the IUP, then determine the cleanest, clearest, and most narrow way to achieve those goals. In determining what, if any, changes need to be made to the IUP, keep in mind the following guidelines:

1) **Draft prohibitions as narrowly as possible using clear, defined terms.** A good rule of thumb is to not prohibit more activity than absolutely necessary. For instance, if an employer is concerned about employees sharing trade secrets or confidential company information, then it should say exactly that instead of prohibiting disclosure of "all" company information. Even better, define the terms "trade secrets" and "confidential information." Similarly, an employer that wishes to prevent misuse of its protected trademarks can fashion a prohibition that tracks the language of the applicable statute instead of prohibiting "any" use of the company's name or logo. The NLRB is more likely to uphold a policy when the employer's legitimate intent is made clear.

2) **Avoid subjective terms that can lead to ambiguity.** Avoid words like "offensive" or "inappropriate," which are ambiguous and open to a variety of interpretations. They do not provide sufficient notice to an employee of what type of conduct is actually prohibited and may encompass much more activity than is appropriate. For instance, criticism of a supervisor would likely be "offensive" to the supervisor but may very well still be protected activity under Section 7.

3) **Eliminate duplicative prohibitions.** IUPs need not include specific prohibitions that are simply subsets of a broader prohibition. For example, if the employee handbook already contains a sexual harassment policy that covers the internet activity at issue (e.g., making unwanted sexual comments or advances toward coworkers), then there is no need to also single out related internet activity. The same is true of provisions relating to trademarks, trade secrets, threats/harassment, and many other topics. As noted by the NLRB, context is key. When an employer attempts to draft a prohibition out of

context, it may very well end up drafting an overbroad, ambiguous prohibition that may run afoul of Section 8.

4) **Include a Section 7 carve out.** Expressly state that the policies and prohibitions contained therein are not intended to discourage or prohibit an employee from engaging in concerted activity with respect to the terms and conditions of his employment. Also note that an employee will not be subject to discipline for engaging in such protected activity. This carve out should be written in a conspicuous place and manner. Avoid the use of limiting terms such as "appropriate" or "valid." The NLRB found that a Section 7 carve out that allowed for a discussion of terms and conditions of employment "in an appropriate manner," without a definition or example of "appropriate" versus "inappropriate," could be construed as prohibiting Section 7 activity. It is therefore best to stick to the language of the NLRA and NLRB cases without elaboration.

5) **Provide Examples.** The NLRB has frequently mentioned that providing examples of prohibited conduct in the IUP may assist employees to understand the type of conduct prohibited and, in turn, understand that protected activity is not prohibited. However, be sure that the examples are sufficiently narrow and clear so as to not run afoul of Section 8.

6) **Pay attention to timing.** In light of the second prong of step two of the *Lutheran Heritage* test, it is best not to promulgate new rules in the wake of union activity. If the rule is seen to be a direct response to the union activity, it may be assumed to be in violation of Section 7 and found unlawful. Advise employers to create an IUP early on and update it regularly to avoid giving the impression that an employer was motivated by fears of union-related activity.

Enforcement of IUPs

As demonstrated by the third prong of the second step of the *Lutheran Heritage* test, the manner in which an IUP is interpreted and enforced by the employer is equally important. The best-drafted policy is worthless if it is not applied properly. The following guidelines will help keep your client out of trouble:

1) **Educate personnel.** Advise employers to educate supervisors and human resource ("HR") staff with respect to (a) what constitutes protected activity under Section 7, and (b) how their conduct may violate Section 8. Also, anyone expected to interpret and enforce policies must be trained as to their proper interpretation to maintain consistency and avoid applying them in an overbroad manner.

2) **Investigate thoroughly.** Before taking any action against an employee, the supervisor must fully understand the extent of the employee's actions and the context. Supervisors must be instructed to follow a specified investigatory procedure. This may include conducting employee interviews and obtaining additional documents or information that will reveal the full history and context of the employee's actions. For instance, a supervisor considering whether to discipline an employee based on one apparently harassing Facebook post may find through investigation that the post was only one part of a larger conversation taking place on Facebook between several coworkers about their working conditions.

3) **Do not be hasty.** Nobody likes being criticized. It is tempting for a supervisor to take quick action to make an example out of a seemingly disloyal or rude employee, especially when the supervisor is the target of the employee's comments. However, hasty action may only result in bigger problems. Advise the employer to take a deep breath and count to 10 — then follow investigatory protocol.

4) **Seek guidance when uncertain.** Advise employers to train supervisors to seek guidance from HR or superiors when they are uncertain whether an employee's activity may be protected under Section 7. Supervisors should not be making inconsistent and uninformed judgment calls.

Conclusion

As technology changes, so does the law. The recent NLRB social media cases make it abundantly clear that attorneys must work with their employer clients to reexamine the text and enforcement of their IUPs to avoid running afoul of Section 8. Taking care to carefully draft (or re-draft) an IUP and to train personnel to properly enforce it is crucial in today's climate. It is the only means for employers to protect themselves against the Section 8 dangers posed by social media. Fortunately, attorneys now have the guidance to assist their clients in doing exactly that.

Endnotes

1. These types of policies are referred to by a number of different names (e.g., Computer Use Policy, Social Media/Blogging/Social Networking policy, IT Policy) but generally set forth employees' rights, obligations, and limitations with respect to use of the internet and social media.
2. 29 U.S.C. §157 (emphasis added).
3. *Id.* § 158(a)(1).

4. *Meyers Industries, Inc,* 268 NLRB 493, 497 (1984).
5. *Martin Luther Memorial Home, Inc. d/b/a/ Lutheran Heritage- Livonia ("Lutheran Heritage")*, 343 NLRB 646, 646-47 (2004).
6. In *Atlantic Steel* the NLRB held that "even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act." 245 NLRB 814, 816 (1979). It held that the following four factors must be balanced in determining whether an employee's outburst has "crossed that line": 1) the place of the discussion; 2) the subject matter of the discussion; 3) the nature of the employee's outburst; and 4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Id.*
7. In *NLRB v Int'l Brotherhood of Electrical Workers, Local 1229 ("Jefferson Standard"),* 346 U.S. 464 (1953), the U.S. Supreme Court held that an employer may discharge an employee for disloyalty, even in the midst of a labor dispute. The NLRB has since distilled *Jefferson Standard* as follows: "communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection." *In re American Golf Corp*, 330 NLRB 1238, 1240 (2000).
8. In one case the NLRB applied a "modified Atlantic Steel analysis which combined some elements of both cases."
9. For instance, the NLRB found that comments were not rendered unprotected where employees referred to their supervisors as a "scumbag," "asshole," and "super mega puta" (a term for "whore").

Predictive Coding: The ESI Tool Of The Future?

By: Scott A. Petz, *Dickinson Wright PLLC* & Thomas D. Isaacs, *Dickinson Wright PLLC*

Executive Summary

The explosion of electronic documents maintained by companies has resulted in voluminous pools of potentially relevant documents, on the order of millions, that are gathered in response to document requests. The process of predictive coding involves a dynamic, interactive process between attorneys and predictive coding software offered by third-party vendors. By beginning with a "seed set" of documents reviewed by senior counsel for relevance, and building upon that in an iterative process, attorneys are able to cull through millions of documents in an efficient and cost-effective manner.

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Introduction

Both the Federal Rules of Civil Procedure and the Michigan Court Rules make it clear that electronically stored information ("ESI") is discoverable.[1] ESI[2] is a term of art that causes attorneys a lot of anxiety. As well it should, given the pace at which technology is advancing, the proliferation of sources in which discoverable information may be found and the rate at which attorneys are being sanctioned for failing to properly operate in the evolving eDiscovery world. For these reasons, attorneys must take the time to stay knowledgeable of what constitutes ESI and their obligations with respect to preserving, reviewing and producing ESI in litigation.

Predictive coding has emerged as the newest and hottest eDiscovery technology intended to assist attorneys with ESI document review and production. In the most basic sense predictive coding is an interactive process that allows an attorney to use software to cull through large volumes of data to evaluate the responsiveness of documents without the need for a direct manual review of all those documents. Accordingly, if used appropriately predictive coding may reduce the time and expense of document review projects and the number of projects that clients elect to outsource, as well as provide litigation counsel an effective and efficient way to locate and retrieve responsive materials.

How Does Predictive Coding Work?

It is important to recognize at the outset that predictive coding is not "automated" or "automatic coding." Instead, predictive coding uses sophisticated algorithms to determine a document's relevancy based on the software's interaction with a human reviewer, similar to how an email "spam filter" can eliminate email a person has previously determined is "junk."[3] In the litigation context, the predictive coding process can be generally broken down as follows: (1) The senior attorney and/or his or her core team ("Team") review and code a "seed set" of documents; (2) the predictive coding software identifies properties of the coded documents, which are used to electronically code other documents; (3) the Team then reviews these other documents for accuracy and adds them to the original seed set to further enhance the predictive coding software's capability; (4) once the reviewer's coding and the predictive coding software's predictions "sufficiently coincide," the predictive coding software is deemed to have learned enough to confidently predict the coding for the remaining documents in the set.[4] Generally, the Team "needs to review only a few thousand documents to train the computer."[5]

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After the coding process is complete, the predictive coding software categorizes documents by perceived relevance, which reduces the number of documents that ultimately may need to be manually reviewed.[6] Predictive coding can, for example, rank the relevancy of documents on a scale of 1 to 100, which may allow the Team to manually review only those documents that are most likely to be responsive, and only manually review a sample of the documents likely to be non-responsive for quality control.[7]

Have Courts Approved the Use of Predictive Coding?

United States Magistrate Judge Andrew Peck of the Southern District of New York placed predictive coding on the main stage in an October 2011 article for the Law Technology News. In his article, Magistrate Judge Peck discussed the virtues of predictive coding when compared to more traditional document review methods such as linear manual review and keyword searches.[8] Magistrate Judge Peck recognized that at that time there was no judicial opinion either approving or rejecting predictive coding, but that counsel could look to his "article as a sign of judicial approval."[9]

Soon thereafter, Magistrate Judge Peck considered and approved the use of predictive coding as a discovery tool in litigation. In *Moore v Publicis Groupe SA*, the parties agreed to the use of predictive coding in concept, but disagreed on its implementation and the processes to be followed in order to ensure compliance with the Federal Rules of Civil Procedure.[10] Magistrate Judge Peck accepted the defendant's use of predictive coding, basing his decision on his finding that the defendant's proposed predictive coding process was transparent and subject to appropriate quality controls.

In *Moore*, the defendant gathered approximately 3 million electronic documents that were potentially responsive to the plaintiff's discovery requests.[11] The defendant proposed using predictive coding in order to efficiently cull down the population of documents without having to incur the expense of a costly manual review.[12] As part of its proposal, the defendant created a seed set of 2,399 documents through sampling and keyword searches with Boolean connectors.[13] The plaintiffs were able to provide the defendant with certain additional keywords, which resulted in another 4,000 documents being added to the seed set.[14] Senior attorneys – not junior associates or paralegals – reviewed and coded the seed set.[15]

The defendant further agreed to give plaintiffs the as-coded original seed set for their review so they could make any desired changes to the coding that could then be incorporated to "train" the predictive coding software.[16] The defendant then proposed to review documents the predictive coding software returned as relevant in seven iterative rounds to determine if the computer was in fact returning responsive materials.[17] Any changes in coding during these rounds would be incorporated by the software to further stabilize its training. Finally, the defendant agreed to review a random sample (2,399 documents) that the predictive coding software returned as not relevant to make sure that the documents were not actually responsive.[18] The defendant agreed that it would show plaintiff all the documents it looked at for each review round.[19]

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The plaintiffs agreed to defendant's use of predictive coding, but disputed the reliability of the defendant's protocol for the review, arguing that there were no standards to assess whether the software's results were accurate.[20] The plaintiffs further asserted that the defendant's predictive coding approach was contrary to the FR Civ P 26(g) requirement that an attorney certify that his or her client's document production is "complete" and "correct," and that accepting the defendant's proposed protocol violated the gatekeeping function under FRE 702.[21]

Magistrate Judge Peck rejected the plaintiff's arguments and determined that predictive coding, while "not magic," is "an acceptable way to search for relevant ESI in appropriate cases."[22] Magistrate Judge Peck recognized that the goal of any review method is to maximize the amount of "recall" ("the fraction of relevant documents identified during a review") and "precision" ("the fraction of identified documents that are relevant") at a cost proportionate to the case.[23] Magistrate Judge Peck found that predictive coding was just as, if not more, reliable than other traditional ways of review, such as linear manual document review or using keyword searches.[24] Further, the court determined that predictive coding, by lessening the significant costs of document review and production, can serve the need for cost effectiveness and proportionality in discovery as required by FR Civ P 26.[25]

Moreover, Magistrate Judge Peck noted that the defendant's transparency in setting forth its proposed predictive coding protocol and willingness to share its seed set with the plaintiffs "made it easier" for the court to approve the defendant's use of predictive coding.[26] The court finally held that for predictive coding to be allowed in a party should develop an appropriate process using available technology and institute suitable quality controls while adhering to the proportionality requirements of FR Civ P 1 and 26.[27]

Magistrate Judge Peck's opinion, which "appears to be the first in which a Court has approved of the use of computer-assisted review,"[28] was adopted by Judge Carter, Jr. in his opinion rejecting plaintiffs' objections to, among other things, Magistrate Judge Peck's opinion.[29]

A Virginia state circuit court also approved the use of predictive coding in perhaps the only other case to date that addresses the use of predictive coding. In *Global Aerospace, et al v Landow Aviation LP, et al*, the Loudoun County Circuit Court ruled on April 23, 2012 that the defendants could use predictive coding for purposes of processing and producing ESI.[30] There were approximately 2 million documents, or 250 gigabytes worth of ESI, at issue. The defendants filed a motion for a protective order to approve their use of predictive coding, arguing that it would return a higher percentage of relevant documents than either linear manual review or keyword searches at a fraction of the time and expense.[31] The defendants proposed to give the plaintiffs a copy of their seed set documents before the software separated the relevant from the irrelevant documents, and then to take a statistically validated sample from the resultant relevant and irrelevant document groups once the search was processed for quality control purposes.[32] The court granted the defendants' motion.[33]

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Predictive Coding: Best Practices

Predictive coding should not be feared or ignored by the legal community as the bar waits for more courts to address its use. However, as the above demonstrates, an attorney seeking to use predictive coding must be prepared to defend its use.[34] Factor-based tests are a popular and helpful way for courts and attorneys alike to make complicated legal determinations. Consequently, it should be of little surprise that attorneys must be aware of what factors courts consider when determining whether to approve the use of predictive coding in a case. Magistrate Judge Peck's opinion offers attorneys such guidance, which can be broken down as follows: (1) Whether the parties have reached an agreement on the use of predictive coding; (2) the amount of ESI at issue; (3) the superiority of predictive coding to available alternatives; (4) the need for cost effectiveness under FR Civ P 26; (5) the need for proportionality under FR Civ P 26; and (6) the transparency of the process proposed.[35] Certain factors and other best practices are discussed below.

Michigan Court Rules were amended effective January 1, 2009 to address the possibility of early involvement by a court on discovery matters related to ESI.

Address the Use of Predictive Coding Head On: The Federal Rules of Civil Procedure require parties to address eDiscovery issues at the onset of litigation.[36] In particular, Rule 26(f) requires parties to consider ESI when conferring about the case's discovery plan. Rule 26(f)(3) requires the parties' discovery plan to state the parties' views and proposal on, among other things, "(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced."

When litigating in state courts, the applicable court rules should be checked to identify what rules, if any, may require the parties to address eDiscovery issues early on in litigation. The Michigan Court Rules were amended effective January 1, 2009 to address the possibility of early involvement by a court on discovery matters related to ESI.[37] This amendment has been criticized because unlike the Federal Rules of Civil Procedure, parties are not required to meet and confer regarding electronically stored information in all cases.[38]

Whether required by the applicable rules or not, an attorney should always consider tackling the issue of ESI head on. If you are considering predictive coding as a tool to deal with ESI, then this should be raised at the beginning of the case.[39] The goal of addressing eDiscovery early on is to reduce the risks and costs associated with ESI. The best way to do this is by attempting to reach an agreement with opposing counsel on these issues early on, and to the extent you are unable to do so to seek court intervention to determine, for example, whether the court will approve the use of predictive coding.[40]

Be Transparent About Your Predictive Coding Process: The New York federal case and the Virginia state

case show that transparency is vital to a court approving a proposed predictive coding protocol. The producing parties in both *Moore* and *Landow* explicitly revealed the procedures they intended to follow with respect to the selection and review of a seed set and the statistical confidence levels they sought once the predictive coding software was trained. The producing parties also agreed to let the opposing party review the proposed seed set coding and make any revisions they deemed necessary. In fact, Magistrate Judge Peck acknowledged that such transparency was a key factor in the court approving the use of predictive coding.[41]

Institute Quality Control Procedures to Demonstrate the Reliability of Your Predictive Coding Process: Although predictive coding has the potential to significantly cut down on the time and expense of large ESI document reviews, appropriate quality control processes must be put in place to show that a predictive coding protocol will lead to reliable results. Such measures include reviewing multiple sets of random documents at the outset to ensure the software is adequately trained before it is used to code the document population, and reviewing documents the software coded as not relevant to ensure that such materials are in fact non-responsive. Courts are unlikely to approve of the use of predictive coding unless such strict quality control processes are put in place to ensure that the results are reliable.[42]

Recognize Your Role: Attorneys must recognize that, except perhaps for a talented few, they are not litigation technology specialists. Accordingly, attorneys should reach out to litigation technology specialists to assist in creating a reasonable and defensible plan for their use of predictive coding at the beginning of litigation. Various companies offer predictive coding services, such as Epiq Systems,[43] Xpriori,[44] OrcaTec[45] and Recommind.[46] These companies and others can offer attorneys valuable information in determining whether to use predictive coding in a specific case.[47]

Endnotes

1. FR Civ P 34(a)(1)(A); *see also* MCR 2.302(B)(1).
2. *See* Dean Gonsowski, *Top Ten eDiscovery Predictions for 2012* (Dec 8, 2011), http://www.clearwellsystems.com/e-discovery-blog/2011/12/08/top-ten-ediscovery-predictions-for-2012/.
3. *See Moore v Publicis Groupe SA*, 2012 US Dist LEXIS 23350, at *7, n 2 (SDNY Feb 14, 2012).
4. *See, e.g.*, Andrew Peck, *Search, Forward*, L. Tech News (Oct 2011), http://www.law.com/jsp/lawtechnologynews//PubArticleLTN.jsp?id=1202516530534 (registration required to access).
5. *See* Andrew Peck, n 4 *supra*.
6. *See id*.
7. *See id*.
8. *See id*.
9. *See id*.
10. 2012 US Dist LEXIS 23350, *3-4, n 1 (SDNY Feb 14, 2012).
11. *See Moore,* n 3 *supra*, at *9.
12. *See Moore*, n 3 *supra*, at *9-11.
13. *See Moore*, n 3 *supra*, at *16-17.
14. *See id*.
15. *See id*.
16. *See id*.
17. *See Moore*, n 3 *supra*, at *17-18.
18. *See id*.
19. *See id*.
20. *See Moore*, n 3 *supra*, at *24-26.
21. *See Moore*, n 3 *supra*, at *20-24.
22. *See Moore*, n 3 *supra*, at *3 & 27.
23. *See Moore*, n 3 *supra*, at *27.
24. *See Moore*, n 3 *supra*, at *28-34.
25. *See Moore*, n 3 *supra*, at *34-35.
26. *See Moore*, n 3 *supra*, at *36-37.
27. *See Moore*, n 3 *supra*, at *39-40.
28. *See Moore*, n 3 *supra*, at *39.
29. *See Moore v Publicis Groupe SA*, 2012 US Dist LEXIS 58742 (SDNY Apr 26, 2012).
30. *See* Order Approving The Use Of Predictive Coding For Discovery, (Va Cir Loudon County Apr 23, 2012), Case No CL 61040.
31. *See* Memorandum In Support Of Motion For Protective Order Approving The Use Of Predictive Coding, (Va Cir Loudon County Apr 9, 2012), Case No CL 61040.
32. *See* Memorandum, n 31 *supra*.
33. *See* Order, n 30 *supra*.
34. *See, e.g.*, Andrew Peck, n 4 *supra* (providing insights on what constitutes a "defensible" use of predictive coding); Mark Michels, *Predictive Coding: Reading the Judicial Tea Leaves*, L Tech News, (Oct 17, 2011), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202518919552&slreturn=1 (directs reader to LexisNexis to access article) (providing important insights on how to defend the use of predictive coding).
35. *See Moore*, n 3 *supra*, at *35-36.
36. *See Argus and Assoc, Inc v Prof'l Benefits Serv, Inc*, 2009 US Dist LEXIS 39437 (ED Mich May 8, 2009) (noting the requirement in Rule 26(f) to include electronic discovery issues in the discovery plan and admonishing parties for their failure to live up to the requirements of the rule, but refusing to impose sanctions for failure to meet disclosure deadline when both parties bore some responsibility for failure).
37. *See* MCR 2.401(B)(1)(d) & (B)(2)(c).
38. *See* B Yelton III and D Bargy, *Michigan's New Discovery Rules: Early Involvement Can Reduce Risks and Costs of E-Discovery*, The Litigation Newsletter (State Bar of Michigan), Spring 2009, pp 7 - 11, http://www.michbar.org/litigation/pdfs/spring09.pdf.
39. *See* Andrew Peck, n 4 *supra*.
40. *See* Andrew Peck, n 4 *supra*; *Predictive Coding = Great E-Discovery Cost and Time Savings*, The Metropolitan Corporate Counsel (Nov 16, 2011), http://www.epiqsystems.com/uploadedFiles/Epiq_in_the_News/MCC_Baker_Laing.pdf.
41. *See Moore*, n 3 *supra*, at *36-37.
42. *See id.*
43. Epiq Systems Inc., www.epiqsystems.com.
44. Xpriori LLC, http://xpriori.com/.
45. Oratec LLC, http://orcatec.com/.
46. Recommind Inc., http://www.recommind.com/solutions/overview.
47. The vendors identified here do not reflect the authors' endorsement of any particular vendor. Rather, they are merely some examples of vendors offering such services.

The Deplorable State of Law Firm Information Security: Preventing Law Firm Data Breaches

Sharon D. Nelson, Esq. and John W. Simek, *© 2011 Sensei Enterprises, Inc.*

Another day, another data breach. Data breaches have proliferated with amazing speed. In 2011, here was the roundup of some of the largest victims: Tricare, Nemours, Epsilon, WordPress, Sony, HB Gary, TripAdvisor, Citigroup, NASA, Lockheed Martin and RSA Security. Some mighty big names on that list.

Don't be lulled into thinking that law firms (large and small) aren't suffering data breaches just because they don't have millions of clients affected. On November 1, 2009, the FBI issued an advisory warning law firms that they were specifically being targeted by hackers. Rob Lee, an information security specialist who investigates data breaches for the security company Mandiant, estimated that 10% of his time was spent in 2010 investigating law firm data breaches.

Matt Kesner, the CIO of Fenwick and West LLP, has lectured at ABA TECHSHOW and appeared on a podcast acknowledging that his law firm has been breached twice. As he has also noted, it is very unlikely that we know of most law firm data breaches since the firms have a deeply vested interest in keeping breaches quiet. This may be less true in the future now that 46 states have data breach notification laws. In fact, by the time you read this, it is possible that a federal data breach notification law will have finally been enacted — several bills were wending their way through the laborious legislative process in late 2011.

Shane Sims, a security practice director at PricewaterhouseCoopers has said, «Absolutely we›ve seen targeted attacks against law firms in the last 12 to 24 months because hackers, including state sponsors, are realizing there›s economic intelligence in those networks especially related to business deals, mergers, and acquisitions." Matt Kesner has noted that China is often responsible for state-sponsored hacking — and that China doesn't waste its "A" squads on law firms because their security is so dreadful — the rookies on the "C" squads are good enough to penetrate most law firms.

While we agree, don't be misled — garden variety cybercriminals are interested in law firm data as they engage in identity theft. This is as true for solos and small firms as it is for the big guys. Just think of the financial data that may be contained in the Separation Agreements drafted by family lawyers, almost all of whom are solos or in small firms. Those who practice the black arts of business espionage are also interested — and perhaps hired by the opposing party in litigation.

We hope we've piqued your interest in law firm data security and whether your own firm is secure. We wish there were a silver bullet for law firm security, but the truth is that there is no magical cloak to protect your data. You can be the first kid

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on your block to be infected with some sort of malware in what's known as a "zero day exploit" — meaning that you got the malware before the security companies have had a chance to muster a defense against it.

That said, there are some security basics that every lawyer should be aware of. Be very careful not to accept the word of your IT provider that you're secure. You need to do your own checking — or hire an independent third party to do so. There are legions of stories of IT providers who lawyers depended upon but who screwed up security and contributed to subsequent data breaches.

So away we go — our top practical security tips!

1. Have a strong password — at least 12 characters. No matter how strong an eight character password is, it can now be cracked in about two hours. A strong 12 character password takes roughly 17 years to crack. Much easier to hack someone else. Use a passphrase so you can remember the password: Love ABATECHSHOW 2012! Would be a perfect example.

2. Don't use the same password everywhere. If they crack you once, they've got you in other places too.

3. Change your passwords regularly. This will foil anyone who has gotten your password.

4. Do not have a file named "passwords" on your computer. And do not have your password on a sticky note under your keyboard or in your top right drawer (the two places we find them most often!)

5. Change the defaults. It doesn't matter if you are configuring a wireless router or installing a server operating system. In all cases, make sure you change any default values. The default user ID and passwords are well known for any software or hardware installation. Apple isn't immune either, since there are default values for their products as well.

6. Your laptop should be protected with whole disk encryption – no exceptions. Stolen and lost laptops are one of the leading causes of data breaches. Many of the newer laptops have built-in whole disk encryption. To state the obvious, make sure you enable the encryption or your data won't be protected. Also, encryption may be used in conjunction with biometric access. As an example, our laptops require a fingerprint swipe at power on. Failure at that point leaves the computer hard drive fully encrypted.

7. Backup media is also a huge source of data leaks — it too should be encrypted. If you use an online backup service (which means you're storing your data in the cloud), make sure the data is encrypted in both transit and storage – and that employees of the backup vendor have no access to decrypt keys.

8. Thumb drives, which are easy to lose, should be encrypted – and you may want to log activity on USB ports. It is common for employees to lift data via a thumb drive – without logging, you cannot prove exactly what they copied.

9. Keep your server in a locked rack in a locked closet or room — physical security is essential.

10. Most smartphones write some amount of data to the phone — even opening a client document may write it to the phone whether or not you save it. The iPhone is particularly data rich. Make sure you have a PIN for your phone — this is a fundamental protection. Don't use "swiping" to protect your phone — thieves can discern the swipe the vast majority of time due to the oils from your fingers. Also make sure that you can wipe the data remotely if you lose your phone.

11. Solos and small firms should use a single integrated product to deal with spam, viruses and malware. For solos and small firms, we recommend using Kaspersky Internet Security 2012, which contains firewall, anti-virus, anti-spyware, rootkit detection, anti-spam and much more. For larger firms, we are fans of Trend Micro.

12. Wireless networks should be set up with the proper security. First and foremost, encryption should be enabled on the wireless device. Whether using Wired Equivalent Privacy (WEP) 128-bit or WPA encryption, make sure that all communications are secure. WEP is a weaker layer and can be cracked. The only wireless encryption standards that have not been cracked (yet) are WPA with the AES (Advanced Encryption Standard) or WPA2.

13. Make sure all critical patches are applied. This may be the job of your IT provider — too often, this is not done.

14. If software has gone out of support, its security may be in jeopardy — upgrade to a supported version to ensure that it is secure.

15. Control access — does your secretary need access to Quickbooks?

Probably not — this is just another invitation to a breach.

16. If you terminate an employee, make sure you cut all possible access (including remote access) to your network immediately and kill their ID. Do not let the former employee have access to a computer to download personal files without a trusted escort.

17. Using cloud providers for software applications is fine **provided** that you made reasonable inquiry into their security. Read the terms of service carefully and check your state for an ethics opinions on this subject.

18. Be wary of social media applications which are now being invaded by cybercriminals. Giving another application access to your credentials for Facebook, as an example, could result in your account being hijacked. And even though Facebook now sends all hyperlinks through Websense first (a vast improvement), be wary of clicking on them.

19. Consider whether you need cyberinsurance to protect against the possible consequences of a breach. Most insurance policies do not cover the cost of investigating a breach, taking remedial steps or notifying those who are affected.

20. Have a social media and an incident response policy. Let your employees know how to use social media as safely as possible – and if an incident happens, it is helpful to have a plan of action in place.

21. Dispose of anything that holds data, including a digital copier, securely. For computers, you can use a free product like DBAN to securely wipe the data.

22. Make sure all computers require screen saver passwords and that it gets invoked within a reasonable period of inactivity.

23. Use wireless hot spots with great care. Do not enter any credit card information or login credentials prior to seeing the https: in the URL.

24. For remote access, use a VPN or other encrypted connection.

25. Do not give your user ID and password to anybody. This includes your secretary and even the IT support personnel.

None of these safeguards is hard to implement. Unfortunately, even if you implement them all, new dangers will arise tomorrow. The name of the game in information security is "constant vigilance."

MDTC New Section Chair

John Mucha
Commercial Litigation

John Mucha, III is a member of Dawda, Mann, Mulcahy & Sadler, PLC's litigation practice group, where he specializes in handling commercial, real estate, construction, banking and automotive supplier disputes. He received his undergraduate degree and Master of Public Policy Studies degree from the University of Michigan. Mr. Mucha received his Juris Doctorate from University of Michigan Law School, where he was on the editorial staff of the Journal of Law Reform. He is the past Chair of the Litigation Section of the State Bar of Michigan and past President of the Birmingham Rotary Club. Mr. Mucha resides in Oakland County with his wife Patricia, and their two children.

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Email Missteps To Avoid: "Reply To All" & "Auto-Complete"

By: B. Jay Yelton, III, *Miller Canfield P.L.C.* & Phillip M. Shane, *Miller Canfield P.L.C.*

Executive Summary

The unintended release of information via email can create problems for both attorneys and their clients. Courts have addressed various issues that can arise due to the inadvertent or improper use of email correspondence, including waiver of privilege, release of confidential materials, or possible ethical violations. Careful email usage can avoid the significant risks and unintended consequences associated with this method of communication.

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It would be a gross understatement to say that email is the medium of choice for business communications in the not-so-new millennium. Approximately 29.4 billion emails (not including spam and viruses) from 1.9 billion users were sent *per day* in 2010.[1] Properly used, email is an extremely effective and efficient way to request and share information. Improper or inadvertent use of email communication can lead to unintended and, in the legal realm, potentially devastating consequences.

Consider the following scenario: a defense attorney sends an email to plaintiff's counsel, with a "bcc" to his client as a seemingly efficient way to keep the client informed of what is transpiring in the case. The client replies to the email with a response that is clearly intended for his defense attorney, but inadvertently uses the "reply to all" function of his email system, thereby sending his response to opposing counsel as well as his own attorney. Defense counsel notices his client's mistake and asks plaintiff's attorney to delete the email. Instead of deleting it, plaintiff's counsel submits the email as an exhibit to a motion for summary judgment.

This is precisely what happened in a Massachusetts state court case.[2] Superior Court Justice Judith Fabricant ultimately denied the plaintiff's motion and precluded further use of the email, but warned that "[defendant] and his counsel should not expect similar indulgence again. Reply all is risky. So is bcc. Further carelessness may compel a finding of waiver." Although the court agreed that the inadvertent email in question was privileged, defense counsel David C. Johnson learned a valuable lesson about using email in his practice:

> "I will no longer blind cc my client in e-mails to the other side, because I don't want what happened here to happen again," Johnson said. "From now on, I will send an e-mail to the other side and then send a separate copy to my client to make sure there is not a 'reply all' problem again."[3]

In addition to potential privilege waiver, careless or hasty use of "reply to all" could also result in lawyers violating their bar associations' rules of professional conduct. Most states, including Michigan, forbid a lawyer from communicating directly with a party represented by another lawyer, unless the other lawyer consents.[4] In a 2009 opinion, the ethics committee of the New York City bar addressed whether an attorney who "ccs" his or her own client on an email to another attorney representing a separate party gives implied consent to the direct communication that could occur if the other attorney sends a "reply to all" response email.[5] The committee agreed that in some email communications where multiple lawyers and clients are involved, implied consent to "reply to all" responses may be inferred, depending on how the communication begins and whether it is adversarial in nature. However, the committee

also cautioned that the safest course of action is to obtain counsel's express consent, either orally or in writing, and that attorneys who fail to do so risk violating the no-contact rule.

Another risky feature that is standard to most email systems is the "auto-complete" function. In theory, this tool is intended to save time for email users by suggesting or inserting recipient email addresses as users begin to type them in the "to," "cc," or "bcc" fields of an outgoing message. In reality, these fields are often populated with the addresses of unintended recipients, creating the risk that the sender will misdirect confidential or privileged information.

One of the most well-known auto-complete mistakes in recent years resulted in the inadvertent disclosure of confidential settlement discussions to the tune of $1 billion, which then made the front page of the New York Times. During negotiations with United States Attorneys over alleged improper marketing of the drug Zyprexa, an outside attorney for manufacturer Eli Lilly & Co. mistakenly emailed highly confidential settlement information to a financial reporter who shared the same last name as her co-counsel, due to the auto-complete function of her email software.[6] Shortly thereafter, a comprehensive article authored by the same reporter appeared on the first page of the *Times,* entitled "Lilly Considers $1 Billion Fine to Settle Case."[7] It does not take a marketing degree or public relations expertise to know that a company settling allegations of impropriety involving one of its most profitable products would prefer to release the news on its own terms.

Besides inadvertent disclosure of confidential information, auto-complete errors can also result in the disclosure of attorney-client privileged communications. One of these instances became the basis of an evidentiary dispute in a federal district court case.[8] The scenario began when defendants' counsel sent an email to his client. The client replied, including co-counsel and another individual in his response. Apparently, the auto-complete function of the client's email system supplied the third party's email address because his first name began with the same two letters as that of the intended recipient, another attorney representing defendants. The unintended recipient forwarded the email to another individual, who in turn forwarded the email to plaintiff's Italian counsel. Plaintiff's Italian counsel then forwarded the entire email chain to plaintiff's trial counsel in the underlying lawsuit, who attached the email exchange as an exhibit to a motion for a protective order. Not surprisingly, defense counsel moved to exclude the email from evidence.

Approximately 29.4 billion emails (not including spam and viruses) from 1.9 billion users were sent per day in 2010.

Fortunately for defendants, the court granted the motion, finding that although defendants' care in addressing the email was "hasty and imperfect," the defendants had "relied on a system that had worked in a particular way in the past to continue working the same way in the future" and took reasonable steps to rectify the inadvertent disclosure as proscribed by FRE 502(b). However, the court also noted that regardless of the outcome of defendants' motion, "the cat [was] out of the bag" as to strategy that the defendants discussed with counsel in the email exchange.

It is certainly true that advances in technology, including email, have enhanced attorneys' ability to communicate with their clients, and vice versa. It is also true that these advances can present significant risks when used improperly or inadvertently. As a practical matter, it is best to refrain from using "bcc" to avoid an accidental "reply to all." Instead, lawyers who wish to share a communication to opposing counsel with their client should first email opposing counsel, and then forward the email to their clients. Before sending an email, attorneys and clients alike should pause and confirm that the recipients listed are actually the intended recipients. Businesses, including law firms, should inform and frequently remind users of the risks associated with the "reply-to-all" and "auto-complete" functions of their email systems.

Endnotes

1. Email Fun Fact: How Many Emails Are Sent Every Day, http://www.sendmail.com/sm/blog/wik/?p=1357 (Aug. 19, 2011) (citing The Radicati Group, Email Statistics Report, 2010).
2. *Charm v Kohn*, 2010 WL 3816716 (Sept 30, 2010).
3. Accidental 'reply all' email is privileged document, http://newenglandinhouse.com/2011/01/18/accidental-%E2%80%98reply-all%E2%80%99-e-mail-is-privileged-document/ (Jan. 18, 2011, 16:54 EST).
4. MRPC 4.2.
5. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-1, available at http://www2.nycbar.org/Ethics/eth2009-1.htm.
6. Katherine Eban, *Lilly's $1 Billion E-Mailstrom*, Portfolio.com, Feb. 5, 2008, http://www.portfolio.com/news-markets/top-5/2008/02/05/Eli-Lilly-E-Mail-to-New-York-Times/.
7. *Id.* An electronic copy of the article is available at http://www.nytimes.com/2008/01/31/business/31drug.html.
8. *Multiquip, Inc v Water Mgmt Sys LLC*, 2009 WL 4261214 (D Idaho 2009).

Recommendations Of The Judicial Selection Task Force

By Peter L. Dunlap, *Peter L. Dunlap, P.C.*

On May 10, 2012, at MDTC's Annual Meeting, MDTC Past President Peter Dunlap gave a speech addressing the Michigan Judicial Task Force's April 2012 recommendations. The substance of that speech, adapted for print, follows. All quoted material is from the Michigan Judicial Selection Task Force: Report and Recommendation (April 2012).

I am here to ask for your help and to highlight the recommendations of the Michigan Judicial Selection Task Force. The Task Force was formed in late 2010 chaired jointly by then Michigan Chief Justice Marilyn Kelly, a democrat, and Judge James Ryan, Sr., judge for the United States Court of Appeals for the Sixth Circuit, a republican. The 20 additional Task Force members are from all political spectrums, 12 lawyers and 8 non-lawyers, all of whom served without pay.

The impetus, aside from our own concerns, was a series of articles by and interviews with Justice Sandra Day O'Connor who served as the Honorary Task Force Chair. Justice O'Connor was concerned about the accelerating monetary contributions to state supreme court judicial campaigns and the effect of money on the independence of the state court judiciary, both real and as perceived by the public. Much of that money was contributed by anonymous sources.

Another concern was the obnoxious nature of political campaigns for those posts through the vehicle of so called "negative advertising" that has a cancerous effect on the image of the courts in the mind of the public. As Justice O'Connor has explained, "motivated interest groups are pouring money into judicial elections in record amounts. Whether they succeed in their attempts to sway the voters, these efforts threaten the integrity of judicial selection and compromise public perception of judicial decisions."

Another Task Force concern was Michigan's odd method of selecting nominees for the court who then run in what Michigan's Constitution mandates as a "non-partisan" election. As most of you know, the candidates are nominated by political parties. That methodology is not in Michigan's Constitution but is prescribed by statute, so it is important to know that it can also be changed by statute. We then have the anomaly of candidates selected at party conventions, funded with huge partisan monetary contributions who then run in what the public is told is a non-partisan election.

To address these and other concerns, the Task Force made the following recommendations:

1. Legislation requiring "that supreme court campaign advertisements fully disclose the source of their funding." The last election for two seats on the supreme court saw spending of approximately $9 million, and of that, only $2.3 million was

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RECOMMENDATIONS OF THE JUDICIAL SELECTION TASK FORCE

spent by the candidates' own committees. "Over the last decade, more than half of all spending on supreme court races in Michigan went unreported . . . ."

2. Legislation doing away with nomination by political parties and requiring candidates run in an open primary, just like the court of appeals and every other judicial position in Michigan.

3. The "establishment of a citizens' campaign oversight committee" that "would monitor judicial campaign advertisements" by any source, whether candidates or third parties, and "denounce false, misleading or destructive" campaign messages.

4. Approximately one half of all Michigan judges began their judicial careers as mid-term appointees of Michigan governors solely at the Governor's discretion. The Task Force recommended that "the Governor voluntarily create an advisory commission" composed of lawyers and non-lawyers to screen candidates for supreme court vacancies and make public, not private, recommendations for the position. The Governor would pledge in advance to appoint justices only from the list presented by the advisory screening commission. The public would be assured "that the Governor did not base his or her appointments on whim or political patronage but instead on a sound examination of each candidate's suitability for the office."

5. Remove the requirement in Michigan's Constitution prohibiting the election or appointment to judicial office of anyone over 70 years of age by amendment. This age limitation applies only to judges. Age is just one other consideration for the public to determine who is elected. Please remember that the Constitution of 1963 is now itself 50 years old.

> Justice O'Connor was concerned about the accelerating monetary contributions to state supreme court judicial campaigns and the effect of money on the independence of the state court judiciary, both real and as perceived by the public.

6. Have a voter education guide be created by the Michigan Secretary of State for each supreme court candidate to provide "a neutral, factual, relevant description of each candidate's qualifications."

Contrary to some reports, the Task Force did not recommend implementation of a merit selection system. However, the report notes that "many members" of the Task Force supported such a system, which would require a constitutional amendment. The Arizona system was singled out as a model. The commission identifying selectees for the Governor's appointment would be composed of a non-lawyer majority.

What can you do: Study this report and discuss it with other members of the public and your fellow lawyers. Write letters to the editor. Talk to your legislative representatives. Public pressure will be the only way this report is turned into action.

The report can be found at www.mijudicialselection.com.

JOIN AN MDTC SECTION

To the 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.*

If you are interested in chairing a section, please contact MDTC President Timothy A. Diemer at TimDiemer@jacobsdiemer.com.

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MDTC Legislative Report

As I write this report in mid-June, our Legislature is preparing for its last week of session before the summer recess. The House of Representatives is up for grabs this year and the stakes are high, as I've said before. The Representatives from both sides of the aisle are anxious to hit the campaign trail, and the Senators and legislative staff are poised to give their aid — whatever it takes — to help secure the interests of their respective parties. The Republicans enjoy a comfortable margin, made even more secure by the recent defection of Representative Roy Schmidt from the loyal opposition, who are furious and loudly crying foul over his last-minute shift of allegiance. Still, those with a knowledge and appreciation of recent history will not allow themselves to become too cocky until Election Day has come and gone. Governor Snyder's approval ratings have improved in recent polling, but the President is still a strong contender, and a pro-union constitutional amendment which seems increasingly likely to appear on the November ballot may be viewed as a special referendum on the Republican agenda and many of this session's legislative accomplishments.

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Better predictions of how all of this will unfold can perhaps be made in the weeks to come, but the more immediate question is what will, and will not be accomplished in this, the last full week of session before the Legislature reconvenes in September. It is unlikely that the Republicans will miss the opportunity to claim credit for a tax reduction, so it is probably a safe bet that the pending legislation providing a modest reduction of the income tax rate and a small increase in the personal exemption will probably be finalized and sent to the Governor. There will probably be further consideration of the proposed legislation to reform the pension system for public school employees, but it is unclear whether the difficult questions about that issue can be quickly resolved. Committee hearings on the new medical malpractice tort reform package will continue and it is possible that these bills could be passed by the Senate before the break, but it now appears that final passage will probably have to wait until September, at least.

Public Acts of 2012

Our Legislature has been busy in the last three months. Thus, as of this writing, there are 158 Public Acts of 2012. Those of interest to our membership include:

2010 PA 53 – House Bill 4929 (Haveman – R): This act has amended the Public Employment Relations Act to **prohibit payroll deductions of union dues by public school employers**. The passage of this legislation generated a great deal of partisan animosity, which has been further inflamed by the majority's inclusion of a small appropriation designed to insulate this amendatory act from challenge by referendum.

2012 PA 68 - House Bill 4647 (Heise – R): This act has amended the Revised Judicature Act to add a new section MCL 600.2164a, which will **allow the presentation of expert testimony at trial by the use of interactive video communication equipment**, with the consent of all parties. This amendatory act took effect on June 1, 2012, and applies only to actions filed on and after that date.

2012 PA 84 – HB 4601 (Haveman – R): This act has amended the Revised Judicature Act to add a new Chapter 30, consisting of a single new section MCL 600.3001. This new statute **imposes limitations upon the liability of successor corporations for asbestos claims**.

2012 PA 86 – HB 5081 (Huuki – R); 2012 PA 87 – HB 5082 (Cotter – R) and 2012 PA 88 – HB 5083 (Lipton – D): These amendatory acts have **revised numerous sections of the Uniform Commercial Code** and added several new provisions.

2012 PA 98 – Senate Bill 291 (Pavlov – R): This act has amended the Vehicle Code, MCL 257.658, to **allow motorcyclists and their riders who are 21 years of age or older to ride without a crash helmet under certain circumstances** defined therein. Prior versions of this legislation were vetoed, on two occasions, by former Governor Granholm. In this session, SB 291 had remained in limbo for several months in deference to Governor Snyder's desire to address this issue in conjunction with no-fault auto insurance reforms, which became stalled in the House last fall. With no resolution of the no-fault legislation in sight, SB

This year's discussion of new reforms was initiated by the introduction of five Republican-sponsored Senate Bills, dubbed the "Patients First Reform Package," on May 3, 2012.

291 was passed on its own, despite the Governor's lack of enthusiasm.

2012 PA 142 – Senate Bill 269 (Schuitmaker – R): This act has amended the Revised Judicature Act, MCL 600.8401, to **increase the jurisdictional amount for claims adjudicated in the small claims court**. The jurisdictional amount will be raised from $3,000.00 to $5,000.00 on September 12, 2012. Four additional increases of $500.00 each will take effect on January 1st of 2015, 2018, 2021 and 2024.

2012 PA 158 – House Bill 5362 (Denby – R): This act has amended the Insurance Code, MCL 500.3135, to **increase, from $500.00 to $1,000.00, the limitation on the amount of damages which may be recovered for damage to a motor vehicle not covered by insurance**. The amendatory act also provides, with respect to recovery of such damages, that "damages shall not be assessed if the damaged motor vehicle was being operated at the time of the damage without the security required by section 3101." This amendatory act will take effect on October 1, 2012.

The New Medical Malpractice Tort Reform Initiatives

The litigation of medical malpractice claims has been changed dramatically by the medical malpractice tort reform legislation of 1993. That legislation has given rise to many legal challenges in our appellate courts, but little has been done since that time to change the statutory provisions governing these actions. That has changed quickly in the last few weeks with the introduction of competing packages proposing a variety of new medical malpractice tort reforms.

This year's discussion of new reforms was initiated by the introduction of five Republican-sponsored Senate Bills, dubbed the "Patients First Reform Package," on May 3, 2012. This action was followed shortly thereafter by the introduction of identical bills in the House. Not to be outdone, the Democrats quickly countered these efforts by introducing their own package of more patient-friendly bills touted as their "Patient Safety Package."

The Republican Senate Bills and their House counterparts are:

Senate Bill 1110 (Kahn – R): This bill would amend the Revised Judicature Act to add a new section MCL 600.2912i. The new section would **shield licensed health care professionals and licensed health facilities and agencies from liability** for medical malpractice in cases involving emergency medical care provided in a hospital emergency department or obstetrical unit, and any such care provided in a surgical operating

Welcome New Members

MDTC Welcomes These New Members

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Not to be outdone, the Democrats quickly countered these efforts by introducing their own package of more patient-friendly bills touted as their "Patient Safety Package."

room, cardiac catheterization laboratory, or radiology department immediately following evaluation or treatment in an emergency department, unless the plaintiff is able to prove, by clear and convincing evidence, that the licensed health care provider's actions constituted gross negligence. House Bill 5698 (Walsh – R) is identical to SB 1110.

Senate Bill 1115 (Kahn – R): This bill would amend several sections of the Revised Judicature Act and add a new section MCL 600.6306a. The bill would amend MCL 600.1483, establishing the existing caps on noneconomic damages, by **expanding that section's present definition of "noneconomic loss"** to also include "loss of household or other services, loss of society and companionship, whether claimed under section 2922 or otherwise," and "loss of consortium."

The new MCL 600.6306a would **prescribe a new order of judgment for medical malpractice cases**. This new section, and corresponding amendments of § 6306, would add new requirements that: 1) a reduction of noneconomic damages necessitated by application of the statutory caps on such damages in medical malpractice cases be apportioned proportionally between past and future noneconomic damages; 2) the reduction of future damages to "gross present cash value" (in all cases) be calculated at a rate of 5% per year **compounded annually** (legislatively overruling case law providing that this value is calculated without compounding, thus increasing the amount of the reduction); and 3) the total judgment amount in a medical malpractice case be reduced by the amount of all settlements paid by all joint tortfeasors, including all joint tortfeasors who were not parties to the action and/or not described in § 5838a(1). The reduction for settlements paid by joint tortfeasors would be allocated proportionally between past and future damages, and would be applied before calculation of judgment interest. House Bill 5669 (Haveman – R) is identical to SB 1115.

Senate Bill 1116 (Meekhof – R): This bill would **amend MCL 600.2912a, defining the required burden of proof in medical malpractice cases**. The new subsection (3) would provide that the defendant is not liable in an action for medical malpractice if the conduct at issue constituted an "exercise of professional judgment." A defendant's act or omission would qualify as an exercise of professional judgment "if the person acts with a reasonable and good-faith belief that the person's conduct is both well founded in medicine and in the best interests of the patient." The question of whether an act or omission was an exercise of professional judgment would be a question of law for the court to decide. If the court determines that the act or omission cannot qualify as an exercise of "professional judgment," the question of whether the defendant satisfied the standard of practice would then be a question of fact for the jury.

SB 1116 also seeks to **eliminate the present uncertainty concerning claims for loss of opportunity**. Subsection (2) currently provides that, in an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result "unless the opportunity was greater than 50%." As amended, this provision would simply state that the plaintiff cannot recover for loss of such opportunities. House Bill 5670 (MacGregor – R) is identical to SB 1116.

Senate Bill 1117 (Moolenar – R): This bill would amend MCL 600.2912 to clarify, consistent with the existing language of MCL 600.5838a, that **an action for medical malpractice may be maintained against any person who is, or holds himself or herself out to be, an employee or agent of a licensed health facility or agency, and who is engaged in or otherwise assisting in medical care and treatment**. At present, this section is limited to persons who profess or hold themselves out to be a member of a state licensed profession, and thus, it does not apply to persons who are not, and do not claim to be, a member of a state licensed health profession. **SB 1117** would also amend MCL 600.2169, prescribing the qualifications for expert witnesses in medical malpractice cases, to establish qualifications for experts testifying for or against a party who is not a licensed health professional. House Bill 5671 (Walsh – R) is identical to SB 1117.

Senate Bill 1118 (Hune – R): This bill would **amend the tolling provisions of MCL 600.5852**. At present, Subsection 5852(1) provides that when a person dies before the statute of limitations has run, or within 30 days thereafter, an action that survives by law may be commenced by the personal representative of the deceased within 2 years after issuance of the letters of authority, provided that the action is filed within 3 years after the period of limitations has run. SB 1118 would provide that, in actions alleging medical malpractice, the 2-year tolling period would run from the date that letters of authority are issued to the first personal representative, and

A defendant's act or omission would qualify as an exercise of professional judgment "if the person acts with a reasonable and good-faith belief that the person's conduct is both well founded in medicine and in the best interests of the patient."

would not be enlarged by the issuance of subsequent letters of authority, except as otherwise provided in the new subsection 5852(3). That provision would allow the filing of an action alleging medical malpractice within 1 year after the appointment of a successor personal representative in cases where the original personal representative dies or is declared legally incompetent within 2 years after his or her appointment, provided that the action is filed within 3 years after the period of limitations has run.

SB 1118 would also amend MCL 600.6013, pertaining to calculation of judgment interest, to **eliminate prejudgment interest on costs and attorney fees in medical malpractice cases**. In its present form, the statute provides that all of the judgment interest calculated under the "sliding scale" of subsection (8) "is calculated on the entire amount of the money judgment, including attorney fees and other costs." The bill would amend subsection (8) to provide that, in medical malpractice cases, interest on costs or attorney fees would not be calculated for any period prior to entry of the judgment. House Bill 5672 (MacGregor – R) is identical to SB 1118.

The Democratic "Patient Safety Package" includes:

Senate Bill 1136 (Johnson – D): This bill would amend MCL 600.1483 to **increase the caps on noneconomic damages in medical malpractice actions in certain cases**. A new subsection (3) would provide that the amount awarded for noneconomic damages would not exceed the greater of the applicable cap provided under subsection (1) **or** an amount equal to three times the amount of damages awarded for economic loss in cases where the Department of Community Health has reported findings of one or more specified grounds for discipline of the defendant to a disciplinary committee under MCL 333.16221. The enumerated grounds for discipline would include, among others, that the defendant has been convicted of criminal sexual conduct; that his or her ability to practice in a safe and competent manner has been adversely affected by mental or physical inability; a declaration of mental incompetence; substance abuse; action taken with intent to harm the plaintiff; and fraudulent conduct, including alteration of records for the purpose of avoiding liability. The potential for application of the increased cap would also apply in any case where the defendant has threatened or attempted to coerce the plaintiff, or a minor plaintiff's parent, to prevent reporting of the defendant's misconduct. House Bill 5662 (Irwin – D) is identical to SB 1136.

Senate Bill 1137 (Johnson – D): This bill would amend MCL 600.6306 to require **judicial enhancement of the award for noneconomic damages as a penalty in medical malpractice cases where the trier of fact has found one or more enumerated forms of misconduct** on the part of the defendant. The new subsection (4) would require the court to adjust the award of damages by doubling the award of noneconomic damages **or** awarding noneconomic damages of $500,000.00, whichever would be greater, if the trier of fact has determined that the defendant has done one or more of the following: 1) acted with intent to harm the plaintiff; 2) practiced medicine on the plaintiff while under the influence of alcohol or a controlled substance; 3) intentionally altered relevant records for the purpose of avoiding liability; 4) promoted the use of an unnecessary drug, device, treatment, procedure or service for personal gain; or 5) threatened or attempted to coerce the plaintiff, or a minor plaintiff's parent, to prevent reporting of the defendant's misconduct.

Senate Bill 1138 (Hopgood – D): This bill would amend the Public Health Code, MCL 333.16421, to **require the Department of Community Health to make annual reports providing generic information concerning its handling of disciplinary matters available to the public** on its website by April 1st of each year. The required information would include: the number of complaints filed against physicians; the number of investigations of licensees; the number of disciplinary hearings conducted; the number of reports of disciplinary action; and the types of disciplinary action taken by disciplinary subcommittees in the preceding calendar year. The bill would also amend MCL 333.20175 to require health facilities or agencies to provide similar generic information concerning disciplinary investigations and actions on their internet websites.

The Senate Insurance Committee has held a series of public hearings on Senate Bills 1115, 1116, 1117 and 1118, but no vote has yet been taken to report any of those bills for consideration by the full Senate. The corresponding House Bills – HB 5669, HB 5670, HB 5671 and HB 5672 – were scheduled for hearing in the House Judiciary Committee on June 7th, but the hearing was cancelled due to the press of other

The Legislature will be in session for one day only in July, and will return for a short session in September. The legislative leadership may wish to gauge the political winds at that time to decide whether it will be advisable to consider these issues further in the days leading up to that all-important election.

business. Not surprisingly, the bills of the Democratic "Patient Safety Package" have not been scheduled for hearing.

Word around town has been that the Republican-sponsored bills are on a fast track, and might be pushed through final passage in both houses before the summer recess. The MDTC Executive Committee quickly responded to this intelligence by preparing a detailed statement of position on this legislation and presenting that position to the legislative decision makers in writing, and in testimony before the Senate Insurance Committee. These comments and those provided by other interested parties appear to have slowed the pace somewhat, and the planned date for the summer recess has been moved up. Thus, it now appears unlikely that these bills will receive final approval before the summer recess. The bills taken up in Committee could be passed by the Senate before the summer recess, but there are new rumors that the votes may not be there to move them in their present form, which suggests that there will probably be some changes. The Legislature will be in session for one day only in July, and will return for a short session in September. The legislative leadership may wish to gauge the political winds at that time to decide whether it will be advisable to consider these issues further in the days leading up to that all-important election.

What Do You Think?

As I've often said before, the MDTC Board regularly discusses pending legislation and positions to be taken on bills and resolutions of interest. Your comments and suggestions are appreciated, and may be submitted to the Board through any Officer, Board Member, Regional Chairperson or Committee Chair. In light of recent events, it would seem that this would be a good time to make your feelings known.

The Michigan Defense Trial Counsel Judicial Award

First annual recipient, Justice Marilyn Kelly, Michigan Supreme Court

This award is presented annually to commend one or more state or federal judges for their service to and on behalf of the state civil bar, the legal profession, and the public. This award is established to recognize judges who have demonstrated the highest standards of judicial excellence in the pursuit of justice, while exemplifying courtesy, integrity, wisdom, and impartiality. It is awarded to the judges who best exemplify that which brings honor, esteem, and respect to the practice of law.

The award will be presented during the MDTC Winter Meeting Luncheon, Friday, November 2, 2012 at The Baronette Renaissance Hotel, Novi, MI

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 Lee Khachaturian (dkhachaturian@dickinsonwright.com) or Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).*

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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 Decides that Minority Tolling Provision Does NOT affect One-Year-Back Rule

Joseph v Auto Club Ins Ass'n, 491 Mich 200 (2012)

In a long awaited decision, the Supreme Court has overruled *University of Michigan Regents v Titan*, 47 Mich 289 (2010), and held that the minority tolling provision of MCL 600.5851(1) does not toll the one-year-back rule contained in MCL 500.3145(1). Disagreeing with the *Regents* panel, and once again addressing the doctrine of *stare* decisis, the court ruled that *Regents* was wrongly decided and superseded the "Legislature's explicit intent" set forth in the "plain, clear, and simple language" of MCL 500.3145(1).

The *Joseph* court reinforced the legislative intent that recovery of PIP benefits be limited to losses incurred within one year before the date of which the action is filed, holding that "the minority/insanity tolling provision addresses only when an action may be brought but does not preclude the application of the one-year-back rule, which separately limits the amount of benefits that can be recovered."

30 Day Notice Provision Bars Uninsured Motorist Claim, says the Supreme Court

DeFrain v State Farm, ___ Mich ___ (2012) (issued May 30, 2012)

Differentiating between a notice of suit provision and a notice of claim provision, the Supreme Court reversed the ruling that the 30-day notice provision did not bar the claim filed by the surviving spouse of the deceased insured 86 days after the accident. The Supreme Court held that the unambiguous requirement that the notice of a hit and run accident be provided within 30 days of the accident was a condition precedent to the uninsured motorist ("UM") benefits, and that State Farm was not required to demonstrate that the late notice prejudiced State Farm in any way.

Noting that the Court of Appeals improperly disregarded the order issued in *Jackson v State Farm*, 472 Mich 942 (2005), the Supreme Court reinforced the parties' rights to contract freely. The court distinguished the contract provision at issue in *Koski v Allstate*, 456 Mich 439 (1997), which addressed the question of denial of statutorily required indemnification and defense of a suit against the insured based on the insured's failure to timely notify the carrier of the suit. Uninsured motorist coverage is optional, unlike residual liability coverage and, therefore, no prejudice need be shown in order to enforce a contractual notice provision contained in the UM section of the policy.

Insurers of Each Divorced Parent Equally Liable for PIP Benefits to Minor Child

Grange Insurance Company of Michigan v Lawrence and Farm Bureau, ___ Mich App ___ (2012) (issued April 24, 2012)

Addressing the factors set forth in both *Workman v DAIIE*, 404 Mich 477 (1979), and *Dairyland v Auto Owners*, 123 Mich App 675 (1983), regarding the establishment of the "domicile" of a purported "resident relative," the Court of Appeals held that the child was a resident relative of both parents. In affirming summary disposition granted in favor of Farm Bureau, the Court of Appeals held that both Farm Bureau, the insurer of the mother of the minor, and Grange, insurer of the minor's father, occupied the same level of priority for PIP benefits to the minor who had been killed while an occupant of the mother's vehicle.

In so ruling, the court observed that although the mother had primary physical custody, the parents had joint legal custody. The child had belongings and a bedroom at the father's home where she stayed every other weekend, although her pets were with her mother and her stated address was her mother's address. The parents testified that the father saw his daughter almost every day and that they had no intention of altering the parenting arrangement. The Court of Appeals agreed that there was no genuine issue of material fact and that Grange was properly ordered to reimburse Farm Bureau for 50% of the benefits Farm Bureau had paid.

Differentiating between a notice of suit provision and a notice of claim provision, the Supreme Court reversed the ruling that the 30-day notice provision did not bar the claim filed by the surviving spouse of the deceased insured 86 days after the accident.

Pedestrian Accident Victim May be a Ward of the Group Home in which He Lived and Receive PIP Benefits from Insurer of the Corporate Entity.

Michigan Ins Co v Nat'l Liab & Fire Ins, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2012 (Docket No. 301980)

In an unusual case, the Court of Appeals reversed an order granting partial summary disposition to the insurer of a group home at which the injured pedestrian lived at the time of the accident. Noting that in the home's policy, an "insured" refers to "[y]ou or any family member," "you" refers to [the home] as the "Named Insured," and the term "family member" is defined as "a person related to you by blood, marriage, or adoption who is a resident of your household, including a *ward* or foster child," the court reiterated that a corporate entity is capable of having a "ward." The matter was remanded to the trial court for a determination of the factual issue with focus on the type and extent of control that is exercised by the foster care home over an individual resident.

Court of Appeals Continues to Provide Guidance on Permissible Considerations to Determine Reasonableness of Provider Charges

Bronson Methodist Hosp v Auto-Owners Ins Co, 295 Mich App 431 (2012)

With the continually rising tide of provider suits, the Court of Appeals, following the logic recently expressed in *Hardrick v ACIA*, 294 Mich App 651 (2011) (reported in the last No Fault column), further defined the parameters of reasonableness of provider charges in reversing summary disposition entered in favor of the plaintiff hospital. Continuing the trend of holding providers responsible for justifying the amounts charged to no fault carriers, the court held that a material factual dispute as to reasonableness of the charges the hospital billed to Auto Owners for surgical implants precluded summary disposition.

The court reiterated that no fault carriers are *required* to investigate the reasonableness of charges and rejected the provider's argument (which the trial court had accepted) that insurers are not entitled to know the actual cost of items charged to them by providers. The court noted that the question of reasonableness is not limited to the customary charge for items by providers because providers may unreasonably mark up the costs. Citing *Advocacy Organization for Patients & Providers v ACIA*, 257 Mich App 365 (2003), the court drove home that "the plain and ordinary language of § 3107 [MCL 500.3107] requiring no-fault insurance carriers to pay no more than reasonable medical expenses, clearly evinces the Legislature's intent to 'place a check on health care providers who have "no incentive to keep the doctor bill at a minimum."'"

The Court of Appeals found that the trial court erred in refusing to require Bronson to answer Auto Owners' discovery requests seeking to learn the actual cost of the implants to Bronson. However, the ruling was limited. Recognizing that "permitting insurers access to a provider's cost information could open the door to nearly unlimited inquiry into the business operations of a provider, including into such concerns as employee wages and benefits," the court explicitly limited its ruling to "the sort of durable medical-supply products . . . which are billed separately and distinctly from other treatment services and which . . . require little or no handling or storage by a provider."

The decision is further evidence of the current trend of reducing skyrocketing provider charges in the no fault arena to the costs acceptable in other situations such as non-accident injuries paid by health insurers, workers compensation matters and Medicare/Medicaid payments.

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Medical Malpractice Report

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Affidavits of Merit

Hanna v Merlos, 491 Mich 897; 810 NW2d 382 (2012), reversing *Hanna v Merlos (On Reconsideration)*, unpublished opinion per curiam of the Court of Appeals, issued March 3, 2011 (Docket No. 289513).

The Facts: Plaintiff in this dental malpractice case filed a complaint, but the complaint the plaintiff filed did not have an affidavit of merit attached (nor was the affidavit attached to the copy defense counsel received). When defense counsel asked plaintiff to provide a time-stamped copy of the affidavit of merit, plaintiff's counsel provided a copy of the affidavit with a time-stamp showing a date nearly a month after the filing of the complaint (and within a few days of defense counsel's request for a time-stamped copy). With time left in the statute of limitations period, the defendant moved for summary disposition, arguing that under *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000), the failure to file a complaint with an affidavit of merit as required under MCL 600.2912d(1) results in a failure to commence a malpractice action.

The trial court denied the motion because plaintiff insisted that he had filed an affidavit with the complaint, and no one had checked the physical file. After the defense searched the physical file and discovered that the file contained no affidavit of merit (and the register of actions did not reflect its filing), defendant again moved for summary disposition. The trial court acknowledged that there was no affidavit in the file, and that it was "mandatory" to file a complaint with an affidavit, but characterized the requirement as a "technicality" and refused to grant summary disposition. Because there was time remaining in the statute-of-limitations period, the trial court cautioned plaintiff that he might want to dismiss and refile the case with the affidavit; plaintiff never did so.

The defendant filed an application for leave to appeal, which was denied. The Supreme Court, however, ordered the Court of Appeals to consider the appeal as on leave granted. The Court of Appeals ultimately affirmed the trial court.

In ruling, the Court of Appeals, like the trial court, acknowledged that there was no affidavit of merit in the file and indicated that it thus appeared not to have been filed with the complaint. The court rejected the plaintiff's argument that he had tried to refile it a month later but somehow the trial court again failed to file that affidavit. But the court noted that the plaintiff attached a copy of the affidavit to a response to defendant's trial court motion for reconsideration of the order denying summary disposition. Also, the defendant attached a copy of the affidavit to his motion for summary disposition (to illustrate that the affidavit had not been filed with the complaint). These two "serendipitous filings" occurred before the expiration of the statute of limitations. The Court of Appeals, citing *Wood v Bediako*, 272 Mich App 558, 561-562; 727 NW2d 654 (2006), held that these "serendipitous" filings were sufficient to remedy the failure to file the affidavit with the complaint.

The Supreme Court granted oral argument on the defendant's application for leave to appeal.

The Ruling: The Supreme Court, citing *Scarsella* and *Ligons v Crittenton Hosp*, 490 Mich 61, 84, 85; 803 NW2d 271 (2011), reversed the Court of Appeals in a peremptory order and remanded to the trial court for entry of an order granting the defendant summary disposition. The court explained that this was because "[t]he plaintiff failed to 'file with the complaint an affidavit of merit …' as required by MCL 600.2912d(1)."

Practice Tip: Rarely does a plaintiff file a medical malpractice (or dental malpractice) case without an affidavit of merit. But if you find yourself defending such a case, consider filing a motion for summary disposition. The *Hanna* ruling (particularly its reliance on *Ligons*) calls the "serendipitous filing" rule of the Court of Appeals' opinion in *Wood* into question, suggesting that a plaintiff may only be able to remedy the failure to file an affidavit of merit by dismissing the case and refiling it, and then only if the statute of limitations (which is not tolled if the complaint is filed without an affidavit of merit) has not expired.

Notice Provisions

Ramsey v Bd of Regents of the University of Michigan, unpublished opinion per curiam of the Court of Appeals, issued April 17, 2012 (Docket No. 303794).

The trial court acknowledged that there was no affidavit in the file, and that it was "mandatory" to file a complaint with an affidavit, but characterized the requirement as a "technicality" and refused to grant summary disposition.

The Facts: The plaintiff's decedent died while receiving inpatient care at the University of Michigan Hospital in October 2005. MCL 600.6431(3) provides that a person seeking damages for "personal injuries" against the state (including a state institution like the University of Michigan) must file either a notice of intent to seek a claim or the claim itself within six months of "the event giving rise to the cause of action." The plaintiff, however, waited until July 2009, nearly four years later, to serve the notice of intent required in medical malpractice cases under MCL 600.2912b, and did not file her complaint in the Court of Claims until September 2010. The Court of Claims granted the university summary disposition because the claim (or notice of it) was not filed in the Court of Claims by the statutory deadline of April 2, 2006.

The Ruling: The Court of Appeals affirmed. It held that the notice requirement of MCL 600.6431 required strict compliance. The court rejected an argument that this notice provision was invalid because it conflicted with the notice of intent provision of MCL 600.2912b. Instead, the court held that there was nothing that would prevent a plaintiff from complying with both notice provisions, and thus nothing about MCL 600.2912b excuses strict compliance with MCL 600.6431.

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Appellate Practice Report

Ability to Reach a Consent Judgment or Stipulated Order of Dismissal While Preserving the Right to Appeal

Sometimes a trial court ruling on a particular claim or issue will end the case as a practical matter, even if there are other claims or issues remaining. While an interlocutory appeal to the Michigan Court of Appeals is always available, another option is for the parties to reach a consent judgment or stipulated order of dismissal while preserving the key trial court rulings for an appeal as of right. Although consent judgments and stipulated orders of dismissal are generally not appealable, authority from both the Michigan Court of Appeals and Supreme Court provide for the ability of parties to preserve the right to appeal. It is well established that the Michigan Court of Appeals has jurisdiction "only over appeals filed by an 'aggrieved party.'" *Reddam v Consumer Mortgage Corp*, 182 Mich App 754, 757; 452 NW2d 908 (1990), citing MCR 7.203(A) ("The court has jurisdiction of an appeal of right filed by an aggrieved party . . . ."), overruled in part on other grounds by *Cam Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 557; 640 NW2d 256 (2002). Thus, a party ordinarily cannot appeal either from a consent judgment or a stipulated order of dismissal. *Cam Constr*, 465 Mich at 556 ("[O]ne may not appeal from a consent judgment, order or decree."); *Begin v Michigan Bell Telephone Co*, 284 Mich App 581, 585; 773 NW2d 271 (2009) ("A party that waives an objection to a rule of practice or to evidence, stipulates to facts, or confesses judgment, generally cannot later claim the right to appellate review of those matters."); *Schwendener v Midwest Bank & Trust Co*, unpublished opinion per curiam of the Court of Appeals, issued November 8, 2011 (Docket No. 295756); 2011 Mich App LEXIS 1950, *20 ("[N]either the family nor Michael is 'aggrieved' by the December 2009 stipulated order, so this Court [is] without jurisdiction.").

There is, however, a recognized exception for consent judgments and stipulated orders of dismissal that expressly preserve the parties' right to appeal. As the Supreme Court observed in *Travelers Ins v Nouri*, 456 Mich 937; 575 NW2d 561 (1998), "the Court of Appeals has previously recognized that an appeal of right is available from a consent judgment in which a party has reserved the right to appeal a trial court ruling." Thus, the Supreme Court in *Travelers* reversed the Court of Appeals' dismissal of the defendant's claim of appeal because, although the parties agreed to entry of a consent judgment against the defendants that accepted the plaintiffs' factual allegations as true, the judgment reserved the defendants' right to appeal the trial court's denial of their motion for summary disposition. *Travelers Ins v U-Haul of Michigan, Inc*, 235 Mich App 273, 278; 597 NW2d 235 (1999).

Also instructive is one of the cases that the Supreme Court cited in *Travelers — Smith v City of Westland*, 158 Mich App 132; 404 NW2d 214 (1986). In *Smith*, the plaintiff brought several claims against the City of Westland arising out of the plaintiff's decedent's suicide while being detained in the city's jail. The plaintiff alleged various state law claims, along with a 42 USC 1983 civil rights claim. After the civil rights claim was dismissed on summary disposition, the parties reached a consent judgment that "settled all outstanding claims against all defendants" and "specifically preserved plaintiff's right to appeal from the [order dismissing the plaintiff's civil rights claim]." *Id.* at 134.

A more recent example of preserving appellate rights in a stipulated order is *Pugh v Zefi*, 294 Mich App 393; ___ NW2d ___ (2011). There, the parties reached an agreement to arbitrate their dispute over the defendant insurer's refusal to pay underinsured motorist benefits. As a result, the trial court dismissed the case. However, the order of dismissal specifically reserved the insurer's right to appeal the trial court's prior denial of its motion for summary disposition on the coverage issue. *See also Vanderveens Importing Co v Keramische Industrie M deWit*, 199 Mich App 359,

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Although consent judgments and stipulated orders of dismissal are generally not appealable, authority from both the Michigan Court of Appeals and Supreme Court provide for the ability of parties to preserve the right to appeal.

360; 500 NW2d 779 (1993) (appeal from consent judgment that preserved the defendant's right to appeal the trial court's rulings "concerning jurisdiction and the question of whether or not the matter should have been tried in the Netherlands").

While parties should of course proceed with caution any time they consider entering into a consent judgment or stipulated order of dismissal, these authorities provide ample support for the ability of parties to save time and money litigating peripheral claims or issues when it would be more efficient to simply reach an agreement on them while preserving the most important issues for immediate appeal.

Deciding Appeals Based on Unpreserved Questions of Law

As a general matter, an issue that is not preserved in the trial court will not be considered on appeal.[1] As the Michigan Supreme Court explained in *Walters v Nadell*, 481 Mich 377; 751 NW2d 431 (2008), "[u]nder our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court," such that "a failure to raise an issue waives review of that issue on appeal." *Id*. at 386; *see also In re Forfeiture of Certain Personal Property*, 441 Mich 77, 84; 490 NW2d 322 (1992) ("Issues and arguments raised for the first time on appeal are not subject to review."); *Duray Dev, LLC v Perrin*, 288 Mich App 143, 149; 792 NW2d 749 (2010) (explaining that to preserve an issue for appeal, a party must specifically raise it before the trial court).

This includes constitutional claims. In *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234 n 23; 507 NW2d 422 (1993), the Supreme Court observed that it had "repeatedly declined to consider arguments not presented at a lower level, including those relating to constitutional claims." *Id*. at 234 n 23. Applying that general rule, the court declined to address the University of Michigan Board of Regents' argument that "application of the [Open Meetings Act] to governing boards of public universities in the manner prescribed by the Court of Appeals violates the autonomy vested in such bodies by the Michigan Constitution. Const 1963, art 8, § 5," because "the issue was neither presented to nor evaluated either by the trial court or the Court of Appeals." *Id*. at 234; *see also Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 351; 793 NW2d 246 (2010) (refusing to address various constitutional claims because they "were not raised before, addressed, or decided by the Court of Claims").

At the same time, however, the Supreme Court has said that "the preservation requirement is not an inflexible rule; it yields to the necessity of considering additional issues when necessary to a proper determination of a case." *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011) (citations and internal quotation marks omitted). A good example of this was in *Mack v City of Detroit*, 467 Mich 186; 649 NW2d 47 (2002). One of the issues in *Mack* was whether the governmental tort liability act, MCL 691.1407, preempted the Detroit City Charter, which purported to recognize a private cause of action for sexual orientation discrimination. *Id*. at 206. Although neither party had raised the preemption issue, the Supreme Court decided the case on that basis, holding that "[i]f the charter creates a cause of action for sexual orientation discrimination, then it conflicts with the state law of governmental immunity." *Id*.

In response to the dissent's assertion that the court should not have decided the case on an issue that was never raised, the *Mack* majority said that it "absolutely oppose[d]" the notion that "although a controlling legal issue is squarely before this Court, in this case preemption by state law, the parties' failure or refusal to offer correct solutions to the issue limits this Court's ability to probe for and provide the correct solution." *Id*. at 207. "Such an approach," the majority reasoned, "would seriously curtail the ability of this Court to function effectively." *Id*.

So when is the Court of Appeals or the Supreme Court likely to consider an issue for the first time on appeal? The most common formulation of the test appears to be (1) whether consideration of the issue is "necessary to a proper determination of a case," and (2) whether the question is one of law, as to which the necessary facts have been developed. *See Castillo v Exclusive Builders, Inc*, 273 Mich App 489, 494 and n 3; 733 NW2d 62 (2007) (addressing unpreserved issue concerning application of MCR 2.405 because it was "necessary to a proper determination of the case" and because the question was "one of law, concerning which the necessary facts have been presented"). Thus, in *Toll Northville, Ltd v Northville Twp*, 272 Mich App 352; 726 NW2d 57 (2006), vacated in part on other grounds 480 Mich 6; 743 NW2d 902 (2008), the Court of Appeals

The Supreme Court has said that "the preservation requirement is not an inflexible rule; it yields to the necessity of considering additional issues when necessary to a proper determination of a case."

addressed whether the Tax Tribunal had jurisdiction or authority to grant the relief requested by the plaintiff. In *Fisher v WA Foote Mem'l Hosp*, 261 Mich 727; 683 NW2d 248 (2004), the Court of Appeals reached the unpreserved issue of whether MCL 333.21513(e) creates a private cause of action.

On the other hand, the Court of Appeals has declined to address issues that, although they involved questions of law, required further factual development. For example, in *Royce v Chatwell Club Apartments*, 276 Mich 389; 740 NW2d 547 (2007), the defendant argued that it could not be held liable for a statutory violation relating to its alleged failure to keep its premises in reasonable repair because it had no actual or constructive notice of the black ice that caused the plaintiff's fall. *Id.* at 398. The Court of Appeals declined to address the issue because it was not raised in the trial court and because the necessary facts had not been presented:

Although this Court may address an unpreserved issue if it involves a question of law and the facts necessary for its resolution have been presented, *Sutton v City of Oak Park*, 251 Mich App 345, 349; 650 NW2d 404 (2002), we decline to address this issue because the necessary facts have not been presented. In particular, the record fails to disclose whether defendant had notice of the condition of the parking lot. . . . [*Id*. at 399.]

Seeking to raise an issue for the first time on appeal is always an uphill battle, but there is authority from both the Michigan Supreme Court and the Court of Appeals for considering unpreserved legal issues that go to the heart of the case and that do not require factual development.

Avoiding Waiver in the Questions Presented

It is no secret that the Michigan Supreme Court and Court of Appeals may decline to consider an issue that is not raised in the Questions Presented section of an appellant's brief. But given the frequency of opinions holding that issues have been waived, it appears that this rule continues to be a trap for the unwary.

The rule has its genesis in Michigan Court Rule 7.212(C)(5), which provides that an appellant's brief must contain, among other things, "A statement of questions involved, stating concisely and without repetition the questions involved in the appeal. Each question must be expressed and numbered separately and be followed by the trial court's answer to it or the statement that the trial court failed to answer it and the appellant's answer to it." MCR 7.212(C)(5). Michigan's appellate courts have concluded that the mandatory phrasing of this rule means that failure to raise an issue in the Questions Presented section results in waiver. *English v Blue Cross Blue Shield of Mich,* 263 Mich App 449, 459; 688 NW2d 523 (2004); *Grand Rapids Employees Independent Union v Grand Rapids,* 235 Mich App 398, 409-410; 597 NW2d 284 (1999).

Although this rule is firmly established, courts may overlook deficiencies in an appellant's Questions Presented in a few scenarios. It is not uncommon for an appellate panel to conclude that it *could* simply skip an argument because it was not raised in the Questions Presented, but to consider the argument anyway. This practice rarely offers appellants much comfort; most opinions considering waived issues conclude that the waived arguments lack merit in any event. *See, e.g., Copeland v Genoa Twp,* unpublished opinion per curiam of the Court of Appeals, issued June 30, 2011 (Docket No. 301442); *In re Hawkins,* unpublished opinion per curiam of the Court of Appeals, issued January 25, 2005 (Docket No. 255172); *People v Scott*, unpublished opinion per curiam, issued April 19, 2002 (Docket No. 225944).

A panel may also look past an appellant's failure to raise an issue in its Questions Presented if the proper resolution of the case hinges upon a question of law that the appellant failed to raise. *See, e.g., Tolbert v Isham,* unpublished opinion per curiam of the Court of Appeals, issued May 29, 2003 (Docket No. 231424); *Feyen v Grede II, LLC,* unpublished opinion per curiam of the Court of Appeals, issued April 19, 2012 (Docket No. 304137) ("Nevertheless, we overlook the presentation deficiency in the case at bar because a resolution of the issue is necessary for a proper determination of the outcome of the case.").

For example, in *Tolbert, supra,* the trial court entered a default judgment against the defendant in an auto negligence case. The defendant's attorney was unable to appear for trial because he had another trial scheduled that day and was unable to adjourn either proceeding. The primary issue on appeal was whether the trial court had abused its discretion in entering a default judgment when the defense attorney was not at fault for his inability to appear at trial. In their briefs and at oral argument, the parties also disputed whether the plaintiff had a "serious

So when is the Court of Appeals or the Supreme Court likely to consider an issue for the first time on appeal? The most common formulation of the test appears to be (1) whether consideration of the issue is "necessary to a proper determination of a case," and (2) whether the question is one of law, as to which the necessary facts have been developed.

impairment of bodily function" sufficient to maintain an action for non-economic loss under Michigan's no-fault law. *Id.*, 4. This issue was not raised in the appellant's Questions Presented. Nevertheless, after holding that the trial court abused its discretion in entering a default judgment, the Court of Appeals considered whether the plaintiff had a cause of action in the first place. The panel explained that consideration of this issue was appropriate, despite its absence from the appellant's Questions Presented, because it was a question of law and it had been fully briefed and argued. *Id.* (Presiding Judge Cooper, however, dissented in part because she saw no need to consider an issue that was not raised in the Questions Presented).

The possibility of waiving issues by not raising them in the Questions Presented leads to an advocacy question—whether it is advisable to argue that an opposing party has raised an issue that was not properly framed in its Questions Presented. The Court of Appeals has noted and agreed with parties' criticisms of opposing parties' Questions Presented. *Russo v Shurbet Partners, Inc*, unpublished opinion per curiam of the Court of Appeals, issued October 6, 2011 (Docket No. 298090) ("We agree with defendant that plaintiffs have not raised any appealable issue in their brief. An issue not raised in an appellant's questions-presented section is considered waived on appeal."). It appears, therefore, that there is no rule against raising questions about an opposing party's Questions Presented, even if this issue is typically one that the court itself raises.

The more difficult advocacy question is how to avoid waiving issues by omitting them from the Questions Presented. Although there are no hard and fast rules, a review of the relevant case law suggests three key practices.

First, address every order from which your client is seeking relief in your Questions Presented section. *See United Elec Supply Co, Inc v Terhorst & Rinzema Const Co,* unpublished opinion per curiam of the Court of Appeals, issued March 13, 2008 (Docket No. 276290) (declining to consider order granting a motion for summary disposition where the Questions Presented focused only on a motion to reconsider). In other words, consider not just the legal issues on appeal but also the context in which they arise.

Second, consider including a separate "question presented" for each discrete legal error or basis for reversal. It may be tempting to combine related issues into a single question—for example: "Should this Court reverse the $2 million verdict and remand for further proceedings where the trial court admitted numerous statements in violation of the Michigan Rules of Evidence?" This kind of statement may have the virtue of efficiency but it has little else to offer. It does not identify any specific errors by the trial court and therefore creates a risk that a panel will conclude that certain claims of evidentiary error have been waived.

Third, do not miss an opportunity to address the underlying merits when an appeal focuses—at least at first blush—on a procedural issue. *Tolbert* highlights the importance of addressing both threshold legal issues (in *Tolbert,* whether the trial court abused its discretion in entering a default judgment) *and* dispositive legal issues (in *Tolbert,* whether the plaintiff stated a tenable no fault claim at all).

Although there is no magic formula, these steps may minimize the chance of inadvertently waiving an issue by failing to raise it in the Questions Presented.

Essential Online Resources for Handling Appeals in Michigan

Handling an appeal obviously requires access to a solid online research service like Lexis or Westlaw. But there are a number of free resources on the web that can make research more efficient and cost-effective when used together with Westlaw or Lexis. Beyond legal research, plugging in to some of the leading appellate blogs, LinkedIn groups, and Twitter feeds can keep you better informed of new decisions and their potential impact on your practice. The following is a brief summary of some essential online resources for lawyers handling an appeal in Michigan, along with some suggestions for expanding your online toolbox.

Websites

Michigan's **One Court of Justice site** (www.courts.michigan.gov) provides an online hub to all of Michigan's courts, along with many essential resources for appellate practice. These include the Michigan Court Rules (coa.courts.mi.gov/rules), the Michigan Rules of Evidence (coa.courts.mi.gov/rules/documents/2MichiganRulesOfEvidence.pdf), and the Michigan Rules of Professional Conduct (coa.courts.mi.gov/rules/documents/5MichiganRulesOfProfessionalConduct.pdf).

The **Michigan Supreme Court's website** offers resources including recent administrative orders (courts.michigan.

It is no secret that the Michigan Supreme Court and Court of Appeals may decline to consider an issue that is not raised in the Questions Presented section of an appellant's brief. But given the frequency of opinions holding that issues have been waived, it appears that this rule continues to be a trap for the unwary.

gov/supremecourt/Resources/Administrative/index.htm#administrative) and Michigan's Model Civil Jury Instructions (www.courts.michigan.gov/mcji-index.htm). The court also provides invaluable assistance to the appellate bar by making briefs from recently argued cases available for download (courts.michigan.gov/supremecourt/Clerk/MSC-orals-PriorSessions.htm).

The **Court of Appeals' website** (coa.courts.mi.gov/resources/public.htm) allows users to search current and closed cases by party name, attorney, or docket number. Users can also search opinions (coa.courts.mi.gov/resources/opinions.htm) by keyword and access the Court of Appeals' Internal Operating Procedures (coa.courts.mi.gov/pdf/clerkiops.pdf).

The **Michigan Legislature** (www.legislature.mi.gov) offers easy access to Michigan's Compiled Laws. Users can search Michigan's statutes by keyword or citation, and can browse by chapter or section. The Legislature also allows users to retrieve pending legislation and a wealth of material on the legislative history of current and pending laws.

Google Scholar now provides easy—and free—access to appellate opinions from across the country. Visit Google Scholar (scholar.google.com/) and select "legal documents" to search court opinions. Users can also simply type a citation to a reporter in the dialog box to retrieve an opinion. For example, to retrieve the Michigan Supreme Court's 2004 opinion in *Wayne County v Hathcock,* visit Google Scholar, select "legal documents," type "471 Mich. 445" and run a search. (Typing "Wayne County v Hathcock" will also retrieve the opinion.)

Listservs

Opinions: Anyone can sign up to receive regular emails with links to new opinions and orders from the Michigan Supreme Court and Michigan Court of Appeals. Instructions are found at the Court of Appeals' website. (coa.courts.mi.gov/resources/subscribe.htm). Subscribe by sending an email with "Subscribe AppellateOpinions" as both the subject line and message body to listserv@listserv.michigan.gov.

Orders: To receive new orders from the Michigan Supreme Court, send a message with "Subscribe AppellateOrders" as the subject and body to listserv@listserv.michigan.gov.

Administrative orders: To receive e-mail notifications from the Michigan Supreme Court on administrative matters such as proposed amendments to court rules, email listserv@listserv.michigan.gov with "Subscribe ADMMATTERS" as the message.

Appellate Practice Listserv: Members of the Appellate Practice Section of Michigan's bar can join the section's listserv by visiting groups.michbar.org/wws/subscribe/appellate. Enter your email address and, once your membership has been verified, you will receive emails that other members of the Appellate Practice Section address to the section as a whole. Most of these emails are questions about procedural matters, and the ensuing discussions are often lively and informative.

Blogs

Howard Bashman's blog, **How Appealing** (howappealing.law.com/), is one of the best resources on the internet for staying on top of new appellate decisions and developments from across the country. It is updated almost constantly and eschews punditry in favor of short, factual descriptions of new legal developments.

Cleveland-based firm Squire Sanders maintains the **Sixth Circuit Appellate Blog** (www.sixthcircuitappellateblog.com), an excellent and regularly-updated blog on new decisions from the Sixth Circuit Court of Appeals.

SCOTUSblog (www.scotusblog.com) provides up-to-date coverage of the United States Supreme Court from leading Supreme Court advocates and scholars.

Warner Norcross & Judd maintains the **One Court of Justice blog** (www.ocjblog.com), which offers regular posts on new decisions from the Michigan Supreme Court and Michigan Court of Appeals.

LinkedIn

LinkedIn (www.linkedin.com) is more than a networking site. It offers group discussion forums that allow practitioners to stay tapped into subjects of interest to the appellate bar. These groups include:

ABA Section of Litigation: Appellate Practice Committee

Appellate Advocacy Committee (subgroup of the ABA Tort Trial & Insurance Practice Section)

Appellate Lawyer Network

Appellate Lawyer Networking Group

Council of Appellate Lawyers

Michigan Online Attorney Network

State Bar of Michigan

Beyond legal research, plugging in to some of the leading appellate blogs, LinkedIn groups, and Twitter feeds can keep you better informed of new decisions and their potential impact on your practice

Twitter

There are an increasing number of credible legal commentators who use Twitter to inform followers about new decisions and legal subjects of interest. Some suggestions:

@ABAJournal (legal news)

@howappealing (a Twitter feed accompanying Howard Bashman's How Appealing blog)

@natlawreview (legal news)

@WSJLaw (legal news from the Wall Street Journal)

@BryanAGarner (commentary from legal writing expert Bryan Garner)

@JURISTnews (global legal news)

There is an almost unlimited supply of websites, Twitter feeds, and blogs clamoring for attention. These suggestions may lead you to new corners of the internet and to resources that help you stay informed and efficient.

Endnotes

1. This article is limited to issue preservation in civil cases, as the rules differ somewhat with respect to criminal cases, particularly when a claimed constitutional violation is at issue.

By: Michael J. Sullivan and David C. Anderson, *Collins Einhorn Farrell & Ulanoff P.C.*,
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Legal Malpractice Update

Litigation Funding Contracts: Advise with Care

Shanks v Lawyer Defendants, unpublished opinion per curiam of the Court of Appeals, issued April 17, 2012 (Docket No. 302726)

The Facts: After sustaining a closed head injury in an automobile accident, plaintiff retained the defendant attorneys to file an automobile negligence lawsuit. While her accident case remained pending, plaintiff entered into three litigation funding contracts and received cash advances totaling $150,000. After the accident case was resolved, the funding companies demanded repayment of more than double that amount. Plaintiff sued her attorneys, asserting claims for legal malpractice and breach of fiduciary duties. Plaintiff contended that her attorneys had encouraged her to enter into illegal and usurious litigation funding contracts and negligently failed to pursue appointment of a conservator due to her closed head injury.

The circuit court granted summary disposition in defendants' favor, finding that plaintiff possessed sufficient mental capacity to enter into the litigation funding contracts and that defendants had not breached any fiduciary duties. The Court of Appeals affirmed for somewhat different reasons.

The Ruling: The Court of Appeals affirmed summary disposition in favor of the defendants. The court first addressed plaintiff's competency to enter into the litigation funding contracts. After citing the test for determining mental capacity to contract, the court found that defendants produced sufficient evidence of plaintiff's mental capacity. Upon submission of this evidence, the burden shifted to plaintiff to show a genuine issue of disputed fact regarding her competence. Plaintiff failed to do so given that she testified at her deposition that although she was a "vulnerable adult" she adamantly rebuffed the notion that she needed a guardian other than her son, asserting, "I'm afraid of being assigned a guardian where they would be controlling me for the rest of my life and then there will be fist fighting out on the front lawn, literally." Plaintiff further admitted that her neuropsychiatrist never told her she needed a guardian.

Further, while plaintiff's attorney submitted an unsigned affidavit from plaintiff's neuropsychiatrist that plaintiff "was not competent to make or understand major financial decisions and not competent to enter into legally binding contracts since the date of her accident and beyond," the court held that an unsigned affidavit cannot create a material issue of fact and thereby defeat summary disposition. (citing *Prussing v General Motors Corp*, 403 Mich 366, 369-370 (1978)).

With regard to plaintiff's remaining legal malpractice claims that the defendant attorneys breached their alleged duty to refrain from encouraging plaintiff to enter into the litigation funding contracts, or to actively dissuade her from doing so, plaintiff failed to present expert testimony on those issues. The court held that the complex "legal and ethical challenges associated with litigation loan agreements . . . fall well outside the realm of a lay persons ordinary experience."

The court also held that plaintiff's breach of fiduciary duty claims arose from precisely the same conduct identified as giving rise to the legal malpractice claims.

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When it comes to litigation funding contracts, proceed cautiously. Many legal malpractice claims arise out of them. The borrowers rarely understand the implications of the contracts and later try to blame their lack of understanding on the attorneys.

Therefore, plaintiff's claims were "for malpractice and malpractice only." Plaintiff could not avoid the expert testimony requirement by labeling her claim as a breach of fiduciary duty rather than legal malpractice.

Practice Tip: When it comes to litigation funding contracts, proceed cautiously. Many legal malpractice claims arise out of them. The borrowers rarely understand the implications of the contracts and later try to blame their lack of understanding on the attorneys.

Communications Regarding New Legal Services do not Extend the Time within which a Party Can Bring an Action Based on Prior Services Rendered

Anderson v Lawyer Defendants, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2012 (Docket No. 301946)

The Facts: The lawyer defendants represented the plaintiffs in connection with plaintiffs' purchase of an automobile dealership. The purchase of the dealership closed in February and March of 2007. In December of 2009, plaintiffs filed a legal malpractice claim against the defendants, which included allegations that the defendants failed to adequately perform due diligence in conjunction with the purchase, structured the purchase of the stock sale, and failed to protect plaintiffs' interests. Plaintiffs also asserted a quantum meruit claim.

Defendants moved for summary disposition based on the expiration of the two-year statute of limitations and on the basis that plaintiffs failed to establish genuine issues of fact as to the proximate cause and duty elements of their claims. The trial court granted the motion.

The Ruling: The Court of Appeals affirmed summary disposition in favor of the lawyer defendants. The court held that the lawyer defendants discontinued serving the plaintiffs with respect to the purchase of the automobile dealership in February and March of 2007, which was more than two years before the filing of the complaint in December 2009. The court also held that plaintiffs' quantum meruit claim was barred by the two-year statute of limitations because it was based on plaintiffs' claims of inadequate representation.

Plaintiffs contended that emails submitted to the trial court established an ongoing attorney-client relationship continuing into February 2008. In these emails, plaintiffs informed the lawyer defendants that the dealership had been sold, that the plaintiffs were considering legal action against other parties, and asked the lawyer defendants for advice in rescinding the stock purchase and returning the stock to the original seller. The lawyer defendants responded by indicating that plaintiffs could not force the original seller to take the stock back and by asking whether a different attorney was working on the issues. The court noted that to determine whether such activities extend the legal representation, the proper inquiry is whether the new activity occurs pursuant to a current, as opposed to a former attorney-client relationship. The court found that the emails did not suggest an ongoing representation surrounding the purchase of the dealership, but rather indicated that plaintiffs were seeking *new* legal services in dealing with the problems encountered in the acquired dealership. In other words, the emails were unrelated to the "matters out of which the claim for malpractice arose."

Practice Tip: Generally, follow up activities such as advising a former client of a change in law or investigating and attempting to remedy a mistake in an earlier representation are insufficient to extend the period of service for statute of limitations purposes.

The Attorney Judgment Rule Protects Strategic Decisions when Made in Good Faith in the Exercise of Reasonable Care

Ponte v Lawyer Defendants, unpublished opinion per curiam of the Court of Appeals, issued April 24, 2012 (Docket No. 300789)

The Facts: The lawyer defendant represented the plaintiff in his divorce action. Plaintiff alleged three instances of legal malpractice: (1) defendant's failure to move for reconsideration of the trial court's September 5, 2006 order; (2) defendant's failure to establish the ex-wife's refusal to qualify for SSD benefits; and (3) defendant's failure to directly convey plaintiff's settlement offer to the ex-wife. The lawyer defendants moved for summary disposition based on the attorney judgment rule. That rule recognizes that "mere errors in judgment by a lawyer are generally not grounds for a malpractice action where the attorney acts in good faith and exercises reasonable care, skill and diligence." *Simko v Blake,* 448 Mich, 648, 658 (1995). The trial court granted summary disposition in favor of the lawyer defendants, and plaintiff appealed.

The court found that the emails did not suggest an ongoing representation surrounding the purchase of the dealership, but rather indicated that plaintiffs were seeking new legal services in dealing with the problems encountered in the acquired dealership. In other words, the emails were unrelated to the "matters out of which the claim for malpractice arose."

The Ruling: The appellate court affirmed summary disposition in favor of the lawyer defendants. First, the court found that the submitted evidence revealed that defendant's decision not to seek reconsideration of the trial court's September 5, 2006 order in the divorce case is protected by the attorney judgment rule.

Second, the court held that the record also revealed that the defendant acted in good faith and exercised reasonable care, skill and diligence on behalf of the plaintiff in pursuing the SSD issue. During the underlying divorce trial, the lawyer defendant specifically pressed the ex-wife concerning how many applications for SSD she had filed, the requirements that precluded her from qualifying, and measures she could take to qualify.

Finally, the court concluded that the plaintiff failed to establish factual support for his claim that the lawyer defendant committed legal malpractice by failing to communicate his proposed settlement offer directly to the ex-wife. The court noted that a lawyer is prohibited from communicating with a party represented by another attorney about the subject of the representation. MRPC 4.2. However, the evidence demonstrated that defendant exercised reasonable care to make sure plaintiff's offer was communicated to the ex-wife indirectly.

Practice Tip: Matters of strategy are generally protected by the attorney judgment rule. This can extend to decisions on what motions to file, what witnesses to call, and what avenues to pursue. *Simko*, *supra* at 658.

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Supreme Court

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Supreme Court Update

One-Year Back Rule Trumps Minority/Insanity Tolling Provision

On May 15, 2012, in a 4-3 decision, the Michigan Supreme Court overruled *Univ of Michigan Regents v Titan Ins Co*, 487 Mich 289 (2010) and held that the one-year-back rule is unaffected by the minority/insanity tolling provision, which otherwise tolls the period in which a plaintiff must commence an action. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200; __ NW2d __ (2012).

Facts: In 1977, when she was 17 years old, the plaintiff suffered traumatic brain injuries and paralysis as a result of an automobile accident. Since that time, she received over $4 million in personal protection insurance ("PIP") benefits from the defendant insurer. In 2009, 32 years after the accident, the plaintiff filed suit against the defendant, seeking benefits for case-management services provided by her family members since the 1977 accident. The defendant moved for summary disposition and argued that the one-year-back rule under MCL 500.3145(1) barred the plaintiff from recovering benefits for services rendered more than one year before the date on which she filed the complaint. In response, the plaintiff argued that, given her condition, the minority/insanity tolling provision of MCL 600.5851(1) tolled the one-year-back rule.

Relying on *Univ of Michigan Regents*, a 2010 decision of the Michigan Supreme Court, the trial court denied the defendant's motion for summary disposition and held that, should the plaintiff be deemed "insane," the minority/insanity tolling provision tolls the one-year-back rule and allows her to recover benefits for the entire 32-year period. In *Univ of Michigan Regents*, the Supreme Court held that the minority/insanity tolling provision of MCL 600.5851(1), which tolls applicable statutes of limitations for minors and insane persons, tolls not only the time in which a plaintiff could institute an action for benefits, but also the one-year-back rule's limitation on the benefits a plaintiff is entitled to recover'.

After the trial court denied its motion, the defendant filed an interlocutory appeal to the Court of Appeals and a bypass application for leave to appeal to the Michigan Supreme Court challenging the trial court's decision.

Holding: The Supreme Court granted the defendant's bypass application for leave to appeal, overruled *Univ of Mich Regents*, and reinstated *Cameron v Auto Club Ins Ass'n*, a 2006 opinion of the Supreme Court holding that the minority/insanity tolling provision tolls only statutes of limitations, not statutes designed to limit the recovery of damages. Under the clear language of MCL 500.3145(1) and 600.5851(1), "the minority/insanity tolling provision, which addresses only when an action may be *brought*, does not preclude the application of the one-year-back rule, which separately limits the *amount* of benefits that can be recovered." Because *Univ of Mich Regents* "patently failed to enforce the requirements of the statutes that it interpreted," the court determined that it had a duty to overrule the *Regents* decision and "restor[e] the law to mean what its language plainly states – a no-fault 'claimant may not recover benefits for any portion of the loss incurred more than 1

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Under the clear language of MCL 500.3145(1) and 600.5851(1), "the minority/insanity tolling provision, which addresses only when an action may be brought, does not preclude the application of the one-year-back rule, which separately limits the amount of benefits that can be recovered."

year before the date on which the action was commenced.'"

The dissent, authored by Justice Marilyn Kelly and joined by Justices Cavanagh and Hathaway, argued that there was no change in legislation or policy to support the majority's decision to overrule the recent and established precedent of *Univ of Mich Regents*. The dissent also argued that the majority's conclusion leads to an "absurd" result that "defies common sense" because it effectively concludes that the legislature intended to provide minors and insane persons an opportunity to commence a cause of action seeking PIP benefits but no opportunity to actually recover them.

Significance: The decision reinstates and reaffirms prior precedent detailing the interplay between the minority/insanity tolling provision of MCL 600.5851(1) and the one-year-back rule under MCL 500.3145(1), and provides guidance to no fault insurers and litigants that the minority/insanity tolling provision tolls statutes limiting the time in which a plaintiff may file suit but not statutes limiting the amount of damages a plaintiff may ultimately recover. The end result, as highlighted by the dissent, is that individuals who may otherwise be protected by the minority/insanity tolling provision under MCL 600.5851(1) may be afforded the right to seek PIP benefits but not necessarily the right to recover those benefits.

Actual Prejudice is not Needed to Enforce Unambiguous and Time-Specific Notice Provisions

In a 4-3 decision dated May 30, 2012, the Michigan Supreme Court held that an insurer need not show actual prejudice to enforce the clear and unambiguous language of an insurance policy requiring an insured to provide notice of an accident within a specified period of time. *DeFrain v State Farm Mut Automobile Ins Co*, __ Mich __; __ NW2d __ (2012).

Facts: In May 2008, the plaintiff pedestrian was struck and severely injured by a hit-and-run driver. The plaintiff maintained an uninsured motorist insurance policy with the defendant, State Farm, which required him to provide notice of the hit-and-run accident within 30 days after it occurred. The defendant did not receive notice of the accident until August 2008, months beyond the 30 day notice period. The plaintiff filed an action to recover uninsured motorist benefits on October 8, 2008.

The defendant moved for summary disposition, arguing that the plaintiff's failure to comply with the 30-day notice requirement of the policy relieved the defendant of its obligation to provide benefits under the policy. The plaintiff argued, on the other hand, that the notice provision was ambiguous and was enforceable only upon a showing that the plaintiff's failure to timely provide notice of the accident caused the defendant to suffer actual prejudice. The trial court agreed with the plaintiff and denied the defendant's motion for summary disposition because there was no evidence that the plaintiff's late notice prejudiced the defendant.

The Court of Appeals granted the defendant's interlocutory application for leave to appeal and affirmed the trial court's decision, concluding that the 30-day notice provision did not preclude the plaintiff's claim because the defendant suffered no actual prejudice as a result of the plaintiff's untimely notice. In reaching this conclusion, the Court of Appeals relied on *Koski v Allstate Ins Co*, 456 Mich 439; 572 NW2d 636 (1998), which held that an insurer who seeks to cut off responsibility based on its insured's failure to comply with a notice requirement bears the burden of establishing actual prejudice.

Holding: The Michigan Supreme Court reversed and held that the Court of Appeals erred by "reading a prejudice requirement into the notice provision where none existed … [and by] disregarding controlling authority laid down by this Court." Specifically, the Court of Appeals disregarded two prior decisions of the Supreme Court, *Jackson v State Farm Mut Automobile Ins Co*, 472 Mich 942 (2005), and *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), that stood in direct conflict with the Court of Appeals' conclusion.

Jackson involved a policy for uninsured motorist coverage that, like the present case, required a claimant to report a hit-and-run accident to the insurer within 30 days as a condition precedent to receiving benefits. In *Jackson*, the Supreme Court issued an order reversing the Court of Appeals and holding that an insurer need not show actual prejudice before it can avoid responsibility under an uninsured motorist policy where the insured fails to provide timely notice of the accident. Although an order and not an opinion of the court, *Jackson* remained binding on the Court of Appeals.

The end result, as highlighted by the dissent, is that individuals who may otherwise be protected by the minority/insanity tolling provision under MCL 600.5851(1) may be afforded the right to seek PIP benefits but not necessarily the right to recover those benefits.

Similarly, *Rory* held that unambiguous contract provisions that shorten the period of limitations are to be enforced as written unless the provision would violate law or public policy. "As with the *Jackson* order, the Court of Appeals was bound by *Rory*, which required it to enforce the 30-day notice provision as written . . . ."

Distinguishing its prior decision in *Koski*, the Supreme Court noted that the *Koski* policy required the insured to provide notice of suit immediately or within a reasonable time, "whereas the instant case involves a contractual provision requiring the insured to notify State Farm within 30 days of the accident." According to the court, "[t]here is an obvious distinction between a contract provision requiring notice 'immediately' or 'within a reasonable time,' which are temporally imprecise terms, and one that requires notice 'within 30 days,' which could not be clearer." Thus, although actual prejudice may be required with respect to imprecise terms, no showing of prejudice is required where the notice requirement contains a specific duration.

Because the policy at issue expressly required the insured to provide notice of the hit-and-run accident within 30 days, the insured's failure to do so barred his claim for benefits.

Significance: This decision again highlights the distinction between notice provisions that contain "reasonable" durations, which require a showing of actual prejudice, and those containing specific time requirements, which do not.

Municipalities may be Held Responsible for the Discharge of Raw Sewage into State Waters by Private Individuals

On May 17, 2012, in a nearly unanimous decision, the Michigan Supreme Court held that a municipality may be held liable under MCL 324.3109(2) of the Natural Resources and Environmental Protection Act for the discharge of raw sewage into state waters by private individuals within the municipality's borders. *Dep't of Environmental Quality v Worth Twp*, 491 Mich 227; __ NW2d __ (2012).

Facts: In 2003, 2006, and 2008 the Department of Environmental Quality (DEQ) conducted water quality surveys of surface waters within and around the defendant, Worth Township's borders. The surveys established that the surface waters were contaminated with raw human sewage from septic systems on privately owned properties located in the township. As a result of the contamination, the surface waters at issue were included on Michigan's list of "impaired waters."

The DEQ and the township entered into a compliance agreement, through which the township agreed to construct a municipal sewage system. The township did not construct the sewage system by the agreed upon date, causing the DEQ to file an action under the Natural Resources and Environmental Protection Act ("NREPA") seeking to compel the township to prevent the discharge of raw sewage into state waters. The township moved for summary disposition and argued that it could not be held responsible for the discharge of raw sewage by private individuals.

The trial court denied the township's motion and, instead, granted summary disposition in favor of the DEQ and directed the township to take necessary corrective measures to prevent any further discharge of the raw sewage. On appeal, the Court of Appeals reversed and remanded for entry of summary disposition in the township's favor. The Court of Appeals held that a municipality cannot be required to prevent the discharge of raw sewage into state waters when the municipality was not, itself, involved in the discharge and had not otherwise accepted responsibility for the discharge. The Court of Appeals further concluded that MCL 324.3109(2) of NREPA creates a rebuttable presumption that a municipality itself discharged the raw sewage and, accordingly, if the municipality can show that it did not cause the discharge, it may avoid liability.

Holding: In a 6-1 decision, the Michigan Supreme Court reversed and held that the Court of Appeals erred by interpreting MCL 324.3109(2) in a manner that improperly precludes a municipality from being held responsible for the discharge of raw sewage into state waters by private individuals within its borders. Under NREPA, a municipality may be held liable if it "directly or indirectly discharges into state waters a substance that is or may become injurious to public safety." MCL 324.3109(2) creates "a presumption that the municipality is in violation of NREPA when a discharge originates within its boundaries, irrespective of who actually caused the discharge."

Looking to the historical context of raw sewage disposal laws, the court concluded that it was clear that MCL 324.3109(2) places "responsibility for a

This decision again highlights the distinction between notice provisions that contain "reasonable" durations, which require a showing of actual prejudice, and those containing specific time requirements, which do not.

discharge of raw sewage on the municipality in which the discharge originated and as giving that municipality the burden of showing that the discharged raw sewage does not rise to the 'is or may become injurious' standard in order to avoid" responsibility under NREPA. The Court of Appeals erred by interpreting the provision as creating a presumption that the municipality directed the discharge, rather than a presumption that the discharge — regardless of who directed it — was or may become injurious.

The Court of Appeals further erred by determining that the township could not be held liable as a "municipality" because the term municipality also includes the state and the state should not be allowed to shift its own responsibility to a municipality. The Supreme Court rejected this reasoning and explained that the most localized form of government involved, in this case the township, has the authority and responsibility to prevent the discharge of raw sewage.

In his dissenting opinion, Chief Justice Young noted that the majority's holding imposes strict liability on a municipality for every injurious or potentially injurious discharge of raw sewage that originates within its borders. Specifically, under the majority's interpretation, MCL 324.3109(2) creates a presumption that can only be rebutted by showing that the discharge was not injurious and not by showing that the municipality did not cause the discharge. In Chief Justice Young's view, a municipality should be able to rebut any presumption arising under MCL 324.3109(2) by showing either that the discharge is not injurious or that the municipality was not the discharging party.

Significance: As Chief Justice Young suggests in his dissenting opinion, the court's decision effectively imposes strict liability against a municipality for the discharge of harmful raw sewage within its borders, no matter who caused the discharge and no matter what measures the municipality took to prevent it.

DRI Report

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DRI Report: July 2012

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

DRI's Annual Meeting is coming up quickly. It is scheduled for October 23-28, 2012 in New Orleans, Louisiana at the beautiful New Orleans Marriott. The Annual Meeting is a fantastic opportunity to meet new national contacts in your field of specialty and connect with old friends while hearing a power-packed slate of speakers including Dee Dee Myers, Ambassador Karen Hughes, Niall Ferguson, and Roy Blount, Jr. You also will not want to miss the Thursday night reception at the Mercedes-Benz Superdome. Other upcoming DRI events are detailed at www.dri.org.

New MDTC members will now automatically be enrolled in DRI's first year free membership program. If you have not been a DRI member in the past, you should also be eligible. Please let me know if you or someone you know is interested in a new or renewed DRI membership. I can be reached at eperdue@dickinsonwright.com, or 616-336-1038.

By: Hilary A. Ballentine
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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.

Minority/Insanity Tolling Provision

The Michigan Supreme Court issued a favorable opinion in *Joseph v ACIA* (No. 142615) on May 15, 2012. The issue in *Joseph* was "whether the minority/insanity tolling provision of MCL 600.5851(1) applies to toll the one-year-back rule in MCL 500.3145(1) of the no-fault act. In an opinion authored by Justice Mary Beth Kelly, the court answered that question in the negative and held that the minority/insanity tolling provision does not preclude application of the one-year-back rule. In so ruling, the court distinguished the minority/insanity tolling provision, which addresses only when an action may be *brought*, from the one-year-back rule, which separately limits the amount of benefits that can be *recovered*. The *Joseph* decision overrules *Univ of Mich Regent v Titan Ins Co*, 487 Mich 289 (2010), and reinstates *Cameron v Auto Club Ins Ass'n*, 476 Mich 55 (2006). Justices Marilyn Kelly, Michael Cavanagh, and Diane Hathaway dissented, indicating they would hold "that MCL 600.5851(1) saves a minor or insane person's 'claim,' which includes the right to recover all of his or her personal protection insurance benefits." **Ronald M. Sangster, Jr**. of the **Law Offices of Ronald M. Sangster, PLLC**, authored the MDTC amicus brief in *Joseph*.

Written Notice of No-Fault Claim

In other matters, the Michigan Supreme Court held oral argument on March 7, 2012 in *Atkins v Smart* (No. 140401). The issue in *Atkins* involves whether written notice of a no-fault claim, together with the defendant's knowledge of facts that could give rise to a tort claim by the plaintiff, is sufficient to constitute written notice of the plaintiff's tort claim under MCL 124.419. **Hal O. Carroll, Esq.** authored the amicus brief on behalf of the MDTC. That decision remains pending.

Recovery of No-Fault Benefits for Witnessing Accident

In the coming months, the MDTC will be filing amicus briefs in a number of cases, including *Boertmann v Cincinnati Insurance Co* (No. 142936). The issue the MDTC will address in *Boertmann* is whether a no-fault insured who sustains psychological injury producing physical symptoms as a result of witnessing the fatal injury of a family member in an automobile accident, while not an occupant of the vehicle involved, is entitled under MCL 500.3105(1) to recover benefits for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle.

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.

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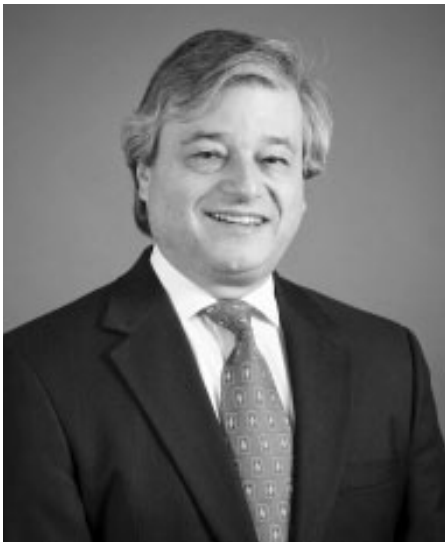

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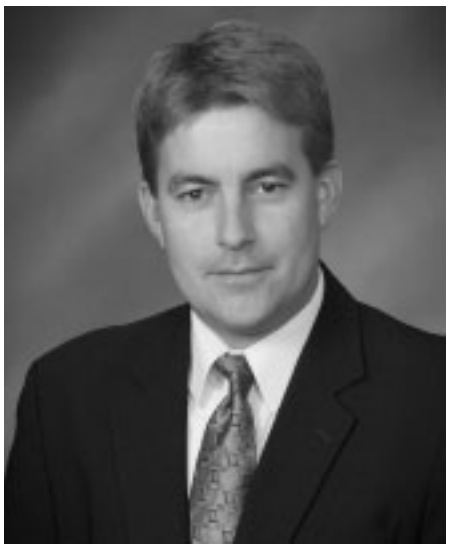

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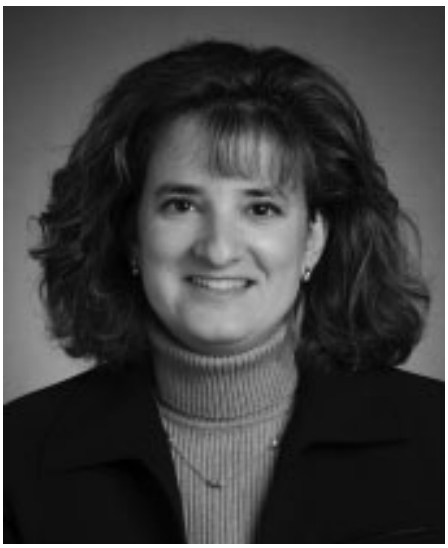

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Court Rules Update

By: M. Sean Fosmire
Garan Lucow Miller, P.C.
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Michigan Court Rules (and the RJA) 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

2006-47 — Records and documents – adopted in part

Issued:	12-21-2011
Comments by:	9-1-12
Order adopting 1.109(C)	5-24-12

This one was briefly described as a proposal in our last issue. One part has been adopted; as to the others, the Supreme Court entered an order in April 2012 extending the time for comments to September 1, and a public hearing is expected in the fall.

The changes to Rule 1.109, entitled "Court Records Defined," and the proposed changes to Rule 8.119, entitled "Court Records and Reports," were the central amendments of the proposal.

Overall, the word "papers" would be replaced by the phrase "documents and other materials." Two new subsections, (A) and (B), were to be added, with new definitions of the terms "court records" and "documents." The filing standards currently in place as (A) and (B) were to be redesignated as (C). A new 1.109(D) was proposed to add provisions governing the use of electronic signatures, in addition to traditional handwritten signatures. The rule is broad enough to allow any character, process, or symbol to be used if it is intended to serve as the lawyer's signature on an electronic document.

As adopted, however,

No change was made to 1.109(A)(1) or 1.109(B), and

The changes regarding signatures were adopted as a new 1.109(C)

The court's May 24 order was silent on the other changes to Rule 1.109. The other changes may still be made when final action is taken on the other proposals, or they may have been rejected.

2010-26 — Record on appeal

Rules	7.210 and 7.212
Proposed	11-10-11
Adopted	4-4-12
Effective	5-1-12

This adds a new requirement that the trial court "settle the record" for use on appeal, including a statement of facts, when there is no available transcript. Motions, proposed statements, and counter-statements may 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."

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.

STATUTORY AMENDMENT

Video testimony by experts

A new section 2164a has been added to the Revised Judicature Act by Public Act 68 (2012):

(1) If a court has determined that expert testimony will assist the trier of fact and that a witness is qualified to give the expert testimony, the court may, with the consent of all parties, allow the expert witness to be sworn and testify at trial by video communication equipment that permits all the individuals appearing or participating to hear and speak to each other in the court, chambers, or other suitable place. A verbatim record of the testimony shall be taken in the same manner as for other testimony.

(2) Unless good cause is shown to waive the requirement, a party who wishes to present expert testimony by video communication equipment under subsection (1) shall submit a motion in writing and serve a copy of the motion on all other parties at least 7 days before the date set for the trial.

(3) A party who initiates the use of video communication equipment under this section shall pay the cost for its use, unless the court otherwise directs.

Effective date: Cases filed on and after June 1, 2012

PROPOSED

2011-08 - Summary Disposition

Rule affected: MCR 2.116
Issued: 5-2-12
Comments open to: 9-1-12

This would add the following to (c) (7): "selection of a forum other than Michigan in which to file an action on a controversy." This would cover contracts that include a forum selection provision.

2011-06 - Default Judgment

Rule affected: MCR 2.603
Issued: 4-18-12
Comments open to: 8-1-12

For a default in a case where a sum certain has been demanded, section (B) (2) allows the clerk rather than a judge to enter the judgment. The proposed amendment is to specify that this may be done only if the amount of damages requested in the default is not greater than the amount stated in the complaint.

2012-03 - Interpreters

Rule affected: MCR 1.111 and 8.127
Issued: 5-212
Comments open to: 9-1-12

A new MCR 1.111, with three alternative versions of some provisions, is proposed to govern the appointment of interpreters in court hearings.

A new 8.127 would create a board to oversee certification and other functions relating to interpreters.

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A Heartfelt Thanks To Hal Carroll

After over ten years of dedication and commitment to the *Michigan Defense Quarterly*, Hal Carroll has decided to turn over the reins as Editor of the *Quarterly*. Hal has tirelessly worked behind the scenes to build and maintain the quality and substance of the *Quarterly*. It is through his hard work and unwavering passion that the *Quarterly* has been able to maintain its excellence all these years. This is best exemplified by the fact that Hal is being replaced not by one person but by an entire committee. So please, join MDTC in honoring Hal and his innumerable contributions to the *Quarterly*. Hal, we thank you. As you hang up your hat, we tip ours to you.

MDTC Annual Meeting

May 10–11, 2012 • Annual Meeting, The Westin Book Cadillac — Detroit

Tim & Molly Diemer

Patrick Muscat, Judge Jeanne Stempien, Richard Joppich

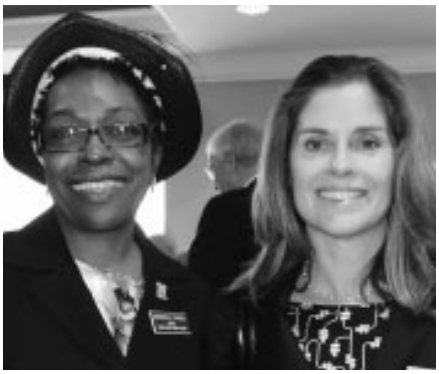
Judge Shelia Johnson & Judge Edward Ewell, Jr.

Robert Schaffer, Jim Lozier and Jim Bodary

Judge William Collette, Tony Smith, Chris Collette, Frank Reynolds

Tom Rockwell and Barb Lamb

Hal Carroll and Phil Korovesis



Judge Deborah Thomas and Bridget McCormick

Scott Holmes, Chief Judge Jonathan E. Lauderbach, US Magistrate Mona Mazjoub, Josh Richardson

Richard Joppich & Barbara Buchanan

MDTC Annual Meeting Sponsors: *CED Investigative Technologies, Inc., Rimkus Consulting Group, Inc., Legal Copy Services, Inc., Michigan Legal Copy, Engineering Systems, Inc., Shadow Investigations, Inc., ProAssurance Casualty Company, Ringler Associates, Donan Engineering, CourtCall, LLC, Butzel Long, Spectrum Computer Forensics and Risk Management, LLC, Exponent, Forcon International Michigan Ltd., Robson Forensic Inc.*

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Pat & Tony Smith, Julie Fershtman

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MDTC Schedule of Events 2012–2013

2012

September 14	16th Annual MDTC Open Golf tournament – Mystic Creek
September 19–21	SBM – Annual Awards Dinner & Meeting – Grand Rapids Respected Advocate Award Presentation
September 26	MDTC Board Meeting – Okemos
October 4	Meet the Judges – Hotel Baronette, Novi
October 24–28	DRI Annual Meeting – New Orleans
November 1	Board Meeting – Hotel Baronette, Novi
November 1	Annual Past Presidents Dinner – Hotel Baronette, Novi
November 2	Winter Meeting – Hotel Baronette, Novi

2013

January 10	Award Nomination Deadline for Excellence in Defense and Young Lawyer Golden Gavel
January 25	Future Planning – The Atheneum, Greek Town
January 26	Board Meeting – The Atheneum, Greek Town
March 14	Board Meeting – Okemos
June 20–23	Summer Conference – Crystal Mountain, Thompsonville, MI
Sept 18–20	SBM Awards Banquet and Annual Meeting Respected Advocate Award Presentation
October 16–20	DRI Annual Meeting – Chicago

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