MICHIGAN DEFENSE
QUARTERLY

Volume 29, No. 4 April 2013

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MICHIGAN DEFENSE TRIAL COUNSEL, INC.

THE STATEWIDE ASSOCIATION OF ATTORNEYS REPRESENTING THE DEFENSE IN CIVIL LITIGATION

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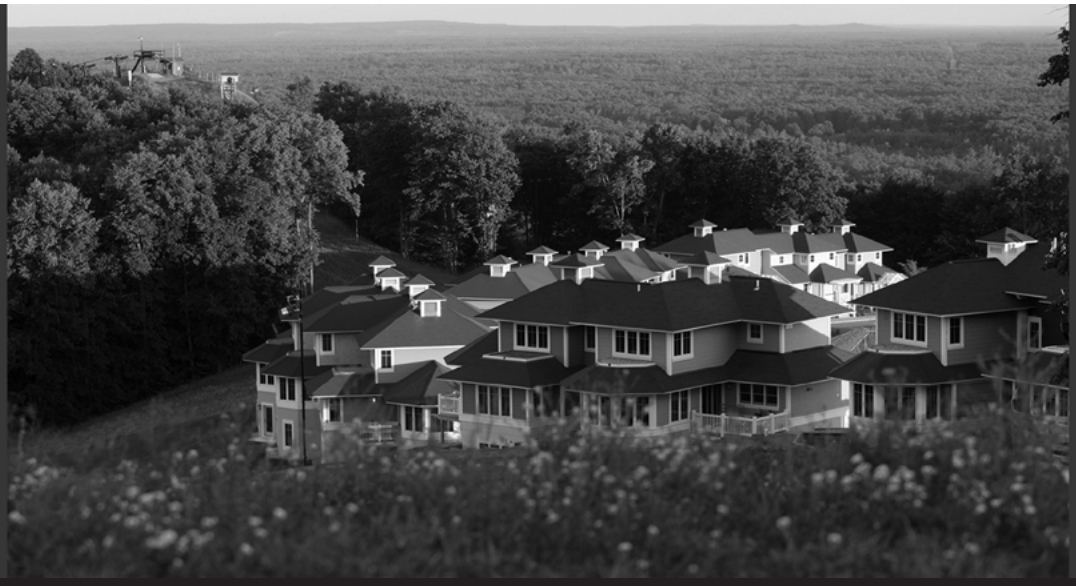

MDTC ANNUAL MEETING & CONFERENCE

Michigan Defense Trial Counsel
Date: *June 21 & 22, 2013*
Location: *Crystal Mountain*
Room reservations:
http://tinyurl.com/mdtc-reservations

MDTC attendees have the contracted group rate available 3 days pre and post conference.

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MDTC

Michigan Defense Trial Counsel, Inc
The Statewide Association of Attorneys Representing the Defense in Civil Litigation
P.O. Box 66
Grand Ledge, Michigan 48837
Phone: 517-627-3745
Fax: 517-627-3950
www.mdtc.org • info@mdtc.org

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Editor's Notes

Editor:
D. Lee Khachaturian
dkhachaturian@dickinsonwright.com

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

Associate Editor: Kimberlee A. Hillock
khillock@willinghamcote.com

Associate Editor: Beth A. Wittmann
beth.wittmann@kitch.com

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

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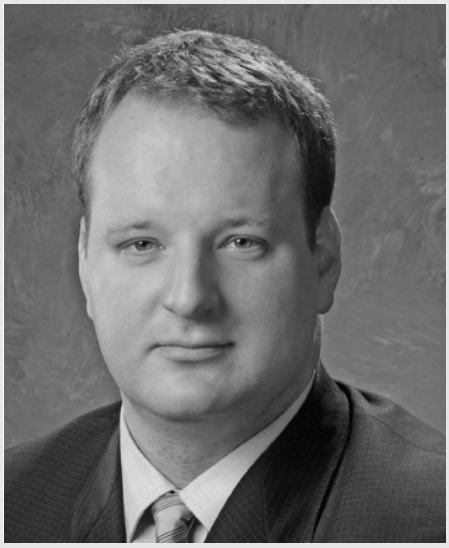
President's Corner

By: Timothy A. Diemer, *Jacobs and Diemer PC*

The Evolution and Re-Branding of MDTC



Timothy A. Diemer
President
Jacobs and Diemer PC
500 Griswold St, Suite 2825
Detroit, MI 48226
(313) 965-1900 • (313) 965-1919
TimDiemer@jacobsdiemer.com

"Change is the law of life. And those who look only to the past or present are certain to miss the future."--John F. Kennedy

For years now, the Michigan Defense Trial Counsel has tried to come to grips with the changing demographics of membership, not just in terms of devising outreach strategies of who we market our group to, but also now to the point of how we define ourselves. As our organization has grown and shifted out of its traditional Personal Injury/Insurance Defense roots, the "Defense" of "Michigan Defense Trial Counsel" does not really fit all that well in light of our recent expansion into the commercial arena, where the Plaintiff/Defendant designation often carries little significance and many of our commercial law members represent the plaintiff as often as the defendant. The "T" of MDTC is also starting to lose its descriptive value where both the President and Vice President, in addition to many Board Members, are not themselves "trial" attorneys at all, having chosen an appellate practice specialty.

Some of these demographic changes were imposed upon us by external forces, such as the changing legal economy pushing many Personal Injury and Insurance Defense lawyers to adapt and incorporate new practice areas into their firms. Other changes have been by design and foresight. Past Presidents such as Steve Johnston, Robert Schaffer and our Immediate Past President, Phil Korovesis, anticipated the changing legal landscape and drove the organization to begin actively recruiting Commercial Litigators and encouraging their participation with seminars and conferences geared toward these practice areas.

We Are Now Forced to Deal with the Successes of Our Past Presidents

Leadership has struggled with exactly how to handle the broadening and diversification of our membership. Unlike our traditional counterpart, the Michigan Association for Justice, which felt it necessary to re-brand itself once the phrase "Trial Lawyer" began to carry an unfortunate and completely undeserved negative connotation, the Michigan Defense Trial Counsel has contemplated a name change for a different reason, i.e., to more accurately reflect who we are. The words "Defense" and "Trial" no longer aptly describe our membership, but attempts at crafting a more accurate name proved difficult as it would be virtually impossible to devise a moniker broad enough to encompass all that we have become.

To that end, the MDTC Board of Directors has decided to begin de-emphasizing "Michigan Defense Trial Counsel" in favor of referring to ourselves as just "MDTC." The change is subtle because so many have already referred to us by our acronym over the years, yet represents a necessary shift away from simply being known as civil defense trial lawyers. That is no longer who we are.

This change in philological focus will be rolled out over the next few months in a number of different formats. On the motion of incoming President Ray Morganti, MDTC has adopted a new logo to modernize our look. Ray also devised a new slogan to reflect the changing tide: no longer does MDTC support just "excellence in the defense of civil litigation," but because so many of our members are commercial lawyers, our

To that end, the MDTC Board of Directors has decided to begin de-emphasizing "Michigan Defense Trial Counsel" in favor of referring to ourselves as just "MDTC."

motto has been updated to reflect that we now broadly support "excellence in civil litigation." These re-branding efforts will be incorporated into our newly designed, completely revamped website, which will offer not just a better look and layout, but also increased functionality such as the ability to register for events and renew memberships online.

Our Annual Award Winners Reflect the Changing Landscape

The re-branding of MDTC is also reflected in the distinguished attorneys who will be honored at our upcoming Annual Conference. Our Golden Gavel Award Winner is **Joe Richotte** of Butzel Long, whose practice area is far removed from Personal Injury or Insurance Defense — it is also often removed from the courtroom altogether. As a White Collar Criminal Defense Attorney, much of Mr. Richotte's practice is in compliance and investigation, not litigation.

Likewise, the first of our two recipients of our annual "Excellence in Defense Award," **Kathleen Lang** of Dickinson Wright is, herself, a commercial law specialist. Not only is Kathleen the first female winner of this prestigious award, she is also the first exclusively commercial litigator to receive it.

In fact, Kathleen, herself, played a role in the transition of our organization into the commercial law realm. At the 2006 MDTC Annual Meeting in Traverse City, she gave a presentation on some of the more elementary concepts of commercial litigation, such as the Economic Loss Doctrine, knowing that, at the time, her audience was going to consist primarily of tort lawyer specialists. MDTC's Commercial Law Section has come a long way since then: At our most recent Winter Meeting, the Commercial Litigation topics had advanced to nuanced, technical discussions such as Joint Defense Agreements, the newly created Business Courts, as well as the intersection of the Bankruptcy Code with Commercial Litigation.

Our other Excellence in Defense Award winner brings us to yet another seismic change MDTC has undertaken over the past few years: from a group that stayed on the sidelines while our elected officials forced changes upon our professional lives to a group whose input and commentary on proposed legislation is actively sought out by members of the legislature.

Past President Korovesis set us on this path, announcing at his Future Planning and Board Meetings that enhanced political engagement was necessary so that we could be a part of and help shape the legislative changes that would impact the practice of law and not simply have these changes imposed upon us against our will. The specter of the then-proposed Health Care "Courts," which threatened to dispose of the civil justice system altogether in favor of administrative tribunals where doctors, not juries, decided claims of Medical Malpractice was zany, yet a realistic enough possibility to grab our attention and force us into action.

Our quickened learning curve, where at first we had no idea how to even get started with political engagement to now being asked by legislators to sit in on brainstorming sessions and comment on proposed legislation, is owed to the mentorship and assistance of our other "Excellence in Defense" Award Winner, **Steve Galbraith**. Through his work with the Negligence Section of the State Bar and Oakland County Bar Association, Steve is a seasoned political actor who cheerfully offered us tremendous assistance. Steve showed us the ropes and has continued to support MDTC's political efforts, always happy to swap information, strategy and ideas as to which bills would be of a benefit to MDTC and its members and which would be harmful. Steve's excellent skills as a defense trial lawyer will also be honored in addition to his active work fighting on behalf of lawyers outside of the courtroom, one of the key criterion weighed by our Awards Committee.

2013 Annual Meeting at Crystal Mountain

I hope you will join us at one of our state's finest resorts for our Summer Conference June 21–22 at Crystal Mountain where we will present these honors to Steve Galbraith, Kathy Lang and Joe Richotte at the Awards Banquet.

Our program chairs, Rick Paul, Matt Nelson and Cathy Jasinski have put together an awesome program focusing on the nuts and bolts of a case from Opening Statement through Appellate Oral Argument. The committee has secured some of the most accomplished members of the Michigan Bar to provide "Master's Class" demonstrations on best litigation practices as well as judges and justices drawn from both the state and federal benches.

The resort, too, has upped its accommodations for us, offering discounted room rates for conference attendees who would like to extend their stays before or after the program and by also offering discounted spa services for attendees and spouses, to go with first class golf, a pool for children of all ages, and Lake Michigan beachfront just 20 minutes away. I hope to see you there.

The Uniform Asset Freezing Orders Act:
Cause for Concern

By: Steven Puiszis, *Hinshaw & Culbertson LLC*

The DRI Center for Law and Public Policy, through scholarship, legal expertise and advocacy provides a meaningful voice for the defense bar in the national discussion on issues of substantive law. The Center's mission is to intervene on those occasions when it determines that the fairness and balance of the judicial system may be jeopardized. The development of the Uniform Asset Freezing Orders Act by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") presents such an issue.

The NCCUSL recently completed drafting a Uniform Asset Freezing Orders Act. In 2013 sponsors placed the Act on the legislative agendas of Colorado and North Dakota. There is information that Utah and the District of Columbia are contemplating action in the spring.

Breathtaking in Scope

The Act is breathtaking in its scope. It would authorize the issuance of an asset freezing order in any type of action "in which monetary damages are sought." The only exemptions from the Act's coverage are claims against an individual for a consumer debt (defined as a debt incurred primarily for personal, family or household purposes), and actions arising under a state's family or domestic relations law.

The Act would allow a plaintiff to potentially freeze a defendant's assets, which are not exempt from execution under state law, long before any judgment is entered against a defendant or any jury's determination of fault is made. An asset freezing order can be entered even before any discovery is commenced.

The Act broadly defines "assets" to include "anything that may be subject of ownership, whether real or personal, tangible or intangible, legal or equitable, or any interest therein." It would even allow assets to be frozen in which an innocent co-owner has an interest.

Draconian in Nature

The draconian nature of the Act is reflected by the requirement that a party who is subjected to an asset freezing order must apply for a court order permitting the payment of the party's "ordinary living expenses, business expenses, and legal representation." And, the Act provides that the party subjected to the freezing order "bears the burden of establishing the amount of those expenses."

The Act is modeled on a preliminary injunction platform. To obtain an asset freezing order a court must find that there is: (1) a substantial likelihood of prevailing on the merits of the underlying claim; (2) a substantial likelihood that the assets of the defendant will be "dissipated" so the moving party will be unable to receive

Steven Puiszis is a partner in the Chicago office of Hinshaw & Culbertson LLP and is a member of the DRI's Board of Directors. Steve chairs a task force formed by DRI to work with state and local defense organizations to oppose the adoption of the Uniform Asset Freezing Orders Act. Steve is a Past President of the Illinois Association of Defense Counsel and also serves as the Chair of DRI's Judicial Task Force.

satisfaction of a judgment; (3) any harm that the party whose assets are frozen be "clearly outweighed" by the harm to the moving party if the order is not issued; (4) the order would not be adverse to the public interest. "Dissipate" is defined to include "any action" with regard to the asset to defeat satisfaction of an existing or "future" judgment, including "selling, removing, alienating, transferring, assigning, encumbering "or similarly dealing with an asset." The Act would allow an asset freezing order to be entered without notice to the defendant for a defined period.

Non-Parties and Extraterritoriality

The Act authorizes the service of an asset freezing order on a nonparty who has "custody or control" of an asset subject to the order. It provides that once served, a nonparty "shall freeze" the assets of the party "until further order of the court." A nonparty can be held in contempt for failing to comply with an asset freezing order.

The Act requires a court to recognize an asset freezing order issued by a court in another state unless such recognition would violate the forum state's public policy, the order was issued without notice, or the issuing court did not employ procedures substantially similar to those in Act. It would also require a court to recognize an asset freezing order issued by a court *outside* the United States unless certain grounds for non-recognition of the order are established. However, the Act places the burden of proving a ground for non-recognition on the party resisting the order. Section 10 of the Act literally provides that an asset freezing order is entitled to full faith and credit in the same manner as a judgment.

Many Causes for Concern

DRI and the Center oppose the Act for a number of reasons.

No fraudulent intent is required to obtain an asset freezing order. The Act potentially can be applied to anyone with insufficient assets to satisfy a future verdict.

- A party's assets should not be frozen based on a court's best guess as to the potential value of a cause of action. How will the value of a tort claim be established and how can a court possibly address the impact of comparative fault or contributory fault principles on the value of a claim before any discovery has occurred?

The Act would allow a plaintiff to potentially freeze a defendant's assets, which are not exempt from execution under state law, long before any judgment is entered against a defendant or any jury's determination of fault is made.

- The term "ordinary business expenses" is undefined. Many types of critical business transactions needed to keep a company solvent in today's tough economy may be blocked by the Act. The Act will limit a company's ability to sell or transfer its assets in the ordinary course of its business.
- Will a company under a freeze order be allowed to raise capital, enter into transactions or incur expenses that might expand its business? The Comment to Section 3 of the Act states once an order is in place, "any person with notice of the order could not cooperate . . . to place a new mortgage on the asset or enter into a new contract containing rights of set-off." The cost of running a small business could skyrocket if a court must be consulted every time a company seeks to acquire or convey an asset.
- Will the Act preclude a family from buying a new car, putting a new roof on the house, taking a vacation, or paying for a child's college education? The head of a household who is the subject of an asset freezing order may need to seek court approval to pay for these types of expenses.
- In some jurisdictions it can take 4–5 years before a suit goes to verdict. It is unfair to permit a defendant's assets be frozen before the merits of a claim against it is resolved.
- Generally, a defendant's assets are not subject to discovery. The Act may require a defendant to disclose assets in an attempt to defeat or dissolve an asset freezing order.
- The value of an insurance policy meets the definition of an asset. If a claim's potential value exceeds the insurance policy limits, the plaintiff can freeze the assets of an individual or business. Thus, the Act may create new conflicts of interest between an insured, who may want to settle for policy limits to get out from under a freezing order, and a carrier that believes the case should be defended.
- The imposition of an asset freezing order will likely cause more cases to be settled for reasons having nothing to do with the merits of a claim.

The Act can be found at http://www.uniformlaws.org/shared/docs/asset_freezing orders/2012_afo_final.pdf.

The Center has formed a Task Force on Asset Freezing Orders to work with State and Local Defense Organizations and other interested groups where the Act has been or will be introduced. The Task Force is comprised of Steven Puiszis, Sky Woodward, John Cuttino, Jill Rice, Julie Walker and Neva Lusk.

MDTC Schedule of Events 2013

2013

June 20–23	Annual Meeting — Crystal Mountain, Thompsonville, MI
Sept 18–20	SBM Awards Banquet and Annual Meeting Respected Advocate Award Presentation — Lansing, MI
October 16–20	DRI Annual Meeting — Chicago, IL
November 7	Past Presidents Dinner
November 8	Winter Meeting — Sheraton Detroit Novi, Novi, MI

2014

May 15 & 16	Annual Meeting — The Atheneum Hotel, Greektown
October 2	Meet the Judges — Hotel Baronette, Novi, MI
November 6	Past Presidents Dinner
November 7	Winter Meeting — Marriott, Troy, MI

Wearing the Company Hat:
Understanding the Opportunities and Challenges of Fed. R. Civ. P. 30(b)(6)

By: D. Lee Khachaturian, *Dickinson Wright PLLC*

Executive Summary

Federal Rule of Civil Procedure 30(b)(6) is an often-forgotten discovery tool that can help develop and build a case and that can enhance — or if treated carelessly, undermine — a party's position. This article outlines the opportunities and challenges of this strategic tool and lays out practice guidelines for parties both issuing and responding to Rule 30(b)(6) notices or subpoenas to help maximize their use of this discovery device.

Introduction

In 1970, the Federal Rules of Civil Procedure were amended to create a tool by which a party could more readily seek binding testimony on behalf of a corporation: Rule 30(b)(6). Rule 30(b)(6) addressed three problematic issues with respect to obtaining testimony from an entity:

> First, the amendment reduced the difficulty in determining whether a person deposed is a managing agent. Second, the amendment curbed the "bandying" by which various officers of a corporation are deposed, and, in turn, each disclaims knowledge of facts that are clearly known by someone in the organization. Thirdly, the amendment protects the corporation by eliminating unnecessary and unproductive depositions.[1]

This article outlines the opportunities and challenges of this often-neglected strategic tool. It then sets forth practice guidelines with respect to issuing and responding to a Rule 30(b)(6) notice or subpoena. Not surprisingly, because Rule 30(b)(6) is a discovery rule, most decisions addressing the procedures and obligations arising from it are issued by district court and magistrate judges. While there are literally thousands of district court opinions addressing various aspects of Rule 30(b)(6), only a few federal circuit courts have had occasion to substantively address this rule. As a result, practitioners are advised to review case law that has developed in their particular jurisdiction before issuing or responding to a Rule 30(b)(6) notice or subpoena.

An Overview of Rule 30(b)(6)

Rule 30(b)(6) allows a party to issue a notice or subpoena to an organization pursuant to which it specifies topics on which testimony is sought. In response, the organization is required to designate one or more witnesses to provide testimony on those topics on its behalf.

Rule 30(b)(6) states the following:

> *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. *The persons designated must testify about information known or reasonably available to the organization.* This paragraph (6) does not

D. Lee Khachaturian is a member of Dickinson Wright PLLC in Detroit, Michigan. She concentrates her practice in commercial litigation, with an emphasis on business torts, non-compete agreements and trade secrets, and banking litigation. Ms. Khachaturian is Secretary of MDTC, and is on the Steering Committee of DRI's Commercial Litigation Committee. She can be reached at (313) 223-3128 or dkhachaturian@dickinsonwright.com.

preclude a deposition by any other procedure allowed by these rules.[2]

The 1970 Advisory Committee Notes explain the purpose of Rule 30(b)(6) depositions and provide useful guidance in interpreting and complying with a party's obligations under Rule 30(b)(6). In relevant part, the Advisory Committee Notes observe the following:

- By having the organization designate the person(s) whose testimony will be binding on the organization, it alleviates what used to be the burden on the discovering party to make an independent determination of whether a particular employee qualifies as a "managing agent" such that the employee's testimony could bind the organization.
- Rule 30(b)(6) also alleviates the organization from unnecessarily having a large number of its officers and agents deposed by a discovering party who is uncertain who in the organization has knowledge of the issues for which he seeks discovery.
- An organization may designate individuals other than officers, directors, and managing agents to testify on behalf of the organization, but only with their consent.
- An employee or agent who has an independent or conflicting interest in the litigation can refuse to testify on behalf of the organization.
- If the discovering party believes a person who is not designated by the organization may have information, the discovering party still may depose that person pursuant to Rule 30(b)(1) ("Notice in General"). However, the testimony of an individual deposed pursuant to Rule 30(b)(1) does not necessarily bind the organization (and therefore is not necessarily an admission by the organization).[3]

Rule 30(b)(6) also alleviates the organization from unnecessarily having a large number of its officers and agents deposed by a discovering party who is uncertain who in the organization has knowledge of the issues for which he seeks discovery.

The Opportunities and Challenges of Rule 30(b)(6)

Rule 30(b)(6) is a two-way street. It presents opportunities and challenges for both the discovering party and the responding party.

Opportunities for the Discovering Party: There are a number of advantages to seeking testimony pursuant to a Rule 30(b)(6) deposition. Probably the most significant benefit is that it places the burden on the receiving party not only to identify person(s) with relevant information, but also to properly prepare a person or persons to address the "matters on which examination is requested" on behalf of the organization.[4]

Before Rule 30(b)(6) was enacted, discovering parties often subpoenaed various officers and directors under Rule 30(b)(1), only to have each state that he or she had no direct personal knowledge

Because the choice of who to designate rests with the responding organization, the organization also has the opportunity to designate the person it believes will be the best witness to speak on its behalf.

of the topics at issue. Rule 30(b)(6) gives the discovering party a way to locate the appropriate corporate witness(es) without having to fish around the organization's officers, directors and managing agents, only to learn that they do not possess any meaningful information. Rule 30(b)(6) obviates this problem by allowing the discovering party to identify the topics on which it seeks information, and leaving it to the responding party to determine who the appropriate witness or witnesses are.

In addition, to the extent no individual employed by the corporation has personal knowledge that is relevant to the matter raised, but the corporation has relevant records or has other relevant sources of information, Rule 30(b)(6) requires the corporation to gather and review material from these various sources within the organization and designate a deponent on behalf of the organization to testify to that material. In other words, even if there is no person who has direct knowledge of relevant issues, the corporation is required to prepare someone to testify.[5] It also has been held that a 30(b)(6) witness "must testify to both the facts within the knowledge of the business entity and the entity's opinions and subjective beliefs, including the entity's interpretation of events and documents."[6]

Rule 30(b)(6) also is a great source of testimony that is binding on a corporation, as testimony taken pursuant to Rule 30(b)(6) is broadly admissible against the organization at trial.[7]

Moreover, a party is not precluded from taking the deposition of any person it believes has additional relevant information just because it notices up a Rule 30(b)(6) deposition. If the discovering party knows of specific witnesses whose testimony may be beneficial to its case, that witness' deposition may be taken under Rule 30(b)(1).

Finally, Rule 30(b)(6) does not necessarily limit the scope of the deposition to the topics designated in the 30(b)(6) notice

or subpoena. The discovering party may be permitted to ask a witness any question that is relevant to discovery in the lawsuit.[8] Counsel, however, may note on the record that answers that go beyond the scope of the designated topics are not binding on the designating party.[9]

Opportunities for the Responding Party: Rule 30(b)(6) also gives a party responding to a 30(b)(6) deposition notice or subpoena some advantages in the defensive discovery process.

Identifying a witness or witnesses in response to a 30(b)(6) notice gives a corporation the opportunity to present an integrated account of facts, which gives the corporation better "control" of the testimony offered on behalf of the corporation.[10] This is particularly useful when there is no other way to readily control potentially conflicting testimony given by various employees of the organization.

Because the choice of who to designate rests with the responding organization, the organization also has the opportunity to designate the person it believes will be the best witness to speak on its behalf. As observed above, the designated person need not have personal knowledge of the facts, as long as through preparation, he or she can be educated on the facts and be the official voice of the organization. Any witness who can gather the necessary relevant information may be designated by the organization.

Still, the organization cannot "hide the ball" by designating a witness with absolutely no knowledge of the matters when the organization knew of witnesses who were knowledgeable and readily available. The responding party must make a "meaningful effort to acquit its duty to designate the appropriate witness."[11]

Challenges for the Discovering Party: A party who plans to notice up a deposition under Rule 30(b)(6) must insure that it is complying with the rule's requirements.

A deposition notice that states that the deposition is being taken pursuant to Rule 30(b)(6) yet names a specific individual is inconsistent with the procedure described in Rule 30(b)(6) that allows the organization to designate the person(s) who will speak on its behalf, and actually may be construed to be a notice pursuant to Rule 30(b)(1).[12] Rule 30(b)(1), which generally addresses notices of deposition, does not impose the same duty of preparation as Rule 30(b)(6).

A deposition notice that states that the deposition is being taken pursuant to Rule 30(b)(6) yet names a specific individual is inconsistent with the procedure described in Rule 30(b)(6) that allows the organization to designate the person(s) who will speak on its behalf, and actually may be construed to be a notice pursuant to Rule 30(b)(1).

The discovering party also must designate the specific topics to be covered with "reasonable particularity."[13] Listing topic descriptions that are overly broad, such as descriptions generally requesting all information supporting a claim or defense, or that do not bear a reasonable relationship to the legal issues in the case, may lead a court to rule that the organization is not required to produce a Rule 30(b)(6) witness in response to a 30(b)(6) notice or subpoena, or that the designated witness is not required to prepare for questions relating to those overly broad topics.[14]

In drafting the topics to be covered, keep in mind that the deposition of each designated witness will be limited to one seven-hour day.

Challenges for the Responding Party: The pitfalls a responding party must avoid when responding to a notice or subpoena for a 30(b)(6) deposition are numerous and are more harmful than those faced by the discovering or issuing party.

Rule 30(b)(6) requires that the designated witness review all documentation and information relating to the specific topics that is "known or reasonably available" to the organization. That is, in contrast to a Rule 30(b)(1) deposition in which a deponent is allowed to answer "I don't know" or "I don't recall," a Rule 30(b)(6) deponent must prepare for the deposition.[15]

If no one has personal knowledge of the listed 30(b)(6) topics, the responding party has a duty to exert reasonable efforts to locate relevant information, including interviewing lower level employees that may have direct personal knowledge of events, so that it can *create* a witness with enough obtained knowledge to adequately respond to questions relating to the listed topics.[16] The organization must do the best it can to obtain the information and produce an appropriate witness.[17]

Because of this duty, Rule 30(b)(6) requires the organization to undergo the arduous process of conducting an investigation into the facts and preparing one or more witnesses to review all relevant materials and present the organization's singular position on the specific topics.[18] This may be difficult when some of the information gathered contradicts other information received.

These additional burdens are exacerbated by the fact that the designated witness is giving testimony on behalf of the organization that is binding on the organization.[19] Therefore, a party needs to critically assess who would best represent the corporation in the 30(b)(6) deposition before designating a person or persons.

As is the case with any discovery tool, a court may impose sanctions in connection with a party's failure to comply with Rule 30(b)(6). For example, when a Rule 30(b)(6) designated witness fails to appear, sanctions may be appropriate under Rule 37(d) (addressing a party's failure to attend its own deposition). Notably, the designation of witnesses who are completely unknowledgeable on the topics specified in the notice can be "tantamount to a complete failure of the corporation to appear" under Rule 37(d).[20] To warrant the imposition of sanctions, however, the "inadequacies in a deponent's testimony must be egregious and not merely lacking in desired specificity in discrete areas."[21]

It should be noted that if the responding party is unable to produce a witness with the required knowledge (after review of materials and preparation), it is not required to provide an answer to the deposition questions. However, as a result, it also may be precluded from offering "any evidence, direct or rebuttal, or argument at trial as to that topic."[22]

Finally, even if a party identifies someone who, in good faith, it thinks will be a responsive 30(b)(6) witness, if it turns out the witness does not know the requisite information, that party may have a duty to substitute another person once that deficiency becomes apparent.[23]

The Use of Alternative Discovery Tools

The Federal Rules of Civil Procedure do not give a responding party the *right* to elect to supply answers in written responses to interrogatories rather than through a Rule 30(b)(6) deposition. But if topics listed in the Rule 30(b)(6) notice are intended to elicit contentions — responses that require a mix of law and facts, requiring the witness to address the legal basis on which the organization bases its conclusions — it may be appropriate for the responding party to file a motion with the court requesting that it be allowed to respond to the topics through answers to written interrogatories.[24]

> Care should be taken to ensure that information other than privileged communications and attorney work product are used to prepare the witness for deposition.

Practice Guidelines

This section outlines guidelines for parties issuing and responding to a 30(b)(6) notice or subpoena. Given the lack of controlling authority, it bears repeating that before issuing or responding to a 30(b)(6) notice or subpoena, practitioners should examine case law in their respective jurisdictions to determine if there is relevant binding precedent or if the court in which the case is pending has ruled on any issues involving 30(b)(6) depositions.

Discovering Party — Issues to Consider in Connection with a 30(b)(6) Notice and Deposition: Before issuing a Rule 30(b)(6) notice or subpoena and taking a 30(b)(6) deposition, a party should consider the following:

- Timing: Given that the objective of a Rule 30(b)(6) deposition is to get binding admissions from a corporation, in most cases it makes sense to take a 30(b)(6) deposition earlier rather than later. This allows a party to get a handle on the opposition's position, and thereby allows that party to better develop its trial strategy and assess the strength of its case.

- Subject matter: Topics should be drafted to elicit the information needed, yet not be so overly broad that they could reasonably lead to a valid objection. Again, the topics on which testimony is sought must be described "with reasonable particularity," and the notice must describe the topics in a way that allows the responding party to identify the appropriate person(s) able to provide the information, and to adequately prepare the witness(es) to do so.[25]

- In drafting the topics to be covered, keep in mind that the deposition of each designated witness will be limited to one seven-hour day.[26] If numerous topics are specified but the responding party designates only a single witness, the discovering attorney may not have adequate time to address all of the topics in the single deposition. Nonetheless, the discovering party may seek to extend the time allowed for the deposition.[27]

  Also consider that although Rule 30(b)(6) has no numeric limit to the number of topics that can be listed in the notice, it is within the discretion of the court to limit discovery under Rule 26(b)(2) based on factors such as the burden imposed on the responding party, and whether there are other means available to obtain the information. The greater the number of topics listed in the notice, the greater the chances are that it will result in a discovery dispute that must be addressed by the court.

  Do not forget to actually ask the designated 30(b)(6) witness substantive questions on the designated topics. "Counsel's failure to ask the deponent substantive questions on the designated [30(b)(6)] topics of a deposition cannot support a motion to compel the party to produce a new deponent."[28]

Responding Party — Issues to Consider in Connection with a 30(b)(6) Notice and Deposition: When a party receives a Rule 30(b)(6)

notice or subpoena, it should consider at least the following:

- Review the notice to determine whether there are legitimate objections to any of the topics specified (i.e., overly broad, topics not described with the required "reasonable particularity"). Keep in mind that (1) if a party objects to a topic, that party may be precluded from presenting testimony on that topic at trial;[29] and (2) a conference with the discovering party is required by Rule 37 before a motion can be filed.

- Identify the people (including former employees and third parties) who have knowledge of the matter at issue and interview them.

- Conduct an investigation to determine the appropriate documentation that should be reviewed by the witness(es).

- Decide who to select as the designated witness(es). The witness may be a former employee or other third party, provided he or she consents to the designation. Also, consider that the less direct knowledge the designated witness has, the more the attorney will have to prepare the witness to testify.

- Prepare the witness(es) for deposition. The witness may need to interview lower level employees who may have direct personal knowledge of events in order to become knowledgeable. The witness also may need to review documentation and information gathered throughout the organization in order to become properly knowledgeable.

  Care should be taken to ensure that information other than privileged communications and attorney work product are used to prepare the witness for deposition. If the witness repeatedly refuses to answer questions because the only information he possesses about the matter was obtained through privileged communications and/or work product, it is possible the witness will be required to testify to the facts he learned via otherwise privileged communications, which risks an inadvertent disclosure of privileged communications or work product.[30]

- Consider other issues in the deposition. The Rule 30(b)(6) witness testifies as to "corporate knowledge," not his or her personal knowledge of the matters. Often, this witness is a person who the discovering party may also want to depose under Rule 30(b)(1) because the person also possesses personal knowledge of the events. The parties are permitted to agree, for the convenience of the witness, that the witness will be deposed in one sitting for both capacities. When this occurs, care must be taken to make it perfectly clear in which capacity the witness is answering each question.

  Object when the question is outside the scope of the topics specified in the notice. If the defending attorney allows the witness to answer (to the extent he can) after the objection has been made, if the objection proves to be meritorious, it may result in the testimony being treated as that of the individual, rather than the organization.[31]

  If, despite thorough preparation, the witness does not know or cannot recall the answer to a question that is within the scope of the notice, the parties may agree to allow the witness to obtain the information during a break. If the information will take longer to obtain, the parties may agree that the additional information will be supplied at a later time, or added when the witness reviews and signs the deposition as required by Rule 30(e). If the information is significant enough, the deposition may need to be reconvened, or a new witness designated who can properly respond to the question.[32]

If, despite thorough preparation, the witness does not know or cannot recall the answer to a question that is within the scope of the notice, the parties may agree to allow the witness to obtain the information during a break.

Conclusion

Rule 30(b)(6) is a powerful, often-forgotten tool that if used wisely can greatly enhance a party's position and if treated carelessly, can seriously undermine a party's position. Whether a party is issuing or responding to a notice or subpoena, 30(b)(6) depositions are a useful strategic device that can help develop and build a case. However, attorneys also must be aware of the potential traps underlying a party's obligations with respect to a 30(b)(6) deposition so as to avoid pitfalls that could significantly derail their case.

Endnotes

1. *Protective National Insurance Co of Omaha v Commonwealth Insurance Co*, 137 FRD 267, 278 (D Neb, 1989), citing *Cates v LTV Aerospace Corp*, 480 F2d 620, 623 (CA 5, 1973); 1970 Advisory Committee Notes to Fed R Civ P 30(b)(6); see also *Rainey v American Forest & Paper Association*, 26 F Supp 2d 82, 95 (DDC, 1998) ("the Rule aims to prevent a corporate defendant from thwarting inquiries during discovery, then staging an ambush during a later phase of the case").
2. Fed R Civ P 30(b)(6) (emphasis added).
3. *Cf Gordon v SS Vedalin*, 346 F Supp 1178, 1181 (D Md, 1972) (finding that when an officer of a corporation has direct knowledge of or participated in an event, the officer's knowledge is imputed to the corporation).
4. Fed R Civ P 30(b)(6); *King v Pratt & Whitney*, 161 FRD 475, 476 (SD Fla, 1995) ("The corporation has an affirmative duty to produce a representative who can answer questions that are both within the scope of the matters

described in the notice and are 'known or reasonably available' to the corporation.").

5. *Jakob v Champion International Corp*, 2001 US Dist Lexis 19010 (ND Ill, 2001) (finding that a corporation must designate a representative even if there is no current employee with actual knowledge of the events, but holding that plaintiff was required to depose two other witnesses who had direct knowledge of the subject matter at issue prior to taking a 30(b)(6) deposition); *Canal Barge Co v Commonwealth Edison Co*, 2001 US Dist Lexis 10097 (ND Ill, 2001); *United States v Taylor*, 166 FRD 356, 361 (MDNC, 1996) (holding that a corporation is not relieved of its duty to produce a witness when matters are reasonably available through "documents, past employees, or other sources"). *Cf Reed v Nellcor Puritan*, 193 FRD 689 (D Kan, 2000) (finding that defendant "is not required to designate someone with 'personal knowledge' to appear on its behalf at the Rule 30(b)(6) deposition").
6. *Canal Barge Co*, 2001 US Dist Lexis 10097, at *4; *Taylor*, 166 FRD at 361 ("Moreover, the designee must not only testify about facts within the corporation's knowledge, but also its subjective beliefs and opinions. . . . The corporation must provide its interpretation of documents and events.").
7. Fed. R. Civ. P. 32(a)(3).
8. *King*, 161 FRD at 476; *Detoy v City & County of San Francisco*, 196 FRD 362, 366-367 (ND Cal, 2000). *But see Paparelli v Prudential Insurance Co*, 108 FRD 727, 730 (D Mass, 1985) (holding that a Rule 30(b)(6) witness was not required to answer questions beyond the scope of the topics specified in the notice).
9. *Detoy*, 196 FRD at 367.
10. *Reed*, 193 FRD at 692 (observing that Rule 30(b)(6) "was meant to prevent the necessity of naming several company representatives in order to find the one with knowledge of the relevant facts whose testimony could bind the company. . . . Rule 30(b)(6)'s procedure allows the designation of one company representative whose testimony may bind the corporation on the noticed subjects"); *Taylor*, 166 FRD at 360 ("Rule 30(b)(6) gives the corporation being deposed more control by allowing it to designate and prepare a witness to testify on the corporation's behalf.").
11. *Resolution Trust Corp v Southern Union Co*, 985 F2d 196, 197 (CA 5, 1993) ("Rule 30(b)(6) streamlines the discovery process. It places the burden of identifying responsive witnesses for a corporation on the corporation."); *Reilly v NatWest Markets Group, Inc*, 181 F3d 253, 268-269 (CA 2, 1999) (holding that a party that produced a Rule 30(b)(6) witness, that purportedly was knowledgeable about the relevant subject matter, was precluded from presenting other witnesses at trial allegedly knowledgeable about that same subject matter).
12. *Operative Plasterers' & Cement Masons' International Association v Benjamin*, 144 FRD 87, 89-90 (ND Ind, 1992) (granting motion for protective order when 30(b)(6) deposition notice named "specific individuals as the deponents, rather than an organization," failed "to describe the subject matter of the proposed examination," and gave "no indication, apart from the bare citation of Rule 30(b)(6), that the deponents were expected to testify on behalf of the" corporation).
13. Rule 30(b)(6); *Taylor*, 166 FRD at 360.
14. See, e.g., *Reed*, 193 FRD at 692 (quashing plaintiff's 30(b)(6) notice as overbroad – when it indicated that "areas of inquiry will 'include, but not [be] limited to' the areas" enumerated – because defendant could not "identify the outer limits of the areas of inquiry noticed").
15. *Protective National Insurance Co of Omaha*, 137 FRD at 278; *King*, 161 FRD at 476 ("The corporation has an affirmative duty to produce a representative who can answer questions that are both within the scope of the matters described in the notice and are 'known or reasonably available' to the corporation."); *Zappia Middle East Construction Co v The Emirate of Abu Dhabi*, 1995 US Dist Lexis 17187, at *10 (SDNY, 1995) ("While Rule 30(b)(6) is not designed to be a memory contest . . . the deponents must be both knowledgeable about a given area and prepared to give complete and binding answers on behalf of the organization.").
16. *Taylor*, 166 FRD at 361 ("If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation.").
17. *Jakob*, 2001 US Dist Lexis 19010, at *3 (finding that a corporation must designate a representative even if there is no current employee with actual knowledge of the events); *Canal Barge Co*, 2001 US Dist Lexis 10097, at *8 ("[Defendant] still has a duty to designate a representative who has knowledge on these topics, even if the employee has no personal knowledge and has to be educated."); *Taylor*, 166 FRD at 361 (holding that a corporation is not relieved of its duty to produce a witness when matters are reasonably available through "documents, past employees, or other sources").
18. *Resolution Trust Corp*, 985 F2d at 197.
19. *Rainey*, 26 F Supp 2d at 94 ("By commissioning the designee as the voice of the corporation, the Rule obligates a corporate party 'to prepare its designee to be able to give binding answers' in its behalf. . . . Unless it can prove that the information was not known or was inaccessible, a corporation cannot later proffer new or different allegations [through, for example, an affidavit,] that could have been made at the time of the 30(b)(6) deposition."); see also *Taylor*, 166 FRD at 362 ("if a party states it has no knowledge or position as to a set of alleged facts or area of inquiry at a Rule 30(b)(6) deposition, it cannot argue for a contrary position at trial without introducing evidence explaining the reasons for the change"). *Compare to AI Credit Corp v Legion Insurance Co*, 265 F3d 630, 637 (CA 7, 2001) (holding that testimony of a Rule 30(b)(6) witness does not bind a corporation as a judicial admission and therefore can be contradicted by another witness at trial).
20. *Resolution Trust Corp*, 985 F2d at 197 (affirming district court's award of fees and costs when the designated 30(b)(6) witness testified that he had no knowledge as to each item identified in the notice); *Taylor*, 166 FRD at 363 ("Producing an unprepared witness is tantamount to a failure to appear."); *Marker v Union Fidelity Life Insurance Co*, 125 FRD 121, 126 (MDNC, 1989) ("An inadequate Rule 30(b)(6) designation amounts to a refusal or failure to answer a deposition question. Among the other remedies, the Court can require the corporation to re-designate its witnesses and mandate their preparation for re-deposition at the corporation's expense.").
21. *Zappia Middle East Construction Co*, 1995 US Dist Lexis 17187, at *26; *Banco Del Atlantico, SA v Woods Industries Inc*, 519 F3d 350, 352-354 (CA 7, 2008) (affirming district court's dismissal of the case as a sanction when plaintiffs' counsel asserted an inordinate number of privilege and work product objections and instructed the witness not to answer even the most basic questions with respect to the first 30(b)(6) witness, and when the second 30(b)(6) witness was produced after the court gave plaintiffs two options to cure the issues with respect to the first 30(b)(6) witness, witness gave only cursory "talking point" answers).
22. *Taylor*, 166 FRD at 359.
23. *Marker*, 125 FRD at 126 (holding that when, during the course of the deposition, a party became aware that its Rule 30(b)(6) witness was unable to adequately answer questions within the scope of the notice, that party had duty to substitute another witness who could properly answer the questions).
24. *Canal Barge Co*, 2001 US Dist Lexis 10097, at *6 ("However, some inquiries are better answered through 'contention interrogatories' when the questions involve complicated legal issues."); *Protective National Insurance Co of Omaha*, 137 FRD at 282 (observing that in *Lance, Inc v Ginsburg*, 32 FRD 51 (ED Pa, 1962), the judge found it "unrealistic to expect a lay witness to be able to" testify as to whether an affidavit was invalid under the trademark act without the professional advice of counsel); *Taylor*, 166 FRD at 363 n7 ("Some inquiries are better answered through contention interrogatories wherein the client can have the assistance of the attorney in answering complicated questions involving legal issues.").
25. *Steil v Humana Kansas City, Inc*, 197 FRD 442, 445 (D Kan, 2000) (granting in part defendant's motion for a protective order, finding some but not all of plaintiff's 30(b)(6) topics overly broad); *Reed*, 193 FRD at 692 (finding notice to be overly broad because it indicated that the listed topics were "not exclusive" and the defendant could not "identify the outer limits of the areas of inquiry noticed").
26. Fed R Civ P 30(d)(1); 2000 Advisory Committee Notes to Rule 30(d); *Canal Barge Co*, 2001 US Dist Lexis 10097, at *9-10 ("if a corporation designates more than one representative in response to a deposition notice

under Rule 30(b)(6), the one day limit applies separately to each designee").

27. Fed R Civ P 30(d)(1); 2000 Advisory Committee Notes to Rule 30(d); *Canal Barge Co*, 2001 US Dist Lexis 10097, at *10-11.
28. *Buck v Ford Motor Co*, 2012 US Dist LEXIS 22641, at *9 (ND Ohio, February 23, 2012), citing *Cummings v General Motors Corp*, 2002 US Dist LEXIS 27627 (WD Okla), and *Rivet v State Farm Mut Auto Ins Co*, 316 Fed Appx 440, 448 (CA 6, 2009).
29. *Taylor*, 166 FRD at 360.
30. *Protective National Insurance Co of Omaha*, 137 FRD at 279-280 ("where a document may be insulated from discovery because of the work product doctrine, the facts contained therein must be disclosed in response to a properly worded interrogatory or deposition question").
31. *Detoy v City & County of San Francisco*, 196 FRD 362 (ND Cal, 2000) (finding that if a corporation objects to questioning beyond the scope of the notice, the corporation may request jury instructions to explain that the answers of deponent were answers or opinions of the individual and not admissions of the corporation); *King v Pratt & Whitney*, 161 FRD 475 (SD Fla, 1995) (observing that answers to questions outside those noticed are governed by general deposition rules).
32. *Resolution Trust Corp v Southern Union Co*, 985 F2d 196 (CA 5, 1993); *Marker v Union Fidelity Life Insurance Co*, 125 FRD 121 (MDNC, 1989) (holding that when during the course of the deposition, a party became aware that its Rule 30(b)(6) witness was unable to adequately answer questions within the scope of the notice, that party had duty to substitute another witness who could properly answer the questions).

MED/ARB:
A Time and Cost Effective Combination for Dispute Resolution[1]

By: Martin C. Weisman, *Professional Resolution Experts of Michigan, LLC (PREMi)*

Executive Summary

MED/ARB as an alternate dispute resolution process that is gaining in use. It involves combining the voluntary and private mediation process with the final and binding arbitration process. This hybrid alternative to litigation before a judge and/or jury is something advocates and parties should consider, given the economic environment and the desire for speed, lower cost, and finality.

Martin C. Weisman is a founding partner of the firm Weisman, Young & Ruemenapp, P.C., where his civil litigation practice involves banking, trusts and estates, employment, shareholder actions, commercial transactions, real estate and professional liability.

While there are many different forms of alternative dispute resolution, the concept of MED/ARB is one that is gaining in its use. It involves the combination of private voluntary dispute resolution mediation with a dispute resolution process where the parties agree in writing to submit the dispute for resolution to a neutral third-party arbitrator for, generally, a final and binding decision.

The differences between these two ADR processes are quite clear. In mediation, which is private and voluntary, the mediator, who is acceptable to all parties, assists the parties in identifying issues of mutual concern, develops options for resolving those issues, and finding resolutions which are acceptable to the parties. Mediation is nonbinding.

In arbitration, however, the parties present proofs and arguments to the arbitrator who then determines the facts and decrees an outcome. The parties to arbitration control the process. There is usually one arbitrator or panel of three arbitrators and often the arbitrator or arbitrators have special expertise appropriate for the subject matter of the dispute. The arbitration process only addresses those disputes which the arbitrator has been given the power to resolve and this authority can be given by contract, order of a court of competent jurisdiction or legislative mandate.

MED/ARB combines the mediation and arbitration processes as a means to avoid the increased cost and difficulty of court litigation and, for that matter, even arbitration. This process begins with a neutral third party facilitating settlement discussions as a mediator. In instances of irresolvable impasse, the neutral third-party then becomes an arbitrator, conducts an arbitration and renders an award. This process can be efficient, can provide the parties with the best of both types of ADR processes, with a guarantee of closure, while maintaining fairness. Oftentimes, counsel for the parties like this approach because it allows someone else to give "bad news" to their clients.

Of course there are also problems with the use of this format. Ethical issues arising out of caucus communications and confidentiality, the parties' perception of impartiality of both the mediator and the arbitrator, and the tendency to have a more restrained mediation process because of inhibitions of the parties to be openly candid are just a few of the issues. The benefits and burdens of MED/ARB must be weighed by the parties in each situation when determining whether or not to use this process.

There are several variations of the process including ARB/MED which begins with the parties presenting their case to the neutral third-party arbitrator who renders a decision, which is not revealed, and then the parties commence a standard mediation facilitated by the same person. If they are able to resolve their issues, the arbitration award is discarded. If the parties are unable to resolve the issue in mediation, the arbitration award is revealed and generally becomes binding.

No matter which form of this hybrid process is used, the neutral must possess all of the qualifications for both mediation and arbitration and likely will have topic specific expertise in the issues involved.

The ethical standards of the arbitration will generally govern the MED/ARB process, since those represent a higher and tougher standard.

The MED/ARB starts with a written agreement or court order. It is essential that this agreement or court order is one which is understood by the parties as well as counsel. An arbitrator's authority is only based upon the authority granted to him in the arbitration agreement or order to compel arbitration. Similarly, the arrangement between the mediator/arbitrator and the parties is also based upon the agreement that the mediator/arbitrator has with the parties and their counsel. This can be accomplished through execution of an engagement agreement, a mediation agreement tailored to the MED/ARB process, or combining them both. A sample of the language advocates and ADR providers should use include the following:

> The Client and Counsel have requested [NAME] to act in the capacity of mediator and arbitrator. During the mediation portion of this engagement, [NAME] may conduct private sessions/caucuses with one party and exclude the other and receive confidential information and/or information which may not be admissible or relevant in the arbitration. The parties hereby acknowledge that this may occur, and if it did, same would not be used to disqualify [NAME] from acting as arbitrator nor be grounds for vacatur or challenge to confirmation of any arbitration award.
>
> Any and all conflicts created by [NAME's] dual capacity as arbitrator and mediator are hereby waived.

The MED/ARB starts with a written agreement or court order. It is essential that this agreement or court order is one which is understood by the parties as well as counsel.

> [NAME] shall have complete authority over the mediation and arbitration subject to the Arbitration Agreement of the parties as well as the American Arbitration Association's Commercial Arbitration Rules and MCR 2.411.
>
> [NAME] shall have the same limited immunity as judges and court employees would have under federal or state law as he is not a necessary party in any judicial or arbitration proceeding relative to the mediation/arbitration contemplated by this engagement.
>
> When a party representative meets alone with the mediator, he or she will clearly inform [NAME] what statements or documents shall remain confidential, and what may be shared with the other party(ies). But in any event, nothing disclosed in these private discussions may be considered in the arbitration unless introduced by either party independently during the arbitration.

At the outset of the engagement, an in-person conference with the parties and their counsel is the best way to ensure that everyone understands the process and executes the documents in a knowing and appropriate manner. During this conference, it is important to discuss all of the benefits and burdens of the process, and to describe how the process will work. You should answer any of the concerns voiced by the parties or their counsel and these answers must be clear, concise and candid, for it is only then that a valid and acceptable executed agreement will result.

This hybrid procedure allows for voluntary settlement opportunities with closure. Since the arbitrator does not have to be educated in the substance of the problems involved in the dispute, having already learned of the ins and outs of the dispute during the mediation portion of the process, significant economies in both time and expense can result.

On occasion, following the mediation portion of a MED/ARB, the parties will elect to submit the matter to the arbitrator in a "summary" fashion. This may take the form of submitting the matter on briefs, exhibits, and affidavits with no testimony being offered. They may do this because of the knowledge shown by the mediator/arbitrator and their confidence in the mediator/arbitrator to be fair and impartial during the mediation phase. Because the parties know that the mediator will ultimately be a final and binding decision maker, there is also a greater tendency for the mediation process to result in a settlement, thereby cutting out the expense and time involved in the arbitration process.

This process is something for advocates and parties alike to consider. In the current economic environment, given the rise in the use of alternative dispute resolution techniques for problem solving, and given the desire for speed, lower cost, and finality, more and more parties and their counsel are utilizing the Med/ARB process to resolve their disputes.

Endnotes

1. This article was published in Michigan Lawyers Weekly October 10, 2011.

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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,*
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- *Sharing tips and case strategies, and*
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If you are interested in chairing a section, please contact MDTC President Timothy A. Diemer at TimDiemer@jacobsdiemer.com.

Appellate Practice ***appellate@mdtc.org***	Beth A. Wittmann beth.wittmann@kitch.com Matthew T. Nelson mnelson@wmj.com
Labor and Employment ***labor@mdtc.org***	Gouri G. Sashital gsr@kellerthoma.com
Professional Liability & Health Care ***profliab@mdtc.org***	Michael R. Janes mrj@martinbacon.com
Young Lawyers ***younglaw@mdtc.org***	Robert Paul Vance pvance@ccglawyers.com
Insurance Law ***insurance@mdtc.org***	Darwin Leroy Burke, Jr. dburke@rvnvlaw.com
Municipal and Government Liability ***munigov@mdtc.org***	Ridley S. Nimmo, II rnimmo@plunkettcooney.com
Law Practice Management ***pracmgt@mdtc.org***	Thaddeus E. Morgan tmorgan@fraserlawfirm.com
Trial Practice ***trialprac@mdtc.org***	David Ottenwess dottenwess@ottenwesslaw.com
General Liability ***genliab@mdtc.org***	Thomas W. Aycock taycock@shrr.com
Commercial Litigation ***comlit@mdtc.org***	John Mucha III jmucha@dmms.com

Michigan Supreme Court Insurance BOLO (Be on the Lookout) Report

By: Kimberlee A. Hillock, *Willingham & Coté, P.C.*

Executive Summary

The Michigan Supreme Court has a handful of cases before it, on which an opinion or order should be issued by July 31, 2013, that either directly or indirectly will affect insurance law and those who practice it. Some cases the Court has agreed to hear, while others the Court has ordered oral argument with respect to whether it should grant an application for leave to appeal. This article discusses each of these cases and identifies the specific issues presently before the Court.

Kimberlee A. Hillock is a shareholder and a co-chairperson of Willingham & Coté, P.C.'s Appellate Practice Group. Before joining Willingham & Coté, P.C., Ms. Hillock worked as a research attorney and judicial clerk at the Michigan Court of Appeals, and as a judicial clerk at the Michigan Supreme Court. Since joining Willingham & Coté in 2009, Ms. Hillock has been instrumental in achieving favorable appellate results for clients in ten Michigan Court of Appeals cases and eight Michigan Supreme Court matters. Her most notable success was *Spectrum Health Hosp v Farm Bureau Mut Ins Co*, 492 Mich 503; 821 NW2d 117 (2012). She has more than nine years' experience in appellate matters and is a member of the Michigan Supreme Court Historical Society Advocates Guild. She is also an associate editor of the *Michigan Defense Quarterly*.

The Michigan Supreme Court has either granted leave or ordered oral argument on several cases that have the potential of significantly affecting insurance law. For almost all calendar cases in which the Supreme Court has heard oral argument, an opinion or order will be issued by July 31st, the end of the court's calendar year.[1] Therefore, insurance practitioners should be on the lookout for these decisions sometime between now and July 31, 2013. This article sets forth the significant insurance issues before the court.

The Court Is Considering Whether, or to What Extent, an Insurer Must Pay for Handicap-Accessible Vans as Transportation:

Admire v Auto-Owners Ins Co,[2] was discussed in a previous BOLO report in the January 2012 edition of *Michigan Defense Quarterly*. This case is significant because it directly addresses whether an insurer only has to pay for the incremental costs associated with a claimant's injuries, or whether an insurer must pay for the entire cost of an item once a claimant is injured. To briefly recap, the insurer in *Admire* agreed to pay for handicap modifications to a van purchased by the plaintiff but declined to pay for the base purchase price of the van itself in light of the Supreme Court's decision in *Griffith v State Farm Mut Auto Ins Co,*[3] a no-fault case in which the Supreme Court held that only those costs associated with an injured person's care, recovery, or rehabilitation were compensable, and *Weakland v Toledo Engineering Co,*[4] a worker's compensation case in which the Supreme Court held that the base purchase price of a van is not compensable.

Both the trial court and the Michigan Court of Appeals held that the insurer was required to pay for the purchase price of the van itself. The insurer applied for leave to appeal to the Supreme Court. On September 23, 2011, the Supreme Court directed the Court Clerk to schedule oral argument on whether to grant leave to appeal or take other action, and directed the parties to address "whether, or to what extent, the defendant is obligated to pay the plaintiff personal protection insurance benefits under the no-fault act, MCL 500.3101 *et seq.*, for handicap-accessible transportation."

On March 7, 2012, the Supreme Court held oral argument on whether to grant the insurer's application for leave to appeal. On March 23, 2012, the Court granted leave to appeal and directed the parties to brief the following issues:

> (1) whether MCL 500.3107(1)(a) allows the plaintiff to recover the full cost of handicap-accessible transportation or whether the plaintiff's recovery is offset to the extent that the handicap-accessible transportation replaces the plaintiff's other transportation costs; (2) if the plaintiff's recovery is offset, what procedure a fact-finder must undertake in calculating the amount of the plaintiff's recovery and what evidence is relevant to that calculation; (3) whether there is any basis in MCL

500.3107(1)(a) to treat transportation costs differently from other household expenses, such as food or housing, that every person incurs whether injured or not; and (4) whether the principles and standards articulated in *Griffith v State Farm Mutual Automobile Ins*, 472 Mich 521 (2005), are sufficient to resolve this dispute.

Oral argument was held November 14, 2012, and an opinion is pending.

May Mental Distress Damages Be Awarded for Negligent Damage to Real Property:

In *Price v High Pointe Oil Co, Inc,*[5] the Supreme Court granted High Pointe Oil Company's application for leave to appeal and directed the parties to address "whether mental distress damages may be awarded for negligent damage to real property." Although not technically an insurance case, this case may prompt insurers to revisit the language in their policies.

To provide a little background, in 2006, the plaintiff replaced her oil furnace with a propane furnace and telephoned the defendant to cancel fuel oil deliveries. Prior to this call, the plaintiff had been on the defendant's "keep full" list. No fuel oil deliveries were made for more than one year. On November 17, 2007, the defendant attempted to deliver fuel oil through the fill pipe that was still present. However, because the oil furnace had been removed, the defendant ended up pumping 396 gallons of fuel oil into the plaintiff's basement. Many of the plaintiff's personal items could not be salvaged, and the entire house had to be demolished because of environmental contamination.

The plaintiff filed suit alleging several counts including gross negligence, negligence, and negligent infliction of emotional distress. She claimed that under the court rules she was entitled to noneconomic damages for emotional distress and mental anguish. The trial court granted the defendant summary disposition with regard to the gross negligence and negligent infliction of emotional distress counts, but concluded that the plaintiff was entitled to seek noneconomic damages for mental anguish suffered as a result of the defendant's negligence.

The defendant appealed the $100,000 jury verdict in favor of the plaintiff. It argued that under Michigan law the plaintiff was not entitled to seek noneconomic damages for mental anguish caused by the destruction of property. In a published decision, the court of appeals affirmed. The court rejected as inapposite defendant's case law addressing the measure of damages for economic loss suffered as a result of real property because these cases did not address noneconomic damages. It declined to extend to real property the appellate holdings that noneconomic damages could not be recovered for the loss of personal property because it concluded that real property and personal property have been treated differently for tort purposes. Instead, it applied the general rule that a plaintiff may recover noneconomic damages in tort claims. The court concluded that emotional distress was different from mental anguish, and to the extent the plaintiff sought recovery for mental anguish, she was not required to show physical manifestation of injury. It further found that the plaintiff had presented sufficient evidence of mental anguish.

The defendant filed an application for leave to appeal to the Supreme Court. On March 21, 2012, the Supreme Court granted leave to appeal, and directed the parties to address "whether mental distress damages may be awarded for negligent damage to real property." Oral argument was held November 15, 2012.

Update: On March 21, 2013, the Supreme Court issued its opinion reversing the court of appeals decision.[6] The Court reaffirmed that the historical measure of damages for negligent destruction of property is the cost of replacement or repair.[7] It noted that no Michigan case had ever permitted recovery of noneconomic damages for the negligent destruction of property.[8] And it found no relevant basis to treat real property differently from personal property for damages purposes.[9] Because (a) the market sets the price of property for economic damages purposes; (b) economic damages, unlike noneconomic damages, are easily verifiable; (c) limiting damages to economic damages limits disparities in damage awards; and (d) limiting damages to economic damages affords a reasonable level of certainty regarding scope of liability, the Supreme Court declined to alter the general rule. Thus, the measure of damages for negligent destruction of property, whether real or personal, continues to be the cost of replacement or repair, and noneconomic damages for emotional distress are not recoverable.

Can a Person Who Has a Seizure while Driving an Uninsured Motorcycle, which Results in an Accident with a Parked Motor Vehicle, Recover PIP Benefits on the Basis that His Seizure Disorder Was Caused by a Previous Accident:

In *McPherson v McPherson,*[10] the plaintiff suffered a head injury in 2007 while riding as a passenger in a vehicle insured by Progressive Michigan Insurance Company. According to his attending physician, plaintiff developed a seizure disorder that was solely related to the auto accident. While riding his uninsured motorcycle 10 months later, plaintiff crossed four lanes of traffic and struck a parked car. He claimed that the accident was the result of a seizure. Progressive denied benefits. It later sought summary disposition on the basis that the plaintiff's subsequent injuries were solely related to the motorcycle

accident, and the plaintiff was not entitled to PIP benefits because he failed to insure his motorcycle. Plaintiff claimed the motorcycle accident was the result of his seizure disorder, which was the result of the 2007 accident, and supported his argument with expert testimony. Finding a question of fact, the trial court denied the summary disposition motion.

The court of appeals majority likewise found that a question of fact existed as to whether the plaintiff's 2008 motorcycle crash arose out of the 2007 accident. It rejected the insurer's argument that the 2008 motorcycle accident was a superseding cause of the plaintiff's new injury. The dissenting judge would not have reached the causation issue but instead would have held that the plaintiff was foreclosed from seeking PIP benefits on the basis that he was driving an uninsured vehicle. On September 21, 2012, the Supreme Court ordered oral argument on whether to grant the application or take other action. Oral arguments were held January 10, 2013.

Is the "Primary Purpose/ Incidental Nature" Test Used by the Court of Appeals for Determining Whether a Commercial Vehicle Is Being Used in the Business of Transporting Passengers Consistent with the Language of MCL 500.3114(2) and, if so, What Is Its Proper Application:

We Want the Music Company (WWTMC) was the host of an annual six-day-long music festival. It contracted with a commercial carrier to provide transportation from the airport to the event by charter busses at scheduled shuttle times. WWTMC owned three passenger/cargo vans, which were generally used to transport performers, staff, volunteers, and equipment on festival grounds. The president of WWTMC testified that the vans were not intended to transport festival attendees. On August 5, 2008, several attendees arrived at the airport too late to ride the shuttle busses. They negotiated a ride with the driver of one of the vans. On the way to the festival, the van was involved in a one-vehicle roll-over accident. The attendees filed claims with their own insurance companies, which paid PIP benefits and then sought reimbursement from WWTMC's insurer.

> Thus, the measure of damages for negligent destruction of property, whether real or personal, continues to be the cost of replacement or repair, and noneconomic damages for emotional distress are not recoverable.

The trial court ruled that WWTMC's insurer was the insurer of highest priority under MCL 500.3114(2). It found it significant that the van was being used to transport passengers at the time of the accident, the van was designed to accommodate passengers, the van was insured as a commercial vehicle, and WWTMC's business was benefitted by transporting people to the music festival.

The Michigan Court of Appeals reversed.[11] Relying on *Farmers Ins Exch v AAA of Michigan*,[12] *Thomas v Tomczyk*,[13] and *Lampman v Workman*,[14] the court of appeals applied the primary purpose/incidental nature test and concluded that WWTMC's insurer was not first in priority because the primary purpose of WWTMC was the production of the annual festival, and its transportation of attendees was incidental to its overall business. On May 23, 2012, the Supreme Court granted leave limited to the following issue:

> [W]hether the "primary purpose/ incidental nature" test for determining whether a commercial vehicle is being used in the business of transporting passengers is consistent with the language of MCL 500.3114(2), and, if so, whether it was applied properly to the facts of this case.[15]

Oral argument was held January 9, 2013.

Is a Claimant Entitled to Recover His Medical Expenses Arising from a Motorcycle Accident Involving a Motor Vehicle from both the Insurer of the Motor Vehicle and His Health Care Insurer:

In *Harris v Auto Club Ins Ass'n,*[16] the plaintiff was injured while riding a motorcycle that was struck by a vehicle insured by ACIA. The plaintiff was insured through a health insurance policy with Blue Cross Blue Shield of Michigan ("BCBSM"). ACIA has paid and continues to pay all of the plaintiff's outstanding medical bills. The plaintiff filed suit claiming he was entitled to recover for these same medical bills from BCBSM. BCBSM's policy provided that it would not cover services payable under any other health care benefit plan, and that it would coordinate benefits payable with those paid under another group health plan. The policy further provided that BCBSM would not pay for those services that the insured legally did not have to pay and for which the insured would not have been charged if the insured did not have coverage through BCBSM. The trial court granted summary disposition to BCBSM based on these provisions.

The court of appeals reversed. The majority concluded BCBSM's coordination of benefits provisions did not apply because a no-fault insurer was not a

health care benefit plan or group health plan. The court further held that the plaintiff became legally liable to pay the medical expenses when the services were provided under *Shanafelt v Allstate Ins Co*,[17] and *Bombalski v Auto Club Ins Ass'n*.[18] Therefore, the BCBSM policy provision that precluded payment when an insured did not have to pay was not applicable. The court found inapplicable the reimbursement provisions of the BCBSM policy because it concluded that these provisions pertained to tort actions in which the insured could recover both economic and non-economic damages.

The dissenting judge would have concluded that BCBSM's policy precluded the plaintiff from receiving a double recovery because the policy precluded payment for which an insured legally did not have to pay. Because ACIA paid all the medical bills, the plaintiff legally did not have to pay anything. The dissenting judge was not persuaded by the majority's interpretation of *Shanafelt* or *Bombalski* because those cases interpreted the meaning of the term "incur" under the no-fault act, and the BCBSM policy did not use the term "incur." He pointed out that it was error to apply a statutory definition to a term in a contract that is unrelated to the statute. Nevertheless, he found that *Bombalski* supported the conclusion that the plaintiff was not entitled to double recovery from ACIA. Because the "legally do not have to pay" clause was unambiguous, and the plaintiff was not liable to pay for any services when ACIA had already paid them, the dissenting judge would have affirmed the trial court's grant of summary disposition to BCBSM.

The Michigan Supreme Court granted BCBSM's application for leave to appeal and directed the parties to address "whether the plaintiff is entitled to a double recovery from both Auto Club Insurance Association and Blue Cross Blue Shield of Michigan of medical expenses arising from a motorcycle accident involving a motor vehicle."[19] Oral argument was scheduled to be heard March 6, 2013.

> The court of appeals majority likewise found that a question of fact existed as to whether the plaintiff's 2008 motorcycle crash arose out of the 2007 accident. It rejected the insurer's argument that the 2008 motorcycle accident was a superseding cause of the plaintiff's new injury.

Is a Tailgate on a Dump Trailer "Equipment Permanently Mounted on a Vehicle" for Purposes of MCL 500.3106(1)(b), and, if so, Was the Plaintiff's Injury "a Direct Result of Physical Contact with" the Tailgate:

In *Lefevers v State Farm Mut Automobile Ins Co,*[20] the plaintiff was injured when, while trying to force open the tailgate of a dump trailer, the tailgate suddenly broke free and caused the plaintiff to lose his balance and fall 12 feet into the landfill. The trial court denied the no-fault insurer's motion for summary disposition because it concluded that (a) the vehicle was unreasonably parked, (b) the plaintiff was injured as a direct result of physical contact with equipment permanently mounted on the vehicle, and (c) the plaintiff was injured as a direct result of contact with property being lowered from the vehicle.

The court of appeals affirmed. It held that the tailgate on the dump trailer constituted equipment permanently attached to the vehicle, and found that plaintiff presented sufficient evidence to establish an issue of fact as to whether his injury occurred as a direct result of his physical contact with the tailgate. The court concluded, however, that (a) there was no evidence that the plaintiff's injuries were the direct result of physical contact with the dirt being unloaded, and (b) the dump trailer was not unreasonably parked.

On October 4, 2012, the Supreme Court ordered oral argument on whether to grant the application for leave to appeal and directed the parties to address the following:

> [W]hether the tailgate on the plaintiff's dump trailer was "equipment permanently mounted on the vehicle" for purposes of MCL 500.3106(1)(b), and, if so, whether the plaintiff's injury was "a direct result of physical contact with" the tailgate.

Oral argument was scheduled to be heard March 7, 2013.

The Supreme Court Is Considering Two Cases Pertaining to the Domicile of a Minor Child of Divorced Parents:

In *Grange Ins Co of Michigan v Lawrence,*[21] both parents shared joint legal custody of the minor child, but the mother had primary physical custody. The minor child was killed in a motor vehicle accident while riding as a passenger in a car driven by her mother. The mother's insurer paid benefits, then sought partial recoupment from the father's insurer on the basis that the insurers were in equal priority under MCL 500.3114(1). The father's insurance policy's definition of family member stated that "[i]f a court has adjudicated that one parent is the custodial parent, that adjudication shall be conclusive with

respect to the minor child's principal residence." The trial court disagreed with the father's insurer and concluded that the mother's insurer was entitled to recoup 50 percent of the first party benefits paid.

The court of appeals affirmed. It concluded that there was nothing in MCL 500.3114(1) or case law that limited a minor child of divorced parents to one domicile or that defined domicile as a "principal residence." It found that the undisputed evidence clearly showed that the minor child resided with both parents. And it held that the father's insurance policy provision that limited coverage only to relatives whose principal residence was with the insured was in conflict with the statute and therefore invalid. On September 19, 2012, the Supreme Court granted leave to appeal and directed the parties to address:

> (1) whether a person, and in particular the minor child of divorced parents, can have two domiciles for the purpose of determining coverage under MCL 500.3114(1) of the Michigan no-fault act; (2) whether, in answering the first issue, a court order determining the minor's custody has any effect; and (3) whether an insurance policy provision giving preclusive effect to a court-ordered custody arrangement is enforceable.

Oral argument is scheduled to occur in April 2013.

In *Automobile Club Ins Ass'n v State Farm Mut Automobile Ins Co*,[22] the minor child's parents were also divorced, but the father lived in Tennessee. The trial court concluded that the minor child was domiciled with her mother in Michigan at the time of the motor vehicle accident that resulted in her death and, therefore, the mother's insurer was first in priority.

The Michigan Court of Appeals reversed the grant of summary disposition in favor of the father's insurer, concluding that summary disposition to either insurer was inappropriate because a question of fact existed as to the minor's domicile. It noted that "domicile" is generally defined as "'[that place where a man has his true, fixed, and permanent home and principal establishment and to which, whenever he is absent, he has the intention of returning.'" Citing the same factors as those cited in *Grange Ins Co of Michigan*, *supra*, the court nevertheless reached a conclusion different from that reached in *Grange*. Instead of finding that the minor child could have been domiciled with both parents, the court concluded that there was evidence supporting domicile with either parent, and that the trial court was not permitted to make credibility determinations. Thus, the court held by implication that a person can have only one domicile. The court also rejected the argument that the trial court was bound by previous decisions of Michigan courts in other jurisdictions holding that the minor was domiciled in Tennessee.

Citing the same factors as those cited in *Grange Ins Co of Michigan, supra,* the court nevertheless reached a conclusion different from that reached in Grange. Instead of finding that the minor child could have been domiciled with both parents, the court concluded that there was evidence supporting domicile with either parent, and that the trial court was not permitted to make credibility determinations. Thus, the court held by implication that a person can have only one domicile.

On March 23, 2012, the Supreme Court ordered oral argument on whether to grant the application for leave to appeal or take other action. It directed the parties to address:

> [W]hether legal residence and domicile of the insured minor were conclusively established in Tennessee pursuant to the judgment of divorce entered by the Wayne Circuit Court, as amended, or whether the minor had the capacity to acquire a different legal residence or domicile of choice.

Because of the similarity of issues, this case will also be argued in April 2013.

Endnotes

1. MCR 7.312, Michigan Supreme Court Processing of Cases and Administrative Matters, H.7.
2. Supreme Court Docket No. 142842.
3. 472 Mich 521; 697 NW2d 895 (2004).
4. 467 Mich 344; 656 NW2d 175, amended 468 Mich 1216 (2003).
5. Supreme Court Docket No. 143831.
6. *Price v High Pointe Oil Co, Inc,* ___ Mich ___; ___ NW2d ___ (2013).
7. *Id.*, slip op at 1, 7.
8. *Id.*, slip op at 1, 11.
9. *Id.*, slip op at 14-15.
10. Supreme Court Docket No. 144666.
11. *Farmers Ins Exch v Michigan Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued October 18, 2011 (Docket Nos. 289984, 289985).
12. 256 Mich App 691; 671 NW2d 89 (2003).
13. 142 Mich App 237; 369 NW2d 219 (1985).
14. *Lampman v Workman,* unpublished opinion per curiam of the Court of Appeals, issued March 22, 2002 (Docket No. 225743).
15. Supreme Court Docket Nos. 144144, 144145.
16. *Harris v Auto Club Ins Ass'n,* unpublished opinion per curiam of the Court of Appeals, issued December 27, 2011 (Docket No. 300256).
17. 217 Mich App 625; 552 NW2d 671 (1996).
18. 247 Mich App 536; 637 NW2d 251 (2001).
19. Supreme Court Docket No. 144579.
20. Supreme Court Docket No. 144781.
21. Supreme Court Docket No. 145206.
22. Supreme Court Docket No. 143808.

MDTC Files Amicus Brief on Issue of Duty

Owed by Landlords and Other Premises Proprietors to Protect Against and Prevent Criminal Attacks by Third Parties

By: Carson J. Tucker, *Lacey & Jones, LLP*

MDTC has filed an amicus curiae brief in the Michigan Supreme Court in the case of *Bailey v. Schaaf, et al.*, Supreme Court Case No. 144055.

The court invited MDTC to file the amicus brief to assist it in addressing the issue of whether the court of appeals erred "when it extended the limited duty of merchants — to involve the police when a situation on the premises poses an imminent risk of harm to identifiable invitees, see *MacDonald v PKT, Inc*, 464 Mich 322 (2001) — to landlords and other premises proprietors, such as the defendant apartment complex and property management company."

The underlying lawsuit arose after a tenant's guest was shot by an unknown assailant at a residential housing complex in the late evening of Friday, August 4, 2006. The tenant was having a party and a barbecue. The assailant, who was not a guest or a tenant at the complex, was brandishing a gun and threatening to shoot someone. The landlord and the property management company had contracted with a company to provide a courtesy security patrol. Someone informed the security patrol that the assailant was making threats to shoot someone. The police were not called until after the guest was shot.

The injured guest filed suit against the landlord, the property management company, and the security company, alleging that they had a duty to involve the police under *MacDonald v PKT, Inc*. The trial court granted summary disposition for the landlord and property management company.

The Michigan Court of Appeals (Judges Beckering, Whitbeck and M.J. Kelly) reversed, holding that under the circumstances the landlord and property management company had a duty to call the police and could therefore be liable to the injured guest. The court of appeals noted that the Michigan Supreme Court had previously found a "special relationship" existed between merchants and their business invitees such that there was a duty to involve the police to avoid or prevent criminal attacks upon the invitees. The court reasoned that such a "special relationship" also exists under Michigan law between landlords and their tenants, such that a similar duty exists to avoid or prevent criminal attacks upon tenants.

In its amicus brief, MDTC explores the legal underpinnings of the common-law "special relationships" recognized and applied by Michigan courts as giving rise to an extraordinary or heightened duty of care, which duty includes protecting against and preventing criminal attacks. MDTC demonstrates that the landlord-tenant relationship is not similar to those relationships recognized at common law and in Michigan as giving rise to such a heightened duty of care. Such relationships that are in the latter category include innkeeper-guest, tavern owner- patron, and, in some cases, common carrier-passenger. MDTC argues that landlords surrender a great degree of control over their property to the exclusive control of their tenants. Moreover, MDTC's

Carson J. Tucker, Chair of the Appeals and Legal Research Group at Lacey & Jones, LLP, in Birmingham, authored the amicus brief on behalf of MDTC. He can be reached for comment at (248) 283-0763.

amicus brief shows that the court's precedent addressing a landlord's liability to tenants for criminal acts committed upon the latter has been limited to the landlord's duty to maintain the physical condition of the common areas (those areas over which the landlord retains some measure of control) in a reasonably safe condition so as to avoid the opportunity for such events to occur. Further, the amicus brief demonstrates that the "special relationship" between ordinary merchants and their invitees is also not among those giving rise to any extraordinary duty such that liability could be imposed for the unforeseeable and random criminal acts of third parties upon invitees.

MDTC's amicus brief also presents the court with a host of policy concerns that arise from the court of appeals' ruling. These include the economic impact upon affordable housing that could be affected by imposing a duty on landlords to prevent criminal acts of this nature upon their tenants. MDTC demonstrates that finding a legal duty under the circumstances presented does not comport with fundamental elements of tort law in terms of defining duty, breach, foreseeability and causation. In addition, MDTC points to significant concerns raised in incentivizing the creation and deployment of private police forces. Finally, MDTC argues that the court of appeals' decision, rather than being grounded in sound legal reasoning, substitutes the true defendant (the assailant) with the artificial defendant (merchants, landlords, property management companies, etc.) to create vicarious criminals out of the latter for the acts of the former — a notion that is contrary to the rule of law and any notion of personal responsibility at the root of our legal system.

MDTC therefore urges the Michigan Supreme Court to reverse the court of appeals decision and to properly reorient the nature of the ordinary duty owed by merchants and landlords to their business invitees and tenants, respectively. The duty of merchants and landlords is only one of reasonable care to keep the physical premises over which they retain control in a reasonably safe condition so as to avoid foreseeable injury. Criminal acts perpetrated by unknown third parties upon invitees and tenants, or their guests, as the case may be, are not actionable in lawsuits against these types of property owners.

The Michigan Supreme Court held oral argument in this case on March 5, 2013. MDTC's amicus brief was the subject of much discussion at the argument.

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

MDTC Legislative Report

The work of the 96th Legislature is now history, and the 97th is up and running. There are some new faces in the House, but the balance of power remains the same with the Republicans enjoying a majority in both houses, despite their loss of a few seats in the House.

The lame duck session is usually uninteresting and fairly unproductive when the party that owns it all will have the same authority in the next session, but that was not the case this last time around. There may have been some uncertainty among Republicans as to how the new members might line up or how well the Governor would support conservative agendas in the second half of his term, and there was definitely a strongly-held feeling that the failed effort to enshrine collective bargaining rights in the state constitution should be rewarded with the passage of right-to-work legislation. But whatever the causes may have been, the Republicans used the recent lame duck session to advance their agenda as if there were no next year. The result was the passage of a vast quantity of legislation, much of which was approved without any significant input from the minority party. The Democratic legislators voiced their displeasure loudly to little avail, and thousands of citizens came to the Capitol to do so as well. It was a fascinating, and at times frightening, spectacle to watch from my vantage point across the street.

The events of last December have caused hard feelings which remain as the new Legislature begins its work, and recent polling suggests that Governor Snyder's approval rating has suffered. The trust and respect required for bipartisan cooperation have been damaged, and must be rebuilt if anyone is interested in trying to do so. And although it is much too early to make any predictions about the results of the next general election, we can all be assured that the campaigns will be spirited and well financed.

2012 Public Acts

There are now 625 Public Acts of 2012 — 278 more than when I last reported in the first week of December. The new Public Acts of interest include:

2012 PA 354 (Senate Bill 402) has amended the Public Health Code to add a new Section MCL 333.5139, which will **allow physicians and optometrists to voluntarily make a report to the Secretary of State, or to warn third parties, of physical or mental conditions adversely affecting a patient's ability to safely operate a motor vehicle**. This new section provides immunity from civil or criminal liability arising from the making of such reports to physicians and optometrists who make a report of such conditions in good faith, with due care.

2012 PA 608 (Senate Bill 1115) and 2012 PA 609 (Senate Bill 1118) have enacted some of the less controversial medical malpractice tort reforms addressed in last year's public hearings before the Senate Insurance Committee. These bills were approved and enrolled without further amendment in the form detailed in my last report. As I mentioned last time, the most controversial bills of the Republican-sponsored medical malpractice tort reform package — Senate Bill 1110 and Senate Bill 1116 — were not reported to the full Senate. Senate Bill 1117 was passed by the Senate on November 30, 2012, but was not taken up in the House. The votes required for immediate effect could not be obtained, and thus, Public Acts 608 and 609 will take effect on March 28, 2013. Pursuant to amendments adopted on November 29th, there will be no retroactive application of any of the changes affected by this amendatory legislation.

2012 PA 361 (Senate Bill 689) will amend the Revised Judicature Act, MCL 600.2102, prescribing the procedures required for authentication of affidavits made out-of-state, and add a new Chapter 21A, entitled the "Uniform Unsworn Foreign Declarations Act." As amended, MCL 600.2102 will provide that, **where by law an affidavit of a person residing in another state or a foreign country is required or may be received in judicial proceedings, the affidavit must be authenticated under the Uniform Recognition of Acknowledgements Act, MCL 565.261, *et seq*., or be an "unsworn declaration" executed under the new Chapter 21A**. The new Chapter establishes procedures required for judicial acceptance of unsworn declarations made by declarants outside of the boundaries of the United States. This new statutory scheme will apply, subject to enumerated exceptions, to an "unsworn declaration," defined as "a declaration or

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

The "Uniform Interstate Depositions and Discovery Act" will establish the procedures for enforcement of subpoenas issued by courts of foreign jurisdictions for deposition testimony; production, inspection or copying of documents; and inspection of premises.

other affirmation of truth in a signed record that is not given under oath, but is given under penalty of perjury." As used in these new provisions, the term "record" includes electronically stored information, and signing includes signing by an electronic process. This amendatory Act will take effect on April 1, 2013.

2012 PA 362 (Senate Bill 707) will amend the Revised Judicature Act to add a new Chapter 22, entitled the "Uniform Interstate Depositions and Discovery Act." This new chapter will **establish the procedures for enforcement of subpoenas issued by courts of foreign jurisdictions for deposition testimony; production, inspection or copying of documents; and inspection of premises**. Under these provisions, a subpoena may be issued by the Clerk of the circuit court for the county in which the discovery is to be conducted upon the presentation of a foreign subpoena. The locally-issued subpoena will then be served and enforced, and the contemplated discovery will be conducted or resisted, in accordance with applicable Michigan statutes and court rules. These new provisions will replace the existing provisions of MCL 600.1852(2), effective April 1, 2013.

2012 PA 371 (Senate Bill 903) will **create a new "uniform arbitration act" based upon the model act of the same name proposed by the Uniform Law Commission**. The new act will take effect on July 1, 2013, and will replace the existing provisions of RJA Chapter 50 — MCL 600.5001 through MCL 600.5305 — which will be repealed by 2012 PA 370 (Senate Bill 902) on that date.

2012 PA 468 (House Bill 5466) will amend MCL 691.991, pertaining to prohibited indemnity provisions in construction contracts, **to prohibit public entities, other than public universities, from requiring contractors or Michigan-licensed architects, professional engineers, landscape architects or professional surveyors to provide indemnification against liability for any amount greater than their degree of fault in contracts for design or construction of a building or other improvement of real property**. At present, this section prohibits and invalidates provisions requiring indemnification against liability arising from the sole negligence of the promise/indemnitee and/or its agents or employees. This amendatory Act, which will take effect March 1, 2013, will also expand the scope of the existing prohibition to specifically include contracts for design of a building, structure, appurtenance or appliance, and contracts for the design, construction, alteration, repair or maintenance of other improvements to real property.

2012 PA 553 (Senate Bill 895) has amended the Revised Judicature Act, MCL 600.6023, to **exempt interests in educational trust accounts from execution**. The exempted interests include interests in accounts and contracts established under the Michigan Education Trust Act, the Michigan Education Savings Program Act, and sections 529 and 530 of the Internal Revenue Code.

2012 PA 558 (Senate Bill 1043) will amend the Revised Judicature Act, MCL 600.2559, to **increase a variety of fees for process servers**, effective March 28, 2013.

2012 PA 582 (Senate Bill 1296) has amended the Revised Judicature Act to add a new section MCL 600.5838B, **establishing a 6-year statute of repose for claims of legal malpractice**.

2012 PA 590 (Senate Bill 1240) has created a new "social services agency liability act" which provides **limited immunity from civil liability for social service agencies and their directors, members, officers, employees and agents while acting on behalf of the agency in conducting a child social welfare program**. The immunity provided by this new act will not apply if the conduct causing the personal injury or property damage at issue amounts to gross negligence or willful misconduct, or is prohibited by a law, the violation of which is punishable by imprisonment.

New and Renewed Initiatives

As usual, the bills introduced in the new session include some new initiatives and reintroductions of many bills from the last session that died for lack of final approval at the end of the year. These include the following:

Senate Bill 61 (Hune – R) and Senate Bill 62 (Smith – D) would **allow Blue Cross and Blue Shield of Michigan to become a nonprofit mutual disability insurance company**. Bills to accomplish this objective (former Senate Bills 1293 and 1294) were passed in the lame duck session, but Governor Snyder vetoed them because he did not approve of language, added by amendment, restricting the availability of coverage for abortions. The reintroduced bills have been passed by both Houses, without the abortion provision, and will soon be sent to the Governor for his approval.

House Bill 4064 (Heise – R) would **require the State Court Administrative Office to establish and maintain record management policies and procedures for the courts and allow courts to charge a reasonable fee established by Supreme Court rule for electronic access to court records**. This bill has been reported by the House Judiciary

It is with mixed feelings that I must now report the impending retirement of Bruce Timmons, who has well and faithfully served the Legislature and the people of Michigan as the Republican counsel to the House Judiciary Committee for 45 years.

Committee, and awaits final passage on the House Third Reading Calendar.

House Bill 4156 (Potvin – R) would amend the Public Health Code, MCL 333.16184 and 333.16185, to **allow retired nurses to provide uncompensated services to medically indigent persons under a special volunteer license, with the same immunity from liability that is currently provided under section 16185 to physicians, dentists and optometrists** providing such uncompensated care.

House Bill 4354 (Walsh – R) reintroduces a concept which was initially included in last year's medical malpractice tort reform package (former House Bill 5698 and Senate Bill 1110) but not reported for consideration by the full House or Senate. It would amend the Revised Judicature Act to add a new section MCL 600.2912i. The new section would **shield licensed health care professionals and licensed health facilities and agencies from liability for medical malpractice in cases involving emergency medical care provided in a hospital emergency department or obstetrical unit, and any such care provided in a surgical operating room, cardiac catheterization laboratory, or radiology department immediately following evaluation or treatment in an emergency department**, unless the plaintiff is able to prove, by clear and convincing evidence, that the licensed health care provider's actions constituted gross negligence.

Senate Bill 132 (Bieda – D) has again proposed the **repeal of the "drug immunity"** provided under MCL 600.2946.

House Bill 4057 (Kandrevas – D) reintroduces a proposal from the 95th Legislature. It would amend MCL 600.2959 to add a new subsection (2), providing that "**whether a condition is open and obvious may be considered by the trier of fact only in assessing the degree of comparative fault**, if any, and shall not be considered with respect to any other issue of law or fact, including duty."

A Fond Farewell

It was predicted early on that term limits would put the welfare of Michigan's citizens in the hands of legislators with little experience and institutional knowledge, and that this would inevitably require the less experienced legislators to rely more heavily upon the guidance of lobbyists and legislative staff. This has been found to be true, but the result is not unfavorable when the consulted lobbyists and staff are knowledgeable and honest. The difficulty is that many legislative staff are also short-timers who stay for a while and then move on to other pursuits. They, also, lack the long-term institutional knowledge that is often so valuable in the legislative process. Those who possess this important knowledge are, unfortunately, a rare and vanishing breed. Thus, it is with mixed feelings that I must now report the impending retirement of Bruce Timmons, who has well and faithfully served the Legislature and the people of Michigan as the Republican counsel to the House Judiciary Committee for 45 years.

Bruce was already a living legend when I came to Lansing in 1991 to serve as Majority Counsel to the Senate Judiciary Committee, and I was privileged to work closely with him during my 5 years in that position. He is both genuinely brilliant and quietly humble — a combination rarely found anywhere these days, especially in the Legislature. He has an encyclopedic memory and a vast store of historical knowledge about every issue addressed by the Judiciary Committees since 1968. He has always been extremely busy, but has been generous with his time and wise counsel nonetheless, and thus, it comes as no surprise that he has always been well-liked and respected by legislators and staff of both parties, and by executive officers, judges and lobbyists too numerous to list. He has been a good friend to me from the start, and has continued to be an extremely valuable source of information about pending legislation since my return to the world of litigation in 1996. Bruce is deserving of a long and happy retirement, but he will be sorely missed. I hope that all of our members will join me in wishing him well.

MDTC E-Newsletter Publication Schedule

Publication Date	Copy Deadline
December	November 1
March	February 1
June	May 1
September	August 1

For information on article requirements, please contact:

Alan Couture
ajc@runningwise.com

Scott Holmes
sholmes@foleymansfield.com

By: Susan Leigh Brown, *Schwartz Law Firm P.C.*
sbrown@schwartzlawfirmpc.com

No Fault Report

Patient's Settlement Waiving Future PIP Benefits Extinguishes Provider Claim for Subsequent Treatment

Michigan Head & Spine Institute v State Farm, ___ Mich App ___ (2013) (issued February 12, 2013, Judges Murphy, Donofrio and Gleicher).

An injured insured settled her PIP claim with a waiver of all past, present and future benefits and entered into a release with State Farm containing the waiver. Michigan Head & Spine treated the insured for accident-related injuries after the settlement and billed State Farm. State Farm refused payment, citing the release.

Both the district court and the circuit court, on initial appeal, ruled in favor of the plaintiff-provider. The court of appeals reversed, stating that while benefits may be payable directly to providers under MCL 500.3112, the injured person may waive payment of any and all benefits in exchange for the settlement, including benefits payable "on behalf of" the injured person as well as those payable directly *to* the injured person.

The court did, however, make specific note of the fact that, before plaintiff rendered the treatment in question, its patient had advised the provider both of the lawsuit and the fact that it was over, as well as the claim number and the name and phone number of the insurance adjuster, so that the provider could have checked the status of the insurance claim before it rendered treatment. The court also made a point of the fact that, because the patient had agreed in writing to be personally liable for payment of the provider's bills, the provider still had a remedy, though not from State Farm. Although the statement by the court in this regard is dicta, it is foreseeable that the result in future provider suits could be the opposite if either the provider was unaware of earlier litigation or the patient had not agreed, *in writing*, to be responsible for payment.

Transportation Charges May Be "Replacement Services" Rather than "Allowable Expenses" and May Not Be Charged for Miles Not Actually Driven. Flat Fees for Pick-Up and/or Wait Time May Be Payable if Reasonable

ZCD Transportation, Inc v State Farm, ___ Mich App ___ (2012) (issued November 27, 2012, approved for publication January 29, 2013; Judges Jansen, Stephens and Riordan).

ZCD leveled several types of charges for transportation provided to a patient who had been physically able to transport himself, despite disabilities, before the subject accident. ZCD charged a flat fee for each pick-up, plus mileage for each trip with a mileage minimum, and an hourly fee for wait time billed in 15 minute increments. Some of the trips charged were for personal trips unrelated to medical treatment.

The court of appeals held that transportation costs for personal trips not for care, treatment, or rehabilitation, such as forays for grocery shopping, et cetera, are replacement services expenses, not "allowable expenses" and, therefore, must be subject to the $20 per day maximum for replacement services.

The court also held that charges for miles not actually driven, for example a 20-mile minimum charge for a 15-mile round trip, are not compensable because

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@schwartzlawfirmpc.com

The court of appeals ruled that the profit distributions previously paid (K–1 income) also constituted "income from work" and was, consequently, "wage loss" that Home Owners was required to pay.

the charges are for services not actually rendered. However, the court remanded the question of the pick-up and wait time fees, holding that the question for these charges was not whether the charges constituted allowable expenses (on the trips that were for medical treatment), but whether the charges were reasonable. The court held that the reasonableness of the charges is a fact question to be resolved on remand.

Operation of Vehicle by Excluded Driver/Owner Voids All Coverage, Thereby Precluding Driver from Obtaining PIP Benefits

Bronson Methodist Hospital v Michigan Assigned Claims Facility, 298 Mich App 192 (2013) (issued August 30, 2012, approved for publication October 23, 2012; Judges Markey, Fitzgerald and Borrello).

Bronson Hospital provided care to Ms. X. Although she owned the vehicle in which she was injured while driving, her fiancé, rather than she, had obtained the insurance on the vehicle. The policy specifically excluded Ms. X as an operator, stating that operation of the vehicle by the named excluded person would void all liability coverage.

The court found that Ms. X's act of driving the vehicle at the time of the accident rendered the vehicle uninsured in violation of MCL 500.3101. Therefore, Ms. X was the owner of a vehicle on which the required security was not maintained at the time of the accident. As a result of driving her own, uninsured vehicle, Ms. X was precluded from obtaining PIP benefits pursuant to MCL 500.3113.

The court noted that the issue was not the identity of the person who obtained the insurance (i.e., a non-owner of the vehicle) as had been the question in *Iqbal v Bristol West*, 278 Mich App 31 (2008), but the fact that an excluded driver was operating the vehicle and was the claimant. In fact, another recent unpublished court of appeals' decision, *Gagnon v Citizens Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued January 29, 2013 (Docket No. 301188), reiterated the *Iqbal* rule that a vehicle's owner need not obtain insurance him/herself as long as *someone* obtained the requisite insurance on the vehicle.

K-1 Distribution Income from Subchapter S Corporation Is an Element of "Loss of Income from Work" and Must Be Paid as Wage Loss Benefit

Brown v Home Owners Insurance Company, ___ Mich App ___ (2012) (issued December 4, 2012; Judges Borrello, Fitzgerald and Owens).

Plaintiff was an attorney who was the sole shareholder of a subchapter S company. Prior to the accident, plaintiff was paid not only wages but also distributions from the company's profits. Home Owners paid wage loss exclusively on the amount of salary (W-2 wages) plaintiff had earned prior to the accident. The court of appeals ruled that the profit distributions previously paid (K-1 income) also constituted "income from work" and was, consequently, "wage loss" that Home Owners was required to pay.

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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).*

Kimberlee A. Hillock, at Willingham & Coté, P.C., reports that Willingham & Coté, P.C. celebrated 50 years of service and success by giving back to the community with a blood drive, alongside the American Red Cross, entitled "50 pints of blood for 50 years." The event took place at the East Lansing Marriott at University Place on Friday, March 29, 2013 and represented the firm's commitment to share the gift of life with those who need it.

Matthew T. Nelson, and Nicole L. Mazzocco, of Warner Norcross & Judd LLP in Grand Rapids, Michigan, recently authored an amicus brief on behalf of DRI — *The Voice of the Defense Bar* in the case of *O'Boyle v. Longport*. The brief was filed with the New Jersey Supreme Court, at the court's invitation, to assist the court in deciding how to best define the work-product doctrine and common-interest rule under New Jersey law.

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INDEMNITY AND INSURANCE ISSUES

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

MDTC
Info@mdtc.org
PO Box 66
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By: Geoffrey M. Brown, *Collins, Einhorn, Farrell & Ulanoff*
geoffrey.brown@ceflawyers.com

Medical Malpractice Report

Ordinary Negligence versus Malpractice

Hunt v William Beaumont Hospital, unpublished opinion per curiam of the Court of Appeals, issued August 21, 2012 (Docket No. 303150).[1]

The Facts: The plaintiff sued the defendant arising out of the death of her decedent after suffering renal failure after the injection of a contrast dye administered before a CT scan. The plaintiff pleaded both ordinary negligence and medical malpractice claims against the defendants. The ordinary negligence claim was premised upon the fact that the contrast dye was administered by a radiology technician, and radiology technicians are not licensed healthcare professionals. The defendants argued, however, that the claim was properly one for medical malpractice.

The Ruling: The Michigan Court of Appeals held that the claims sounded in medical malpractice and affirmed summary disposition in defendants' favor on the ordinary negligence claim. The court stressed that the plaintiff's argument improperly emphasized the fact that the technician, who was the defendant hospital's employee, was not a licensed healthcare professional. Instead, the court explained, the proper analysis was whether there was a professional relationship between the technician and the patient.

The court held that the question of professional relationship turned on the fact that the technician was an employee of the hospital, which is a licensed healthcare facility.[2] Since the technician was an employee of a licensed healthcare facility, the court held that there was a professional relationship between the technician and the decedent.

The next question was whether the claim involved a matter of medical judgment. The court held that the technician did exercise medical judgment since the order for the CT scan did not specify whether dye should (or should not) be administered, and she made the decision to administer the contrast dye. The court of appeals therefore held that the claim was properly one for medical malpractice and affirmed summary disposition on the ordinary negligence claim

Practice Tip: Plaintiffs sometimes seek to assert ordinary negligence claims instead of malpractice claims in the hope of avoiding the requirements (such as the requirement to send a notice of intent to sue and file an affidavit of merit with the complaint) and the limitations (including application of the non-economic damages cap or the shorter statute of limitation) of tort reform legislation, particularly where the person providing the care at issue is not a member of a licensed healthcare profession. When representing a licensed healthcare facility, the fact that the employee who rendered care is not a member of a licensed profession should not prevent the consideration of filing a motion for summary disposition on an ordinary negligence claim.

Bursley v PGPA Pharmacy, Inc, unpublished opinion per curiam of the Court of Appeals, issued November 8, 2012 (Docket No. 307655).

The Facts: Plaintiff sued the defendant pharmacy that filled a prescription for the drug Lamictal. The pharmacy, in filling the prescription, did not inform her of the FDA's "black-box warning" regarding serious side effects including the life-threatening Stevens Johnson Syndrome, but rather simply provided a list of other possible side effects. Plaintiff took the medication and suffered a number of serious side effects, including Stevens Johnson Syndrome. Plaintiff sued the pharmacy for ordinary negligence.

The pharmacy moved for summary disposition, asserting that the claim was properly one for malpractice requiring the plaintiff to file the complaint with an affidavit of merit (which she did not do) and that the statute of limitations therefore had expired. The trial court granted the motion, and plaintiff appealed.

The Ruling: In a bit of an inverse situation compared to the *Hunt* opinion discussed above, the defendant in this matter was a pharmacy, which is not a licensed healthcare facility. The claim against the pharmacy was actually one of vicarious liability for the negligence of the pharmacy's pharmacist, and pharmacists *are* licensed healthcare professionals. The Michigan Court of Appeals held that because the claim against the pharmacy was for vicarious liability for the pharmacist, the pharmacist was a licensed professional, and the claim was related to an issue of medical judgment — the alleged duty to counsel plaintiff about the black-box warnings — the claim was properly a medical malpractice

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

When representing a licensed healthcare facility, the fact that the employee who rendered care is not a member of a licensed profession should not prevent the consideration of filing a motion for summary disposition on an ordinary negligence claim.

claim that required the filing of an affidavit of merit with the complaint. Since an affidavit had not been filed with the complaint, and since the statute of limitations had run, the court held that the trial court properly dismissed the complaint with prejudice.

Practice Tip: Be wary of any ordinary negligence claims filed against a person or entity listed in MCL 600.5838a. If the claim involves medical decision-making by either a licensed professional or an employee or agent of a licensed entity, and no affidavit of merit was filed or no notice of intent was served, the case may be positioned for summary disposition.

Notice of Intent

Lajoice v Northern Michigan Hospitals, Inc, unpublished opinion per curiam of the Court of Appeals, issued August 28, 2012 (Docket Nos. 300684 & 300788).[3]

The Facts: The plaintiff's decedent presented to the emergency department with a fever, pneumonia, and an elevated white-blood-cell count. The defendants, a pulmonologist and a thoracic surgeon, performed several procedures over the next couple of weeks to remove fluid and pus and to insert drainage tubes. A few days after her discharge from the hospital, plaintiff called the surgeon's office several times because she was coughing up blood and experiencing pain, but she was allegedly told to simply come in for her regularly scheduled appointment the following week. At a follow-up appointment, several complications were discovered, but the decedent was sent home. The next day, the decedent began coughing up blood and was taken by ambulance to a nearby hospital and diagnosed with possible sepsis. She died later that day.

The plaintiff sent a notice of intent (NOI) that contained a two-and-a-half-page factual statement and listed 115 alleged standards of care with respect to the various defendants. The section regarding the manner in which the standard of care was allegedly breached, however, simply said, "The applicable standard of practice and care was breached as evidenced by the failure to do those things set forth in section II above." The section concerning the actions allegedly required to have been taken to comply with the standard of care similarly said only, "The action that should have been taken to achieve compliance with the standard of care should have been those things set forth in section II above." And the section regarding proximate cause only said, "As a result of defendants' blatant, gross and negligent errors and omissions, a Wife and Mother of two young Sons became permanently and cognitively impaired, and ultimately, she died."

The defendants moved for summary disposition, alleging that the NOI did not comply with the statutory requirements. The trial court agreed and dismissed the case with prejudice. The court of appeals affirmed. The Michigan Supreme Court, however, vacated both orders in light of *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), which had been decided in the interim, and remanded to the trial court for further consideration in light of *Bush*. The trial court again dismissed with prejudice, concluding that the NOI was defective and did not represent a good-faith effort to comply with the statutory requirements. The plaintiff again appealed to the court of appeals.

The Ruling: The Michigan Court of Appeals agreed that the NOI was defective, and affirmed the trial court on that basis. But the court held that the defective NOI *did* constitute a good-faith effort to comply with the requirements of MCL 600.2912b regarding NOIs. The court therefore reversed the trial court's ruling on that point and remanded to the trial court for reinstatement of the case. The court further ordered the trial court to provide the plaintiff the opportunity to prepare an amended NOI that complied with the statute.

Practice Tip: While challenges to the sufficiency of NOIs were once commonplace, they are increasingly becoming futile. As *Bush* and its progeny make clear, even defective NOIs toll the statute of limitations. At best, a challenge to an NOI will result in a dismissal without prejudice; it is more likely that the court will simply require plaintiff to fix the defect, or even just disregard the defect. The only way a defective NOI can result in a with-prejudice dismissal is if it can be successfully argued that the NOI is defective *and* that the defects are the result of an NOI that was not prepared in a "good faith" effort to comply with the statute. As this case demonstrates, the scope of what the court of appeals considers a "good faith effort" is fairly broad. Even where three of the required five sections of the NOI contained only a single, cursory sentence, the NOI, though defective, was found to be "good enough" to constitute a good-faith effort. Counsel should consider whether a challenge to the sufficiency of an NOI is warranted, given that courts will permit amendment of, or even overlook, defective NOIs. It is likely that only a seriously

The only way a defective NOI can result in a with-prejudice dismissal is if it can be successfully argued that the NOI is defective and that the defects are the result of an NOI that was not prepared in a "good faith" effort to comply with the statute.

defective NOI — perhaps one that utterly fails to name your client, or one that does not properly set forth the facts or alleged standard of care — is going to be seen as so defective as to be deemed not to toll the statute of limitations. And even then, the dismissal will only be with prejudice if the untolled statute of limitations would be expired on the date of the dismissal.

Endnotes

1. The defendants' application for leave to appeal and the plaintiff's application for leave to cross appeal to the Michigan Supreme Court were both pending at the time of this writing.
2. Under MCL 600.5838a, medical malpractice claims are properly made against "a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health care facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment."
3. The defendants' application for leave to appeal and the plaintiff's application for leave to cross appeal to the Michigan Supreme Court were both pending at the time of this writing.

By: Phillip J. DeRosier, *Dickinson Wright*, and Trent B. Collier, *Collins Einhorn Farrell & Ulanoff*
pderosier@dickinsonwright.com; trent.collier@ceflawyers.com

Appellate Practice Report

Is There Any Consequence to an Appellee's Failure to Respond to an Appellant's Arguments on Appeal?

A question recently came up on the State Bar of Michigan Appellate Practice Section's listserv about what happens when an appellee does not respond to an appellant's arguments on appeal. At the trial court level, there is ample authority that a party's failure to respond to a motion for summary disposition may be considered a concession that the motion is properly granted. See, e.g., *Oden v Warren*, unpublished opinion per curiam of the Court of Appeals, issued May 12, 2009 (Docket No. 284085); 2009 Mich App LEXIS 1040, at *2-3 ("[B]y failing to respond to AHMA's motion for summary disposition, plaintiff effectively conceded that the motion should be granted."). But what if, on appeal, an appellee fails to file a brief or otherwise respond to an argument raised by an appellant? Will the appellate court treat that failure as a confession of error?

In some jurisdictions, the answer is clearly yes. For example, the rule in Indiana is that "failure to respond to an appellant's argument on a duly preserved and argued issue constitutes a confession of error by the appellee if the appellant makes a *prima facie* showing of error." *Kindred v State*, 493 NE2d 467, 468 n 1 (Ind Ct App, 1986). The same rule applies in "the case when an appellee files no brief." *Id.*

The Arizona appellate courts likewise treat an appellee's failure either to file a brief or respond to the issues presented as a "confession of reversible error" so long as the appellant has raised a "debatable issue." See *Bulova Watch Co v Super City Dep't Stores,* 422 P2d 184, 187 (Ariz Ct App, 1967) ("As we have previously indicated, appellees' answering brief did not favor this court with a discussion of the merits of the controversy. It is well settled in this jurisdiction that an appellee's failure to *file* an answering brief where there are debatable issues constitutes a confession of reversible error. We believe the principle is equally applicable when an appellee does in fact file [8] a brief which fails to respond to the issues presented."). Applying that rule in *Liberty Mut Ins Co v MacLeod*, 498 P2d 523 (Ariz Ct App, 1972), the Arizona Court of Appeals reversed the trial court's application of a three-year statute of limitations because the appellant presented a "debatable issue" as to whether a six-year statute of limitations should apply and the appellee failed to respond.

The Mississippi Supreme Court takes a less strict approach: "The failure to respond with a brief has at times been labeled the equivalent of a confession of error, but it will not cause reversal if the appellate court 'determines with confidence, after considering the record and brief of appealing party, that there was no error.'" *White v Usury*, 800 So2d 125, 128 (Miss, 2001). The Texas appellate courts have similarly held that "whenever an appellee fails to file a brief, the appellate court should conduct an independent analysis of the merits of the appellant's claim of error, limited to the arguments raised by the appellant, to determine if there was error." *Dillard's, Inc v Newman*, 299 SW3d 144, 147 (Tex Ct App — Amarillo, 2008).

So what is the approach followed in Michigan? It is well established that an

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

Trent Collier is a member of the appellate department at Collins, Einhorn, Farrell & Ulanoff, P.C., in Southfield. His practice focuses on the defense of legal malpractice, insurance, and general liability claims at the appellate level. His email address is Trent.Collier@CEFLawyers.com.

Not only does an appellee who fails to file a brief (or who files a late brief) waive the right to oral argument, MCR 7.212(A)(4), but it obviously increases the odds of a reversal if the appellate court does not have the benefit of the appellee's view of the law and the record.

appellant's failure to brief an issue is "tantamount to abandoning it." *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). However, when it comes to an appellee, the Michigan Supreme Court has said that "the failure of an appellee to file a responsive brief may not properly be considered to be a confession of substantive error." *People v Smith,* 439 Mich 954; 480 NW2d 908 (1992).

Of course, this is not to suggest that an appellee should ever fail to file a brief or to respond to an appellant's argument. Not only does an appellee who fails to file a brief (or who files a late brief) waive the right to oral argument, MCR 7.212(A)(4), but it obviously increases the odds of a reversal if the appellate court does not have the benefit of the appellee's view of the law and the record.

Sealing the Appellate Record: A Guide to Practices in Michigan's Appellate Courts

There is a well-known presumption that court records are open to the public. Some proceedings, however, concern special interests that justify the courts sealing certain records from public review. Thus, Michigan's appellate courts have adopted procedures to allow parties to request an order sealing appellate records when appropriate.

Appeals in State Court

A party may obtain an order sealing the appellate record in the Michigan Supreme Court and Michigan Court of Appeals only by filing a motion. Notably, the record is sealed pending resolution of a motion to seal. See MCR 7.211(9)(c); MCR 7.313(D).

When reviewing a motion to seal, both the Michigan Supreme Court and the Michigan Court of Appeals follow the standards set forth in MCR 8.119. See MCR 7.211; MCR 7.313. Rule 8.119 provides that a record may not be sealed unless "(a) a party has filed a written motion that identifies the specific interest to be protected, (b) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order, and (c) there is no less restrictive means to adequately and effectively protect the specific interest asserted." MCR 8.119(F).

Although these standards may seem clear enough, their use in practice is more opaque. Most court orders granting motions to seal records tend, for obvious reasons, to say little about the reasons that warrant sealing the record. See, e.g., *In re Donald E Massey Revocable Trust, Dated December 13, 2001*, ___ Mich ___; 825 NW2d 63 (2013); *Fifth Third Mortgage-MI, LLC v Hance,* 493 Mich 862; 820 NW2d 910 (2012).

The rules applicable to the Michigan Court of Appeals specifically provide that an order sealing the record can be challenged by any person at any time during an appeal. See MCR 7.211(9)(f). The Michigan Supreme Court's rules do not contain an analogous provision.

Appeals Before the Sixth Circuit Court of Appeals

The Sixth Circuit Court of Appeals respects any orders to seal the record entered by lower courts. Indeed, any party wishing to unseal a record initially sealed by a lower court must seek relief before the lower court prior to filing a motion to unseal with the Sixth Circuit. See 6 Cir. R. 11(C).

As for records that were not previously sealed, it is presumed in the Sixth Circuit that the appellate record will be open to the public. 6 Cir R 25(h). Parties may, however, request to seal all or part of the record by filing an appropriate motion. *Id.*

Unlike the Michigan Court Rules, the Sixth Circuit Court of Appeals' rules do not provide a specific framework for considering motions to seal. See 6 Cir. R. 25(h). In *Elliott Co v Liberty Mut Ins Co*, No. 08-3419, 2009 WL 750780 (CA 6, March 23, 2009), the court stated that motions to seal must be decided by the court itself, not the clerk's office. The court also stressed the "strong presumption in favor of public access to judicial proceedings" and held that a party must present a "legally sufficient" reason to overcome this presumption in order to seal the appellate record. *Id.,* quoting *EEOC v Nat'l Children's Ctr, Inc,* 98 F3d 1406, 1409 (CA 5, 1996).

In the end, then, parties wishing to seal the appellate record in Michigan's state appellate courts or the Sixth Circuit face the same conundrum: extant case law provides little guidance about what showing is sufficient to overcome the presumption that court records will be open to the public. Appellate counsel must craft a motion to seal based on whatever unique circumstances prompt a special concern for confidentiality, bearing in mind the general presumption against sealed records and the importance of making a strong showing of special need.

Taxation of Costs in Michigan Appeals: A Caveat

Under the Michigan Court Rules, the prevailing party in a civil appeal may be entitled to tax costs against the non-prevailing party. See MCR 7.219 (Michigan Court of Appeals); MCR 7.318

Appellate counsel must craft a motion to seal based on whatever unique circumstances prompt a special concern for confidentiality, bearing in mind the general presumption against sealed records and the importance of making a strong showing of special need.

(Michigan Supreme Court). It is common to see language at the end of opinions noting the relevant section of the court rules and granting the prevailing party the right to tax costs. Being granted this right would certainly seem to be a good thing, and it may very well be. But the right to tax costs should come with a caveat: *do the math first.*

First, a word about procedure. To obtain costs, the prevailing party must file a certified or verified bill of costs "[w]ithin 28 days after the dispositive order, opinion, or order denying reconsideration is mailed." MCR 7.219(B). The objecting party may file a response within 7 days after service of the bill of costs. MCR 7.219(C). The clerk must "promptly" verify the prevailing party's costs and tax as appropriate. MCR 7.219(D).

If either party wishes to challenge the clerk's action, it may file a motion "within 6 days from the date of taxation." MCR 7.219(E). Review, however, is limited to "those affidavits or objections which were previously filed with the clerk." *Id.*

This procedural outline gives one a sense of the time that may be involved in putting together an application for costs. The application must be verified, it must be capable of withstanding an objection, and it must preserve all the arguments necessary for subsequent motion practice in the event the clerk's award is deficient in some respect.

The scope of taxable costs is limited under the Michigan Court Rules. The prevailing party may collect only "reasonable costs incurred in the Court of Appeals." MCR 7.19(F). These include the cost of (1) printing briefs, (2) an appeal or stay bond, (3) transcripts, (4) documents necessary for the appeal record, and (5) fees paid to court clerks. *Id.* If the prevailing party wishes to tax any additional costs, it must connect the right to do so to an applicable statute or court rule. See MCR 7.2119(F)(6)-(7).

The list of taxable costs is not long. In many appeals, particularly those in which the prevailing party did not incur any expense related to an appeal or stay bond, there is a strong possibility that these costs will not exceed the attorney fees that will necessarily be incurred in putting them into verified form and pursuing their taxation — particularly if one factors in collectability issues. Nevertheless, the costs in some appeals may be large enough to justify, or even mandate, their pursuit.

Thus, upon receipt of an order allowing a client to tax costs incurred in an appeal, counsel should provide his or her client with a realistic picture of the likely expense of pursuing costs as well as the likely recovery before pursuing an order taxing costs. Engaging in these calculations upfront allows a client to make an informed decision about whether pursuit of costs is ultimately likely to be worthwhile.

Michigan Supreme Court Announces Live-Streaming of Oral Arguments

The Michigan Supreme Court recently announced that oral arguments and other hearings taking place at the Hall of Justice will be streamed on the Court's website. The Court's press release, "Live from the Hall of Justice! Supreme Court starts live streaming hearings," can be found at http://courts.mi.gov/News-Events/press_releases/Documents/LiveStreaming.pdf.

New Regional Chair

Conor B. Dugan
Varnum LLP

Bridgewater Place, P.O. Box 352, Grand Rapids, MI 49501-0352
Phone: 616-336-6892, Fax: 616-336-7000, Email: cbdugan@varnumlaw.com

Conor Dugan is a Trial and Appellate Law attorney and a member of the Litigation and Trial Services Practice Group. Conor's focus is on commercial litigation, as well as bankruptcy and labor law. As a former clerk for then Judge Samuel A. Alito, Jr. of the U.S. Court of Appeals for the Third Circuit and attorney for the Department of Justice, Conor has experience and insight in handling both appellate and trial court matters in federal court. He has orally argued a dozen cases in seven different Federal Courts of Appeals and handled matters in Federal District Court.

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

Legal Malpractice Update

Dueling Affidavits Regarding Scope and Duration of an Attorney's Representation Are Likely a Roadblock to Summary Disposition Even Where the Attorney-Party May Be in a Better Position to Describe the Services Provided or Explain the Intent of Those Services

Estate of Esther Hubert v Attorney Defendants, unpublished opinion per curiam of the Court of Appeals, issued January 24, 2013 (Docket No. 307346).

The Facts: On April 20, 2001, defendant attorneys filed a complaint on behalf of plaintiffs to recover about $3.7 million contributed by plaintiffs to a Ponzi scheme. On April 17, 2002, a default judgment against one of the Ponzi scheme creators was obtained for $11,737,908.72, plus post-judgment interest, in favor of plaintiffs. In September 2006, plaintiffs entered into a settlement and release agreement with the other Ponzi scheme creator. Part of the settlement agreement was a consent judgment against the other creator in favor of plaintiffs for $2.2 million. The trial court entered the consent judgment on September 26, 2006. After entry of the consent judgment, defendant attorneys represented plaintiffs in various collection efforts regarding the default judgment and the consent judgment. Defendant attorneys were unable to recover any substantial amount of the money, and on June 17, 2011, plaintiffs filed a complaint alleging that defendants committed legal malpractice in their representation of plaintiffs.

Defendant attorneys filed a motion for summary disposition, arguing that plaintiffs' complaint was time-barred by the applicable two-year statute of limitations. Defendants maintained that their representation of plaintiffs in the original action ended on September 26, 2006, after the entry of the consent judgment, and that plaintiffs then hired them for discrete, post-judgment collection tasks separate from the original representation with April 16, 2009, being the last day that they provided legal services to plaintiffs. Defendant attorneys provided affidavits and billing records to support their contention.

Plaintiffs responded that defendant attorneys' representation of plaintiffs was continuous before and after the entry of the consent judgment, and that defendant attorneys represented plaintiffs through September 18, 2009. Thus, their complaint, filed on June 17, 2011, was within the two-year statute of limitations for legal malpractice cases. Plaintiffs also supported their contentions with affidavits executed by each plaintiff and also relied on defendant attorneys' billing statement records. Defendant attorneys noted that the billing statement records show that the last day plaintiffs were charged was April 16, 2009, and that the entries after that date represented tasks that were performed as a courtesy to plaintiffs and not legal work.

The trial court found that defendant attorneys' representation of plaintiffs would have had to have continued until at least June 17, 2009 in order for plaintiffs' malpractice action to be timely under the two-year statute of limitations for legal malpractice claims. The trial court concluded that defendant attorneys' representation of plaintiffs in the Ponzi scheme case ended on September 26, 2006, the date of the entry of the consent judgment, and that the legal services provided after the entry of the consent judgment were not continuous with the original case. The court held that these separate matters did not extend the limitations period for any claims arising out of the original case. The trial court also concluded that even if the representation before and after the consent judgment was continuous, plaintiffs' complaint was not timely because the documentary evidence established that defendants' representation of plaintiffs ended on April 16, 2009.

The Ruling: The Michigan Court of Appeals reversed the trial court's holding, concluding that the parties' conflicting evidence presented a question of fact regarding whether the attorney defendants' representation was continuous. Both parties focused their claims on a June 26, 2009 meeting. The attorney defendants claimed that no legal services were provided; only information was exchanged and plaintiffs were asked whether they wanted the defendant attorneys to continue collection efforts, which plaintiffs

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

The court held that plaintiff's statement, through his other attorney, that the attorney defendants did not have authority to act on his behalf is evidence of plaintiff's intent to terminate the relationship.

declined. According to defendants' version of the facts, plaintiffs' complaint was not timely filed.

Plaintiffs claim in their affidavits that at the meeting, the defendant attorneys advised plaintiffs regarding the additional steps they would take to collect on the default and consent judgments, and indicated they would take additional depositions and would continue to represent plaintiffs despite the fact that one of the Ponzi scheme creators had moved to Florida. Thus, the court held that if plaintiffs' affidavits are believed, defendants' representation of plaintiffs continued at least until June 26, 2009, and plaintiffs timely filed the complaint. The court held that because determination of the legal question regarding the timeliness of plaintiffs' complaint depended on the resolution of disputed facts, summary disposition was inappropriate.

Practice Tip: A closing letter may have secured summary disposition for the defendants in this matter.

A Client's Agent May Provide a Communication Terminating the Attorney-Client Relationship if the Agent Is Acting within the Scope of His or Her Authority

Smith v Attorney Defendants, unpublished opinion per curiam of the Court of Appeals, issued January 29, 2013 (Docket No. 306225).

The Facts: Defendant attorneys represented plaintiff in his divorce action. Plaintiff was also represented by another attorney, unaffiliated with defendant attorneys. Plaintiff filed a legal malpractice action against the defendant attorneys on March 30, 2011. The parties disputed whether the defendant attorneys' representation ended before an order of withdrawal was entered in the underlying action on April 10, 2009.

The trial court concluded that the evidence submitted by the parties demonstrated that the limitations period began running more than two years before plaintiff filed the action (or before the order of withdrawal was entered) and, accordingly, granted the attorney defendants' motion for summary disposition.

The Ruling: The court of appeals affirmed the lower court's grant of summary disposition. The court noted that, generally, an attorney's representation of a client continues until that attorney is relieved of the obligation by the client or the court. In this case, plaintiff, through his other attorney, sent letters to opposing counsel in the divorce action in January 2009 stating that his other attorney *alone* had authority to act on plaintiff's behalf and that his other attorney was conveying that information because he had been instructed to do so. These letters indicated that they were copied to plaintiff, as well as the attorney defendants. Although plaintiff's other attorney did not expressly state that it was plaintiff who gave the instruction, the court held that plaintiff's statement, through his other attorney, that the attorney defendants did not have authority to act on his behalf is evidence of plaintiff's intent to terminate the relationship. Moreover, plaintiff did not submit any contrary evidence to establish an issue of fact concerning the accuracy of the statement.

The court further noted the plaintiff's suggestion that his other attorney's statements may not have reflected plaintiff's intentions, but concluded that an attorney is an agent of the client. The court held that plaintiff was thus bound by his other attorney's actions if they were within the scope of authority, and plaintiff did not submit any evidence that he ever sought to correct the assertions made by his other attorney. When the attorney defendants informed plaintiff that they understood the other attorney's letters as a termination of the relationship between plaintiff and the attorney defendants, plaintiff did not respond. The court viewed plaintiff's inaction as evidence that the other attorney had acted within his authority and plaintiff indeed intended to discharge defendants. Because there was no dispute of material fact as to the other attorney's authority, the court declined to authorize additional discovery on the issue.

Practice Tip: Without a clear communication directly from a client that he or she intends to terminate the attorney-client relationship (e.g., a communication from another attorney for the client), it may be prudent to confirm with the client his or her intent to terminate the relationship. While a communication from the client's agent may be sufficient, there could be an issue regarding whether the agent's actions were within the scope of his or her authority for purposes of establishing when the limitations period began running for a legal malpractice claim.

Federal Jurisdiction over Legal Malpractice Claims: Alleged Errors in a Patent Suit Do Not Give Rise to Exclusive Federal Jurisdiction over a Subsequent Legal Malpractice Suit unless the Outcome of the Legal

The United States Supreme Court concluded that allowing state courts to resolve legal malpractice cases arising out of alleged errors in patent cases would not undermine the development of a uniform body of patent law.

Malpractice Suit Would Impact the Development of Patent Law

Gunn v Minton, Supreme Court of the United States, issued February 20, 2013 (Docket No. 11-1118).

The Facts: In the early 1990s, plaintiff, a former securities broker, developed software that allowed financial traders to execute trades on their own. A company subsequently agreed to lease that software. More than one year later, plaintiff filed for a patent that was granted by the U.S. Patent and Trademark Office on January 11, 2000.

Plaintiff later sued the NASDAQ and the National Association of Securities Dealers (NASD), alleging that their services infringed on his patent. NASD and NASDAQ argued that a patent is invalid when the invention claimed is sold more than a year before the patent application is filed. The federal district court granted summary judgment for NASD and NASDAQ.

Plaintiff retained new counsel to argue his case under the experimental use exception, which provides that the patent remains valid if the invention was sold primarily for experimental — rather than commercial — use. Plaintiff's new attorney filed a motion for reconsideration, which the district court denied. The United States Court of Appeals for the Federal Circuit affirmed.

Plaintiff sued his original attorneys for legal malpractice in state court, arguing that their failure to argue the experimental use exception in the original suit cost him the case. The defendant attorneys filed for summary judgment, arguing that there was no evidence to support an experimental use argument due to the fact that they did not know of the earlier sale in order for the experimental use exception to be relevant. The trial court granted summary judgment in favor of the attorney defendants. Plaintiff appealed to the state court of appeals. Shortly after he filed his appeal, the United States Court of Appeals for the Federal Circuit decided a case that gave exclusive jurisdiction to the federal courts in malpractice suits arising from patent litigation. Plaintiff then filed a motion to dismiss his case from the state court of appeals, but the court denied his motion. The appeals court also affirmed the decision of the trial court. The state supreme court reversed the appeals court and dismissed the case, concluding that plaintiff's claim involved a substantial federal issue because the success of plaintiff's claim was reliant upon the viability of the experimental use exception.

The Ruling: The United States Supreme Court reversed the state supreme court, holding that 28 USC § 338(a) does not deprive state courts of subject matter jurisdiction over plaintiff's malpractice claim. Federal law does not create that claim, and so it can arise under federal patent law *only* if it necessarily raises a stated federal issue, actually disputed and substantial, which may be entertained without disturbing an approved balance of federal and state judicial responsibilities.

The Court observed that resolution of a federal patent question was "necessary" to plaintiff's case and the issue is "actually disputed," but the patent question did not carry the necessary significance. Regardless of the resolution of the hypothetical "case within a case," the result of the prior patent litigation would not change as a result of a subsequent legal malpractice case. The United States Supreme Court concluded that allowing state courts to resolve legal malpractice cases arising out of alleged errors in patent cases would not undermine the development of a uniform body of patent law.

Practice Tip: Legal malpractice claims based on an underlying patent matter will rarely arise under federal law for purposes of exclusive federal court jurisdiction. These claims may be litigated in state court in spite of the federal patent issues.

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Samantha A. Murray, *Dickinson Wright PLLC*, 215 S. Washington Square, Suite 200, Lansing, MI 48933, smurray@dickinsonwright.com

Cynthia J. Petty, *Keller Thoma, PC*, 440 East Congress, 5th Floor, Detroit, MI 48226, cjp@kellerthoma.com

Christopher J. Ryan, *Giarmarco Mullins & Horton PC*, 101 West Big Beaver Road, Suite 1000, Troy, MI 48084, cryan@gmhlaw.com

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

Supreme Court Update

Plaintiff's $350,000 Jury Verdict Reinstated as Supreme Court Determines She Established a Prima Facie Case Under the Whistleblowers' Protection Act

In a February 8, 2013, opinion, the Michigan Supreme Court remanded a whistleblowers action to the trial court for reinstatement of a jury verdict in favor of the plaintiff, holding that plaintiff had made out a prima facie case under the Whistleblowers' Protection Act ("WPA") by establishing more than a temporal connection between the protected activity and her termination. *Debano-Griffin v Lake Co and Lake Co Bd of Comm'rs*, ___ Mich ___; ___ NW2d ___ (2013).

Facts: Plaintiff began working as the Lake County 911 director in 1998. Prior to her hiring, county voters approved a 911 millage to fund ambulance services in the county. With the voter-approved funding, Lake County contracted Life EMS to provide the services of two ambulances per day. In 2002, plaintiff learned that Life EMS had been using one of the two ambulances for nonemergency services in other counties. Believing that Life EMS was in breach of its contract with the county and was posing a threat to county residents, plaintiff complained to the board of commissioners and other Lake County officials.

On November 1, 2004, plaintiff also complained about the board of commissioners' decision to transfer $50,000 of the 911 millage funds for use on a mapping project, which was already funded by a grant plaintiff acquired for mapping purposes. Plaintiff complained to the board and during committee meetings that the transfer of funds violated the millage proposal previously approved by voters. The board later returned the millage funds, but not before voting to eliminate plaintiff's position. Plaintiff received notice that her position was eliminated due to budget cuts.

Shortly after her termination, plaintiff filed suit against Lake County and the Lake County Board of Commissioners under the WPA, arguing that she was unlawfully terminated not as a result of budget cuts but because of her complaints regarding Life EMS and the board's transfer of millage funds. The trial court denied defendants' motion for summary disposition, which had argued that plaintiff failed to satisfy her burden of establishing a prima facie case under the WPA because she had not engaged in a "protected activity" under the act and had not provided sufficient evidence of causation. The case then proceeded to trial, after which a jury returned a verdict of $350,000 in favor of plaintiff.

Defendants appealed the trial court's denial of their motion for summary disposition. The Michigan Court of Appeals reversed on two separate occasions. First, the court held that plaintiff was not engaged in a protected activity under the act. The Michigan Supreme Court disagreed and remanded the case back to the court of appeals for consideration of defendants' causation arguments. On remand, the court of appeals held that plaintiff had failed to present sufficient evidence of causation.

Holding: The Michigan Supreme Court again reversed the court of appeals, holding that plaintiff provided sufficient evidence to establish a prima facie case of unlawful retaliation. Under the WPA, a plaintiff establishes a prima facie case by showing that she was engaged in a protected activity, that defendant took an adverse employment action against her, and that a causal connection existed

Joshua K. Richardson is an associate in the Lansing office of Foster, Swift, Collins & Smith, PC. He specializes in employment litigation, municipal law, premises liability and commercial litigation. He can be reached at jrichardson@fosterswift.com or (517) 371-8303.

When viewed in the light most favorable to plaintiff, the court held that the facts supported a reasonable inference on which the jury could conclude that plaintiff was the victim of unlawful retaliation under the WPA.

between the protected activity and the adverse employment action. Although evidence of a temporal relationship alone is insufficient to establish causation, the court concluded that plaintiff's evidence, including evidence that plaintiff's position was fully funded until she made various complaints to the board of commissioners, demonstrated more than a temporal relationship between the protected activity and her termination. In further support of plaintiff's causation argument was evidence that the same entity that made the decision to eliminate plaintiff's position was also the direct recipient of plaintiff's complaints. When viewed in the light most favorable to plaintiff, the court held that the facts supported a reasonable inference on which the jury could conclude that plaintiff was the victim of unlawful retaliation under the WPA.

The court also held that plaintiff presented sufficient evidence to overcome defendants' business judgment defense. In response to defendants' argument that it eliminated plaintiff's position as a result of financial constraints, plaintiff offered minutes of a personnel committee meeting where several county employees requested raises and additional hires for the year following plaintiff's termination. Plaintiff also established that figures in the audit report relied on by defendants revealed there was no financial crisis requiring the elimination of her position. The court concluded that plaintiff was not challenging defendants' business judgment in eliminating her position for financial reasons, but rather was arguing that defendants' explanation — financial distress — was false.

Because plaintiff submitted sufficient evidence on which a reasonable jury could conclude that she was unlawfully retaliated against, the court concluded that the trial court properly denied defendants' motion for summary disposition.

Significance: The court's decision may give rise to an uptick in WPA actions as it can be viewed as limiting employers' ability to obtain summary disposition. The decision suggests that only slightly more than a temporal relationship is necessary to survive summary disposition with respect to causation. The decision also restricts the application of the business judgment rule and demonstrates that a WPA plaintiff can overcome the business judgment defense by challenging the veracity of the employer's stated business decision.

Children Conceived through Artificial Insemination after the Death of a Parent May Not Inherit from the Parent under Michigan Intestacy Law

In a 5-2 decision, the Michigan Supreme Court held that children, born after the death of a parent, who were not in gestation at the time of the parent's death, may not inherit from that parent under Michigan intestacy law. *In re Certified Question*, 493 Mich 70; 825 NW2d 566 (2012).

Facts: In October 2000, plaintiff and her husband, Jeffery Mattison, began an in vitro fertilization program because they were unable to conceive children naturally as a result of Mr. Mattison's medical conditions. Mr. Mattison died intestate three months later. Plaintiff continued the in vitro fertilization program after Mr. Mattison's death and, just weeks later, conceived twins with Mr. Mattison's sperm. Shortly after the birth of her twins the following October, plaintiff filed an application for social security survivors' benefits on behalf of the twins. The Social Security Administration denied the application and determined that, because the twins could not inherit from their father under Michigan intestacy law, they were not entitled to social security survivors' benefits. Plaintiff filed suit in the United States District Court for the Western District of Michigan to challenge the denial of benefits. After the parties stipulated that the determinative issue was whether the twins could inherit from Jeffery Mattison under Michigan intestacy law, the district court entered an order asking the Michigan Supreme Court to resolve the question.

Pursuant to MCR 7.305(B), the district court certified the following question to the Michigan Supreme Court:

> Whether [plaintiff's twins], conceived after the death of Jeffery Mattison via artificial insemination using his sperm, can inherit from Jeffery Mattison as his children under Michigan intestacy law.

Holding: Having granted the district court's request to answer the question, the Michigan Supreme Court held that, under Michigan intestacy law, plaintiff's children cannot inherit from Jeffery Mattison. The court explained that the rights to intestate inheritance vests in Michigan at the time of the decedent's death. Under the Estates and Protected Individuals Code ("EPIC"), certain descendants who "survive" the decedent may inherit the portion of the intestate estate that does not pass to the decedent's surviving spouse. To qualify as a surviving descendant, an individual must be alive when the decedent dies and must live for more than 120 hours afterwards. MCL 700.2104. An individual in gestation at the time of the decedent's death is considered alive

To qualify as a surviving descendant, an individual must be alive when the decedent dies and must live for more than 120 hours afterwards. An individual in gestation at the time of the decedent's death is considered alive for these purposes.

for these purposes. MCL 700.2108.

The court concluded that because the twins were not conceived until 12 days after Jeffery Mattison' death, no inheritance rights vested in them under EPIC. They were neither actually alive nor in gestation at the time of his death. Nor would rights flow from any presumption that the twins are the natural issue of Jeffery Mattison. Under MCL 700.2114(1)(a), if a child is born or conceived during marriage, both spouses are presumed to be the child's natural parents. The court explained, however, that marriage legally terminates upon the death of a spouse and, consequently, the twins' conception after Jeffery Mattison's death could not be construed as being during marriage.

Because the twins were conceived and born after Jeffery Mattison's death, they do not qualify as surviving descendants under EPIC and have no inheritance rights under Michigan intestacy laws.

Significance: As the use of assisted reproductive technology continues to increase, so too will the likelihood that more children will be precluded from inheriting from their parents. Justice Marilyn Kelly suggested as much in her concurring opinion, in which she urged the Legislature to act to prevent similar situations from recurring.

Bank Acquiring Mortgages from the FDIC Must Record Mortgage Assignments before Instituting Foreclosures by Advertisement

In a December 21, 2012, opinion, the Michigan Supreme Court held that JPMorgan Chase Bank's foreclosure by advertisement on a residential mortgage purchased from the FDIC was voidable because the bank failed to first record an assignment of the mortgage. *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98; 825 NW2d 329 (2012).

Facts: Plaintiffs refinanced their residence with a loan from Washington Mutual Bank in 2007. Plaintiffs secured the loan with a mortgage on the residence, which Washington Mutual properly recorded. In 2008, Washington Mutual collapsed. The FDIC, acting as receiver, sold the mortgage, as well as nearly all of Washington Mutual's assets, to JPMorgan through a purchase and assumption agreement. In 2009, plaintiffs sought a loan modification and, based on information received from a Washington Mutual representative, allowed their loan to become delinquent. JPMorgan later notified plaintiffs that it was foreclosing on the property and began a foreclosure by advertisement. After JPMorgan acquired the property at a sheriff's sale, plaintiffs filed suit to set aside the sale, arguing among other things that JPMorgan had failed to abide by MCL 600.3204(3), which requires the recording of a mortgage assignment before a foreclosure by advertisement may be initiated.

The trial court granted JPMorgan's motion for summary disposition, ruling that JPMorgan had acquired plaintiff's mortgage from the FDIC "by operation of law," which rendered the requirements of MCL 600.3204(3) inapplicable. The Michigan Court of Appeals reversed and held that, because JPMorgan was not the original mortgagee and acquired the mortgage by agreement rather than "by operation of law," the requirements of MCL 600.3204(3) continued to apply. The court reasoned that the FDIC's acquisition of the mortgage was by operation of law, but JPMorgan's subsequent purchase of the mortgage was not. The court of appeals held, therefore, that because JPMorgan failed to record a mortgage assignment before instituting foreclosure proceedings, the foreclosure sale was void *ab initio* under MCL 600.3204(3).

Holding: The Michigan Supreme Court affirmed in part and reversed in part, holding that 1) JPMorgan failed to comply with MCL 600.3204(3) by not recording a mortgage assignment because its acquisition of the mortgage was not "by operation of law," but 2) its failure to record the assignment rendered the foreclosure sale voidable, not void *ab initio*. Pursuant to MCL 600.3204(3), a mortgagee cannot validly foreclose on a mortgage by advertisement unless the mortgage and all subsequent assignments are duly recorded. No recording is necessary, however, when the mortgage is transferred by operation of law. Under the Financial Institutions Reform, Recovery, and Enforcement Act, the FDIC has the authority to transfer the assets of failed banks without approval. 12 USC § 1821(d)(2)(A) states that the FDIC "shall, as conservator or receiver, and *by operation of law*," obtain all rights, powers and assets of a failed insured depository institution, such as Washington Mutual. Relying on precedent from 1885, the court determined that a transfer "by operation of law" occurs involuntarily or as a result of no affirmative action on the part of the transferee. While the FDIC's acquisition of the mortgage was involuntary, JPMorgan's subsequent purchase of that mortgage was entirely voluntary. Consequently, JPMorgan did not obtain the mortgage by operation of law and was, therefore, required to record an assignment of the mortgage before foreclosing by advertisement.

Although JPMorgan failed to comply with MCL 600.3204(3), its failure did not, as the court of appeals had concluded, render the foreclosure sale void *ab initio*.

The court's decision demonstrates that banks, including JPMorgan and any others who acquire mortgages from the FDIC, must fully comply with Michigan's foreclosure requirements.

Rather, "defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable." The court remanded the case to the trial court for a determination of whether, under the circumstances presented, the foreclosure sale should be set aside. The court explained that to set aside the foreclosure sale, plaintiffs must demonstrate that they were prejudiced by JPMorgan's failure to comply with MCL 600.3204(3).

Justice Zahra authored a dissenting opinion in which Chief Justice Young and Justice Mary Beth Kelly joined. In his dissent, Justice Zahra argues that JPMorgan was exempt from the recording requirements of MCL 600.3204(3) because JPMorgan's acquisition of Washington Mutual's assets from the FDIC was by operation of law. Pursuant to federal authority, the FDIC was permitted to transfer Washington Mutual's assets to JPMorgan "without any approval, assignment, or consent." Justice Zahra also disagreed with the majority's conclusion that "by operation of law" necessarily contemplates an involuntary action, citing numerous operation-of-law transactions — such as mergers — that require some voluntary action.

Significance: The court's decision demonstrates that banks, including JPMorgan and any others who acquire mortgages from the FDIC, must fully comply with Michigan's foreclosure requirements. JPMorgan must now take additional steps to record mortgage assignments on the countless Michigan mortgages it acquired from Washington Mutual — by way of the FDIC — to ensure the validity of its ongoing and subsequent foreclosures by advertisement.

By: Jonathan E. Moore, *Warner Norcross & Judd LLP*
jmoore@wnj.com

Predictive Coding: Fad, Future, or Here and Now?

Introduction

Practitioners having any intersection with e-discovery issues probably have already heard about "predictive coding" or one or more of its synonyms.[1] Predictive coding has been the hottest topic in e-discovery for over a year.[2] And although the technical aspects of predictive coding may be unclear — or even downright mysterious — to most practicing lawyers, the reason for the interest in predictive coding could not be clearer. Predictive coding is the most promising technological development to date for solving the central problem of e-discovery: its staggering cost.[3]

The specific algorithms, coding techniques, and proprietary technologies that each predictive-coding vendor incorporates into its particular software product may differ substantially. But each nevertheless promises to accomplish the same broad goal of dramatically reducing the cost of the most expensive component of civil litigation: the review of documents by human beings.[4]

Of course, this cost-savings resonates with litigators and clients who have seen first-hand how "e-discovery" can wreck litigation budgets, overwhelm otherwise winnable cases, and bloom into an expensive and uncontrollable sideshow. And recent court decisions approving[5] — or even mandating[6] — the use of predictive coding have increased its appeal. But, like any wise and wary consumer, the first inquiry is its reliability. Making an informed judgment, however, requires a peek inside the "black box" of predictive coding.

How Does Predictive Coding Work?

At its essence, predictive coding is a process in which computer software is used to make decisions about whether a document or set of documents is more likely responsive to a given set of criteria. The responsiveness criteria may or may not equate to or include relevance in the legal sense; they can also be set to identify other attributes, such as privilege status, or responsiveness to a particular document request. The software identifies — or "codes" — documents that are deemed to match the review criteria, distinguishing them from the documents that do not match the criteria. Some tools assign a "likely relevant/not relevant" code or even a "relevance score," which can be used to establish a cutoff for second-pass manual review.

Most predictive-coding tools work by beginning with a sample set of documents that have been selected by human reviewers. The coding information learned in reviewing the sample set is then applied to the remaining universe of documents, or "corpus," to be reviewed. The cost-savings benefit of predictive coding is determined by the number of documents in the corpus that can be "reviewed" solely by the computer, without the need for human review, or deferred from review due to the low likelihood of being relevant as determined by the system.

Most lawyers and clients so far have been reluctant to rely exclusively on predictive coding to accomplish a review of documents prior to production. But even if the

Jonathan E. Moore is a partner in the Grand Rapids office of Warner Norcross & Judd, LLP, and specializes in commercial litigation, automotive litigation and electronic discovery. Mr. Moore is a co-author of the e-discovery chapter of ICLE's Michigan Civil Procedure treatise. He can be reached at JMoore@wnj.com or (616) 752-2126.

At its essence, predictive coding is a process in which computer software is used to make decisions about whether a document or set of documents is more likely responsive to a given set of criteria.

predictive-coding tool is only used to "cull out" and eliminate irrelevant documents, there still can be substantial potential savings. Every document that predictive coding takes out of the stack to be reviewed by a human represents a cost-savings opportunity. If the cost of reviewing those documents exceeds the cost of using predictive coding, then there is a return on investment.[7]

In addition to the chief benefit — cost reduction — there can be other benefits to using predictive coding. These include enhancing control of the review process, increasing and consolidating substantive knowledge gained from the review among the litigation team, and reducing the risks of leaked information and documents.

Is Predictive Coding Reliable?

Before jumping ahead to a comparative assessment of the reliability of the various predictive-coding tools, it is important first to address the initial hesitance that some feel concerning the very notion of relying on a computer to substitute for or augment a human reviewer — even if only for a portion of the corpus or as a culling tool. Only humans can be relied upon, say the skeptics, to find "all" the relevant documents. Only humans have the judgment and the understanding of the nuances of human language and relationships necessary for such a task, they insist. This technological skepticism has thus acted as a handbrake on the predictive-coding train. Fortunately, however, this skepticism is misplaced.

First, it is important to understand that no predictive-coding software can completely eliminate the need for human involvement. It is not a fully-automated process. Regardless of the predictive-coding tool being used, one or more human beings will need to review at least some number of documents in order to generate a sample set of documents that the tool will use as the basis (or at least the starting point) for making prediction/coding decisions about the remaining universe of documents. In best practice predictive-coding workflows, human manual review is also used at the back end of the process, either as a second-pass review of documents prior to production or to perform a quality-control check on the software's coding decisions.

Second, the empirical evidence suggests that predictive coding is actually at least on a par with, and may in fact be superior to, the supposed "gold standard" of 100% manual review. In the information-science field, the effectiveness of a search or review process is typically assessed according to two measures: recall and precision. Recall measures the fraction (usually expressed as a percentage) of responsive or "relevant" documents identified within the corpus. Precision measures the fraction (again, usually stated as a percentage) of documents identified as responsive that actually are responsive. Both recall and precision are important features of a reliable search and review in the legal context: all other factors being equal, a high recall rate will generally result in a more complete production of responsive documents, whereas a high rate of precision will avoid the problems of a "document dump."[8] What the empirical studies have shown is that the recall and precision rates of technology-assisted review processes are generally higher than those of traditional manual review when dealing with large document sets.[9]

Furthermore, the studies conducted to date have likely understated the superiority of predictive-coding tools over manual review because the same factors that decrease the reliability of human review (chiefly, mistakes and disagreement among reviewers) also infect the very baseline standard by which the recall and precision rates of technology-assisted review tools are judged.[10] And although with elaborate quality controls in place, some manual review processes may be able to achieve comparable — or even higher — recall and precision rates,[11] this result can only be accomplished at extraordinary cost.[12]

Moreover, predictive coding's reliability is all the more apparent when contrasted with the ineffectuality of a keyword search, which is still the most widely used and generally accepted method for identifying documents for a second-pass manual review. Given the prevalence of large data collections, even in small to medium-sized cases, as a practical matter the "gold standard" of 100% manual review is almost never actually used. Rather, manual review is only conducted of documents that have hit on one or more of a list of keywords. The list of keywords may be the unilateral creation of the producing party, or they may be the result of an agreement among counsel.

But regardless, the empirical evidence is overwhelming that such an approach is generally about as effective as throwing darts without the lights on. Keyword searching averages recall rates of approximately 5–25%, meaning that the search will miss 75% to 95% of the relevant documents.[13] The deficiencies of keyword searching have been known for decades among information scientists, and are

It is important to understand that no predictive-coding software can completely eliminate the need for human involvement. It is not a fully-automated process.

increasingly apparent to judges, as well.[14] Although keyword searching certainly has a place in a litigator's toolkit for, among other things, conducting quality-control testing and guiding the review process, it cannot be relied upon as the sole or even primary method for identifying responsive documents. Predictive coding is plainly a superior alternative to the current alternatives.[15]

Are All Predictive Coding Tools Basically the Same?

Of course, merely demonstrating the reliability of predictive coding in principle does not by itself provide any guidance in choosing one of the dozens of predictive-coding products that an ever-increasing number of vendors have brought to the marketplace. And selecting a predictive-coding tool is made even more difficult because of the technical complexity of the information-science theory involved in predictive coding, as well as vendors' financial — and sometimes legal — interest in not disclosing details of their technology.[16] Eventually, market pressures — or judicial scrutiny — may lead to increased transparency (or at least translucency) among predictive-coding vendors. In the meantime, consumers should be able to at least roughly categorize the various predictive-coding tools according to their general methodology, in order to select one that fits the needs of a particular case.

One of the differences among different predictive-coding tools and their workflows concerns how the initial sample set or training set of documents is created. Some vendors make use of a "seed set" of documents — "key" or "hot" documents that are expected to be good exemplars to guide the software in identifying similar documents — that are hand-picked by litigation team members who are knowledgeable about the underlying facts. Other vendors select the initial sample set by applying some form of statistical sampling methodology. Still others do not require initial sample sets and the system selects the documents in a way to optimize its learning.

Experts disagree about which of these approaches is superior. Some criticize the use of seed sets as potentially skewing the results in favor of a subset of responsive documents by overemphasizing attributes of those documents at the expense of the full range of responsive documents — essentially causing the tool to find more of what is already known rather than expand the knowledge base. Others view seed sets as an effective way to jump-start the predictive-coding process and capture the value of the factual knowledge that the reviewers already have. Even at the outset of litigation, there will already be a known set of "key" documents that have been collected; it makes sense, proponents say, to incorporate them into the process.

The key aspect that differentiates predictive-coding tools, however, is how they operate on the corpus after the human reviewer's input has been incorporated. Once the initial sample set has been selected, most predictive-coding workflows include a further iterative "training" process of using knowledgeable litigation team members (usually one senior attorney or a small group of senior attorneys) to review documents from within the corpus to "train" the software so that it "learns" the criteria sufficiently to be able to complete a review of the remaining documents within the corpus without human review.

With some predictive-coding tools, this "training" involves the use of some form of artificial intelligence (AI), usually in the form of a mathematical algorithm that assigns probabilities of responsiveness based on an analysis of the features of documents identified as responsive. With other tools, the "training" review involves more extensive interaction and input from the reviewers, such as highlighting key language in the documents and constructing a set or series of Boolean search strings based upon the identified terms.

The AI-based tools have the advantage of offering a more streamlined, straightforward — and therefore, generally less expensive — review workflow, since typically the human reviewer is asked simply to make a binary yes/know or "thumbs up"/"thumbs down" decision. These tools are often excellent for conducting an early case assessment (ECA), quickly identifying the key documents so that they can be reviewed and incorporated into the trial team's evaluation of the merits of the case. On the other hand, the AI-based tools are by definition less transparent than the interactive rule-based tools, as the criteria for selection are generated entirely by the underlying algorithm.

With an AI-based tool, if one were to ask why a particular document was identified as responsive, the answer must necessarily be simply that it was in some way predicted to be similar to the exemplar documents that the human reviewers identified as responsive. And the only individuals who could answer this question would be the software designer and the individual reviewers. This feature of AI-based tools thus may increase the

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chances that reviewers and vendor representatives may be called to testify in the event that a production is challenged. Of course, this risk can be reduced by reaching an agreement at the outset concerning the predictive-coding methodology, and permitting opposing counsel to review seed-set and exemplar documents. Furthermore, the cost savings from using an AI-based tool may offset this risk or be upheld by the court as proportional to the case.

In addition to greater transparency, the interactive rule-based tools also may prove more defensible in some circumstances. These workflows generally involve a much larger number of documents during the training review — as much as ten times the number in an AI-based review. All other factors being equal, the greater sample size and greater input from the human reviewers make it more likely that the review will identify language that an AI-based tool would otherwise miss, such as jargon, nicknames, and code words. At the same time, since the interactive rule-based tool is only looking for specifically selected language/attributes of the documents, it may result in a more selective set of documents identified as responsive — thus increasing precision. And because the selection criteria (the rules, or the Boolean search strings) can be examined (and modified), this reduces the value — and thus the risk — of testimony by reviewers or the software designers. Simply put, the "reasons" why documents were selected as responsive are written out in plain view; one might object to their reasonableness, but there is no mystery about what they are.

Nevertheless, the very features that may increase the defensibility of the interactive rule-based tools also may make it less useful. The old principle of "garbage in, garbage out" applies. If the criteria (i.e., the rules or search strings) are underinclusive or overinclusive, then the results will be too. This known problem also generally means that you will incur substantial additional cost for a vendor-provided consultant (or team of consultants) to adjust, modify, and repeatedly test the criteria. This greater handling and subjective judgment also injects more potential for disputes, which may need to be resolved by the court on the basis of the vendor consultants' testimony.

Additionally, the much larger number of documents being reviewed also often increases the reliance on review teams — thus not only increasing costs but also the likelihood of human error and inconsistencies among reviewers. This in turn increases the need for supervision by senior attorneys, as well as additional consultant input, all at increased cost. But the increased cost of this approach may be appropriate in certain cases, such as government investigations, high-stakes litigation, or in instances where you are unable or unlikely to reach agreement with opposing counsel. Indeed, in future years we may begin to see a bifurcation in the use of predictive-coding tools, with AI-based tools used in a more or less off-the-rack way for run-of-the-mill litigation matters, and interactive rule-based tools reserved primarily for complex litigation and government investigations.

One important point to keep in mind when comparing these different methodologies is that the results of both can be validated for quality-assurance purposes in the same way: through statistical sampling and testing after the initial review has been completed.[17] Therefore, broadly choosing between these two predictive-coding approaches does not call into question the fundamental reliability of either. The results of a process implementing either can be measured and assessed to a reasonable degree of certainty.

That does not mean, however, that it does not matter which predictive-coding tool you choose. As discussed above, certain tools may be more appropriate than others for the particular circumstances of your case. And one of the key considerations is cost. If you are considering a particular predictive-coding vendor, ask them what their approach and methodology are, and whether their tool is AI- or algorithm-based versus Boolean- or other interactive rule-based approach. Ask what role vendor-provided consultants will play, as well as whether a seed set will be used, and what the total number of documents to be manually reviewed is estimated to be. You can then use this information to compare different candidates and select the one that best fits the needs of your case.

Current Challenges and Limits to Predictive Coding

Although predictive coding shows great promise, the scope of its use is currently limited. For one thing, the current technology only works on text and therefore cannot be used for images, videos, audio files, and other nontext content such as engineering drawings. Its usefulness is also limited for spreadsheets, invoices, purchase orders, and other financial and transactional documents whose signifi-

The key aspect that differentiates predictive-coding tools, however, is how they operate on the corpus after the human reviewer's input has been incorporated.

cance cannot be identified easily by the text it contains.[18]

Why Predictive Coding Is Here to Stay

Far from being just a fad, predictive coding will be a key part of the future of e-discovery, which is a very good thing. The ballooning costs of e-discovery are driven by the incredible volumes of electronic data that are created and stored, both by organizations and individuals. These volumes are increasing at an exponentially accelerating rate. Practitioners have already reached the point where it is not even possible — let alone proportional — to conduct a manual review of all relevant documents in most cases. Assuming that discovery remains a part of the civil litigation process, if we are going to be able to continue to resolve disputes through the legal system, we have no other choice but to rely increasingly on computers to identify the documents that matter. The current predictive-coding products on the market represent an excellent first step in that direction, and undoubtedly, given the intense market demand, future technological developments will provide even more sophisticated tools moving us forward even further.

Endnotes

1. *E.g.*, "technology-assisted review" ("TAR"), "computer-aided review" ("CAR"), "computer-based advanced analytics" ("CBAA"), or other terms used more or less synonymously. Some of these aliases in fact refer to different technologies and approaches. But they are most often used in a generic way to refer to the essential concept of using computer software to reduce the number of documents that require manual review by a human being. Although the term "technology-assisted review" appears to be gaining ground among academics, judges, and some of the best-known faces in the e-discovery crowd, "predictive coding" is still currently the most popular term.
2. *See, e.g.,* Scott A. Petz & Thomas D. Isaacs, "Predictive Coding: The ESI Tool of the Future?," *Michigan Defense Quarterly* (July 2012).
3. *See, e.g.*, Nicholas M. Pace & Laura Zakaras, RAND Corp., *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* 17-31 (2012), available at http://www.rand.org/content/dam/rand/pubs/mongraphs/2012/RAND_MG1208.pdf; Lawyers for Civil Justice Civil Reform Group, U.S. Chamber Institute for Legal Reform, *Litigation Cost Survey of Major Companies*, 2010 Conference on Civil Litigation, Duke Law School, May 11, 2010 (the "Duke 2010 Study"), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf.
4. Pace & Zakaras, *supra*, at xvii (review of documents constitutes 73% of e-discovery costs).
5. *See, e.g.*, *Moore v Publicis Groupe*, No. 11 Civ 1279 (ALC)(AJP), 2012 WL 607412 (SDNY, Feb. 24, 2012), *aff'd*, 2012 WL 1446534 (Apr. 26, 2012); *Nat'l Day Laborer Org Network v US Immigration & Customs Enforcement Agency*, No. 10 Civ 2488 (SAS), 2012 WL 2878130, at *11 (SDNY, July 13, 2012*); In re Actos (Pioglitazone) Prods Liab Litig*, MDL No. 6:11-MD-2299 (WD La, July 10, 2012); *Global Aerospace Inc v Landow Aviation, LP*, No. 61040 (Loudon County, Va Cir Ct, Apr. 23, 2012).
6. *See EORHB, Inc v HOA Holdings, LLC*, No. 7409-VCL (Del Ch, Oct. 15, 2012).
7. Conventional wisdom is that it is best suited to large cases involving hundreds of thousands or millions of documents. But the author's firm has used predictive coding effectively in document sets with as few as 21,000 documents.
8. It is generally understood that recall and precision often diverge. For example, an overinclusive search may have higher recall, but it will have lower precision. By contrast, a highly selective search may have a high recall but will typically miss a larger number of responsive documents, thus resulting in lower precision. Recognizing this dynamic, information scientists have established a third measure, F1, which represents the harmonic mean between recall and precision.
9. *See, e.g.*, Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, Rich J L & Tech (Spring 2011), available at http://jolt.richmond.edu/v17i3/article11.pdf.
10. *See* Herbert L. Roitblatt, Anne Kershaw & Patrick Oot, *Document Categorization in Legal Electronic Discovery: Computer Classification vs Manual Review*, 61 J Am Soc'y for Info Sci & Tech 70, 79 (2010); Maura R. Grossman & Gordon V. Cormack, *Inconsistent Assessment of Responsiveness in E-Discovery: Difference of Opinion or Human Error?*, at 9, available at http://www.umiacs.umd.edu/~oard/desi4/papers/grossman3.pdf.
11. *See* William Webber, *Re-examining the Effectiveness of Manual Review*, ACM SIGIR, July 28, 2011, available at http://www.umiacs.umd.edu/~wew/papers/w11sire.pdf.
12. The original document review that was used as the "gold standard" in the Roitblatt, et al. study took over four months, with a team of 225 attorneys working 16 hours per day, 7 days a week, to review 2.3 million documents, and cost over $13.5 million to produce 176,000 documents. Roitblatt, et al., *supra*, at 73. The Duke 2010 Survey found that in 2008, on average nearly 5 million pages of documents were produced in discovery in major cases, but only about 4,700 pages of these documents were ever used in the case, with an average cost for e-discovery in these cases between $2 million and $9 million. The Duke 2010 Study, *supra*, at 3.
13. David L. Blair & M. E. Maron, *An Evaluation of Retrieval Effectiveness for a Full-Text Document-Retrieval System*, 28 Comm ACM 289 (1985); Hedlin, Tomlinson, Baron, Ooard, 2009 TREC Overview, 3.10.9.
14. *See, e.g.*, *Victor Stanley, Inc v Creative Pipe, Inc*, 250 FRD 251, 260, 262 (D Md, 2008); *Nat'l Day Laborer Org Network v US Immigration & Customs Enforcement Agency*, No. 10 Civ 3488 (SAS), 2012 WL 2878130, at *11 (SDNY, July 13, 2012); *William A Gross Const Assocs, Inc v Am Mfrs Mut Ins Co*, 256 FRD 134, 136 (SDNY, 2009); *United States v O'Keefe*, 537 F Supp 2d 14, 24 (DDC, 2008) ("[F]or lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread.").
15. For an excellent in-depth analysis of the problems with traditional search methods, see Ralph Losey's "Secret of Search" series, http://e-discoveryteam.com/2011/12/11/secrets-of-search-part-one; http://e-discoveryteam.com/2011/12/18/secrets-of-search-part-ii; http://e-discoveryteam.com/2011/12/29/secrets-of-search-part-iii.
16. *See, e.g.*, The Orange Rag, *Predictive Coding War Breaks Out in US eDiscovery Sector*, http://www.legaltechnology.com/the-orange-rag-blog/predictive-coding-war-breaks-out-in-us-ediscovery-sector/.
17. For a good introduction to the application of sampling methods, see Doug Stewart, *Application of Simple Random Sampling (SRS) in eDiscovery*, http://www.umiacs.umd.edu/~oard/desi4/papers/stewart2.pdf.
18. Note, however, that these sorts of documents generally are more likely than other document types (such as email messages) to be kept in an organized fashion rather than in an undifferentiated mass, thus decreasing the need for an automated retrieval method.

By: Edward Perdue, *Dickinson Wright PLLC*
eperdue@dickinson-wright.com

DRI Report

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

I am writing as MDTC's state representative to the Defense Research Institute (DRI), the MDTC's sister national defense counsel organization.

DRI is currently running a free year membership promotion. To the extent you are not already a member of DRI, and if eligible, as a benefit of your MDTC membership you receive a free year's membership to DRI. All you need to do is ask me about it and I can confirm your eligibility and get your application form filled out for you.

As many of us have experienced firsthand, DRI is a great way to begin (or continue) to build your national network and offers a great many opportunities for professional development in specialty committees or affinity groups of your choosing (such as Young Lawyers, Veterans' Network, Commercial Litigation, Construction Law, etc.). There is no easier source of business than to meet and get to know a DRI member from a firm in another state who will refer you when he or his colleagues have a need for Michigan counsel.

DRI also puts on quite a few seminars and annual meetings each year in exciting and fun venues that offer its members an opportunity to meet other practitioners in their field on a face to face basis. My wife and I just returned from a wonderfully organized DRI annual meeting in New Orleans where, among other things, there were presentations by two former US Press Secretaries and a party on the field in the Super Dome. This year's annual meeting will be at the Chicago Sheraton Hotel and Towers from October 16-20.

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. I can easily process your request for your free year of DRI membership, so let me know and I will send you the application form.

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MDTC LEADER CONTACT INFORMATION

Officers

Timothy A. Diemer
President
Jacobs & Diemer, P.C.
500 Griswold St., Ste 2825
Detroit, MI 48226
313-965-1900 • 313-965-1919
Tim.Diemer@jacobsdiemer.com

Raymond Morganti
Vice President
Siemion Huckabay, P.C
One Towne Square Ste 1400
P.O. Box 5068
Southfield, MI 48076
248-357-1400 • 248-357-3343
rmorganti@siemion-huckabay.com

Mark A. Gilchrist
Treasurer
Smith Haughey Rice & Roegge
100 Monroe Center NW
Grand Rapids, MI 49503
616-774-8000 • 616-774-2461
mgilchrist@shrr.com

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

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

Board

Angela Emmerling Boufford boufford@butzel.com 248-258-2504 • 248-258-1439	Butzel Long PC 41000 Woodward Ave. Bloomfield, MI 48304
Hilary A. Ballentine hballentine@plunkettcooney.com 313-983-4419 • 313-983-4350	Plunkett Cooney 38505 Woodward Ave Bloomfield Hills, MI 48304
Barbara Eckert Buchanan beb@kellerthoma.com 313-965-7610 • 313-965-4480	Keller Thoma, P.C. 440 East Congress, Fifth Floor Detroit, MI 48226
Lawrence G. Campbell lcampbell@dickinsonwright.com 313-223-3703 • 313-223-3598	Dickinson Wright P.L.L.C. 500 Woodward Ave., Ste 4000 Detroit, MI 48226
Jeffrey C. Collison jcc@saginaw-law.com 989-799-3033 • 989-799-2969	Collison & Collison PC 5811 Colony Dr North Saginaw, MI 48638
Michael I Conlon MIC@runningwise.com 231-946-2700 • 231-946-0857	Running, Wise & Ford, PLC 326 E State St, PO Box 686 Traverse City, MI 49684
Terence P. Durkin terence.durkin@kitch.com 313-965-6971 •313-965-7403	Kitch, Drutchas, Wagner, Valitutti & Sherbrook 1 Woodward Ave., Ste. 2400 Detroit, MI 48226
Scott S. Holmes sholmes@foleymansfield.com 248-721-8155 • 248-721-4201	Foley & Mansfield PLLP 130 East Nine Mile Road Ferndale, MI 48220
Richard J. Joppich richard.joppich@kitch.com 517-381-7182 • 517-381-4427	The Kitch Firm 2379 Woodlake Dr., Suite 400 Okemos, MI 48864-6032
Matthew T. Nelson mnelson@wnj.com 616-752-2539 • 616-222-2539	Warner Norcross & Judd LLP 900 Fifth Third Center, 111 Lyon Street NW Grand Rapids, MI 49503
Allison C. Reuter areuter@hopenetwork.org 616-301-8000 • 616-301-8010	General Counsel, Hope Network P.O. Box 890, 755 36th St., SE Grand Rapids, MI 49518-0890
Joshua Richardson jrichardson@fosterswift.com 517-371-8303 • 517-371-8200	Foster Swift Collins & Smith PC 313 South Washington Square Lansing, MI 48933

MDTC LEADER CONTACT INFORMATION

Section Chairs

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

Commercial Litigation: John Mucha III, Chair
jmucha@dmms.com
248-642-3700 • 248-642-7791
Dawda, Mann, Mulcahy & Sadler, PLC
39533 Woodward Ave., Suite 200
Bloomfield Hills, MI 48304

General Liability: Tom Aycock
taycock@shrr.com
616-458-8391 • 616-774-2461
Smith, Haughey, Rice & Roegge
100 Monroe Center NW
Grand Rapids, MI 49503

Insurance: Darwin L. Burke, Jr.
dburke@rvnvlaw.com
586-469-8660 • 586-463-6997
Ruggirello Velardo Novara & Ver Beek, PC
65 Southbound Gratiot Avenue
Mount Clemens, MI 48043

Labor & Employment:
Gouri G. Sashital
gsr@kellerthoma.com
313-965-8924 • 313-965-1531
Keller Thoma PC
440 East Congress, 5th Floor
Detroit, MI 48226

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

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

Professional Liability & Health Care:
Michael R. Janes
mrj@martinbacon.com
586-979-6500 • 586-468-7016
Martin, Bacon & Martin, P.C.
44 First Street
Mount Clemens, MI 48043

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

Young Lawyers: Robert Paul Vance
pvance@ccglawyers.com
810-232-3141 • 810-232-1079
Cline, Cline & Griffin, PC
503 S. Saginaw St., Ste. 1000
Flint, MI 48503

Regional Chairs

Flint: Bennet Bush
Garan Lucow Miller PC
8332 Office Park Drive
Grand Blanc, MI 48439
810-695-3700 • 810-695-6488
bbush@garanlucow.com

Grand Rapids: Conor B. Dugan
Varnum LLP
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
616-336-6892 • Fax: 616-336-7000
cbdugan@varnumlaw.com

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

Lansing: Paul Tower
Garan Lucow Miller PC
504 S. Creyts Rd., Ste. A
Lansing, MI 48917
517-327-0300
ptower@garanlucow.com

Marquette: Johanna Novak
Foster Swift Collins & Smith, PC
205 S. Front Street, Suite D
Marquette, MI 49855
906-226-5501 • 517-367-7331
jnovak@fosterswift.com

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

Southeast Michigan: Nicole DiNardo Lough
Faurecia North American
900 N. Squirrel Road Suite 175
Auburn Hills, MI 48326
248-484-3351
nicole.lough@faurecia.com

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

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