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IN THIS ISSUE:

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President's Corner

By: Timothy A. Diemer
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From the President

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Honoring Our Volunteers

At DRI-affiliated meetings with non-Michigan lawyers, my revealing the fact that I do not practice in a mandatory CLE state is usually met with gasps. Once composure is regained, the conversation then typically turns to amazement at the success the Michigan Defense Trial Counsel enjoys despite functioning as a monolithically voluntary organization where no one is actually forced to participate.

At these meetings designed for the individual State and Local Defense Organizations to swap ideas and strategies, we Michigan representatives often lead by example. Other states praised our Respected Advocate Award program, where we honor a lawyer from the other side of the aisle who best exemplifies civility, professionalism and quality advocacy, and have themselves adopted it. We shared our strategy for fostering a strong commercial litigation presence while other states are just now getting their section off the ground. The same is true of our golf outing; we recently hosted our 16th annual outing while other states' outings are still in their infancy.

Needless to say, constantly adapting and trying new programs as opposed to merely repeating the same things again and again where participation is not mandatory requires a lot of work to get new initiatives off the ground. It does not seem as if a day passes where I do not reach out to volunteers asking for yet more assistance with spearheading a new program or with reaching out to membership to promote an upcoming event or member benefit. Other Past Presidents share similar stories of leaning on our Board Members and Section and Regional Chairs to make our organization thrive, a daunting task especially in these economically challenging times.

In this spirit, I am delighted to honor two dutiful volunteers at the upcoming Past President's Dinner in conjunction with the MDTC Winter Meeting, *Developments in Commercial Law that Every Litigator Should Know*, on November 3, 2012.

MDTC President's Special Recognition Award: James Bodary

The highly publicized role of MDTC in the ongoing Tort Reform battles in Lansing was bolstered by MDTC Past President James Bodary, who twice made the trek to Lansing to offer testimony on the hotly debated medical malpractice proposals. As a Past President of MDTC and defense lawyer who has spent his career defending hospitals and doctors against medical malpractice claims, Jim was able to speak with an air of credibility and authority unsurpassed by others who offered testimony.

The bill causing the greatest firestorm at the hearings was a proposal to extend the "professional judgment rule" that currently exists in favor of lawyers to additionally cover medical professionals, in a legislative attempt to confer immunity when the doctor acts in good faith or subjectively believes her actions were in the best interest of the patient. The advisability of the professional judgment rule as framed by Senate Bill 1116[1] had been a main sticking point at the hearings, with speakers and legislators harping on the purported unfairness of lawyers receiving the benefits of professional discretion to the exclusion of medical professionals.

This seeming contradiction — why one group gets the benefit of professional judgment and another might not — was at the center of the debate. Legislators and

In this spirit, I am delighted to honor two dutiful volunteers at the upcoming Past President's Dinner in conjunction with the MDTC Winter Meeting.

members of the public in attendance were skeptical of lawyers fighting to protect a rule they themselves have enjoyed but offering reasons why it might not make good policy to extend a similar rule to others.

Jim Bodary's testimony encapsulated the differences between the exercise of judgment for a lawyer, whose practice is more instinctual art than science, and a medical professional whose standard of care more often has defined options based on scientific literature and exacting research. Drawing on his vast experience defending medical professionals, Jim used practical examples to explain how on-the-fly trial strategy does not lend itself to hard and fast, preconceived standards of conduct, where a gut-level choice of whether to call a witness, whether to place blame on a co-defendant, non-party or plaintiff adversary, or whether to ask a certain question of an expert at trial cannot be judged according to formulaic, paint-by-numbers, bright-line rules. As a testament to the clarity and persuasiveness of his presentation, at the end of the hearing, the Senate Committee on Insurance asked for a copy of Jim's remarks for inclusion in the record.

At this time, the Insurance Committee has not voted on these bills, but they viably remain under consideration. We will of course keep membership updated if the status quo should change. In the meantime, we are grateful for Jim Bodary's having agreed to be the voice of MDTC at these hearings.

MDTC Volunteer of the Year: Hilary Ballentine

My other honoree at the Past President's Dinner is equally supportive of MDTC but in a less visible way than Jim Bodary's very public role speaking on our behalf in Lansing. Hilary Ballentine's name does not appear as author on many of the MDTC *Amicus Curiae* Briefs filed in the Michigan Supreme Court and Court of Appeals and, as a result, other than those of us who rely upon her in her role as Chair of the Amicus Committee, Hilary's hard work can often go unnoticed. Anyone who has worked with Hilary's committee will tell you, however, that our success as an organization and our high profile growth as an active Amicus participant is due to the tireless volunteerism of Hilary and her co-chair, Jim Brenner.

The Amicus Committee has always been one of our more active groups and Hilary did not balk at leadership's request that her Committee become even more active by beginning to file even more Amicus Briefs. Now, instead of just considering the requests for Amicus support that come directly from our members, Hilary's Committee also identifies cases where MDTC ought to participate *sua sponte* or where the Court, itself, invites MDTC's participation. Before this policy change, MDTC was often unaware it had been invited to weigh in by the Supreme Court's Order Granting Leave in the case.

Our new policy is to treat requests from the Court in the same way we consider requests from defense lawyers and the result has been the increased amicus participation of MDTC and, of course, increased work for Hilary and her Committee. Hilary has adjusted swimmingly to the increased workload, having solicited a list of MDTC members to serve as authors of these briefs and she never struggles to find an author, yet another testament to our group's spirit of volunteerism.

Having served behind the scenes as the Amicus Committee Chair for five years (and now we are proud to have her as a Board Member), this could in all honesty be viewed as a "Lifetime Achievement Award," but Hilary's volunteer work over this past year has really stood out. When MDTC Member Eric Conn made an urgent, last minute request for an Amicus Brief on a case of huge significance to our organization, facing a "do or die" motion deadline that literally expired in an hour and a half, Hilary had the motion on behalf of MDTC hand delivered in under an hour. This immediate act of precision is but one example of Hilary's voluntary dedication to MDTC.

We are able to accomplish so much because of our volunteers — **only** because of our volunteers. And it could certainly be argued that we innovate in ways other organizations do not because we have no other choice but to be creative since none of us actually have to be here.

I am delighted to be part of the celebration to honor both award winners for their dedication to MDTC and their immeasurable contributions to the success of our organization.

Endnotes

1. In analyzing Senate Bill 1116, the MDTC Executive Committee expressed support for the medical judgment rule currently existing in Michigan law under the case of Rytkonen v Lojacono, 269 Mich 270, 275 (1934) ("Where there is an opportunity for choice, the doctor is not guilty of negligence in using a method so recognized. . . .") Our disagreement was not with the rule, itself, but the overly broad manner SB 1116 was drafted and the unintended consequences of de facto immunity if it were passed. A more detailed analysis of SB 1116 can be found at http://www.mdtc.org/mdtc_member_update_june_2012.

Medical Malpractice:
Qualified Protective Orders and the Treating Physician

By: R. Paul Vance, *Cline, Cline & Griffin*

Executive Summary

A treating physician's medical opinions are often critically important in a medical malpractice case because the physician will not be perceived by the jury as a "hired gun." Although the plaintiff's counsel has unfettered access to treating physicians, defense counsel faces more difficulties in securing access. Before HIPAA, defense counsel commonly had access to treating physicians on the ground that plaintiff waived the privilege by virtue of having filed suit.

The Michigan Supreme Court has allowed continued contact with treating physicians after HIPAA as long as defense counsel seeks a "qualified protective order," but plaintiffs' attorneys have begun to seek affidavits from treating physicians in the pre-suit phase to "lock in" their testimony before defense counsel has the opportunity to meet with the physician.

In light of these impediments, defense counsel should identify any and all relevant treating physicians as early as possible, file a motion for qualified protective order allowing ex parte communication as soon as suit is filed and visit the physicians as soon as possible. Defense counsel should also send plaintiff's counsel interrogatories and requests for production seeking information regarding any meetings plaintiff's counsel may have already had with their client's treating physicians, and specifically request any affidavits or statements obtained by plaintiff's counsel from treating physicians.

R. Paul Vance is an associate attorney at Cline, Cline & Griffin, P.C. in Flint, Michigan. Mr. Vance specializes in medical malpractice defense, insurance defense, employment litigation and sports and entertainment law. Mr. Vance is chair of MDTC's Young Lawyers Section and can be reached at pvance@ccglawyers.com.

The author would like to thank J. Brian MacDonald and Jonathan M. Hartman for their contributions to this article.

In most medical malpractice cases, healthcare professionals who treat a plaintiff become key witnesses who can often "make or break" the case. The plaintiff's treating physicians often stand in the best position to testify about the effect the alleged injury has had on the plaintiff, how the plaintiff's future will be impacted by the injury and past and future medical treatment. Accordingly, the information learned from plaintiff's treating physicians regarding the plaintiff's condition before and after the alleged malpractice can assist in evaluating causation and damages. More importantly, a treating physician may have medical opinions on the cause of the plaintiff's injury or whether the defendant breached the standard of care. A treating physician's medical opinions are often critically important in a medical malpractice case because the physician will not be perceived by the jury as a "hired gun." As such, the success of a plaintiff's medical malpractice action often times rises and falls with the information conveyed by the treating physician.

Presumably, plaintiffs' counsel has unbridled access to these important witnesses and may speak privately to a plaintiff's physicians regarding the nuances of the case. These healthcare providers often go into a deposition or trial having heard only the plaintiff's position. Consequently, plaintiffs routinely use treating physicians as de facto experts to elicit both standard of care and causation testimony, at deposition and trial, after having met with and interviewed the treating physician outside the presence of defense counsel. Thus, without the benefit of understanding both sides of the dispute, treating physicians often unwittingly offer their opinions based on unsupported or false assumptions.

With the above in mind, defense counsel's meeting with a plaintiff's treating physicians is an important part of any medical malpractice suit. This meeting can, among other things, clarify illegible handwriting and/or notes in the medical records, streamline trial testimony, save costs and promote settlement. Ex parte interviews with a plaintiff's treating physician also allow defense counsel to assess the physician's knowledge of plaintiff's medical condition and treatment to determine if a formal deposition is necessary. Without this access, defense counsel must decide whether to depose the physician or risk cross-examining him or her at deposition or trial without the benefit of discovery. Moreover, an ex parte meeting allows the treating physician to better understand both sides of the dispute prior to providing deposition or trial testimony.

Michigan Law Regarding Ex Parte Interviews of Treating Physicians

Under Michigan law, an individual waives the physician-patient privilege by bringing an action to recover for medical malpractice.[1] Based upon the waiver of the physician-patient privilege, defense counsel had historically been able to meet with a plaintiff's treating physicians as part of the informal discovery process without the patient's

Defense counsel's meeting with a plaintiff's treating physicians is an important part of any medical malpractice suit.

permission or presence. However, the implementation of the Health Insurance Portability and Accountability Act ("HIPAA")[2] served to somewhat curtail defense counsel's access to treating physicians. Indeed, after the enactment of HIPAA, the plaintiffs' bar routinely contended that HIPAA precluded ex parte meetings between defense counsel and a plaintiff's physicians. This became a hotly contested issue before trial courts across the state. However, in July 2010, the Michigan Supreme Court issued an opinion in *Holman v Rasak*[3] which specifically authorized ex parte communications between defense counsel and a plaintiff's physicians. In a 5-2 decision, the supreme court held that ex parte interviews of a plaintiff's treating physician are permitted under Michigan law and consistent with HIPAA, provided that "reasonable efforts" have been made to secure a qualified protective order.[4]

The plaintiff in *Holman* filed a wrongful death medical malpractice action alleging the defendant physician failed to properly diagnose and/or treat the decedent, resulting in her death. During the discovery phase of the lawsuit, defense counsel sought to interview the decedent's treating physician, but plaintiff refused to sign a HIPAA release allowing the disclosure of oral communication. As a result of plaintiff's unwillingness to sign the release, defendant moved for a qualified protective order to permit ex parte communication with the decedent's treating physician. The trial court denied defendant's motion and held that HIPAA pertains only to documentary evidence and does not authorize ex parte oral interviews.

As a result of the trial court's decision, leave to appeal was sought and granted. In deciding whether HIPAA permits defense counsel to seek ex parte interviews with a plaintiff's treating physician, the Michigan Court of Appeals held that an ex parte interview with a treating physician is appropriate "if a qualified protective order, consistent with 45 CFR 164.512(e)(1), is first put in place."[5] Subsequently, the Michigan Supreme Court granted leave.

In addressing the issue, the supreme court in *Holman* cited the historic reasoning from *Domako v Roe*,[6] which recognized the pre-HIPAA waiver of the physician-patient privilege in medical malpractice cases. In *Domako*, the Michigan Supreme Court specifically ruled that defense counsel in a medical malpractice action is permitted to seek an ex parte interview with a plaintiff's treating physician once the plaintiff has waived the physician-patient privilege.[7] Thus, the supreme court in *Holman* reiterated that ex parte interviews with a plaintiff's treating physician were lawful and a normal part of the discovery process in Michigan.

After establishing that Michigan law allows defense counsel to conduct ex parte interviews with a plaintiff's treating physician, the majority in *Holman* then addressed whether HIPAA's privacy provisions conflicted with Michigan law.

After the enactment of HIPAA, the plaintiffs' bar routinely contended that HIPAA precluded ex parte meetings between defense counsel and a plaintiff's physicians.

The Michigan Supreme Court specifically authorized the disclosure of a plaintiff's medical information through oral communication for use in a medical malpractice action as long as a qualified protective order has been sought which prohibits the use or disclosure of the plaintiff's protected health information for any purpose other than the litigation for which it was requested, and requires the requesting party to return or destroy the information at the conclusion of the litigation.

Specifically, the court explored the disclosure of an individual's protected health information without a written authorization from the plaintiff.

Writing for the majority, Justice Corrigan cited 45 CFR 164.512(e), which allows a covered entity[8] to use or disclose protected health information without written authorization in several situations.[9] Relevant to ex parte interviews, 45 CFR 164.512(e) contains two instances which allow for dissemination of an individual's protected health information without signed authorizations. A covered entity may disclose protected health information without a signed authorization, if:

> The disclosure is in the context of a judicial or administrative proceeding and in "response to an order of a court or administrative tribunal"; or
>
> The disclosure is in the context of a judicial or administrative proceeding and in "response to a subpoena, discovery request or other lawful process,

that is not accompanied by an order of a court or administrative tribunal."[10]

In reliance upon 45 CFR 164.512(e), the majority in *Holman* held that Michigan law is not "contrary" to HIPAA because it is possible for a covered entity to comply with both Michigan law and HIPAA.[11] As such, the majority concluded that HIPAA does not prevent ex parte interviews from taking place but "merely superimposes procedural prerequisites."[12] The majority reasoned that because it is possible for defense counsel to ensure that any disclosure of protected health information complies with 45 CFR 164.512(e) by making "reasonable efforts" to obtain a qualified protective order, HIPAA does not pre-empt Michigan law.[13] Thus, the Michigan Supreme Court specifically authorized the disclosure of a plaintiff's medical information through oral communication for use in a medical malpractice action as long as a qualified protective order has been sought which prohibits the use or disclosure of the plaintiff's protected health information for any purpose other than the litigation for which it was requested, and requires the requesting party to return or destroy the information at the conclusion of the litigation.[14]

In ruling that ex parte interviews between defense counsel and a plaintiff's physician are lawful and consistent with HIPAA, the Michigan Supreme Court simultaneously held that trial courts have the discretion to deny a motion for a qualified protective order or impose conditions on ex parte interviews.[15] Thus, after *Holman* there was little consistency regarding defense counsel's ability to conduct ex parte interviews with a plaintiff's treating physicians. Because the supreme court failed to establish a clear rule for litigants, whether a qualified protective order is appropriate, and if so, what conditions should be imposed upon an ex parte interview, have been hotly contested issues in trial courts.

The Michigan Court of Appeals attempted to provide some guidance regarding what conditions may lawfully be imposed on ex parte interview with treating physicians in *Szpak v Inyang.*[16] In *Szpak,* the trial court granted the defendants' motion for a qualified protective order but upon the request of plaintiff, imposed additional conditions in the order. Specifically, the trial court ruled that plaintiff's counsel must receive notice of and an opportunity to attend the ex parte interview of plaintiff's treating physicians.

The issue on appeal in *Szpak* was whether there had been a demonstration of good cause requiring the conditions imposed by the trial court, i.e., language contained in the order requiring defendants to give plaintiff's attorney notice of the time, date and location of the ex parte interview and allowing plaintiff's counsel to attend the meetings.[17] The court of appeals ultimately determined the additional conditions imposed by the trial court were unwarranted because they had no bearing on the disclosure of the plaintiff's protected health information.

The Michigan Supreme Court simultaneously held that trial courts have the discretion to deny a motion for a qualified protective order or impose conditions on ex parte interviews.

The court of appeals further explained that the plaintiffs failed to identify any facts supporting a specific fear that defense counsel would "intimidate" the treating physicians during a voluntary ex-parte interview in order to warrant the conditions requested by plaintiff.[18] Furthermore, because there was no showing of any danger of "annoyance, embarrassment, oppression, or undue burden or expense," the court concluded there was no basis to impose any additional conditions in the qualified protective order.[19] For these reasons, the *Szpak* court determined the trial court abused its discretion when it issued the qualified protective order with conditions which were unrelated to compliance with HIPAA or any related privacy concerns.[20]

An Aggressive Response to *Holman* and *Szpak*

Since *Holman* and *Szpak* were decided, plaintiffs have been more aggressive in contacting and communicating with treating physicians. In an attempt to get a "leg up" in the case, some plaintiff attorneys have sought to convince the client's physician to sign an affidavit supporting plaintiff's theory of the case.

The practice of plaintiffs' attorneys pursuing affidavits from treating practitioners is not an entirely new development. It began after the promulgation and enactment of the various tort reform statutes in Michigan, the primary aim of which was the insulation of medical professionals from frivolous litigation, which created the need to obtain and file an affidavit to support the merits of a plaintiff's medical malpractice case. Prospective plaintiffs thereafter were required to secure a supporting affidavit of merit to initiate a medical malpractice lawsuit. The significant cost of hiring expert witnesses seemingly led plaintiffs' counsel to inquire first of the treating physician as a potential cost-saving mechanism. Moreover, a supportive treating physician is almost universally viewed as more credible than a hired expert witness.

Still, the practice of plaintiffs' counsel seeking and obtaining affidavits from treating physicians in support of a plaintiff's

claims has been observed with increasing frequency in recent years. This aggressive tactic can tip the balance of a case in favor of the plaintiff. Unfortunately, defendants do not enjoy the same luxury of unfettered communication with treating physicians in the early stage of a claim investigation or lawsuit, prior to entry of a qualified protective order. Therefore, plaintiffs' attorneys have begun to seek affidavits from treating physicians in the pre-suit phase to "lock in" their testimony before defense counsel has the opportunity to meet with the physician.

A plaintiff's treating physician signing an affidavit after meeting with plaintiff's counsel is a scary proposition for defendants. Not surprisingly, the language of these proposed affidavits is routinely slanted in favor of the plaintiff's theory of the case. In some cases, treating physicians have reportedly been subjected to specific threats to either sign an affidavit or be named as a defendant in the litigation. In practical terms, the opportunity for a treating physician to simply sign an affidavit, usually in return for a promise to keep his or her role in the litigation to a minimum, typically presents an attractive option to the busy medical practitioner. Yet, frequently the affidavits signed by treating physicians turn out to be both factually and medically inaccurate. Even more troubling is that often times these affidavits are not produced during the course of discovery. Rather, the affidavits are used to bolster the plaintiff's position at facilitation or case evaluation, after the time frame for discovery has closed.

In addition to the assertive nature of securing affidavits from treating physicians, attorneys for plaintiffs have also taken it upon themselves to pre-empt defense counsel's request for a meeting with a treating physician by writing the physician to warn them of the potential contact. The author was recently able to obtain such a letter written by a plaintiff's attorney in a medical malpractice lawsuit. The letter warned the treating physician of the potential request for a "private" meeting from defense counsel and asked the treating physician to notify and include plaintiff's counsel in order to avoid the need for multiple meetings. The letter also took great pains to inform the treating physician that they were not required to meet with defense counsel and could decline the request to meet.

Plaintiffs' attorneys would undoubtedly argue that the purpose of such a letter is to simply advise the treating physician of the potential meeting and to ensure that only the plaintiff's relevant medical information is disclosed. However, many times these letters go beyond the stated purpose and can be construed as an attempt to intimidate the physician and/or convince the physician to decline to meet with defense counsel.[21] These types of tactics also implicitly insinuate that defense counsel has some sort of sinister purpose for requesting the ex parte meeting.

The *Szpak* court determined the trial court abused its discretion when it issued the qualified protective order with conditions which were unrelated to compliance with HIPAA or any related privacy concerns.

Practical Considerations

Despite the rulings of *Holman* and *Szpak,* defense counsel is still at a disadvantage relative to communicating with a plaintiff's treating physicians. Indeed, until a medical malpractice complaint is actually filed, absent a HIPAA compliant release, defense counsel is without sufficient means to make "reasonable efforts" to secure a qualified protective order as required by *Holman*. As a result, the plaintiffs' bar has more aggressively sought to communicate with a plaintiff's health care providers prior to filing suit.

Given the current landscape, defense counsel must now be more vigilant than ever when it comes to a plaintiff's treating physicians. First, defense counsel should identify any and all relevant treating physicians as early as possible. As soon as suit has been commenced, defense counsel should file a motion for qualified protective order allowing ex parte communication, being sure to note that any additional conditions (i.e., notice to plaintiff) requested by plaintiff are unwarranted.

Once the qualified protective order has been entered, contact the treating physicians you wish to speak with and schedule a meeting. Practitioners should also send plaintiff's counsel interrogatories and requests for production seeking information regarding any meetings plaintiff's counsel may have already had with their client's treating physicians. Of particular importance, defense counsel should specifically request any affidavits or statements, sworn or otherwise, obtained by plaintiff's counsel from treating physicians. Lastly, if able to schedule a meeting with a treating physician, be sure to inquire whether the physician signed an affidavit or statement and ask for a copy. At a minimum, by obtaining this information, the fear of a surprise affidavit can be eliminated.

Conclusion

Based upon the current state of the law, plaintiffs' counsel will inevitably win the race to the treating physician. However, defense counsel must do its best to meet with and obtain all necessary information from the plaintiff's relevant treating physicians in order to properly defend a

medical malpractice action. Doing so will help to eliminate surprise opinions from a plaintiff's physician and level the playing field between plaintiffs and defendants as it relates to these important witnesses.

Endnotes

1. MCL 600.2912f; MCR 2.314(A)(1)(b).
2. 42 USC 1320d, et seq.
3. 486 Mich 429 (2010).
4. *Id.* at 432.
5. *Holman v Rasak,* 281 Mich App 507, 513 (2008).
6. 438 Mich 347 (1991).
7. *Id.* at 361.
8. 45 CFR 160.103.
9. *Holman,* 486 Mich at 439-440.
10. *Id.; see also* 45 CFR 164.512(e)(1)(ii)(A) and (B) (emphasis added).
11. *Id.* at 447-449.
12. *Id.* at 442, quoting *Arons v Jutkowitz*, 9 NY 3d 393, 415 (2007).
13. As recognized by the dissent, the *Holman* opinion leaves open the question of whether entry of a qualified protective order is actually necessary to conduct ex parte interviews with a plaintiff's treating physicians. However, because the opinion offers no guidance as to what constitutes "reasonable efforts," obtaining a qualified protective order is seemingly a prerequisite to defense counsel communicating with a plaintiff's treating physician.
14. *Id.* at 440.
15. *Id.* at 447-448.
16. *Szpak v Inyang*, 290 Mich App 711 (2010).
17. *Id.*at 714.
18. *Id.* at 715. The "fear" of "intimidation" or "coercion" is a typical argument made by plaintiffs in opposing qualified protective orders. However, that "fear" must be real and supported by the record before a trial court can impose additional conditions on a qualified protective order. Any concerns of coercion and intimidation must be based on the factual circumstances present in the case at bar. *See also* MCR 2.302(C).
19. The *Szpak* court cited MCR 2.302(C) and noted that plaintiff failed to demonstrate that "justice require[d]" the conditions sought by plaintiff and imposed by the trial court. *Id.* at 716.
20. *Id.*
21. Although there does not appear to be any limit on the plaintiff's ability to suggest non-cooperation to the physician, restricting access to witnesses is contrary to Michigan's notion of open discovery. Indeed, "no party to litigation has anything resembling a proprietary right to any witness's evidence. Absent a privilege, no party is entitled to restrict an opponent's access to a witness . . . ." *Domako*, at 361.

Admissibility of Agency Determinations of Employment Discrimination

By: David W. Schelberg, *Keller Thoma, PC*

Executive Summary

One side effect of the economic downturn is an increase in employment discrimination complaints. When an employee brings a complaint before one of the federal or state agencies that is empowered to resolve it, the agency itself does not have the power to award damages. However, the agency can issue a "reasonable cause determination," which is the agency's opinion that unlawful discrimination had occurred. When the employee subsequently files a civil suit, the issue of admissibility of these determinations often arises.

The Sixth Circuit Court of Appeals has not adopted a rule that prohibits admission in all cases, but tends to take a negative view regarding the admissibility of these documents as evidence, particularly in a jury trial. The Sixth Circuit views the reports as having essentially no probative value. Initially, the hearsay rule casts doubt on the admissibility of the report, and to the extent the report details the facts uncovered by the agency, a trial would produce the same facts by way of direct evidence. Moreover, there is a possibility of prejudice, in that a jury may attribute to the agency's determination more weight than it merits, because it came from "experts."

The Sixth Circuit has declined to adopt an absolute prohibition on the admissibility of agency determinations, and leaves the issue to the "sound discretion" of the trial court, but the strong and consistently skeptical view the court has taken suggests that admissibility may be doubtful in most cases.

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An inherent, yet relatively overlooked, side effect of the recent economic downturn is an increase in employment discrimination complaints. Anyone who has lived and worked in Michigan during the past several years is particularly familiar with the drastic measures that many employers have had to take in order to stay in business, not the most severe of which are workforce reduction programs and more selective hiring practices. As the number of workers being laid off or terminated rises, so does the volume of discrimination claims brought by those who feel they were unfairly treated.[1]

After an aggrieved employee or former employee files a complaint with the appropriate administrative agency, such as the Michigan Department of Civil Rights (MDCR) or the U.S. Equal Employment Opportunity Commission (EEOC), the result is often an unsatisfactory remedy, even when the agency concludes that discrimination had occurred. This is because the EEOC and MDCR have rather limited enforcement authority, namely to seek voluntary settlement or to bring legal action themselves against the employer.[2]

As a result, during subsequent litigation, plaintiffs are frequently inclined to offer the reports and determinations resulting from agency investigations as evidence of discriminatory conduct. From this perspective, these documents, particularly those concluding that discrimination had occurred, are highly probative for the purpose of establishing a cause of action. However, whether EEOC and MDCR reports and determinations are admissible as evidence in Michigan courts is far from clear.

Procedure for Obtaining Reasonable Cause Determination

In Michigan, employment discrimination claims may arise under several state statutes, the foremost of which are the Elliott-Larsen Civil Rights Act (ELCRA),[3] which prohibits discrimination based on religion, race, color, national origin, age, sex, height, weight, familial status, or marital status, and the Persons with Disabilities Civil Rights Act (PDCRA),[4] which prohibits discrimination against individuals with mental or physical disabilities. In addition, there are numerous, and sometimes overlapping, federal statutes, namely Title VII of the Civil Rights Act of 1964 (Title VII),[5] the Age Discrimination in Employment Act (ADEA),[6] and the Americans with Disabilities Act (ADA).[7]

An individual who seeks to pursue a claim of discrimination under the Michigan civil rights acts can either file a complaint with the MDCR[8] or bring a private civil action in state circuit court.[9] Under the federal statutes, in contrast, an individual must first file a charge of discrimination with the EEOC before pursuing a private lawsuit.[10] When the EEOC completes its investigation it may issue a "reasonable

Courts in Michigan have for the most part rejected plaintiffs' efforts to introduce reasonable cause determinations, despite relatively strong arguments stressing their highly probative nature.

cause determination," which serves as the agency's opinion that unlawful discrimination occurred.[11] At this point, the EEOC will seek a voluntary settlement with the employer.[12] If unsuccessful, the agency may choose to pursue legal action itself, or alternatively, give the complainant a Notice of Right-to-Sue.[13] This notice may also be issued when the EEOC determines that there was no reasonable cause of discrimination.[14]

Admissibility of EEOC Reasonable Cause Determinations

Though, from a plaintiff's standpoint, an EEOC reasonable cause determination may be perceived as important for the purpose of showing that employer had, in fact, engaged in unlawful conduct, courts in most jurisdictions tend to disfavor the admission of such evidence. With rationales grounded predominately in evidentiary principles, the courts in Michigan have for the most part rejected plaintiffs' efforts to introduce reasonable cause determinations, despite relatively strong arguments stressing their highly probative nature. In particular, plaintiffs may try to characterize reasonable cause determinations as conclusive "findings" by the EEOC that the employer acted in violation of the law. Further, a plaintiff may attempt to use an EEOC determination to bolster her prima facie case when sufficient evidence of discrimination by the employer is otherwise unobtainable.[15] This practice is not uncommon due to the difficulty of establishing the requisite factual basis for establishing a prima facie case of discrimination.

Relevancy

The predominant rationale for rejecting EEOC reasonable cause determinations as admissible evidence is a lack of relevancy. In addressing this issue, the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) has expressed relatively strong disdain towards the use of such documents as substantive evidence.[16] The Sixth Circuit has characterized EEOC reasonable cause determinations, categorically, as having essentially no evidentiary value.[17] Further, the court recognized that although a determination may be material, in that it details the facts uncovered by the EEOC that led to its conclusion that discrimination had occurred, it is not sufficiently probative because many of those same facts would be revealed during the trial.[18]

Similarly, the Sixth Circuit has indicated that EEOC reasonable cause determinations are insufficiently relevant because they serve primarily as factual reports, to which deference by the courts is not warranted. This reasoning, which characterizes EEOC determinations as "tentative conclusions" rather than binding factual findings,[19] is supported by the structure of the statutorily established complaint process. Under the various regulations prohibiting discriminatory employment practices, the EEOC is not empowered to punish violators, or even render a binding judgment that a violation had, in fact, occurred.[20] This can be distinguished from the enforcement regimes under other statutes, such as the Fair Labor Standards Act (FLSA) and the Occupational Safety and Health Act (OSHA), under which agencies within the Department of Labor have authority, independent of the court system, to penalize employers for violations.

Under the various regulations prohibiting discriminatory employment practices, the EEOC is not empowered to punish violators, or even render a binding judgment that a violation had, in fact, occurred.

Since these agencies served as fact-finders with binding authority, courts tend to give deference to their decisions on review.[21]

In contrast, the EEOC is merely charged with investigating complaints of discrimination.[22] Aside from seeking a voluntary settlement with the employer, if the agency concludes that a complaint has merit its exclusive recourse is to file a civil action.[23] During lawsuits alleging unlawful discrimination, whether brought by the EEOC or as a private action by the complainant, the jury or trial judge serves as the fact-finder.[24] Accordingly, federal district courts are not obliged to give deference to any subsequent factual findings or conclusions rendered by the EEOC.[25] Following this reasoning, the Sixth Circuit has construed EEOC reasonable cause determinations as being redundant, if not potentially detrimental, to the court's fact-finding process.[26]

Trustworthiness

Another rationale applied by the Sixth Circuit to exclude EEOC reasonable cause determinations is a lack of trustworthiness. Those jurisdictions that have adopted a favorable attitude towards the admissibility of EEOC determinations have justified their rulings, at least in part, on Federal Rule of Evidence (FRE) 803(6) and 803(8), which exempt certain business and public records from the general ban on hearsay evidence.

However, the Sixth Circuit has embraced the underlying reasoning for the exceptions, namely that they serve to allow otherwise inadmissible hearsay evidence to be admitted only when the evidence is necessary and carries sufficient indications of trustworthiness.

Though EEOC determinations may fall under FRE 803(6) or 803(8) based on the language of the rules, the court has perceived such documents as lacking the indications of trustworthiness represented in other business or public records.[27] For instance, the Sixth Circuit has endorsed the viewpoint that EEOC reports merely reflect the credibility judgments of the EEOC investigator, who must base her conclusions largely on hearsay or other unreliable evidence.[28] Further, the court has indicated that EEOC determinations may be construed as having been created for the purpose of litigation, which would place them outside of the business and public records exceptions.[29]

In addition, the Sixth Circuit has implemented a four-part test to determine whether an agency report related to a discrimination complaint was sufficiently trustworthy to fall under the hearsay exceptions.[30] Under this test, courts must consider "(1) the timeliness of the investigation upon which the report is based, (2) the special skill or experience of the investigators, (3) whether the agency held a hearing, and (4) possible motivational problems."[31] Applying these factors, the court determined that an Ohio Civil Rights Commission probable cause finding did not have the requisite level of reliability.[32]

Unfair Prejudice

The Sixth Circuit has also held that an EEOC reasonable cause determination was inadmissible based on the risk of unfair prejudice. Under the FRE, the court may refuse to admit otherwise relevant evidence if its probative value is "substantially outweighed by the danger of unfair prejudice."[33] The Sixth Circuit has found that juries may attach too much evidentiary weight to such EEOC reasonable cause determinations, given that they carry the label of being an "administrative report."[34] Accordingly, juries may consider an EEOC determination as being more reliable than it actually is merely because it was created by a governmental agency. Though this concern is not as prevalent during a bench trial, the Sixth Circuit has held that in such cases, the risk of unfair prejudice should nonetheless be a consideration during an admissibility inquiry.[35]

The Sixth Circuit has construed EEOC reasonable cause determinations as being redundant, if not potentially detrimental, to the court's fact-finding process.

Practical Application – Is It Reasonable to Presume that an EEOC Determination Will Be Excluded?

Based on a review of relevant decisions, it is fairly clear that the Sixth Circuit and the Michigan Court of Appeals generally disfavor the admission of reasonable cause determinations. However, both courts have stopped short of promulgating a rule that such evidence should be categorically excluded. With respect to EEOC determinations, the Sixth Circuit has held that admissibility is "within the sound discretion of the district court."[36] This rule has been interpreted as the court's attempt to "avoid a *per se* admissibility rule, not necessarily to reject a *per se* inadmissibility rule."[37] To reconcile this apparent contradiction, the Sixth Circuit has issued subsequent rulings that imply a general disposition against admissibility, stating that district courts may validly institute their own *per se* rule of exclusion, while simultaneously refusing to impose a categorical rule on all district courts under the Sixth Circuit's jurisdiction.[38]

The Sixth Circuit has found that juries may attach too much evidentiary weight to such EEOC reasonable cause determinations, given that they carry the label of being an "administrative report."

Despite the Sixth Circuit's willingness to uphold trial court decisions that exclude EEOC reasonable cause determinations, there are indications that the court may not extend this approach to all circumstances. For instance, the court has held that "sound discretion" reasoning for allowing judges to exclude EEOC determinations at trial does not necessarily apply when the determinations are used to attack a motion for summary judgment.[39] In addition, the court has distinguished the factual findings of Administrative Law Judges (ALJ). In contrast to EEOC reasonable cause determinations, ALJ findings are the result of thorough investigations and evidentiary hearings.[40] Also, since the ALJ had the opportunity to observe witness testimony, it is reasonable to construe the resulting factual findings as comparable to that of a district court judge.[41]

Michigan federal district courts have generally followed an approach that rejects EEOC reasonable cause determinations as admissible evidence.[42] Though it may be too soon to presume the adoption of a *per se* rule of exclusion by either of the U.S. district courts in Michigan, it is likely that judges in these jurisdictions may be persuaded to reject EEOC reasonable cause determinations as evidence when faced with arguments emphasizing the Sixth Circuit's relatively strong and

consistent position against admission.

Unlike the Sixth Circuit, the Michigan Court of Appeals approach to this admissibility issue is far more uncompromising. Though the court has not explicitly adopted a *per se* rule that excludes EEOC reasonable cause determinations, it has ruled that administrative reports expressing factual conclusions should be categorically inadmissible as evidence.[43] The rationale for this disposition is grounded in the Michigan public records exception to the general ban on hearsay evidence as expressed in MRE 803(8).[44] Under this evidentiary rule, factual findings resulting from administrative agency investigations are not included under the public records exception.[45] Given that the Michigan Court of Appeals has applied similar reasoning to exclude a report drafted by an MDCR investigator,[46] it is reasonable that this rationale would also apply to EEOC determinations.

Summary

Michigan federal courts have not adopted an approach that categorically excludes EEOC reasonable cause determinations from evidence. Nonetheless, the Sixth Circuit has expressed a relatively consistent attitude of disfavoring the admissibility of such documents, particularly at trial.

The Michigan Court of Appeals has interpreted the public records and business records exceptions to the general ban on hearsay evidence expressed in the MRE as not covering most factual findings derived from administrative agency investigations. In addition to MDCR investigation reports, this likely includes EEOC reasonable cause determinations.

Endnotes

1. It should be noted for clarity that under the various applicable statutes, *see* discussion *infra*, aggrieved individuals may also levy claims of discrimination against their employer for conduct unrelated to termination (e.g., sexual harassment). Further, it is unlawful under all anti-discrimination statutes for an employer to retaliate against an employee who files a discrimination complaint. *See* statutes cited *infra*.
2. *See Marlowe v Fisher Body*, 489 F2d 1057 (CA 6, 1973), *Nichols v Muskingum College*, 318 F3d 674 (CA 6, 2003).
3. MCL 37.2101, *et seq*.
4. MCL 37.1101, *et seq*.
5. 42 USC 2000e, *et seq*.
6. 29 USC 621, *et seq*.
7. 42 USC 12101, *et seq*.
8. MCL 37.2601-37.2605; MCL 37.1605
9. MCL 37.2801; MCL 37.1606.
10. *See, e.g.*, 42 USC 2000e-5. A complaint may also be filed with the MDCR. *See id*.; *see also* U.S. Equal Employment Opportunity Comm'n, *Filing a Charge of Discrimination* <http://www.eeoc.gov/employees/charge.cfm> (accessed Sept. 21, 2012).
11. 42 USC 2000e-5(b); 29 CFR 1601.21. *See Williams v Nashville Network*, 132 F3d 1123, 1129 (CA 6, 1997). For cases arising under the ADA, the EEOC may issue a "letter of violation," rather than a reasonable cause determination. 29 CFR 1626.15(b).
12. *Occidental Life Ins Co of Cal v EEOC*, 432 US 355, 359 (1977).
13. *Id*.
14. *Id*.
15. *See, e.g., Williams*, *supra* at 1128.
16. *EEOC v Ford Motor Co*, 98 F3d 1341, 1996 WL 557800 (CA 6, 1996).
17. *Id*. at *10.
18. *Id*.
19. *See Williams*, *supra* at 1129.
20. *See Ford*, *supra* at *9.
21. *Id*.
22. *See EEOC v Keco Indus*, 748 F2d 1097, 1100 (CA 6, 1984).
23. *See Occidental Life Ins Co of Cal*, *supra* at 359.
24. *Ford*, *supra* at *9.
25. *Id*.
26. *Id*.
27. *See id*. at *11.
28. *See id*.
29. *Id*.
30. *See Alexander v Caresource*, 576 F3d 551, 562 (CA 6, 2009).
31. *Id*. (citing *Chavez v Carranza,* 559 F3d 486, 496 (CA 6, 2009)).
32. *Id*.
33. FRE 403. Michigan Rule of Evidence (MRE) 403 is identical to FRE 403.
34. *See Williams*, *supra* at 1128.
35. *Ford, supra* at *12.
36. *Heard v Mueller Co*, 464 F2d 190, 194 (CA 6, 1972); *Weems v Ball Metal & Chemical Div, Inc*, 753 F2d 527, 528 (CA 6, 1985).
37. *Ford*, *supra* at *11.
38. *See id*.; *Ricker v Food Lion, Inc*, 3 Fed App'x 227 (CA 6, 2001).
39. *Alexander*, *supra* at 562 (distinguishing *Ford*).
40. *Hill v Nicholson*, 383 Fed App'x 503, 514 (CA 6, 2010).
41. *Id*. at 515.
42. *See, e.g., Dorn v Gen Motors Corp*, 131 Fed App'x 462, 471 (CA 6, 2005) (holding that the court below, the U.S. District Court for the Eastern District of Michigan, did not err by refusing to consider an EEOC letter), *Terwillinger v GMRI, Inc*, 952 F Supp 1224, 1229 (ED Mich, 1997) (holding that plaintiff could not rely on a Michigan Civil Rights Division Report to establish a prima facie case). *But see Waller v Thames*, 852 F2d 569; 1988 WL 76532, *2 (CA 6, 1988) (affirming the Eastern District of Michigan judge's decision to exclude a Michigan Civil Rights Commission report, but implying, based on authority from the Fifth Circuit, that a final EEOC cause determination may be admissible). Note that *Waller* was decided before *Ford*.
43. *See, e.g., Slayton v Mich Host, Inc*, 144 Mich App 535, 546-547; 376 NW2d 664 (1985).
44. *Id*. at 547.
45. MRE 803(8) differs from FRE 803(8) in that it does not include subparagraph "C," which includes in the public records exception "factual findings resulting from an investigation made pursuant to authority granted by law." MRE 803(8).
46. *See Mathes III v Oakland Co*, 2011 WL 921520, *6 (Mich Ct App, 2011).

The Legal Hold Notice – 7 Steps to Success

By: Brad Harris, *Zapproved Inc.*

Executive Summary

Developing a legal hold process has become an essential tool for defense lawyers. Developing a reasonable and defensible legal hold process does not have to be a complex or overwhelming task.

Implementing a legal hold process is not about scooping up all of the electronically stored information and locking it away; it is about taking reasonable steps to assure that the data will be there when it is needed.

It is imperative that the attorney know the data sources: how information is created and retained, what retention policies and practices are in place, whether the data is replicated elsewhere, who is responsible for maintaining the data, and who needs to be notified to prevent its routine destruction.

When instructing employees, counsel must include clear and concise directives to custodians to preserve records. A broad order to "save all relevant documents" is not sufficient. Once the hold is issued and communicated, counsel must stay involved, and must seek confirmation that custodians have acknowledged the hold. Counsel must also solicit feedback to ensure proper steps are being implemented, and train the client on the process.

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In the July 2011 issue of the *Michigan Defense Quarterly,* Patrick Ellis described the importance of recognizing and understanding the duty to preserve electronically stored information, or ESI. Court cases, especially at the federal level, continue to illuminate the growing risk to organizations that fail to take this obligation seriously and to put practices in place to mitigate the risk of data spoliation in response to a preservation obligation.

Beginning with the landmark *Pension Committee*[1] decision by U.S. District Court Judge Shira Scheindlin in January 2010, the judiciary became hyper-focused on this area with opinion after opinion coming down for the rest of year, e.g., *Rimkus v Cammarata,*[2] *Crown Castle v Nudd Corp,*[3] *Merck Eprova v Gnosis,*[4] *Jones v Bremen High School,*[5] and *Victor Stanley II*.[6] This focus has continued unabated in 2011, with parties to litigation facing an ever-increasing likelihood that their preservation practices will be called into question.

Clearly counsel can no longer function without developing the judgment to distinguish what must be preserved, the knowledge to negotiate and clearly communicate the scope, and the skills and tools to select and instruct on reasonable and effective methods of preservation.

This article focuses on the mechanics of implementing a reasonable, defensible legal hold process. As discussed, this process need not be a complex or overwhelming task. The standard is not perfection, but reasonableness and good faith coupled with competency. The following seven elements have become imperatives to meet higher standards of preservation, mitigate the increasing risk of costly sanctions, and better prepare for adversaries that can challenge an opponent's preservation efforts when a flawed legal hold becomes a shortcut to victory.

Establish and Follow a Process

First and foremost, it is important to establish a process for responding to a duty to preserve data for litigation. In her *Pension Committee* opinion, Judge Scheindlin observes that courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party. Implementing a legal hold process is not about scooping up all of the ESI and responsive data and locking it in a vault; it's taking reasonable steps to assure that data will be there when needed. (Remember, perfection isn't the standard!)

Although implementing legal holds can seem complicated, the reasons they fail are usually pretty simple. It's exceedingly rare for a party to be sanctioned for good faith, diligent efforts that have gone awry. Demonstrating that you had routine policies, procedures, tools, personnel, and lines of communication in operation, ones that were likely to promote sound preservation, will go a long way toward deflecting the presumption of bad faith at the heart of most sanctions. Each case is unique, with its

own complement of parties, witnesses, evidence, issues, intervals, and outcomes. There is no "cookie cutter" approach or "perfect hold directive" that, used every time, will ensure the proper preservation of information. However, while the details change, the process — and particularly aspects that promote the integrity of process — should be consistent.

Know Your Data Sources

In order to know who needs to be notified, and what instructions you need to provide, it is imperative that you know your data sources. How is information that may be relevant to the anticipated claims or defenses of the case created and retained? What retention policies and practices apply? Is the data replicated elsewhere, e.g., back-up tapes or archives? Who is responsible for maintaining the data, and needs to be notified to prevent routine destruction?

All too often, half-hearted attempts at data preservation are undertaken with little understanding of an organization's information resources. A generic hold directive dispatched en masse to custodians carries high risks. Many will ignore it as incomprehensible or dismiss it as impractical. Worse, it may trigger absurd Herculean preservation efforts crippling productivity and budgets.

Knowing your data sources can begin with assembling the right team within the organization, including representatives from the lines of business, IT staff, records managers and legal. Solicit and document what is known (often referred to as data mapping). As new cases arise, build upon this knowledge base to improve your ability to respond to future preservation obligations.

Issue Timely, Written Legal Holds

Once a duty to preserve has been triggered, the courts expect action to be taken to suspend routine business processes that would result in the destruction of relevant information. In Judge Scheindlin's opinion, "the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information."

> Implementing a legal hold process is not about scooping up all of the ESI and responsive data and locking it in a vault; it's taking reasonable steps to assure that data will be there when needed.

A recent case reinforces this expectation of timely, written legal holds. In *Haraburda v. Arcelor Mittal*,[7] the plaintiff brought a motion to require the issuance of a legal hold. The defendant had refused, stating that a legal hold was premature until after a "meet and confer" session had been completed. The court disagreed, and ordered the defendant to issue a legal hold.

Although a written legal hold certainly represents sound practice, the lack of a written notification does not in and of itself lead to a finding of spoliation. In *Steuben Foods v Country Gourmet Foods*,[8] each party accused the other of spoliation. The sole ground that the defendant asserted in support of its claim of spoliation was the fact that the plaintiff failed to apply a timely written legal hold, resulting in some missing documents from a rather extensive document production. The court disagreed, however, ruling that the missing documents did not prejudice the case, and found no evidence of spoliation on the part of the plaintiff, despite the plaintiff's reliance on a verbal legal hold.

> A generic hold directive dispatched en masse to custodians carries high risks. Many will ignore it as incomprehensible or dismiss it as impractical.

Communicate Your Expectations Clearly

When instructing employees, counsel must include clear and concise directives to custodians to preserve records. Weak or improper instructions are an indication of an attorney not understanding the purpose of a legal hold. In *Samsung v Rambus*[9] the instructions were "to save all relevant documents." The court said that this was the "sort of token effort [that] will hardly ever suffice."

Take the time to consider the audience when you prepare the hold. Different functional teams may play different roles in preserving information, and your hold notifications should be tailored to their specific needs. A database administrator needs to know that he should archive back-up tapes for an enterprise resource planning software system, but if a sales manager received the same notice, it would only lead to confusion.

Follow Up to Ensure Understanding and Compliance

The courts also expect counsel to be engaged to ensure recipients of hold instructions have received the notice, understand what is expected of them, and have agreed to comply. A legal hold notification is not a "fire and forget" action. Counsel needs to stay involved. Seek confirmation that custodians have acknowledged the hold. Solicit feedback to ensure proper steps are being implemented. Train the organization on your process, and audit its performance.

This is an area where automation can make a huge difference. Legal hold automation tools can make it easier for recip-

ients of the hold notice to respond with either acceptance or questions. Interview questions can solicit valuable information for counsel to ensure proper follow-up and comprehension. Automated reminders can be sent to delinquent responders, and reports generated on the status of hold acknowledgements.

Provide for Routine Updates and Reminders

A legal hold should also be considered a living document. Anticipate that changes will likely occur between the times the preservation obligation attaches and the collection or processing of relevant data is performed. Employees leave or change positions. Systems are replaced and updated. Content is purged. Tapes are rotated. Hard drives fail. What is learned about the case evolves over time as well.

Your process must account for such changes and allow for routine updates in recipients, scope and instructions. Furthermore, custodians should be periodically reminded of an ongoing duty to preserve information. Memories fade and old habits return. An occasional reminder reinforces the actions you need to mitigate the risk of inadvertent spoliation, and assures greater evidence that you have taken your duty to preserve seriously.

Document Your Actions

With the increasing likelihood of your preservation actions being challenged by your opponents, and the growing scrutiny of the courts, the need for documentation is critical for defensibility. Document in detail the actions taken with respect to the hold. What was done and when? Who dictated the scope and why? Which custodians were notified, and what follow-up ensued? Cases often take years to resolve. Employees will forget, misremember, depart and die. Extensive, lucid documentation shows the court that you took your preservation duties seriously: absent, incomplete or confusing documentation proves you didn't.

> Although a written legal hold certainly represents sound practice, the lack of a written notification does not in and of itself lead to a finding of spoliation.

Clear, thorough documentation doesn't just happen. It has to be someone's responsibility. Be sure that a person "in-the-loop" has both the skills and the right tools to do the job well.

Final Thoughts

The elements of a successful legal hold are straightforward and not difficult to execute, but they demand organization, diligence, thought, and care. The *Pension Committee* and subsequent opinions provide a forceful reminder that the time to institute policies and procedures to meet legal hold obligations is now. In the time it will take you to identify key custodians, learn what data exist and where it resides, and then formulate a means to identification or collection, the data you're bound to protect may disappear. A good lawyer, like a skilled firefighter or EMT, is ready to roll at a moment's notice. A good lawyer has a plan, and the process, people and tools to effectively execute it when needed. You can't put out a fire or save a life without doing everything possible to be prepared, and you can't put your data preservation on hold until an emergency rears its ugly head.

> Take the time to consider the audience when you prepare the hold. Different functional teams may play different roles in preserving information, and your hold notifications should be tailored to their specific needs.

Endnotes

1. The Pension Committee of the University of Montreal Pension Plan, et al v Banc of America Securities LLC, et al, Amended Order, Case No. 05-cv-9016 (SDNY, Jan 15, 2010).
2. *Rimkus Consulting Group Inc v Nickie G Cammarata*, et al, 07-cv-00405 (SDTX, Feb 19, 2010).
3. *Crown Castle USA, Inc v Fred A Nudd Corp, 2010 US Dist LEXIS 32982, (WDNY, Mar 31, 2010)*.
4. *Merck Eprova AG v Gnosis SpA et al*, 07 Civ 5898 (SDNY, Apr 20, 2010).
5. *Jones v Bremen High School Dist 228, 2010 WL 2106640 (ND Ill, May 25, 2010)*.
6. *Victor Stanley, Inc v Creative Pipe, Inc, et al* (D MD, Sept 9, 2010).
7. Haraburda v Arcelor Mittal USA, Inc, No. 2:11 cv 93, 2011 WL 2600756 (ND Ind, June 28, 2011).
8. *Steuben Foods*, Inc *v Country Gourmet* Foods, LLC, 2011 US Dist LEXIS 43195 (WDNY, Apr 21, 2011).
9. Samsung Elecs Co, Ltd v Rambus, Inc, 2006 WL 2038417 (ED Va, July 18, 2006).

Recovery of E-Discovery Costs under 28 U.S.C. §1920(4)

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Executive Summary

28 U.S.C. §1920(4) was amended in 2008 to permit recovery of copying costs of "materials" rather than the previously permitted "papers." Jurisdictions have interpreted this amendment differently, and SCOTUS has not addressed the issue. A pre-amendment decision of the Sixth Circuit upheld an award for imaging documents, and it remains to be seen how the court will decide other e-discovery cost issues. Until a binding decision is reached, counsel should (a) use the tools referenced in Fed. R. Civ. P. 26(f), and reach an agreement with regard to the burden of costs; (b) be cautious about advising clients on recoverable costs; and (c) have e-discovery vendors delineate the costs associated with specific services.

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Costs associated with e-discovery can be enormous. As Robert Downey Jr.'s Sherlock Holmes would say, "we now have a firm grasp of the obvious."[1] Perhaps less obvious is the discretionary ability of federal courts to award e-discovery costs to prevailing parties under 28 U.S.C. §1920(4). This is a topic that has garnered increased attention from e-discovery experts of late, and has been addressed by federal courts in several recent decisions with significantly different outcomes.

The Language of §1920(4)

28 U.S.C. §1920(4) provides, in part, that "[a] judge or clerk of any court of the United States may tax as costs the following: * * * Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." Prior to 2008, §1920(4) had been limited to "[f]ees for exemplification and the costs of making copies of papers." In light of the increasing importance of e-discovery in the judicial process, the statute was amended, and "papers" was changed to "any materials." This change has paved the way for prevailing parties to seek awards for costs incurred during the process of producing electronically-stored information and for courts to award those costs.

Differences in Interpretation from Jurisdiction to Jurisdiction

In October of last year, in *In re Aspartame Antitrust*, the United States District Court for the Eastern District of Pennsylvania provided some insight into what factors to consider when awarding e-discovery costs under §1920(4). Included were:

The volume of e-discovery requested and produced;

The complexity of the litigation;

E-discovery methods used by the prevailing party and the party that benefited the most from such methods;

The necessity of the methods;

Whether the costs were typically incurred by lawyers or non-lawyers, and

The adequacy of documentation submitted in support of the prevailing party's bill of costs.

The court considered the above factors, along with the fact that the parties agreed to use keyword searches and de-duplication tools to reduce e-discovery costs, and concluded that such tools decreased the volume of data for the benefit of both parties. The court went on to award the prevailing party over $500,000 in e-discovery costs,

which included the cost of creating a litigation database, data storage, data processing and hosting, metadata extraction, imaging of hard drives, de-duplication, keyword searches, and OCR processing.[2] Significantly, the *Aspartame* court drew a distinction between e-discovery costs that are "necessary" under §1920(4) versus costs that are incurred for the convenience of counsel. The court declined to award the prevailing party exemplification costs for sophisticated document management programs, confidentiality labeling, and Bates labeling.[3]

In a 2011 opinion from the Southern District of California, defendants were awarded costs for converting documents into a useable format, as well as the associated project management costs. The court was careful to draw a line between the technical expertise needed in the review and production of electronic data, and the strategic decision-making or "intellectual effort" reserved to lawyers. Costs associated with the former are recoverable. Costs associated with the latter are not. In total, the defendants received over $134,000 in taxed costs under §1920(4).[4]

Courts in the previously discussed cases awarded considerable e-discovery costs to prevailing parties under §1920(4). In contrast to these decisions, earlier this year, the United States Court of Appeals for the Third Circuit reduced an e-discovery cost award from the Western District of Pennsylvania by more than 90 percent.[5] A three-judge panel in *Race Tires* found that the lower court failed to distinguish between e-discovery charges that constitute "[f]ees for exemplification," and charges that constitute "costs of making copies." After taking a critical look at the language of the statute, the court concluded that none of the e-discovery vendor activities during the course of discovery could be regarded as "exemplification" of materials under §1920(4), and only scanning and file format conversion could be considered "making copies." The court paid particular attention to the invoices from e-discovery vendors submitted by the prevailing parties in support of their bill of costs, noting a "lack of specificity and clarity as to the services actually performed." It ultimately reduced an award of more than $365,000 to a little more than $30,000.

In the Third Circuit, *Race Tires* is binding precedent. Outside the Third Circuit, this ruling is only persuasive authority. Until the United States Supreme Court addresses the recovery of e-discovery costs, courts in other circuits may disagree with this opinion and interpret §1920(4) to allow for recovery of a broader range of e-discovery costs. One such court is the United States District Court for the Northern District of California, which, in April 2012, declined to follow *Race Tires*.[6] In *Online DVD Rental*, the court noted the Third Circuit's "well-reasoned" opinion in *Race Tires*, but concluded that in the absence of Ninth Circuit authority and in view of a prior order in the case, a broad reading of §1920(4) to allow for recovery of e-discovery costs was appropriate.

> In October of last year, in *In re Aspartame Antitrust*, the United States District Court for the Eastern District of Pennsylvania provided some insight into what factors to consider when awarding e-discovery costs under §1920(4).

Since the 2008 amendments modified the statutory language, there is little guidance from Sixth Circuit case law on recovery of e-discovery costs under §1920(4). In a 2005 opinion, the Sixth Circuit Court of Appeals upheld a lower court's award of costs for scanning and imaging documents, noting that these costs "were necessarily incurred," and that the district court did not abuse its discretion in interpreting these costs as exemplification and copies of paper under §1920(4).[7]

Earlier this year, the United States District Court for the Western District of Tennessee cited the Sixth Circuit's *BDT Products* decision from 2005 as support for awarding the costs of OCR processing to a prevailing party.[8] It remains to be seen how other courts in the Sixth Circuit will interpret the modified language of §1920(4) with respect to other e-discovery vendor services. However, given the appellate court's arguably broad reading of the pre-amendment language in *BDT Products*, it is quite possible that Sixth Circuit courts will read §1920(4) to allow for recovery of a wider range of e-discovery costs than the Third Circuit.

Key Takeaways for Counsel

As these cases indicate, there is no consensus among jurisdictions regarding the recoverability of e-discovery costs under §1920(4). Therefore, counsel should be familiar with how the court of record has applied §1920(4) before it comes time to file a bill of costs under Fed. R. Civ. P. 54.

In order to maximize the likelihood of recovery of e-discovery costs, counsel should utilize the "Meet and Confer" and scheduling conferences referred to in Fed. R. Civ. P. 26(f) to their full advantage. The "Meet and Confer" session should be used to discuss the entire range of e-discovery issues, including preservation of potentially relevant evidence, the disclosure and exchange of electronically stored information (ESI), the form in which such information should be produced, and the protection of privileged information and materials.

Given the differences in interpretation of §1920(4), counsel should also try to come to an agreement as to what e-discovery processing costs will be borne separately, shared during discovery, and subject to recovery under §1920(4). Areas of agreement should be memorialized, as an agreement between the parties can supersede §1920(4). In a 2011 decision, the United States Court of Appeals for the Federal Circuit reversed a lower court's award of over $230,000 for the use of a vendor-hosted litigation database pursuant to the statute because the parties had agreed at the outset of litigation to share the cost of the service equally.[9] Anything the parties cannot agree to during the "Meet and Confer" should be addressed with the court during the scheduling conference. The court's scheduling order should reflect the parties' agreements and the court's resolution of any disputed issues.

Counsel should be wary of advising clients that a particular e-discovery cost will be recoverable at the end of a case under §1920(4). Until the United States Supreme Court addresses the recovery of e-discovery costs, the landscape outside the Third Circuit is still unsettled as to which e-discovery costs are recoverable under the statute and which are not.[10] However, prior to incurring e-discovery costs in any case, counsel should insist that e-discovery vendors break out invoices clearly in order to avoid confusion or ambiguity about the costs associated with specific services. This will aid the court later on in determining which costs are clearly recoverable and which are not, and will also provide the court with objective evidence to determine whether the costs in question were reasonable and necessary during the underlying litigation.[11]

Endnotes

1. Sherlock Holmes (2009); http://www.imdb.com/title/tt0988045/quotes.
2. *In re Aspartame Antitrust Litigation*, 817 F Supp 2d 608 (ED Pa, 2011). "OCR," or "optical character recognition," is a technology that allows users to identify and capture handwritten, printed, or typed text in scanned image files through an automated computer process.
3. *Id.*
4. *Jardin v DATAllegro*, 2011 WL 4835742 (SD Cal, 2011).
5. *Race Tires America, Inc v Hoosier Racing Tire Corp*, 674 F3d 158 (CA 6, 2012).
6. *In re Online DVD Rental Antitrust Litigation*, 2012 WL 1414111 (ND Cal, 2012).
7. *BDT Products, Inc v Lexmark Intern, Inc,* 405 F3d 415 (WD Tenn, 2005), abrogated on other grounds *Taniguchi v Kan Pacific Saipan, Ltd*, 132 S Ct 1997 (2012).
8. *Frye v Baptist Memorial Hosp, Inc*, 2012 WL 1022034 (WD Tenn, 2012).
9. *In re Ricoh Co, Ltd Patent Litigation*, 661 F3d 1361 (Fed Cir, 2011).
10. Attorneys for Hoosier Racing and DMS have filed a petition for a writ of certiorari to the United States Supreme Court seeking review of the Third Circuit's decision in *Race Tires. Hoosier Racing Tires Corp v Race Tires America, Inc*, 2012 WL 2363410 (US, June 14, 2012). The petition was scheduled for consideration on September 24, 2012.
11. Mark L. Austrian, *Getting Your E-Discovery Money Back: Taxation of Costs and Offer of Judgment*, 54 No. 6 DRI for Def. 12, 18 (June 2012), *available at* http://www.wcl.american.edu/trial/documents/TaxationofCostsandOfferofJudgment.pdf.

MDTC New Section Chairs

Michael R. Janes
Professional Liability & Health Care

Michael R. Janes is a shareholder and president of Martin, Bacon and Martin P.C. in Mt. Clemens, Michigan. His practice includes all areas of personal injury defense with emphasis on the defense of medical malpractice causes of action. Mr. Janes obtained his undergraduate degree from The University of Notre Dame in 1979 and his Juris Doctorate degree from The University of Detroit School of Law in 1981. In addition to his longtime membership in the Michigan Defense Trial Counsel, he is also past president of The Association of Defense Trial Counsel, current council member for the Negligence Law Section of the State Bar of Michigan, member of the American Board of Trial Advocates, Fellow of the Michigan State Bar Foundation and member of the Michigan Society of Health Care Attorneys.

Darwin L. Burke, Jr.
Insurance Law

Darwin graduated from Michigan State University (B.A., with honors 1992) and obtained a law degree from the University of Pittsburgh School of Law in 2001. After working as a staff attorney with the Michigan Court of Appeals, he started litigating a wide array of issues. Gaining important experience representing injured persons, Darwin has since handled all aspects of insurance disputes. He currently advises insurance companies on the nuances and intricacies of the Michigan No-Fault Act, including priority disputes, coverage issues and catastrophic claims. In addition to his work handling insurance defense matters, Darwin has also represented small businesses in general litigation matters. Darwin has appeared in courts through the state, at all levels from district courts to the Michigan Supreme Court. He is a member of the State Bar of Michigan, as well as the Federal Bar Association and Michigan Defense Trial Counsel.

Gouri G. Sashital
Labor and Employment

Gouri G. Sashital is an associate with the firm of Keller Thoma, P.C. Ms. Sashital earned her Juris Doctor from the Wayne State University School of Law. Ms. Sashital concentrates her practice in the area of employment law, including advising and defending employers with respect to claimed civil rights violations, wrongful discharge, unlawful retaliation, and Family Medical Leave Act violations; school law, including advising and defending school districts with respect to special education law and tort liability; and general litigation, including commercial litigation. Ms. Sashital may be contacted at gsr@kellerthoma.com.

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Every section has a discussion list so that the members can discuss issues they have in common. Use 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 can 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, and*
- *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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Ruminations on the Ethics of Law Firm Information Security

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

Lest anyone may have forgotten Rule 1.6 of the ABA Model Rules, here it is – and similar rules apply everywhere:

Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

The trick, of course is how to keep client data secure in the digital era. It isn't easy. Computer security is expensive – and it takes time to understand it – and you will never be done learning because technology morphs constantly.

Are lawyers abiding by their ethical duty to preserve client confidences? Our opinion is that they are not. Here are a few reasons why we have that opinion:

Security expert Rob Lee, a noted lecturer from the security firm Mandiant, has reported to us that Mandiant spent approximately 10% of its time in 2010 investigating data breaches at law firms.

Security expert Matt Kesner, who is in charge of information security at a major law firm, reports that his firm has been breached twice – and that he is aware that other law firms have suffered security breaches – and failed to report them to clients.

The authors are the President and Vice President of Sensei Enterprises, Inc., a legal technology, information security and computer forensics firm based in Fairfax, VA. (703) 359-0700 (phone), or www.senseient.com.

Our own company, Sensei Enterprises, Inc., has never performed a security assessment at a law firm (or for that matter, at any kind of business) without finding severe vulnerabilities that needed to be addressed.

Why do otherwise competent lawyers fail so miserably in their ethical duty to maintain the confidentiality of client data? Here are some of the reasons.

Ignorance – they simply need education.

The "it can't happen here" mentality. This is flatly wrong – even the FBI issued an advisory in 2009 that law firms were specifically being targeted by identity thieves and by those performing business espionage – much of it originating in China and state-sponsored, though of course the Chinese government has vehemently denied involvement in such activities. Matt Kesner, mentioned above as an expert, reports that the Chinese don't bother using their "A" squad hackers to infiltrate law firms – their security is so bad that the rookie "C" squads are able to penetrate law firms.

It's expensive.

And it is. Protecting the security of client data can present a big burden for solos and small law firms. This does not take away a lawyer's ethical duty, however – and it is one reason why the authors lecture so often on computer security. Once a lawyer sees the most common vulnerabilities, he or she can take remedial steps – or engage an IT consultant to do those things that are beyond the skill of the lawyer.

Vigilance never stops.

You cannot secure your data once and think you're done – the rules of information security change on darn near a daily basis – certainly someone in the firm needs to keep up with changes on a regular basis or the firm needs to engage a security consultant to do periodic reviews – the standard advice is that security assessments need to be done twice a year. While that is desirable, it is in our judgment mandatory that assessments be done at least annually.

In the paper world, keeping client data confidential was easy and cheap. In the digital era, abiding by this particular ethical rule is hard and expensive – but it must be done.

Guest Column

"It Ain't Necessarily So"

By: The Honorable William C. Whitbeck, *Michigan Court of Appeals*

2012, as we all know given the barrage of ads that is appearing on our TV sets, is an election year. And I think most of us, despite the incessant pounding that we receive over the airwaves and elsewhere, like elections. In the grand sweep of history, we have come to realize that while free elections may not always result in good government, rigged elections or no elections at all generally produce bad government, or far worse.

It was therefore with amazement that I picked up an edition of the *Detroit Free Press* and learned from a guest columnist that a group of which I was a member—the Judicial Selection Task Force—had proposed to "eliminate [citizens'] right to vote for judges . . . ."

The guest columnist, attorney D. Randall Gilmer, contended that the Task Force recommended replacing the citizens' right to vote with an unelected commission. (We who live in the rather small world of judicial politics refer to this system with the evocative moniker of "'merit' selection.") Mr. Gilmer then ticked off some of the problems with merit selection and ended by asking whether the residents of this great state should have the "ability to hold . . . judges accountable—rather than leaving such a task to people who are unelected and not accountable to us?"

My answer to this question is and has been for some time a resounding yes. I have long contended that election of judges and justices, while far from perfect, is the best method for selecting members of the judiciary in Michigan. We have a considerable history of electing our judges and justices and by and large it has served us well. So what, then, was wrong with Mr. Gilmer's column? Just one thing: *the Judicial Selection Task Force did NOT make a consensus recommendation for merit selection!*

I have long contended that election of judges and justices, while far from perfect, is the best method for selecting members of the judiciary in Michigan. We have a considerable history of electing our judges and justices and by and large it has served us well.

In fact, even the most casual reader of the Task Force's April Report — written in the plainest English we could manage — would recognize that rather than eliminating judicial elections we proposed to expand them! We recommended doing away with our bizarre system of nominating supposedly non-partisan candidates for the Michigan Supreme Court at our partisan party conventions and replacing that strange and less-than-wonderful process with non-partisan primary elections. In short, we should nominate the seven justices of the Supreme Court just as we nominate the other 650+ judges in Michigan

Where, then, did Mr. Gilmer go wrong? Charitably, I suggest that he did not read the Report very carefully. It is true, and the Report reflects, that many members of the Task Force believe that the best method of selecting Michigan Supreme Court justices is by a bipartisan nominating commission modeled on the processes used elsewhere.

But the Task Force throughout its deliberations placed a very high value on consensus. There was no consensus on merit selection. We therefore did not adopt it as one of our recommendations and this the Task Force Report also reflects. This Mr. Gilmer should have known.

And we also proposed to make our judicial elections better. In the increasingly important area of campaign finance, for example, we recommended requiring full disclosure of all contributions of whatever type and from whatever source. If money is the mother's milk of politics, then at least we ought to know, and know in a timely fashion, the origin of that milk. And this Mr. Gilmer should also have known of and perhaps even commented upon, rather than chasing a non-existent but very convenient windmill.

There is a revival of *Porgy and Bess* playing on Broadway. One of its characters insists in song that "It Ain't Necessarily So." So it was in Mr. Gilmer's guest column.

William C. Whitbeck is a judge on the Michigan Court of Appeals and served as Chief Judge of the court for six years of his tenure. He was an attorney in private practice for 20 years and has served in the administrations of three Michigan governors: George Romney, William Milliken and John Engler.

Young Lawyers Section

VII. Post-Trial Motions: Setting the Stage for Appeal

By: Timothy A. Diemer, *Jacobs & Diemer, P.C.*

Editor's Note: This article is the seventh installment in our series providing an introduction to the basics of litigation from a defense perspective. In the first article, we discussed pleading and responding to a cause of action. In the second article, we offered tips and tricks for raising cross claims, third party claims, and pursuing indemnity. In the third article, we addressed seeking discovery and responding to discovery-related issues. The fourth article focused on dispositive motions while the fifth article outlined trial preparation. Parts one and two of the sixth article provided tips, techniques, and strategies for trial advocacy, and the basics of each stage of trial. This article takes us to the next stage, post-trial.

Timothy A. Diemer was recently selected as a biographee in Best Lawyers of America, an honor bestowed upon him at the age of 32 making him one of the youngest Appellate Lawyers in America to be so recognized. In 2011, Crain's Detroit Business honored him as one of Detroit's 40 Under 40. Mr. Diemer is a frequent author and speaker on appellate practice and has been selected to lead the Civil Defense Bar in Michigan, slated to serve as President for the Michigan Defense Trial Counsel in 2012. In addition to his Best Lawyer designation, Mr. Diemer has been recognized as a Top Lawyer by dBusiness Magazine and as a Michigan SuperLawyer for his work with the appellate team at Jacobs and Diemer. Mr. Diemer received his Juris Doctor from Boston College Law School and his Bachelor of Arts from James Madison College at Michigan State University. Business litigation and Insurance Coverage matters round out his practice.

The two previous installments of this series focused on trial strategies, including trial preparation as well as tips for successfully trying a case to verdict. The final article in this series will focus on the appellate process. This installment bridges the gap between the two by focusing on post-trial motions designed to vacate or modify unfavorable jury verdicts as well as mechanisms for setting the stage for an appeal. Note that the time for filing a claim of appeal is tolled during the post-trial motion stage if the post-trial motions, themselves, were timely filed. MCR 7.204(A)(1)(b).

Introduction

Post-trial motions are not an opportunity to retry a case. If the jury has awarded damages against your client and in favor of the plaintiff, don't view post-trial motions as an opportunity to re-try the case to the judge. Post-trial motions, aside from the occasional remittitur order, usually fail to persuade the trial judge to set aside or modify the verdict or order a new trial. That said, while well written and argued post-trial motions may not afford your client relief in the trial court, post-trial motions often set the stage for success in the appellate courts.

No matter how strong the defense trial presentation may have been, if there was conflicting evidence on issues defense counsel feels the jury got wrong, judges are loath to invade the province of the jury and impose their view of the facts. "Assessing credibility and weighing testimony is the prerogative of the trier of fact."[1] "When the evidence presented could lead reasonable jurors to disagree, the trial court may not substitute its judgment for that of the jury."[2]

Assuming a directed verdict motion was made, or a pre-trial motion for summary disposition, the trial court has already ruled that questions of fact warrant a trial. It is nearly impossible in these circumstances to convince a judge that the court was wrong to submit the case to the jury and that the jury's consideration of the evidence was equally wrong. Rather, once the jury has spoken, a defense lawyer has a much better shot at post-trial relief based on arguments limited to legal issues.

Before delving into the specific rules pertaining to the various post-trial motions, one other concern common to all must first be pointed out. It is nearly impossible to secure the entire trial transcripts within the time required to file a post-trial motion — 21 days following entry of the judgment.[3] Thus, while arguing that, for example, the evidence at trial was insufficient to substantiate an element of a plaintiff's tort claim or that the damages testimony presented at trial did not support the jury's award, the defense lawyer rarely has the benefit of the transcript from which to make such arguments.

VII. POST-TRIAL MOTIONS: SETTING THE STAGE FOR APPEAL

There are two ways, essentially, to strategically handle this dilemma. First, you can rely on the judge's memory and recount the trial testimony hoping that the trial judge agrees with your memory of the facts at the motion hearing. The other option is to file the brief attesting to your recollection of the facts, but promise the judge that the transcripts have been ordered, and that the record references of your post-trial motions will be validated once the transcripts are obtained. This latter option, while more expensive since the transcripts are ordered on an expedited basis where the court rules do not actually require a production of the transcripts at this time, is preferable for two reasons: (1) you have the opportunity to substantiate your positions with a supplemental brief once the transcripts come in; and (2), you can preemptively prevent your opposition from distorting the record knowing that once the transcripts arrive, any distortions will be undercut.

With these introductory remarks out of the way, let's look at a few of the various post-trial motions at a defense lawyer's disposal.

Judgment Notwithstanding the Verdict

A motion for judgment notwithstanding the verdict (JNOV) is roughly equivalent to a motion for summary disposition in that the movant argues that the plaintiff failed to sustain the burden of proof on a necessary element of his claim. When moving for JNOV, keep in mind what was mentioned above — if summary disposition and directed verdict motions have already been denied, arguing a factual insufficiency has little chance of success.

A motion for JNOV should be granted only when there is insufficient evidence presented to create an issue for the jury.[4] Similar to summary disposition and directed verdict motions, when deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law.[5] "When the evidence presented could lead reasonable jurors to disagree, the trial court may not substitute its judgment for that of the jury."[6]

> While well written and argued post-trial motions may not afford your client relief in the trial court, post-trial motions often set the stage for success in the appellate courts.

In light of these principles, do not use a motion for JNOV as an opportunity to recast the evidence in a different light hoping the trial judge weighs the testimony differently than the jury. This is not a successful strategy. A well-argued JNOV motion will focus on the legal issues that arose during trial or, if JNOV is not a strong possibility in the trial court, a strategic JNOV motion will develop and preserve key legal issues to set the stage for a consideration of the legal issues in the court of appeals.

> Similar to summary disposition and directed verdict motions, when deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law

Remittitur and Additur

Following the jury verdict, the parties are also given an opportunity to convince the judge that the damages should be lowered (remittitur) or increased (additur) under MCR 2.611(E). This article will focus on remittitur since it is not too often that a defense attorney asks the damages to be increased. Quite simply, a remittitur is warranted if the jury verdict exceeds the highest amount the evidence will support. Instead of the prior "shock the judicial conscience" remittitur standard, the trial court is now required to make an objective inquiry into the excessiveness of the verdict by looking at several factors: (1) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption or simply mistake of law or fact; (2) whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; and (3) whether the amount actually awarded is comparable to other awards in similar cases within the State of Michigan and in other jurisdictions.[7]

Arguing factors 1 and 2 is self-explanatory, but factor 3 requires jury verdict research. Some online legal research tools offer lawyers the ability to conduct this research, but if these tools are not available, many private companies offer jury verdict research services for a reasonable fee.

Requesting a New Trial

The court rules also give parties an opportunity to start all over and re-try the case based on a wide range of reasons identified in MCR 2.611(A)(1), including: an irregularity in the proceedings, jury misconduct, prevailing party misconduct, excessive or inadequate damages due to passion or prejudice, a

verdict clearly or grossly inadequate or excessive, a verdict against the great weight of the evidence or contrary to the law, newly discovered evidence, or an error of law or mistake of fact by the court. Not surprisingly, having sat through a long trial, trial judges are not inclined to order a new trial, and lawyers will typically have better luck impressing an appellate court of the need for a new trial. Trial judges would be more likely to order a remittitur, which would not necessarily engender a new trial.

An order granting a new trial is likewise rare since litigants are only guaranteed a "fair trial," not necessarily a perfect one.[8] This non-guarantee of a perfect trial is further reflected in MCR 2.613(A) -- an error does not warrant post-trial relief unless "refusal to take this action appears to the court inconsistent with substantial justice." This burden is often difficult to meet.

Now that the depressing news is out of the way, let's look at a couple of the grounds which may warrant a new trial. One of the more frequently raised grounds is that the jury verdict was against the great weight of the evidence. Following a trial, it is natural for a defense lawyer to be absolutely convinced in the justice of her cause and equally convinced that the opponent's witnesses were untruthful and that the plaintiff's experts were making things up. But no matter how strong that belief may be, reversing a jury verdict on this ground is virtually impossible. If not to weigh the evidence and make credibility determinations, what is the point of impaneling a jury? In fact, for over 70 years the Michigan Supreme Court has not overturned a jury verdict based on the "great weight of the evidence" test in a civil action.[9]

Another tempting area to seek a new trial will be misconduct of the opposing party and attorney since, again believing in the justice of the case, many defense lawyers feel that the jury verdict could only be explained through the chicanery of opposing counsel. One avenue of success would arise if one's opponent intentionally withheld critical discovery only to ambush the defense at trial. A deliberate refusal to timely divulge discovery which will be central to the opposing party's case or in testing the opposing party's expert can constitute prejudicial error which justifies the granting of a new trial.[10]

An order granting a new trial is likewise rare since litigants are only guaranteed a "fair trial," not necessarily a perfect one.

Other examples of opposing party misconduct warranting a new trial include comparing the sexual harassment plaintiff to a holocaust survivor and the defendant to Nazis;[11] reading an inflammatory poem regarding organ donation to inflame the passion of the jury where organ donation had no relevance at trial;[12] diverting the jurors from the issue in the case by waging unsubstantiated attacks of corporate greed, dishonesty;[13] and repeated references to the defendant's corporate status and the fact that George Steinbrenner was on the board of directors (whatever one's opinion of the Yankees may be, King George is still entitled to a fair trial).[14] "[W]here language is such as evinces a studied purpose to enflame or prejudice the jury, based upon facts not in the case, this Court has not hesitated to reverse."[15]

A deliberate refusal to timely divulge discovery which will be central to the opposing party's case or in testing the opposing party's expert can constitute prejudicial error which justifies the granting of a new trial.

A litigant seeking a new trial based on newly discovered evidence likewise faces a high hurdle as, *a priori*, the grant of a new trial on this basis is disfavored.[16]

Obtaining a Stay of Proceedings, Preparing for an Appeal

Assuming the plaintiff was successful in obtaining a damages verdict against your client, the first matter to take care of is staying the execution of that judgment to protect your client's assets during the appellate process. Unless one or more post-trial motions listed in MCR 2.614(A)(1) are timely filed, execution on the judgment and proceedings supplementary to execution (such as expensive, time consuming and potentially embarrassing creditor's exams) may not occur until 21 days after entry of the judgment. This means that if a post-trial motion is not filed within 21 days of the judgment, the defense lawyer must take action prior to filing a claim of appeal to protect the client's assets from execution. After all, assuming the defendant successfully overturns the verdict on appeal, good luck getting your client's money back after the plaintiff has enjoyed it over the roughly 18 months it takes the court of appeals to decide a case.

Furthermore, if a post-trial motion listed under MCR 2.614(A)(1) is filed, execution on the judgment may not occur until 21 days after entry of an order denying or granting post-trial relief. So, at a minimum, the filing of a post-trial motion extends the automatic stay of execution period until 21 days after such motion is decided. Further, assuming the post-trial motions are denied, the defense lawyer has 21 days to effectuate a stay of proceedings pending appeal.

Stays pending appeal are governed by MCR 7.209, i.e., within the court rules

chapter pertaining to appellate procedure, but the trial judge is responsible for setting the amount of the appeal bond. And while the trial court's authority to act is significantly curtailed once the court of appeals is vested with jurisdiction, one remaining power of the trial court is to modify the bond during the appellate process.[17] The court rules do not specify the required amount of the stay bond, merely requiring that the bond be set "in an amount adequate to protect the opposite party."[18] The custom is to secure a bond in the amount of 125% of the judgment, to take into account the interest that will accumulate during the appeal process. Once the trial court approves the bond, a stay of execution follows: "the trial court may order a stay of proceedings, with or without a bond as justice requires."[19] If the trial court declines to stay proceedings, the defendant can seek a stay in the court of appeals.[20]

Conclusion

Despite the seeming bleak picture painted above, post-trial motions do serve many useful functions. Perhaps most importantly, if an appellate specialist is brought in to handle the appeal, allowing the appellate specialist to draft the post-trial briefs gives that attorney an opportunity to become familiar with the file, the legal issues and the facts, giving the appellate attorney an opportunity to clear up the record, as well as develop and preserve appellate issues.

Appellate attorneys often see a trial as a series of legal issues whereas trial counsel is more likely to home in on witness credibility, damages assessments, testimonial disputes, and other critical trial battles played out in front of the jury. This focus is often considerably different than an appellate attorney's. If your firm has an appellate department or if an outside appellate specialist is brought in to look at your case, the "book lawyer" may find legal issues that

Unless one or more post-trial motions listed in MCR 2.614(A)(1) are timely filed, execution on the judgment and proceedings supplementary to execution (such as expensive, time consuming and potentially embarrassing creditor's exams) may not occur until 21 days after entry of the judgment.

are often not addressed by trial counsel. Post-trial motions give your client an opportunity to explore and develop what ultimately might prove to be outcome determinative legal error. This "new" legal issue can be advocated to the judge on post-trial motion but also has the added benefit of arguably preserving the issue for consideration in the appellate courts. A challenge to the sufficiency of the evidence can be made via a JNOV post-trial motion contesting the lack of proof of an element of the claim or a failure to prove damages.[21]

With an appeal bond in place and the 21-day window for filing a claim of appeal fast approaching, it is time to begin preparation of the claim of appeal documents. That topic, as well as appellate brief writing and oral argument, will be addressed in the next and final installment.

Post-trial motions give your client an opportunity to explore and develop what ultimately might prove to be outcome determinative legal error.

Endnotes

1. *Kelly v Builders Square Inc,* 465 Mich 29, 39-40; 632 NW2d 912 (2001).
2. *Foreman v Foreman,* 266 Mich App 132, 136; 701 NW2d 167 (2005).
3. MCR 2.610; MCR 2.611; MCR 2.612.
4. *Merkur Steel Supply, Inc v Detroit,* 261 Mich App 116, 123; 680 NW2d 485 (2004).
5. *Id.* at 123-124.
6. *Foreman, supra,* 266 Mich App 136.
7. *Gilbert v DaimlerChrysler, Inc,* 470 Mich 749; 685 NW2d 391 (2004) (fn19).
8. *Totman v School District of Royal Oak,* 135 Mich App 121, 127; 352 NW2d 364 (1984).
9. *Davis v Belmont Creamery Co,* 281 Mich 165; 274 NW 749 (1937).
10. *Rock Island Bank and Trust Company v Ford Motor Company,* 54 Mich App 278; 220 NW2d 799 (1974).
11. *Gilbert v DaimerlChrysler Corp,* 470 Mich 749; 685 NW2d 391 (2004).
12. *Porter v Northeast Guidance Center,* 467 Mich 901; 653 NW2d 183 (2002).
13. *Badalamenti v William Beaumont Hospital-Troy,* 237 Mich App 278, 290-291; 602 NW2d 854 (1999).
14. *Reetz v Kinsman Marine Transit Co,* 416 Mich 97, 330 NW2d 638 (1982).
15. *Firchau v Foster,* 371 Mich 75, 78-79; 123 NW2d 151 (1963).
16. *Kroll v Crest Plastics, Inc,* 142 Mich App 284, 291; 369 NW2d 487 (1985).
17. MCR 7.209(C).
18. MCR 7.209(B)(1).
19. MCR 7.209(E).
20. MCR 7.209(A)(2).
21. *Napier v Jacobs,* 429 Mich 222; 414 NW2d 862 (1987).

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MDTC Legislative Report

As I write this report on September 11th, the legislative leadership in Lansing is still planning the agenda for the few remaining session days before the November election. Legislative activity at the Capitol was sparse over the summer, as legislators and staff made preparations for the fall sessions and the all-important election, but work continued on a number of important initiatives behind the scenes.

It is expected that the last of the measures required for implementation of next year's budget will be passed before the end of September, but with scarce time running out and important details yet to be resolved, final consideration of several issues will probably be deferred until the lame duck session. Those issues *may* include: elimination of the unpopular personal property tax and replacement of the revenue it now generates; generation of new revenue for transportation projects; final passage of the abortion package partially addressed over vigorous objection in June; legislation implementing additional changes in the teachers' retirement system; creation of the new health insurance exchange required under the federal Affordable Care Act; no-fault auto insurance reform; and additional medical malpractice tort reforms.

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2012 Public Acts

Our Legislature was very busy in the week after my last report in June, and thus, as of this writing, there are 300 Public Acts of 2012. But only a few of these are likely to be of any interest to our membership. They include the following:

2012 PA Nos. 165 and 205 through 208 (Senate Bill 300 and House Bills 4593 through 4596) have amended the Insurance Code of 1956 to **add new provisions regulating the use of credit information and insurance scores** for the issuance and rating of automobile, homeowners, and other casualty insurance policies.

2012 PA 220 – HB 5340 (Gilbert – R) has amended the Tax Tribunal Act, MCL 205.737, to **substantially increase the judgment interest rate for Tax Tribunal awards** based upon overpayment or underpayment of property tax.

2012 PA 234 – HB 5609 (Huuki – R) has amended the General Property Tax Act by adding a new section MCL 211.78p. This new section **will impose personal liability for payment of delinquent property taxes** upon any person who sells or otherwise conveys the property upon which the taxes are owed to a federally recognized Indian tribe or a member or affiliated entity of such a tribe, if the property becomes exempt from forfeiture, foreclosure or sale for collection of the delinquent taxes under federal law by virtue of the sale or conveyance.

2012 PA 268 – SB 783 (Schuitmaker – R) has amended the Revised Judicature Act, MCL 600.2962, to **limit liability for professional malpractice claims brought against certified public accountants by non-clients** in certain circumstances.

2012 PA 300 – SB 1040 (Kahn – R) has amended the Michigan Public School Employees' Retirement System Act to effect **a number of changes in pension and retiree health benefits for public school teachers.**

Old and New Business

As I mentioned in my last report, several public hearings on the new medical malpractice tort reform package (Senate Bills 1115, 1116, 1117 and 1118) were held before the Senate Insurance Committee in May and June, but the bills were not reported for consideration by the full Senate. An additional hearing was held before the Committee on July 18, 2012, and the members were treated to another four hours of testimony, most of which was presented in opposition. It became apparent that the legislation did not have the necessary support of some of the Republican members, and thus, the Committee was again adjourned without reporting these bills, which have not been scheduled for further consideration to date. It is unlikely that these bills will be given any further consideration before the election, but it is possible that some form of this initiative will be considered in the lame duck session.

House Bill 5128 (Walsh – R) would amend the Revised Judicature Act to replace the current provisions of Chapter 80 – the "Cyber Court" established by 2001 PA 262 – **with new provisions establishing a new "Business Court."** The Business Court would be a special docket for specialized handing of commercial and business disputes, to be established in every circuit having three or more judges. HB 5128 was passed by the House on June 14, 2012, and assigned to

The Business Court would be a special docket for specialized handing of commercial and business disputes, to be established in every circuit having three or more judges.

the Senate Judiciary Committee, which reported it for consideration by the full Senate on September 11th.

Senate Bill 1220 (Schuitmaker – R) would amend the Governmental Immunity Act, MCL 691.1419, pertaining to **municipal liability for sewage disposal system events.** The amendment would provide for an administrative determination of all claims for property damage and economic damages for any personal injury arising from such events, and the award of the administrative hearing officer would be the sole and exclusive remedy with respect to claims asserting those types of damage. SB 1220 has been referred to the Senate Judiciary Committee.

In Memoriam

When I came to Lansing to work for the Senate in 1991, there were elder statesmen with established relationships and a wealth of institutional knowledge to keep the legislative process running smoothly. As a result of the term limits adopted in 1992, they have been replaced by a collection of men and women who will not be allowed to serve long enough to develop the relationships, skills and knowledge required for optimal performance of their duties. A few of the elder statesmen remain on the sidelines today, but their ranks are dwindling with the passage of time.

During my service as Majority Counsel and Policy Advisor to the Senate Judiciary Committee from 1991 to 1996, I was privileged to work with one of the great men of that bygone era – Senator William Van Regenmorter, who served as Chairman of the Senate Judiciary Committee from 1991 through 2002. In June of this year, the ranks of the elder statesmen were further diminished by Senator Van Regenmorter's passing at age 73.

Senator Van Regenmorter was not new to public service in 1991; he had already served four 2-year terms in the House. And when the newly-adopted term limits forced his retirement from the Senate, he returned to the House to serve two more terms. He retired at the end of 2006 – unable to continue to *his* satisfaction by virtue of the Parkinson's disease which he had battled courageously since 2002 while continuing his service as Chairman of the House Judiciary Committee. When elected to the Senate in 1990, Senator Van Regenmorter was already widely known and respected as the author of the Crime Victim's Rights Act and the sponsor of the Crime Victim's Rights amendment of our 1963 Constitution approved by the voters in 1988.

Senator Van Regenmorter preferred for people to call him "Bill," and he insisted that *everyone* should do so, from the Governor to the lowliest Senate page. He was a man of great intellect and even greater humility, who listened carefully to every position and devoted whatever time was required to develop a complete understanding of every issue. He was a forceful advocate for his constituents and for all of the people of the State of Michigan, and was a friend to all, including the members of the opposing party on the other side of the aisle.

On July 18th, Bill's memory was honored by the members of both houses by their unanimous approval of House Concurrent Resolution 57. We will continue on without him, but he will be sorely missed.

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.

Welcome New Members

MDTC Welcomes These New Members

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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

The Michigan Supreme Court released a series of three significant no-fault opinions at the end of July. The court continued the recent trend of eliminating loopholes created by "judicial gloss" applied over the past decades. Once again, the opinions signaled the current court's intent to limit payment of no-fault benefits in line with stricter interpretations of the actual language of various sections of the no-fault act. One case eliminated PIP benefits long afforded to "joyriders," including family members, "disavowing" a 1992 Michigan Supreme Court opinion and its progeny. Another case held that excess "household/replacement services" benefits are *not* recoverable in third party tort cases. In the third case, the court tackled family-provided attendant care, reinforcing the statutory provisions that the services must be for the care of an injured person (distinguishing replacement services), must be actually incurred, and that the rate must be reasonable, i.e., not simply the amount an agency would charge to a no-fault carrier. In all three opinions, the majority of four Justices included Chief Justice Young and Justices Markman, Zahra and Mary Beth Kelly, with Justices Cavanagh, Hathaway and Marilyn Kelly dissenting in each.

Supreme Court Overturns "Joyriding" Exception to MCL 500.3113, Rendering Any Person Who Unlawfully Takes a Vehicle Ineligible for PIP Benefits

Spectrum Health Hospitals v Farm Bureau Mut Ins Co of Michigan, ___ Mich ___ (2012) (issued July, 31, 2012)

Justice Zahra, writing for the majority, held, in reviewing two cases, that (1) the "chain of permissive use" exception to MCL 500.3113(a) is untenable, and (2) there is no "family joyriding" exception to the ineligibility for PIP benefits of a person who takes a vehicle without permission.

In *Spectrum Health*, Farm Bureau's insured was the father of the claimant. The father forbade his adult son from driving the insured vehicle because he had no driver's license. Both the son and the son's girlfriend knew of this prohibition. The insured gave his son's girlfriend permission to use the vehicle. She, in turn, surrendered the keys to the son who was injured in an ensuing accident. Under prior law, the fact that the injured person was a family member of the owner, combined with the fact that the injured person obtained the vehicle from a person who was allowed to drive the vehicle, would have rendered the provision of MCL 500.3113 inapplicable. The court's decision overrules *Bronson Methodist Hospital v Forshee*, 198 Mich App 617 (1993).

In *Progressive Marathon Ins Co v DeYoung*, the companion case to *Spectrum Health*, defendant Ryan DeYoung was a specifically excluded driver on his wife's no-fault policy with Progressive. His wife had expressly forbidden operation of any of the family's four vehicles by her husband. On the night in question, Ryan took the keys to one of the cars from his wife's purse, unbeknownst to her, and promptly got into a serious accident. The court's decision that "no means no," even when a family member takes keys left in the home, "disavowed" former Justice Levin's plurality opinion in *Priesman v Meridian Mutual*, 441 Mich 60 (1992) and its progeny, including *Butterworth Hospital v Farm Bureau,* 225 Mich App 244 (1997), *Mester v State Farm*, 235 Mich App 74 (1999), and *Roberts v Titan (On Reconsideration),* 282 Mich App 339 (2009).

The court reasoned that, had the Legislature intended that replacement services be considered "allowable expenses" it would have included the terms in the same subsection, not differentiated them.

No Excess Replacement Services Available in Third Party Liability Suit

Johnson v Recca, ___ Mich ___ (2012) (issued July 30, 2012)

Holding that replacement services are not "for the care, recovery or rehabilitation" of a person injured in an auto accident, the supreme court reversed the court of appeals' ruling that replacement services are within the scope of "excess" PIP benefits that could be awarded as damages in a tort suit brought pursuant to MCL 500.3135(3)(c). Although wage loss, allowable expenses, and survivor's loss benefits that accrue after the expiration of the three year limit on wage loss and survivor's loss are recoverable in a third party suit, the supreme court corrected the court of appeals' erroneous conclusion that replacement services are a type of "allowable expense" and, accordingly, available in a tort suit.

The supreme court noted that each type of benefit is described separately within the no-fault act: replacement services in MCL 500.3107(1)(c); allowable expenses for the care, recovery and rehabilitation of the injured person in MCL 500.3107(1)(a); and wage loss in MCL 500.3107(1)(b). The court reasoned that, had the Legislature intended that replacement services be considered "allowable expenses" it would have included the terms in the same subsection, not differentiated them. Moreover, the court held, while replacement services are necessitated by the injury, they are services performed by another, which the injured person would have performed but for the accident. In contrast, allowable expenses are expenses specifically intended to care for the injured person to either help him get better or, at least, to keep him from harm. The court held that household services are not performed for those reasons, rather they simply replace the chores the injured person would have performed for basic household maintenance.

Million Dollar Plus Award for Family-Provided Attendant Care Costs Reversed

Douglas v Allstate Ins Co, ___ Mich ___ (2012) (issued July 30, 2012)

Following the logic of *Johnson v Recca*, and released on the same day, the supreme court struck a mighty blow against the huge verdicts often awarded to family members who provide supposed attendant care services to accident victims. Reversing a $1.1 million dollar award rendered by a Washtenaw Circuit Court judge after a bench trial, the Michigan Supreme Court found that plaintiff had not only overreached in regard to the type of services for which she sought compensation but also in the rate demanded. The supreme court applied the four requirements of MCL 500.3107(1)(a): (1) that the services must be for the care, recovery or rehabilitation of the injured person, thereby eliminating household services as an element of allowable expenses, (2) that the expense must be reasonably necessary, (3) that the expense was actually incurred, and (4) that the charge must be reasonable.

The court ruled that the circuit court had failed to make sufficient findings of fact on two of the four elements and had used improper criteria to determine the reasonableness of the rate charged. As for the necessity of services claimed by the plaintiff, the court held that there was sufficient evidence of the need for some attendant care services in the form of an affidavit by a treating physician although there was no specific prescription calling for attendant care. Accordingly, the court found that the trial court had properly denied Allstate's motion for summary disposition on that issue.

The supreme court agreed that the court of appeals had properly reversed and remanded for further proofs the question of whether the expenses were "actually incurred." All of the services were allegedly performed by the claimant's wife who also worked outside the home. She claimed to have supervised her husband first for 67 hours a week,

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).*

Attorney Byron "Pat" Gallagher of the Gallagher Law Firm has been selected to join the Defense Research Institute's Lawyers Professionalism and Ethics Committee. DRI is the leading organization of defense attorneys and in-house counsel. Membership in DRI provides access to resources and tools for attorneys who strive to provide high-quality, balanced and excellent service to their clients and corporations in the defense of civil litigation matters.

Paul and Whitney Vance welcomed their first child, Kellen Mackay Vance, into the world on July 24. He weighed in at 8lbs 10oz and was 22.5 inches.

The Michigan Supreme Court found that plaintiff had not only overreached in regard to the type of services for which she sought compensation but also in the rate demanded.

then for 40 hours a week, in accordance with the physician's recommendation that the claimant be supervised during waking hours. However, no contemporaneous catalog was maintained of what exactly the wife did, for how long, or on what days. Instead, she submitted logs, all prepared on the same day, purporting to outline generally what she had been doing for years. The supreme court agreed with the court of appeals that the failure to track the services or submit logs to the insurance company for years was inconsistent with the claim that plaintiff's wife expected payment for the services. Without expectation of compensation, expenses are not "incurred" as required by the statute. The post-dated logs also fell short of the degree of reasonable specificity required to determine whether the services allegedly performed were reasonable type or duration.

Finally, affirming in part then-judge Zahra's opinion in *Bonkowski v Allstate*, 281 Mich App 154 (2008), an opinion which raised a hue and cry at the time, the supreme court held the rate paid to agencies that provide attendant care services is *irrelevant* to the reasonableness of the rate payable to untrained family members. In this case, an agency had "hired" the wife to provide attendant care services sometime after she started providing them. The agency charged $40 per hour to Allstate but paid the wife only $10 per hour. The supreme court ruled that a fact finder may base the rate payable to a family member on the amount an agency would have paid the actual provider for the services but may *not* base the individual's compensation on the rate an agency would charge. The court noted, however, that the agency charge can be considered, but it cannot be adopted as the per se reasonable rate to pay the individual provider. Therefore, the court ruled that the trial court erred in awarding $40 per hour directly payable to the plaintiff wife, not the agency.

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Medical Malpractice Report

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Settlement Setoffs and the Noneconomic Damages Cap

Velez v Tuma, ___ Mich ___; ___ NW2d ___ (2012)

The Facts: The plaintiff obtained a jury verdict of over $1.5 million, which, after reduction for collateral-source payments and the noneconomic damages cap, resulted in a judgment of $394,200. Before trial, the plaintiff settled with former codefendants for $195,000.

The trial court agreed that the defendant was entitled to a setoff for the settlement, but applied it before applying the noneconomic damages cap. The defendant argued that this was incorrect because it had the same practical effect as applying no setoff at all. The Michigan Court of Appeals, however, affirmed.

The supreme court granted the defendant's application for leave to appeal to consider the proper sequence in which to apply setoff in a case in which the noneconomic damages cap applies. Later, it also granted the plaintiff's cross application, which argued that the common-law setoff rule had been abolished.

The Ruling: The supreme court reversed the court of appeals and the trial court, holding that the setoff should have been applied after the court applied the noneconomic damages cap. In so holding, the court emphasized that "[t]o the extent the Legislature has not abolished principles of joint and several liability, those principles and the common-law setoff rule remain the law in Michigan." Therefore, the court held, "any settlement must be set off from the final judgment after application of the noneconomic damages cap and the collateral source rule." The court also rejected the plaintiff's contention that it somehow mattered what "kind" of damages a settlement was intended to compensate the plaintiff for (i.e., economic versus noneconomic loss). Instead, "the settlement is treated as an aggregate award to be applied against the plaintiff's total actual loss, meaning the final judgment after application of the applicable statutory adjustments."

Practice Tip: In medical malpractice cases with several defendants, it is not uncommon for one or more codefendants to be dismissed from a case after settling with the plaintiff. In cases where a judgment is entered in favor of the plaintiff against the remaining defendants, there is often debate about how (and when) the setoff should be applied. Now, the Michigan Supreme Court has made clear that the setoff is applied after other statutory adjustments to the verdict, such as collateral-source payments and the noneconomic damages cap. If you represent a defendant against whom a judgment is entered, be sure that any settlement paid by a joint tortfeasor is subtracted after any collateral-source and cap reductions. You should resist any attempt by the plaintiff to argue that the settlement is for some specific kind of damages, because *Velez* holds that a settlement, no matter how characterized, is applied against the total loss.

Striking Expert Witnesses

Jilek v Stockson (On Remand and On Reconsideration), ___ Mich App ___; ___ NW2d ___ (2012)

The Facts: The plaintiff appealed from a no cause judgment in favor of the defendants. The court of appeals reversed the judgment of no cause on two grounds. The supreme court reversed the court of appeals, however, and remanded to the court of appeals to consider the remaining issue plaintiff raised, specifically whether the trial court had improperly denied plaintiff's motion to bar defendants' experts from testifying at trial as a sanction for defendants' failure to answer expert witness interrogatories. The defendants argued that a letter their counsel sent enclosing the experts' CVs and detailing information about their testimony sufficed as a response.

The Ruling: The court of appeals agreed with the plaintiff that the letter she received in response to her interrogatories was not a sufficient response. The court went on to state that the plaintiff should have received some relief, but only if she had filed a motion to compel under MCR 2.309(C). Since she didn't, the court affirmed the trial court's denial of the motion to bar the testimony of defendants' experts and the no cause judgment. The court also relied on the fact that the plaintiff only made generalized assertions of prejudice without making any specific showing. The court further concluded that the trial court's limitation of the scope of the experts' testimony to the matters disclosed in the letter constituted an implied sanction.

Practice Tip: The court of appeals' holding in *Jilek (On Remand and On Reconsideration)*[1] suggests that the pru-

The court held, "any settlement must be set off from the final judgment after application of the noneconomic damages cap and the collateral source rule."

dent course when presented with expert witness interrogatories is to provide the response in the form mandated by MCR 2.313, even if you can provide the information requested in some other format, such as a letter.

Goldberg v Wlezniak, unpublished opinion per curiam of the Court of Appeals, issued June 21, 2012 (Docket No. 301439)

The Facts: The plaintiff alleged that the defendant emergency medicine physician breached the standard of care by not administering tissue plasminogen activator (t-PA) shortly after the plaintiff's stroke. The plaintiff's standard-of-care expert, a board-certified emergency medicine physician, testified that the failure to administer t-PA breached the standard of care. He admitted, however, that both the American College of Emergency Physicians (ACEP) and the American Academy of Emergency Physicians (AAEP) had refused to endorse the administration of t-PA as the standard of care for emergency medicine physicians. He further admitted that there was no literature asserting administration of t-PA as the standard of care. The trial court nevertheless denied the defendants' motion to strike the expert under MRE 702 and MCL 600.2955.

The Ruling: The court of appeals reversed the trial court. It held that the trial court's "decision to admit [the expert's] testimony constituted an abuse of discretion." The court of appeals, citing *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781-782; 685 NW2d 391 (2004), emphasized that under MRE 702 and MCL 600.2955, expert testimony must be reliable. It held that the plaintiff's expert's testimony regarding t-PA administration was not reliable. In addition to the ACEP and AAEP positions, the court of appeals also pointed to the expert's testimony that he had only personally administered t-PA once and only referred patients for t-PA administration about twenty times in nine years, and to his admissions that no literature supported administration of t-PA as the standard of care or even as being beneficial to a patient like the plaintiff who suffered a mild stroke.

Practice Tip: When it comes to expert witness qualifications, often there is much focus on whether the requirements of MCL 600.2169—which requires standard-of-care experts to have the same board certification and specialty as the defendant—are met. But even if a plaintiff's experts satisfy that statute, it may nevertheless be appropriate to challenge the expert on MRE 702 reliability grounds. *Goldberg* represents the extreme case of an expert who admitted that his opinion was unsupported by any literature and in fact was directly opposite to the positions of both major emergency medicine professional organizations. But there may be other, less clear-cut cases of experts being unable to support their testimony as reliable under MRE 702 or MCL 600.2955. A motion to strike in those cases may be worth considering.

Endnotes

1. The court of appeals issued a previous opinion in this case, but granted the plaintiff's motion for reconsideration and vacated it, replacing the opinion with this one. The only change appears to be the addition of the phrase stating that the plaintiff would have been entitled to relief if she had filed a motion to compel.

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Appellate Practice Report

Civility in Appellate Briefing – Be Careful What You Say About the Trial Court

"While due allowance must be made for partisanship, it should not be forgotten that the administration of justice is never aided by the substitution of invective for argument."[1]

When challenging a trial court's decision on appeal, it can be tempting to use harsh words. But a decision earlier this year from the United States Court of Appeals for the Fourth Circuit serves as a useful reminder to be careful what you say.

In *United States v Venable*,[2] the Fourth Circuit affirmed the district court's decision to deny the defendant's request for discovery in connection with his selective prosecution claim, but then went on to take the government to task for what the court found to be abusive language directed at the district court, which had expressed concerns about a federal-state law enforcement initiative in Virginia called "Project Exile." Under Project Exile, firearm-related crimes were referred to the United States Attorney's Office for review and federal prosecution whenever possible. While the district court rejected the defendant's claim of racial discrimination for lack of evidence, it expressed dismay at the government's refusal to provide "a fuller explanation about how generally cases were selected for inclusion in Project Exile," finding it to leave "a considerable distaste."[3] Apparently not content with explaining why the district court's decision should be affirmed, the government "insinuate[d] that the district court's concerns 'require[] a belief in the absurd that is similar in kind to embracing paranormal conspiracy theories,'" and "criticize[d] the district court's 'oblique language' on an issue unrelated to th[e] appeal."[4] In response, the Fourth Circuit felt "compelled" to remind the government "that such disrespectful and uncivil language will not be tolerated by this court."[5]

While this decision is one of the more recent examples of an appellate court going out of its way to caution counsel about the use of invective and impugning the integrity of the trial court, it is certainly not alone. In *Big Dipper Entm't, LLC v City of Warren*,[6] the Sixth Circuit Court of Appeals admonished the plaintiff's attorney for using "notably harsh terms" in arguing that the district court had used a flawed methodology in analyzing the plaintiff's zoning challenge:

> Big Dipper criticizes [the district court's] finding in notably harsh terms, asserting that the district court "made no pretense" of applying the proper summary-judgment standard, that the court's analysis of the issue (in a 32-page opinion) was "cursory," that the court "chose to disregard" the "voluminous and detailed analysis" set forth in the report of Big Dipper's expert, Bruce McLaughlin, and so on.[7]

Finding "[a]rguments like these—which casually impugn the motives of the district court or, more commonly, opposing counsel" to be "regrettably common of late," the court thought it "worthwhile to comment on them":

> In our view, a party should think twice about questioning the district court's integrity or that of opposing counsel. That two persons disagree does not mean that one of them has bad motives.[8]

Some courts have gone further than to "comment" on such practices. In *In re Wilkins*,[9] the Supreme Court of Indiana suspended an attorney for 30 days for making the following statement criticizing an Indiana Court of Appeals decision:

> "[T]he Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee … and then said whatever was necessary to reach that conclusion."[10]

In sanctioning counsel, the court found his statement to violate Indiana Rule of Professional Conduct 8.2(a):

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to the truth or falsity concerning the qualifications or integrity of a judge….[11]

The court was also critical of this additional statement in counsel's brief:

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When challenging a trial court's decision on appeal, it can be tempting to use harsh words. But a decision earlier this year from the United States Court of Appeals for the Fourth Circuit serves as a useful reminder to be careful what you say.

> "The Court of Appeals' published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point."[12]

Courts have even issued sanctions and stricken appellate filings containing insulting and unduly harsh criticism of the lower court. That was the case in *Ruston v Dallas County Tex*,[13] where the plaintiff filed a motion to disqualify the trial court judge and to expand the record on appeal.[14] Finding that the motions contained "abusive and disrespectful language" directed at the trial court, the Fifth Circuit struck them and sanctioned the plaintiff. In *Clark v Clark*, the Indiana Court of Appeals decided against striking the appellant's brief, but cautioned that "[f]or the use of impertinent, intemperate, scandalous, or vituperative language in briefs on appeal impugning or disparaging this court, the trial court, or opposing counsel, we have the plenary power to order a brief stricken from our files and to affirm the trial court without further ado."[15]

So how far is too far when it comes to arguing that the trial court erred in its decision? In *In re Maloney*, the Texas Court of Appeals noted that "[a] distinction must be drawn between respectful advocacy and judicial denigration."[16] As one appellate judge acknowledged, "[t]rial judges as well as appellate judges can make mistakes and misstate the law."[17] But no matter "how clearly wrong the ruling," "[a]ttorneys should limit their pleadings and briefs to addressing the legal errors."[18] The Sixth Circuit offered what may be the best advice when it observed that counsel should simply "lay out the facts and let the court reach its own conclusions."[19] Or consider this guidance from the Indiana Court of Appeals:

> Overheated rhetoric is unpersuasive and ill-advised. Righteous indignation is no substitute for a well-reasoned argument. We remind counsel that an advocate can present his cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.
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> * * *
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> . . . The mind, conscious of its own integrity, does not respond readily to the goad of insolent, offensive, and impertinent language. It must be made plain that the purpose of a brief is to present to the court in concise form the points and questions in controversy, and by fair argument on the facts and law of the case to assist the court in arriving at a just and proper conclusion.[20]

Although the line between zealous advocacy and showing disrespect to the trial court is perhaps not always clear, it may well be that the desired result can be achieved, more often than not, by simply arguing that "the trial court erred," and explaining why in logical and dispassionate terms.

The Michigan Court of Appeals' Internal Operating Procedures (a/k/a "the IOPs")

When it comes to handling a case in the Michigan Court of Appeals, one of the most useful resources may be the court's Internal Operating Procedures (commonly known as the "IOPs"). Although much of the information in the IOPs can be obtained from the court rules themselves, the IOPs, which are updated regularly, provide many helpful details about the court's internal processing of appeals. Here are some of the highlights:

- The IOPs explain the intake process for both claims of appeal and applications for leave to appeal, including the assigning of docket numbers, the processing of appeals involving multiple lower court case numbers or orders, and, in the case of appeals as of right, the court's initial determination of its jurisdiction.
- The IOPs provide details about the filing of interlocutory appeals, including how to seek emergency relief and a stay of proceedings. The IOPs also explain the process for submission of emergency appeals and related motions to hearing panels.
- The IOPs provide guidance for securing the transcript for appeal, including how the court addresses late transcript orders, the late filing of transcripts, and situations when the transcript is not available.
- The IOPs explain motion practice in the court of appeals, including the various types of motions that can be filed and when they should be filed.
- Perhaps most useful for practitioners, the IOPs contain comprehensive information relating to the filing of briefs, including timing, form, and how to go about seeking an extension

The Sixth Circuit offered what may be the best advice when it observed that counsel should simply "lay out the facts and let the court reach its own conclusions."

of time. The IOPs also explain the filing of adoptive briefs, joint briefs (e.g., appellant/cross-appellee or appellee/cross-appellant), supplemental authority, and amicus briefs (including the availability of a response).

- The IOPs explain how cases are placed on the court's calendar for oral argument, the ability of parties to advise the court of scheduling conflicts, and how to seek an adjournment or disqualification of a judge.
- The IOPs explain the process for obtaining an audio recording of oral argument.
- The IOPs provide helpful information on the issuance of opinions and orders, filing motions for reconsideration, and taxing costs.
- Finally, the IOPs explain the various circumstances that can lead to the involuntary dismissal of an appeal and how to avoid them.

The Michigan Supreme Court's July 2012 No-Fault Opinions

In three decisions released at the end of its 2011-2012 term, the Michigan Supreme Court provided clarity on the application of Michigan's no-fault act.

Johnson v Recca

In *Johnson v Recca,* __ Mich __; ___ NW2d ___ (Docket No. 143503, July 30, 2012), the court considered whether a plaintiff in a third-party auto accident case may recover damages for excess replacement services. "Replacement services" are paid, under the first-party system, at a rate of not more than $20 per day. *See* MCL 500.3107 and 500.3108. *Johnson* holds, however, that plaintiffs cannot recover damages for replacement services in third-party cases.

The court's reasoning was based on the text of the no-fault act. The act "abolished" liability except as to certain categories of damages. Under section 3135(3)(c) of the act, tortfeasors remain liable for "[d]amages for allowable expenses, work loss, and survivor's loss as defined in [the no-fault act] in excess of the daily, monthly, and 3-year limitations" applicable to PIP carriers. MCL 500.3135(3)(c). The court observed that damages in no-fault cases fall into four categories: allowable expenses, work loss, survivor's loss, and replacement services. Although section 3135(3)(c) preserves liability as to three of those categories, it omits replacement services. This omission, the court reasoned, indicates that the Legislature did not intend for tortfeasors to remain liable for replacement services. Although the plaintiff in *Johnson* argued that "allowable expenses" includes replacement services, the court rejected this argument as contrary to the plain text of MCL 500.3107, which treats allowable expenses and replacement services as separate categories of damages.

Douglas v Allstate Insurance Company

Douglas v Allstate Insurance Company, __ Mich ___; __ NW2d __ (Docket No. 143503, July 30, 2012), was a first-party no-fault case against a PIP carrier. The plaintiff claimed "allowable expenses" for services provided by his wife—a claim that led to a number of statutory and evidentiary issues for the Michigan Supreme Court to resolve.

In an opinion authored by Chief Justice Young, the court held, first, that "allowable expenses must be 'for an injured person's care, recovery, or rehabilitation.'" If attendant care services consist only of "ordinary household tasks" that are not "necessitated by the injury sustained in the motor vehicle accident," they are not "allowable expenses."

Second, allowable expenses must be proven by a preponderance of the evidence, whether services are provided by a family member or by an unrelated party. The plaintiff must establish both the amount and nature of these services, and must show that the expenses were "incurred"—that is, that the plaintiff actually agreed to pay for them.

Third, allowable expenses must be reasonable. In *Douglas,* the plaintiff claimed that his wife's attendant care services were worth $40 per hour based on what a commercial agency would charge a patient for home health care. But this rate, the court held, was "based on factors too attenuated from those underlying the rate charged for an individual's provision of attendant care services." Specifically, this rate included the agency's overhead in addition to the individual employee's compensation for providing home health care services. Thus, the court held that proofs must focus on the *individual's* compensation, not the agency's fee.

Spectrum Health Hospitals v Farm Bureau Mutual Insurance Company of Michigan

In *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Michigan,* __ Mich ___; ___ NW2d___ (Docket Nos. 142874,

When it comes to handling a case in the Michigan Court of Appeals, one of the most useful resources may be the court's Internal Operating Procedures (commonly known as the "IOPs").

143330, July 31, 2012), the court considered two cases. Drivers who had been expressly prohibited from using family members' vehicles sought PIP benefits for injuries sustained while using those vehicles. The no-fault act plainly excludes persons who use vehicles unlawfully from obtaining PIP benefits. Some courts, however, had developed exceptions to this rule: (1) a "chain of permissive use" theory, which allowed a party prohibited from using a vehicle to seek PIP benefits if he or she was given permission to use the vehicle by another authorized user, and (2) a "family joyriding exception," which allowed family members unlawfully using a vehicle to claim PIP benefits. *Spectrum Health* overruled both exceptions, holding that the plain language of the no-fault act allows for neither.

In sum, the court held that replacement services damages are not among the remedies available in third-party tort cases under the no-fault act, clarified the insured's burden of proof in first-party cases, and rejected two judicially created exceptions that conflicted with legislative intent.

The Plurality Puzzle

Beauty, as the saying goes, is in the eye of the beholder. The same may be said of the legal value of plurality opinions. Michigan's courts recognize that plurality opinions generally are not precedential:

> The clear rule in Michigan is that a majority of the Court must agree on a ground for decision in order to make that binding precedent for future cases. If there is merely a majority for a particular result, then the parties to the case are bound by the judgment but the case is not authority beyond the immediate parties.

Spectrum Health Hosps v Farm Bureau Mut Ins Co of Michigan, __ Mich ___; ___ NW2d___ (Docket Nos. 142874, 143330, July 31, 2012), slip op at 31, quoting *People v Sexton,* 458 Mich 43, 65; 580 NW2d 404 (1998), quoting *People v Anderson,* 389 Mich 155, 170; 205 NW2d 461 (1973). But a pair of decisions issued at the end of the Michigan Supreme Court's 2011-2012 term demonstrates that the application of this rule is not always straightforward.

Stand Up for Democracy v Secretary of State

Stand Up for Democracy v Secretary of State, ___ Mich ___; ___ NW2d ___ (Docket No. 145387 August 3, 2012), held that a referendum on Act 4 of 2011, Michigan's Local Government and School District Accountability Act (the "Emergency Financial Manager Act"), must appear on the November 2012 ballot. But the fate of the "substantial compliance" exception—one of the major areas of disagreement between the justices in *Stand Up for Democracy*—is less clear.

Michigan law requires petitions to amend the constitution, initiate legislation, or hold a referendum on existing legislation to meet specific requirements, one of which is that certain language must appear on petitions in "14-point boldface type." The petitioners in *Stand Up For Democracy* submitted a petition for a referendum on the Emergency Financial Manager Act. The relevant language was in 14-point type according to computer software but fell shy as measured by a printer's block. The parties disputed which standard applied, what "point" meant, and, ultimately, whether the petition should be certified. The petitioners also argued that the court could apply a rule of substantial compliance—a judicially-created exception that applied when petitions were *close* to complying with statutory standards.

The court's resolution of the issue was a patchwork, with no single opinion garnering a majority. Justice Mary Beth Kelly's lead opinion concluded that (1) the substantial compliance exception was invalid as applied pre-election and (2) the petition *actually* complied with MCL 168.482 because "type" referred to the size of the printer's block, not the size of the printed text. Thus, Justice Mary Beth Kelly concluded that a writ of mandamus should issue to compel the Board of State Canvassers to certify the referendum for appearance on the November 2012 ballot. Chief Justice Young and Justice Zahra agreed that the substantial compliance exception was without merit but believed that the case should be remanded to the trial court for factual findings. Justice Markman likewise rejected the substantial compliance exception but concluded that the petition did not comply with MCL 168.482. Justice Marilyn Kelly and Justices Cavanagh and Hathaway agreed that a writ of mandamus should issue but believed the substantial compliance exception was valid.

When the dust settled, there were four votes for mandamus. As a result, the court directed the Board of State Canvassers to place the referendum on November's ballot. The fate of the substantial compliance exception was far less

Beauty, as the saying goes, is in the eye of the beholder. The same may be said of the legal value of plurality opinions.

clear. Justices Cavanagh, Marilyn Kelly and Hathaway's partial dissent was an extended eulogy for the doctrine. Yet they also insisted that the court had not decisively rejected the doctrine:

> We note that, given Justice Mary Beth Kelly's finding of actual compliance—which must necessarily encompass substantial compliance, because actual compliance is a *higher* standard than substantial compliance—there are four votes that find at least substantial compliance and allow the voters to determine the merits of this proposal. The determination of whether actual or substantial compliance is the proper standard is unnecessary to the decision in this case. [*Id.* (Justices Cavanagh, Marilyn Kelly, and Hathaway, concurring in part and dissenting in part) (emphasis in original), slip op. at 3.]

In other words, these Justices viewed their colleagues' discussion of the substantial compliance exception as *dicta.*

Justice Mary Beth Kelly's lead opinion rejected this characterization. She contended that a majority of the court had rejected the substantial compliance exception and that the doctrine was now dead letter in Michigan:

> The partial dissent of Justices Cavanagh, Marilyn Kelly, and Hathaway asserts that "there are four votes that find at least substantial compliance...." …This assertion is simply untrue. Rather, there are four votes for the elimination of the judicial expansion of the substantial compliance doctrine, and the partial dissent has refused to recognize that we have now eliminated this judicially created doctrine. Accordingly, when a petition is challenged pre-election, the petition must actually comply with the statutory mandates of MCL 168.482(2), or the petition must substantially comply pursuant to a specific statutory exception or through a form prescribed by the Secretary of State. Neither of the latter two circumstances exists in this case. [*Id.*, slip op. at 9, n 22.]

With the court itself differing on how to characterize *Stand Up for Democracy*'s discussion of the substantial compliance exception, it is hard for advocates to know with certainty where the doctrine stands. The lead opinion clearly asserts that the doctrine is "eliminated." *Id.* But on the other hand, *stare decisis* generally does not apply to plurality opinions and the majority for mandamus—the result ordered by the court—included three Justices who affirmed the doctrine of substantial compliance. It is clear that the court, as it is currently composed, will not apply the substantial compliance doctrine to pre-election petitions. In the event the court's composition changes, however, advocates will have to weigh the difference of opinion expressed in *Stand Up for Democracy* and case law on plurality opinions carefully in determining whether the substantial compliance exception remains viable.

Spectrum Health Hospitals v Farm Bureau Mutual Insurance Co of Michigan

Spectrum Health Hosps v Farm Bureau Mut Ins Co of Michigan, supra, demonstrates the complexities that can arise when lower courts enter the picture. *Spectrum Health* concerned eligibility for personal protection insurance or "PIP" benefits under Michigan's no-fault act and, in the process, considered the court's 1992 plurality opinion in *Priesman v Meridian Mut Ins Co,* 441 Mich 60; 490 NW2d 314 (1992). This opinion, authored by Justice Levin, supposed that there was a "family joyriding exception" to MCL 500.3113(a). Thus, in Justice Levin's view, family members were exempt from the Michigan Legislature's declaration that people who take vehicles unlawfully are not entitled to claim PIP benefits.

Priesman's plurality "family joyriding exception" became a part of Michigan law when the Michigan Court of Appeals adopted it in *Butterworth Hospital v Farm Bureau Ins Co,* 225 Mich App 244; 570 NW2d 304 (1997). The court of appeals recognized that the value of Justice Levin's plurality opinion was "problematic" but felt compelled to follow it because "it affirmed the decision of our Court allowing coverage for a joyriding family member." *Id.* at 248-249. Through this back door, Justice Levin's plurality opinion arguably became part of Michigan law. Indeed, when the *Spectrum Health* majority rejected the family joyriding exception, Justice Cavanagh asserted in dissent that the majority was departing from well-established precedent. The *Spectrum Health* majority found little difficulty in rejecting the doctrine, however, because it was both contrary to the language of the no-fault act and of questionable origin.

Stand Up for Democracy and *Spectrum Health* demonstrate that legal authorities are not always as they seem. One of the primary challenges of appellate advocacy, and one of the pitfalls for unwary advocates, is the task of knowing the weight

of relevant authority. One must consider both where relevant authority came from and where its potential weaknesses as precedent may lie. Ultimately, the Michigan Supreme Court, like high courts across the country, determines the validity of its own precedents. But the best advocates are able to provide the court with persuasive assistance in that process.

Endnotes

1. *Feldkamp v Ernst*, 177 Mich 550, 557; 142 NW 887 (1913).
2. *United States v Venable*, 666 F3d 893 (CA 4, 2012).
3. *Id.* at 900.
4. *Id*. at 904 n 4.
5. *Id*.
6. *Big Dipper Entm't, LLC v City of Warren*, 641 F3d 715 (CA 6, 2011).
7. *Id*. at 719.
8. *Id*.
9. *In re Wilkins*, 777 NE2d 714 (Ind, 2002).
10. *Id*. at 715.
11. Michigan's version of Rule 8.2(a) is identical.
12. *Wilkins*, 777 NE2d at 715.
13. *Ruston v Dallas County Tex*, 320 Fed Appx 262 (CA 5, 2009).
14. *Id*.
15. *Clark v Clark*, 578 NE2d 747, 748 (Ind App, 1999).
16. *In re Maloney*, 949 SW2d 385, 388 (Tex App, 1997).
17. *Shortes v Hill*, 860 So 2d 1, 4 (Fla App, 2003) (Sharp, J., concurring in denial of rehearing).
18. *Id*.
19. *Big Dipper Entm't,* 641 F3d at 719.
20. *B&L Appliances and Services, Inc v McFerran,* 712 NE2d 1033, 1038 (Ind App, 1999).

MDTC New Board Members

Barbara Eckert Buchanan

Barbara earned her Juris Doctor from the Santa Clara University School of Law and holds undergraduate degrees in Economics and Political Science from the University of Michigan. Barbara is a principal at Keller Thoma with her litigation practice concentrated in management side employment and labor law, including civil rights violations, wrongful discharge, retaliation, whistleblower actions, FMLA, FLSA, and non-compete issues. She also provides employment counseling and training to private and public sector employers. Barbara is licensed in the State of California. She formerly served as the Labor & Employment Section Chair for MDTC.

Terence P. Durkin

Terence Durkin is an associate principal with Kitch Drutchas Wagner Valitutti & Sherbrook. His practice focuses on defense of hospitals and healthcare providers in professional malpractice litigation. He joined the firm in 2002, after clerking for the Honorable Thomas S. Eveland of the 56th Circuit Court. Mr. Durkin received his B.A. in political science from Millikin University and his J.D. from Thomas M. Cooley Law School where he was Article Editor of the Journal of Practical and Clinical Law. Mr. Durkin is licensed to practice law in Michigan as well as the U.S. District Court Eastern District of Michigan. Mr. Durkin is a member of the Plymouth Rotary and formerly served as the Professional Liability & Health Care Section Chair for MDTC.

Matthew T. Nelson

Matt Nelson chairs Warner Norcross & Judd LLP's appellate practice group. Matt has successfully represented clients in the United States Supreme Court, the federal courts of appeals, and the Michigan appellate courts. Matt successfully argued before the U.S. Supreme Court on behalf of an individual against the federal government in a case regarding whether the individual could challenge the government's decision to take land into trust to be used for a tribal casino. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012). Matt's appellate experience includes submitting amicus curiae briefs in the state and federal courts including briefs on behalf of the Defense Research Institute, the Coalition of Christian Colleges and Universities, the Michigan Defense Trial Counsel, and the Michigan Health & Hospital Association. Matt is a member of DRI's national amicus committee. Matt routinely works with trial litigators on dispositive motions, motions in limine, and preparing appellate strategy while a case is still in the trial court. Matt also serves as the Appellate Practice Section Co-Chair for MDTC.

Angela Emmerling Boufford

Angela Emmerling Boufford is a business litigation attorney based in Butzel Long's Bloomfield Hills office. She is a graduate of Michigan State University (1994) and the Michigan State University College of Law (J.D., magna cum laude, 1998). Ms. Boufford earned numerous honors during her academic career, including Jurisprudence Achievement Book Awards in Civil Procedure I, Civil Procedure II, Labor Law, and Research Writing and Advocacy. Ms. Boufford was also the proud recipient of an Eve August Moot Court Scholarship and the prestigious International Academy of Trial Lawyers Plaque. Ms. Boufford has extensive litigation experience ranging from the defense of municipalities in 42 U.S.C. §1983 lawsuits to the defense of multi-million dollar commercial and securities-related disputes. She has defended securities brokers and broker/dealers in customer arbitrations across the country. In addition, she has significant experience handling electronic discovery, including the coordination and supervision of large-scale electronic document review projects.

Michael I. Conlon

Mr. Conlon is a partner at Running, Wise & Ford. Mr. Conlon practices in the areas of insurance defense, no-fault/negligence law, appellate law, bankruptcy, and mediation. He has substantial experience in evaluating and litigating automobile accidents, premise liability claims, and first-party/PIP claims. He frequently analyzes insurance coverage issues. Mr. Conlon has completed the Institute of Continuing Legal Education's Civil Case Mediator Training. Mr. Conlon is a 1990 graduate of Wayne State University Law School where he served as editor of the Wayne Law Review. He received his undergraduate degree from the University of Michigan. Mr. Conlon is a member of the Michigan Defense Trial Counsel. He is a former adjunct faculty member at the Detroit College of Law at Michigan State University where he taught debtor-creditor relations. Mr. Conlon is the former chair of the Grand Traverse County Planning Commission.

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Legal Malpractice Update

Suit-Within-A-Suit Doctrine: Absolute Defense to the Underlying Claim Provides Complete Defense to Subsequent Malpractice Claim

Nicklas v Lawyer Defendants, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2012 (Docket No. 299054)

The Facts: In 1998, the defendant attorney and his firm represented the plaintiff in a defamation and tortious interference action against his cardiology colleagues at the University of Michigan Hospital. Four years after he filed the action, the defendant attempted to amend the complaint to add two additional defendants, Dr. Aaronson and Dr. Eagle. By that time, the statute of limitations had expired for most of the plaintiff's claims against Drs. Aaronson and Eagle. Following a no cause of action verdict in the underlying case, the plaintiff filed a legal malpractice action against the defendant, alleging that he was negligent in failing to timely add Drs. Aaronson and Eagle. The trial court granted the defendants summary disposition, holding that the plaintiff failed to establish causation and the defendants were protected by the attorney-judgment rule.

The Ruling: The Michigan Court of Appeals affirmed under the causation analysis, i.e., the suit-within-a-suit doctrine. The court held that the plaintiff failed to show that but for the defendants' alleged malpractice, he would have prevailed in the underlying suit. The court did not reach the attorney-judgment rule issue.

The court detailed significant holes in the plaintiff's defamation and tortious interference claims against Drs. Aaronson and Eagle. The plaintiff failed to establish a connection between himself and Dr. Eagle's alleged defamatory statements because none of the cited statements referred to the plaintiff directly. The plaintiff also failed to establish that Dr. Aaronson published his alleged defamatory statements to a third-party or that the statements concerned plaintiff, as opposed to the cardiology programs that the plaintiff was involved in. Finally, all of the cited statements were subject to a qualified privilege because they were made in response to inquiries from the hospital's Chief of Cardiology. The plaintiff did not have evidence of actual malice. The plaintiff's tortious interference claim was flawed for the similar reason that the alleged interference was simply Drs. Aaronson and Eagle's response to the Chief of Cardiology's inquiries about improving and restructuring the cardiology programs. There was no evidence of an improper motive.

Practice Note: Many times, there is a particularly good reason that an attorney did not "timely" file a cause of action: it was meritless.

Decedent's Attorney-Client Relationship Does Not Provide a Basis for Legal Malpractice Action by Estate, Minor Children

Estate of Marcella M.S. Carter v Lawyer Defendant (In re Carter), unpublished opinion per curiam of the Court of Appeals, issued May 31, 2012 (Docket No. 303364)

The Facts: In 1991, plaintiffs' decedent settled a wrongful death action regarding her husband, which included payment of a monthly annuity for 20 years. She entered into a structured settlement transfer agreement in 2003 to sell a portion of her rights

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The court held that the plaintiff failed to show that but for the defendants' alleged malpractice, he would have prevailed in the underlying suit.

to the annuity payments. Pursuant to the Structured Settlement Protection Act in effect at the time, plaintiffs' decedent sought professional advice from defendant attorney, an attorney in Florida, with regard to the transfer agreement. After an extensive hearing, the transfer agreement was approved by the lower court, the transaction was completed, and plaintiffs' decedent received the compensation set forth in the transfer agreement. Plaintiffs' decedent passed away two years later and, in 2007, her personal representative, minor children, and the minor children's guardian brought suit against, in relevant part, defendant attorney. Plaintiffs alleged claims for malpractice and intentional interference with an inheritance. Defendant attorney did not provide a timely response to the summons and complaint. A default was entered, and plaintiffs filed a motion for default judgment. The lower court granted the motion, and a judgment in the amount of $88,718.84 was entered. Defendant attorney filed a motion to set aside the judgment, which was denied for lack of good cause and because the lower court concluded that defendant attorney's defenses were not meritorious.

The Ruling: The Michigan Court of Appeals affirmed the lower court's denial of defendant's motion to set aside the default judgment, concluding that the lower court had not abused its discretion. The court of appeals did, however, reverse the lower court's award of damages because its findings of fact and conclusions of law were clearly erroneous and did not support a damages award. First, the court of appeals concluded that the lower court erred in finding that the plaintiffs had pled an attorney-client relationship; they only asserted an attorney-client relationship between defendant and plaintiffs' decedent. Even if the decedent's estate could pursue a claim on behalf of their decedent, the court noted that the estate, decedent's minor children and their guardian must nevertheless establish their own attorney-client relationship with the defendant. Because no attorney-client relationship existed with plaintiffs, the court concluded that they had failed to state a claim for legal malpractice against the defendant.

Second, the court noted that the plaintiffs had not set forth any injury sustained by the decedent, who was defendant's client, as a consequence of defendant's alleged negligence. Plaintiffs alleged that the court that approved the transfer agreement, the decedent's minor children, and the estate were all injured by defendant's conduct. The court held, however, that the court that approved the transfer agreement, decedent's minor children, and the estate were not defendant's clients and he owed no duty to them. Only the decedent had an attorney-client relationship with defendant and, thus, only injuries that she sustained as a consequence of defendant's breach of his duties to her are actionable injuries. The court also disagreed that defendant's actions were a cause in fact and legal cause of a financial injury sustained by the decedent in order for her estate to establish a claim for legal malpractice. The decedent agreed to the terms of the transfer agreement, which was the subject of an extensive court hearing before approval, and received the compensation set forth in that agreement. The decedent did not challenge the court order before her death, and the court reasoned that it could not be collaterally attacked through a legal malpractice action asserted by her estate.

Practice Tip: Absent their own attorney-client relationship, a decedent's estate and surviving family members generally cannot state a claim for malpractice against the decedent's former attorney, especially where the decedent did not sustain the injury alleged.

Class Counsel's Communications with Individual Class Members Does Not Create a Higher Duty than Owed to the Rest of the Class

Piotrowski v Lawyer Defendant, unpublished opinion per curiam of the Court of Appeals, issued May 17, 2012 (Docket No. 303772)

The Facts: In 1996, defendant attorney and nine other attorneys filed a proposed class action lawsuit on behalf of female prisoners who were subjected to sexual abuse and misconduct by male prison staff during their incarceration in Michigan state prisons. The trial court approved defendant as one of the ten attorneys to represent the class of plaintiffs in the class action lawsuit against the Michigan Department of Corrections ("MDOC"). Plaintiff was a class member and contacted defendant in 2001 regarding her sexual abuse that occurred in a Michigan state prison in 1998. Plaintiff and defendant exchanged intermittent contact through mid-2005 regarding the status of her offender's plea to fourth degree criminal sexual conduct and the information she needed to provide as a class member.

Absent their own attorney-client relationship, a decedent's estate and surviving family members generally cannot state a claim for malpractice against the decedent's former attorney, especially where the decedent did not sustain the injury alleged.

In June 2009, the parties to the class action lawsuit reached a settlement agreement, and the trial court granted preliminary approval of the settlement agreement, and approved the form and method for class notice of the settlement about a month later. When plaintiff became aware of the settlement, she provided defendant's law office with her mailing address in order to receive the claims forms, but was not advised of the deadline for submitting a claim in order to be entitled to participate in the settlement. Defendant mailed the forms, but plaintiff never received them and the mailings to her address were not returned as undeliverable. After the claim filing deadline had passed, plaintiff returned to defendant's office seeking to file a claim and explained that she did not receive the forms. Plaintiff brought the matter before the trial court, requesting that she be deemed eligible to participate. The court denied her request because she failed to follow the procedure outlined in the plan of allocation for settlement proceeds.

Plaintiff then filed a malpractice claim against defendant, arguing that, although she had discharged her duties to her as a class member, a higher duty arose as a result of her direct and ongoing relationship with defendant. The trial court granted defendant summary disposition on plaintiff's claim, holding in part that defendant did not breach any duty owed to plaintiff.

The Ruling: The Michigan Court of Appeals affirmed the trial court's order granting summary disposition. The court observed that defendant did what was legally adequate and required of her by informing all class members of the settlement. The court held that the defendant attorney acted consistent with prevailing Michigan law and the court order governing notice, and that the attorney's duty was to use reasonable skill, care, discretion and judgment to the class she represented, and not to use extraordinary diligence to plaintiff who was a member of the class. The court also noted that plaintiff offered no authority to support the proposition that a class counsel is held to a higher duty to individual class members if contact with them is somehow made. Such a proposition would contravene the fundamental notion that a class counsel's obligation is run to the class as a whole.

Practice Tip: When it comes to class representation, be mindful of keeping communications with individual class members to matters regarding the class as a whole. Generally, communications with a class member are insufficient to create a higher duty owed to that individual class member where the communications were made pursuant to counsel's responsibilities to the class as a whole.

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Supreme Court

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Supreme Court Update

An Open and Obvious Danger Blocking a Building's Only Entrance is not "Effectively Unavoidable" Simply Because a Plaintiff has a Contractual Right to Enter the Building

In a 4-3 decision, the Michigan Supreme Court held that having a contractual right to enter a building does not render an open and obvious icy condition leading to the building's only entrance "effectively unavoidable." *Hoffner v Lanctoe*, __ Mich __; __ NW2d __ (2012).

Facts: The plaintiff, a fitness center member, sustained back injuries after slipping and falling on a patch of ice on the sidewalk leading to the fitness center's only entrance. The plaintiff saw the ice but proceeded to traverse it anyway. She then sued the fitness center, as well as the owners of the building, who were contractually responsible for snow removal. The plaintiff argued that, although the condition may have otherwise constituted an open and obvious condition, it was effectively unavoidable because it blocked the only entrance to the building, which she had a contractual right to enter. The defendants filed separate motions for summary disposition, arguing that the plaintiff's premises liability claim was barred by the open and obvious doctrine. The trial court denied the motions, holding that questions of fact existed as to whether the icy condition was effectively unavoidable, so as to remove it from the open and obvious framework.

The court of appeals affirmed in part and reversed in part, finding that the condition was effectively unavoidable because no alternative route existed. The court held, however, that the fitness center was entitled to summary disposition because it lacked possession and control over the sidewalk where the plaintiff fell. The building owners appealed.

Holding: The Michigan Supreme Court reversed in part and remanded for entry of an order granting summary disposition to all of the defendants. The court held that the plaintiff failed to present evidence that special aspects existed to remove the condition from the open and obvious doctrine. The court rejected the plaintiff's arguments that her contractual right to enter the building rendered the otherwise open and obvious condition unavoidable. The court explained that having a contractual right to enter a building simply confirms the plaintiff's invitee status and that, contrary to the plaintiff's position, there is no "'business invitee'" exception to the open and obvious doctrine "whereby invitees frequenting a business open to the public have an unassailable right to sue in tort for injuries caused by open and obvious conditions." Rather, the open and obvious doctrine applies equally to all business invitees, regardless of whether a preexisting contractual or other relationship exists. On the point, the court stated: "Neither possessing a right to use services, nor an invitee's subjective need or desire to use services, heightens a landowner's duties to remove or warn of hazards or affects an invitee's choice whether to confront an obvious hazard."

Because the plaintiff was attempting to enter the building to engage in a recreational activity, she was not trapped within the building or otherwise forced to confront

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The court rejected the plaintiff's arguments that her contractual right to enter the building rendered the otherwise open and obvious condition unavoidable.

the known dangerous condition. The condition was, therefore, not unavoidable.

Significance: Seeking to end confusion surrounding the application of the open and obvious doctrine to wintry conditions, the court clarified that the exception to the open and obvious doctrine is narrow and permits recovery only where the circumstances present "a uniquely high likelihood of harm notwithstanding a hazard's obvious nature." Although business invitees invariably have a right to enter premises open to them, the right to enter does not, itself, create a need to enter the premises so as to render conditions leading to the premises effectively unavoidable.

Insurers May Avoid Liability to Third Parties Based on an Insured's Easily Ascertainable Fraud in the Application for Insurance

On June 15, 2012, the Michigan Supreme Court held that insurers may avoid liability to third parties on the ground of fraud by the insured in the application for insurance, even where the fraud is easily ascertainable. *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012).

Facts: The defendant insured's driver's license was suspended on account of several moving violations and accidents. On August 22, 2007, believing that her driver's license would be restored two days later, the insured signed an application for auto insurance with Titan Insurance, declaring that she did not have a suspended license. The policy became effective on August 24, 2007, but the insured's license was not restored until nearly a month later. The insured did not disclose this fact to Titan. In February 2008, while driving the insured vehicle, the insured collided with another vehicle, causing that vehicle's occupants to sustain injuries. During the investigation into the accident, Titan learned that the insured did not have a valid driver's license when it issued the policy. Anticipating that the injured third-parties would file claims against the insured, Titan filed a declaratory judgment action, seeking to avoid liability on the policy. Titan alleged that, had it known of the insured's suspended license, it would not have issued the policy. The injured third-parties' insurer intervened in the action.

The trial court granted summary disposition for the insured and the intervenor insurer. Relying on prior court of appeals' decisions, the trial court concluded that an insurer may not avoid liability to a third party under an insurance policy for fraud in the application for insurance that was easily ascertainable. The trial court further held that whether an insured has a valid driver's license is easily ascertainable. The court of appeals affirmed the trial court and, relying on *State Farm Mut Ins Co v Kurylowicz*, 67 Mich App 568; 242 NW2d 530 (1976), held that "once an insurance event has occurred and a third party … possesses a claim against an insured arising out of that event, an insurer is not entitled to reform the policy to the third-party's detriment when the fraud by the insured was easily ascertainable."

Holding: The Michigan Supreme Court reversed and overruled *Kurylowicz*, holding that nothing in the law warrants the establishment of an "easily ascertainable" rule. In reaching this conclusion, the court reaffirmed its prior decision in *Keys v Pace*, 358 Mich 74; 99 NW2d 547 (1959), which addressed this very issue and reached the same conclusion. Despite *Keys*, the Michigan Court of Appeals, both in the present case and in *Kurylowicz*, determined that, on public policy grounds, an "easily ascertainable" rule should be applied to preclude an insurer from avoiding liability where a third party is involved. In rejecting this proposition, the Michigan Supreme Court held that there is no basis in the law to conclude that public policy "requires a private business in these circumstances to maintain a source of funds for the benefit of a third party with whom it has no contractual relationship." By requiring an insurer to indemnify an insured despite fraud in obtaining insurance, the "easily ascertainable" rule relieves the insured's "personal obligation in the face of his or her own conduct," when, from a public policy perspective, the insured "should bear the burden of his or her fraud."

The court concluded, therefore, that insurers may take advantage of traditional legal and equitable remedies to cancel, rescind, or reform an insurance policy on the ground of fraud in the application for insurance, even when the fraud was easily ascertainable and the claimant is a third party. However, because the record was insufficient to determine whether Titan had established actionable fraud in the application for insurance, the court remanded the case for further proceedings.

Significance: By rejecting the "easily ascertainable" rule, the court overturned nearly four decades of public policy decisions and reestablished the notion that insurers may avoid liability to third

Rather, the open and obvious doctrine applies equally to all business invitees, regardless of whether a preexisting contractual or other relationship exists.

parties on the basis of even minor misrepresentations by insureds in the application for insurance.

No-Fault Plaintiffs Must Establish That Family-Provided Attendant Care was Reasonably Necessary and Actually Incurred at Reasonable Rates

In a 4-3 decision, the Michigan Supreme Court discussed the proofs necessary to support a claim for attendant care benefits and held that expenses must have been reasonably necessary for the injured person's care, recovery, or rehabilitation, and must have been actually incurred at reasonable rates. *Douglas v Allstate Ins Co*, __ Mich __; __ NW2d __ (2012).

Facts: In 1996, the plaintiff was struck by a hit-and-run motorist while riding his bicycle. He sustained severe closed-head injuries as a result of the collision. After the accident, the plaintiff unsuccessfully attempted to hold several jobs. He attempted to commit suicide twice during this time and, in 2005, his psychiatrist indicated that the plaintiff required "further treatment." In May 2005, the plaintiff sued his insurer, seeking unspecified PIP benefits that he claimed his insurer "has refused or is expected to refuse to pay." The plaintiff submitted an affidavit from his psychiatrist that indicated the plaintiff required "care during all waking hours," and that the plaintiff's wife had been providing that care since the accident.

At a bench trial, the plaintiff's wife testified that she spent the entire time she was at home "babysitting" and "watching" the plaintiff, even while she performed other household chores. She also testified about a series of forms, which contained the monthly time she spent providing services between 2004 and 2007. The forms listed services, such as cooking meals, maintaining the family house and yard, and monitoring the plaintiff's medications. The plaintiff's wife admitted that she had not contemporaneously created the forms and, instead, had compiled them all in one day in 2007. Although testimony from Allstate's expert established that an appropriate rate for these services was $10 per hour, the trial court awarded PIP benefits to the plaintiff for attendant care services claimed to have been provided by his wife at a rate of $40 per hour. The court of appeals affirmed in part and reversed in part. The court of appeals upheld the $40 per hour rate as appropriate, but remanded for further proceedings to determine the number of hours of attendant care expenses that were actually incurred.

Holding: The Michigan Supreme Court affirmed in part, reversed in part, and remanded the case for further proceedings. The court held that the court of appeals properly remanded the matter for further determination as to whether the attendant care expenses were actually incurred, but erred in affirming the trial court's hourly rate determination because the $40 hourly rate was "entirely inconsistent with the evidence of an individual's rate of compensation."

The court explained that a plaintiff seeking to recover benefits for allowable expenses bears the burden of establishing that: 1) the expenses were *for* the plaintiff's care, recovery, or rehabilitation; 2) the expenses were reasonably necessary; 3) the expenses were actually incurred; and 4) the expenses were charged at reasonable rates. "The requirement of proof is not extinguished simply because a family member, rather than a commercial health care provider, acts as a claimant's caregiver." Although the no-fault act does not set forth a specific method by which plaintiffs can establish the existence of allowable expenses, the court noted that insureds can most easily satisfy their burden of proof by submitting itemized statements, bills, contracts, or logs. Although the plaintiff's wife completed a log for three years of service, she did so in only one day and included within that log many services that may not have been necessary *for* the plaintiff's care. Because the trial court failed to make a factual determination as to the proper amount of allowable attendant care services provided by the plaintiff's wife, the court remanded the case for further proceedings.

The court also explained that, assuming the plaintiff can satisfy his burden of proving that the allowable expenses were actually incurred, the fact-finder must then determine whether those expenses were incurred at reasonable rates. In determining the reasonableness of rates charged for attendant care provided by family members, the fact-finder may consider hourly rates charged by individual caregivers, but not the hourly rates charged by commercial caregiving agencies. The court observed that, while a commercial agency's fee incorporates the compensation it pays to individual caregivers, "it also incorporates additional costs into its charge that family members who provide services do not incur, particularly the overhead costs inherent in the agency's provision of services." Because the trial court awarded damages at a rate equal to that charged by commercial agencies, the court vacated the award of damages.

Significance: This decision clarifies how reasonable charges for attendant care

By rejecting the "easily ascertainable" rule, the court overturned nearly four decades of public policy decisions and reestablished the notion that insurers may avoid liability to third parties on the basis of even minor misrepresentations by insureds in the application for insurance.

services are to be determined when the services are rendered by a no-fault insured's family members. The decision also reaffirms that allowable expenses for attendant care services must be incurred *for* the injured person's care, recovery, or rehabilitation. Typical household services will not generally qualify as allowable expenses.

Installers of Electric Appliances Owed no Duty to Inspect, Repair, or Warn Homeowners of Existing Uncapped Gas Line

On August 16, 2012, the Michigan Supreme Court held that installers of electric appliances owed no duty with respect to an existing uncapped gas line, because the installers and the plaintiffs had only a limited relationship and the installation of the appliances did not create a new or increased dangerous condition. *Hill v Sears, Roebuck & Co*, __ Mich __; __ NW2d __ (2012).

Facts: The homeowner plaintiffs sustained injuries and property damage after the accidental release of natural gas from an uncapped gas line caused an explosion within their home. When the previous owners of the home moved out, they removed their gas washer and dryer and turned off the gas to the existing gas line. They did not, however, cap the gas line. In 2003, the plaintiffs purchased an electric washer and dryer and had them installed in the same spot where the gas appliances had previously been located. Although the uncapped gas line was visible for several weeks before the installation of the new appliances, once in place, the appliances effectively concealed the gas line. Four years later, the plaintiffs unintentionally opened the valve on the gas line, causing natural gas to accumulate within the home. The plaintiffs smelled the gas but conceded that they did not act, despite being aware of the potential hazards. The home exploded later that night when the plaintiffs attempted to light a candle. Although the plaintiffs escaped from the burning house, they each suffered injuries.

The plaintiffs then sued the previous homeowners, as well as the sellers and installers of the electric appliances, alleging that the installers negligently installed the appliances and failed to properly inspect, cap and warn the plaintiffs of the uncapped gas line. The trial court denied the sellers' and the installers' motions for summary disposition, holding that public policy applies a duty where the defendants exacerbated an existing danger by concealing it. Upon interlocutory appeal, the Michigan Court of Appeals affirmed and agreed that the installers owed a duty not to make the uncapped gas line more dangerous by concealing and preventing the discovery of it. The sellers and installers of the appliances appealed.

Holding: The Michigan Supreme Court reversed and held that the trial court erred in denying the sellers' and installers' motions for summary disposition because the installers, who properly installed the electric appliances, owed no duty to the homeowners with respect to the uncapped gas line. The installers contracted only to deliver and install the appliances, which they completed with due care. Because of the limited nature of the installers' contract, there was no special relationship between the installers and the plaintiffs. There was, similarly, no duty separate and distinct from the contract because the installation, which took only 12 minutes, neither created a new dangerous condition nor made the existing condition more dangerous.

The court also explained that the defendants owed no duty to warn the plaintiffs of the uncapped gas line because the plaintiffs had constructive prior knowledge of the condition. The parties did not dispute that the uncapped gas line was highly visible for several weeks before the installation of the new appliances. According to the court, from a public policy perspective, imposing a duty with respect to the uncapped gas line would effectively require all similarly situated defendants to inspect and prevent all other hazards they could conceivably encounter in a customer's home. The burden of imposing such a duty would be "onerous and unworkable."

Because the installers owed no duty to the plaintiffs with respect to the uncapped gas line and because the sellers of the appliances could only be held liable based on their agency relationship with the installers, both the installers and sellers were entitled to summary disposition.

Justice Marilyn Kelly noted in her dissent that she would have affirmed the court of appeals because, in her view, the installers owed a limited duty to warn the homeowners of the existing uncapped gas line before concealing it with the appliances. Justice Kelly would also have imposed a duty to warn based on the installers' superior knowledge of the dangerous nature of the uncapped gas line.

Significance: This decision clarifies the duties imposed on installers of products within customers' homes and establishes that installers will likely have no duty to protect homeowners from existing and known dangers so long as their installation does not create a new dangerous condition or increase an existing danger.

MDTC Amicus Committee Report

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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.

On August 20, 2012, the Michigan Supreme Court issued a favorable opinion for the defense bar in Atkins v SMART (No. 140401). The issue presented in Atkins was whether notice of a plaintiff's application for first party no-fault benefits constituted written notice of the plaintiff's third-party tort claim against SMART under MCL 124.419. The MDTC authored an amicus brief on behalf of the defendant, who was granted partial summary disposition at the trial court level. The Michigan Court of Appeals reversed, holding that the plaintiff's no-fault claim and information the plaintiff had supplied to defendant and its insurer were sufficient to give defendant notice of a third-party tort claim. The Michigan Supreme Court reversed, adopting the MDTC's position that the statutory notice requirement for third-party tort claims is not satisfied when a plaintiff applies for no-fault insurance benefits. In a 4-3 decision, the court reaffirmed that "[s]tatutory notice requirements must be interpreted and enforced as plainly written," and held that the notice of plaintiff's no-fault insurance application, "even when supplemented with SMART's presumed 'institutional knowledge' of the underlying facts of the injury, does not constitute written notice of a third-party tort claim against SMART sufficient to comply with MCL 124.419." Justice Marilyn Kelly authored a dissent, which Justices Cavanagh and Hathaway joined. In the dissent's view, because there was no prejudice to SMART by the plaintiff's failure to comply with a notice requirement, partial summary disposition in favor of SMART was not warranted. The MDTC amicus brief in Atkins was authored by **Hal O. Carroll.**

In other matters, the MDTC has filed an amicus brief in Boertmann v Cincinnati Insurance Co. (No. 142936). The issue presented 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. The MDTC's amicus brief argues that the no-fault act was not intended to provide recovery for psychological injuries due to the mere witnessing of an accident, and that to allow such claims would result in a significant and impermissible expansion of MCL 500.3105(1) beyond the Legislature's intent. **Valerie Henning Mock of Kopka, Pinkus, Dolin & Eads, PLC** authored the amicus brief on behalf of the MDTC.

In the coming months, the MDTC will weigh in on the case of Bailey v Schaaf (No. 144055). The Michigan Supreme Court has granted leave in Bailey to determine whether the limited duty of merchants – to involve the police when a situation on the premises poses an imminent risk of harm to identifiable invitees – was properly extended by the court of appeals to landlords and other premises proprietors, such as the defendant apartment complex and property management company. **Carson Tucker** of **Lacey & Jones, LLP** will be authoring the amicus brief.

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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DRI Report: October 2012

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As the DRI Annual Meeting liaison to our state I want to inform you about the great things happening at this year's Annual Meeting. The meeting and programming theme, "The 21st Century Lawyer," is designed to provide you with the skills to stay at the top of your game. From blockbuster speakers like Karen Hughes, Dee Dee Myers, Niall Ferguson and Roy Blount, to programs featuring general counsels from Fortune 500 Companies, hands-on sessions about the direction of practice in the 21st Century and the latest technology, this program is second to none.

In addition to the stellar programming, the meeting is back in New Orleans, the ideal destination for networking with great food and music. And, as you watch the sports reels and footage of the New Orleans Saints heading out onto the field, picture yourself and your DRI colleagues joining in some friendly on-field competitions at the Superdome – the site of this year's Thursday evening networking event. Having been to a DRI conference in New Orleans before, I can say with confidence that this is a meeting you won't want to miss. DRI pulls out all the stops in terms of its party planning for the Annual Meeting. There is also plenty of time to visit some famous restaurants on your own time (for example, Antoine's, Arnaud's, Commander's Palace, and Emeril's).

The meeting is scheduled for October 24-28 at the New Orleans Marriot (which is on the edge of the French Quarter). The meeting brochure is available at www.dri.org. Please take the time to get yourself registered and book your hotel room while the reduced rates are still available.

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

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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

2010-31 - Out of state attorneys

Amendment of Rule 5 of the Rules for the Board of Law Examiners

This eliminates the requirement that an applicant for admission by motion must express an intention to maintain an office in this state.

Chief Justice Young concurred in removing this requirement, but noted that this is "no more than a gesture by this Court" in light of the fact that the same requirement is found at MCL 600.946. He would prefer to wait until the statute is amended.

PROPOSED

2012-16 - Court hearings by video

Rule affected: None - New AO 2012-XX
Issued: 7-5-12 Comments open to: 11-1-12

This would allow "judicial officers" to preside over hearings and proceedings by video in certain situations. The primary scenarios are a judge or magistrate in a multi-county circuit, and district courts which hold hearings in more than one location.

2011-09 - Media coverage in appellate courts

Rule affected: Administrative rule 1989-1
Issued: 6-7-12 Comments open to: 10-1-12

This adds a new subsection (b) to govern media coverage of hearings in the Supreme Court and Court of Appeals. The three-day notice and the good cause for limiting or prohibiting media coverage previously applicable to trial courts is carried through. Unlike trial courts, where a decision to limit or prohibit media access is not appealable, a decision at the appellate level may be appealed to the Chief Judge of the Court of Appeals and then to the Supreme Court.

2011-14 - Service of process

Rule affected: MCR 2.105
Issued: 6-20-12 Comments open to: 10-1-12

This would add to subrule (I) a requirement that a "diligent inquiry" to support substituted service includes an online search if the moving party has reasonable access to the internet.

Subrule (I) allows the court, in its discretion, to order service of process in any way (other than those previously noted in the rule) reasonably calculated to give the defendant actual notice. It currently includes the following: "If the name or present address of the defendant is unknown, the moving party must set forth facts showing diligent inquiry to ascertain it."

This amendment is probably unnecessary. In today's world, it is hard to imagine how a person could demonstrate facts showing a "diligent inquiry" without having resorted to online sources.

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.

MDTC Golf Outing 2012

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MDTC Meet The Judges

Thursday, October 4, 2012 • Baronette Renaissance • Novi, Michigan

Brian Einhorn, Kimberly Hillcok, Hon. Mark Boonstra and Hon. Michael Hathaway

Hon. Diane Durzinski, Robert Abramson, David Anderson & Hon. Martha Anderson

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Hon. Mark Boonstra, Mark Gilchrist, Justice Marilyn Kelly, Tim Diemer, Hon. Mark A. Randon, Terry Durkin and Justice Brian Zahra.
(Courtsey of Legal News)

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Robert Paul Vance
Terrence Durkin

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MDTC Schedule of Events 2012–2013

2012

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 Meeting – The Atheneum, Greektown, Detroit
January 26	Board Meeting – The Atheneum, Greektown , Detroit
March 14	Board Meeting – Okemos
June 20–23	MDTC Annual Meeting – Crystal Mountain, Thompsonville, MI
Sept 18–20	SBM Awards Banquet and Annual Meeting Respected Advocate Award Presentation
October 16–20	DRI Annual Meeting – Chicago

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