MICHIGAN DEFENSE
QUARTERLY

Volume 33, No. 1 - 2016

IN THIS ISSUE:

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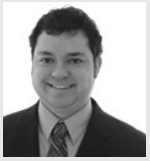

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All articles published in the *Michigan Defense Quarterly* reflect the views of the individual authors. The *Quarterly* always welcomes articles and opinions on any topic that will be of interest to MDTC members in their practices. Although MDTC is 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 Michael Cook (Michael.Cook@ceflawyers.com) or Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).

MICHIGAN DEFENSE
QUARTERLY

Volume 33, No. 1 - 2016

Cite this publication as 33-1 Mich Defense Quarterly

Michigan Defense Quarterly is a publication of the MDTC. All inquiries should be directed to Madelyne Lawry, (517) 627-3745.

President's Corner

By: Hilary A. Ballentine, *Plunkett Cooney* P.C.

Hilary A. Ballentine is a member of Plunkett Cooney's Appellate Law Practice Group who concentrates her practice primarily on appeals related to litigation involving general liability, municipal liability, construction claims, constitutional and medical liability cases, among others. Ms. Ballentine is admitted to practice in Michigan's state and federal courts, as well as the Michigan Court of Appeals, the Michigan Supreme Court, the U.S. Court of Appeals for the Sixth Circuit, and the U.S. Supreme Court.

Ms. Ballentine, who is a member of the firm's Bloomfield Hills office, has been selected as a "Rising Star" in appellate law by Michigan Super Lawyers magazine since 2011. She was also selected as an "Up and Coming" lawyer by Michigan Lawyer's Weekly in 2011.

President of the Michigan Defense Trial Counsel, Ms. Ballentine was named as MDTC's Volunteer of the Year in 2012. She is also an active member of the Michigan Appellate Bench Bar Planning Committee and the DRI – The Voice of the Defense Bar.

A magna cum laude graduate from the University of Detroit Mercy School of Law in 2006, Ms. Ballentine served as a barrister for the school's American Inns of Court program, which involves third- and fourth-year students. Ms. Ballentine currently mentors undergraduate students at the University of Michigan – Dearborn, where she received her undergraduate degree, with high distinction, in 2003

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The MDTC: A Place for Positivity

We have all heard the negative statistics: lawyers are at a greater risk of developing depression, show higher rates of alcohol and illicit drug use, and have an increased likelihood of divorce. The media has certainly grasped onto this, focusing its news reports on those few lawyers who have abused the system, rather than on the vast majority of lawyers who conduct themselves with integrity and according to the rules of law and ethics. This is unfortunate, as it leaves the public, and sometimes even ourselves, with a negative taste.

To counteract this negativity, we must make a concerted effort to increase positivity in our personal and professional lives. One might not automatically associate a legal organization as synonymous with positivity, but that is exactly what the MDTC is - a place for positivity in the legal profession.

The Dalai Lama has said that "in order to carry a positive action we must develop here a positive vision." During my decade-long involvement with the MDTC, I have found this to be undeniably true. The MDTC is a forum for defense attorneys to share their legal experiences with one another, learn from other attorneys, and raise the professional and ethical bar - all in a positive environment. If you have been to an MDTC event before (if you haven't, please remedy this immediately!), you know that you are among colleagues who do not want to tear you down, but build you up. We may practice different types of law and have different approaches to handling cases, but we share a common positive vision: achieving excellence in civil litigation.

While much of the negativity we see on the news is fueled by unacceptance of differing viewpoints, the MDTC does not exist to cut down those on the opposite side of the "v." To the contrary, the MDTC recognizes, through its annual Respected Advocate Award, a member of the plaintiff's bar who has made a positive contribution to the legal profession through exemplary standards of legal and ethical practice. This year, the MDTC is pleased to announce that it has selected Jules B. Olsman of Olsman MacKenzie & Wallace as the Respected Advocate Award recipient. We congratulate Jules for his positive contributions to the bar.

Our annual events, both formal and informal, continue to foster this idea of positivity in the legal profession. At our bi-annual Meet the Judges Event, which will be held this year on October 6, 2016 in Novi, we invite members of both the bench and bar to come together to talk informally, share ideas, ask questions, and collectively discuss ways in which we can better the legal system in our state.

Our November 2016 winter meeting, which will focus on debunking reptilian trial tactics, is another prime example of how the MDTC is working to educate its membership in a positive forum.

Finally, the MDTC is unveiling, for the first time ever, its Legal Excellence

One might not automatically associate a legal organization as synonymous with positivity, but that is exactly what the MDTC is - a place for positivity in the legal profession.

Awards event which will be held at the Detroit Historical Society on March 9, 2017. This event will honor a judge, an experienced practitioner, and a young lawyer who has each made a positive contribution to the practice of law.

This concept of positivity is not synonymous with some Pollyannaish ideal. I am not saying that practicing law in Michigan is always a bed of roses. The never-ending billable hour, unreasonable client demands, and conflict with opposing counsel has no doubt left every one of us feeling negative at some point or another. But the point is not to let this negativity overshadow the positive impact we can have on the legal profession. We cannot eradicate all the nasty in the world; but **we can** take affirmative steps to make the legal system in Michigan a more fair, just, and positive one. And the MDTC is just the place for that.

I sincerely hope you will join us at our upcoming events this year. It is going to be a great year! I'm positive.

Protecting Work Product in the Age of Electronic Discovery

By: Philip Favro, *Driven*

Executive Summary
A significant issue confronting litigation attorneys is the need to protect their work product. With the advent of electronic discovery, some courts have revisited the traditional notions underlying the work-product doctrine. Questions now abound regarding the interplay between work product and the duty to preserve, along with the application of work product to counsel's use of electronic search methodologies. This article addresses these issues by helping lawyers become reacquainted with the elements of the work-product doctrine and by spotlighting how courts are addressing these contemporary work-product questions.

Philip Favro brings over fifteen years of experience to his position as a discovery and information governance consultant for Driven. Phil is a thought leader and a legal scholar on issues relating to the discovery process, the confluence of litigation and technology, and information governance. His articles have been published in leading industry publications and academic journals and he is frequently in demand as a speaker for eDiscovery education programs. Phil is a member of the Utah and California bars. He actively contributes to Working Group 1 of The Sedona Conference and he is the Director of Legal Education for the Coalition of Technology Resources for Lawyers (CTRL).

One of the most critical issues that attorneys must address in litigation is the need to protect their work product. Despite the importance of this issue, some lawyers have forgotten the basic elements of the work-product doctrine. Perhaps they remember *Hickman v Taylor*[1] from the halcyon days of law school, together with Justice Jackson's famous injunction against preparing a case "on wits borrowed from the adversary."[2] Probe more deeply into nuanced issues such as the discovery of fact or opinion work product, however, and the answers may not come so readily.

Regardless of the nature of their practice, litigation attorneys could generally use a refresher course on work product. This is particularly the case since counsel is now litigating in the age of electronic discovery. Questions abound regarding the interplay between work product and the duty to preserve, along with the application of work product to electronic search methodologies. It is critical that lawyers become reacquainted with the elements of the work-product doctrine and learn how courts are addressing these contemporary issues so they can assert a proper claim of work product in litigation.

The Nature and Scope of the Work-Product Doctrine

The basic thrust of the work-product doctrine is codified in Federal Rule of Civil Procedure 26(b)(3)[3] and is also established in other rules[4] and cases.[5] Those authorities memorialize the notion that a party generally cannot discover documents, other tangible items, or intangible materials "that are prepared in anticipation of litigation or for trial by or for another party or its representative."[6] Significant to the issues involved with electronic search methodologies, the work-product doctrine may also safeguard selections or compilations of documents made by counsel.[7]

Notwithstanding the importance that the work product doctrine plays in fostering a zone of privacy for lawyers to prepare their cases, the privilege that it affords is often only a qualified one.[8] The Supreme Court observed as much in *Hickman*, explaining that signed witness statements might nonetheless be subject to discovery for purposes of impeachment when witnesses are unavailable, uncooperative, or where the interests of justice so require.[9] Consistent with *Hickman*, Rule 26(b)(3) provides that a party may obtain an adversary's work product if it establishes that the materials "are otherwise discoverable under Rule 26(b)(1)," demonstrates a "substantial need" for their production, and shows that they cannot otherwise be obtained "without undue hardship."[10]

On the other hand, "opinion work product" – those materials that reflect a lawyer's

"legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case" – enjoys near absolute immunity from discovery.[11] *Hickman* recognized the primacy of opinion work product, reasoning that "not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."[12] Rule 26(b)(3) has captured the importance that *Hickman* placed on safeguarding opinion work product, directing courts to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation" even when they find it discoverable under the Rule 26(b)(3) exception.[13]

This is because the duty to preserve relevant materials, like the work-product doctrine, ripens when litigation is reasonably anticipated or foreseeable.

Work Product and the Duty to Preserve

Because the work-product doctrine covers materials prepared "in anticipation of litigation,"[14] it is often used to safeguard materials from discovery that were prepared months or even years in advance of a lawsuit. However, litigation adversaries have shrewdly argued that work product assertions provide an earlier trigger date for a litigant's duty to preserve relevant information.[15] This is because the duty to preserve relevant materials, like the work-product doctrine, ripens when litigation is reasonably anticipated or foreseeable.[16] In some instances, this has caused a party's preservation duty to be backdated by months or even years.[17] Such a development could expose a party to spoliation sanctions for failing to keep relevant evidence – particularly electronically stored information (ESI) – from that retroactive preservation date.[18] The *Siani v State University of New York* case is particularly instructive on the interplay between the assertion of work product and the duty to preserve.[19]

In *Siani*, the plaintiff sought spoliation sanctions against the defendants for their alleged failure to preserve certain emails after their duty to preserve attached.[20] Relying on the defendants' assertion of work product over certain documents, the plaintiff argued that the defendants' duty to preserve ripened nearly a year before he filed his complaint.[21] While the defendants countered that such an argument lacked supporting authority, the court disagreed:

> The defendants argued that Siani had raised "concerns that he was a victim of ongoing age discrimination" at a meeting in January 2008, and that "[l]itigation was therefore reasonably foreseeable" as of that date. If it was reasonably foreseeable for work product purposes, Siani argues, it was reasonably foreseeable for duty to preserve purposes. The court agrees. … The defendants … have cited no authority that would countermand the common sense conclusion that if the litigation was reasonably foreseeable for one purpose in January 2008, it was reasonably foreseeable for all purposes.[22]

While the court ultimately declined to issue spoliation sanctions against the defendants,[23] the rationale from *Siani* has been followed by multiple courts.[24] This includes a recent ruling from the United States Court of Appeals for the Federal Circuit in *Sanofi-Aventis Deutschland v Glenmark Pharmaceuticals*.[25] In *Sanofi-Aventis*, the court affirmed a permissive adverse inference instruction for lost ESI based on an analogous scenario involving work product and the duty to preserve.[26]

Work Product and Search Terms

Beyond the duty to preserve, the application of work product to electronic search methodologies presents key questions that lawyers should understand and address. One such question is whether work product protects the search terms that counsel has developed to identify information that is responsive to an adversary's discovery requests. While lawyers have long argued in favor of this protection,[27] courts have generally rejected the notion that work product shields search terms from discovery.[28] The judicial reasoning on this issue is captured by the *Romero v Allstate Insurance Company* decision.[29]

In *Romero*, the plaintiffs sought an order requiring the defendants to reveal the search terms they would use to find information responsive to the plaintiffs' document requests.[30] In response, the defendants asserted that the forced disclosure of their search terms would improperly divulge their counsel's work product.[31]

In support of their position, the defendants analogized the development of search terms to a lawyer's selection of certain documents used to prepare a witness for deposition.[32] Counsel's selection of particular documents has been shielded as work product in some instances because disclosing the identity of those documents could "reveal important aspects of [counsel's] understanding of the case" and thereby disclose its mental impressions.[33] In like manner, argued the defendants, compelling the disclosure of the search terms could divulge their lawyers' legal theories or discovery strategy as reflected in the search terms they developed.[34]

Nevertheless, the court rejected the defendants' argument, reasoning instead that their search terms would reveal factual matters sought by plaintiffs'

document requests and not the protected thought processes of their lawyers.[35] The plaintiffs sought to ascertain the documents that were **responsive to their requests**, reasoned the court, and not which documents **defendants believed were relevant to the case**.[36] As a result, the court found the defendants' argument inapposite and granted the motion to compel.[37]

With several courts now adopting the rationale from *Romero*, the issue of whether work product applies to search terms appears to have been resolved in the negative.[38]

Work Product and Predictive Coding

In contrast to search terms, which the judiciary seems disinclined to protect, courts have yet to determine whether the identity of the documents counsel chooses to train the predictive coding process are work product. Commonly referred to as seed sets, these materials are essential for training a predictive coding algorithm to identify responsive information, along with the key documents needed to establish a party's claims or defenses.[39] In the absence of judicial guidance, a robust disagreement has developed on the merits of this issue.[40]

Those who dispute the notion that work product should apply to seed sets justify their position on the need for greater certainty in the predictive-coding process.[41] Disclosure of seed documents, they argue, is necessary to alleviate "fears about the so called 'black box' of [predictive coding] technology."[42] By providing for the transparent development and use of seed sets, advocates of disclosure argue that discovery will proceed in a more orderly fashion and should reduce the potential for costly satellite litigation over the use of predictive coding.[43]

On the other hand, those who favor work product protection contend that a seed set may reflect a lawyer's perceptions of relevance, discovery tactics, or even its litigation strategy.[44] Proponents argue that these conclusions regarding key strategic issues – memorialized in counsel's selection of seed documents – have frequently been protected in analogous circumstances as work product since they may reveal counsel's "mental impressions, conclusions, opinions, or legal theories."[45] And while the application of that argument has been rejected in the context of search terms, seed sets differ significantly from search terms.

Search terms are generally designed to either exclude irrelevant materials or to isolate responsive information.[46] In contrast, lawyers frequently develop seed sets to identify and marshal the evidence needed to prepare a case for summary judgment, settlement proceedings, or trial.[47] Because those documents reflect the manner in which counsel is pursuing its litigation strategy, work-product proponents argue that such a seed set could very well disclose counsel's thought processes and should therefore be safeguarded from discovery.[48]

[C]ourts have yet to determine whether the identity of the documents counsel chooses to train the predictive coding process are work product.

With each side possessing strong arguments to support their respective positions, it remains anyone's guess as to how this issue will be decided. Like most discovery disputes, though, the determination of this issue will likely turn on the facts of the case, the quality of counsel's advocacy, and the court's perception of the matter.[49]

Getting Up to Speed on the Issues

Given the importance of counsel's advocacy on these issues, it is essential that lawyers gain a better understanding of the parameters of the work-product doctrine in the context of these and other electronic-discovery issues. Having a firm grasp on the interplay between work product and electronic discovery will enhance the nature of counsel's advocacy and enable counsel to more competently represent clients on twenty-first century discovery disputes.

Endnotes

1 *Hickman v Taylor*, 329 US 495; 67 S Ct 385; 91 L Ed 451 (1947).

2 *Id*. at 516 (Jackson, J., concurring) ("Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.").

3 FR Civ P 26(b)(3).

4 See, e.g., FRE 502(g).

5 See, e.g., *Upjohn v United States*, 449 US 383, 397-98; 101 S Ct 677; 66 L Ed 2d 584 (1981) (reaffirming *Hickman* and the nature of the work product doctrine).

6 FR Civ P 26(b)(3); FRE 502(g). This includes written witness statements, legal memoranda, letters, and "oral expressions of an attorney's mental impressions, legal theories and subjective evaluations." *Lockheed Martin Corp v L-3 Commc'ns Corp*, unpublished order of the United States District Court for the Middle District of Florida, issued July 29, 2007 (Docket No. 6:05-cv-1580-Orl-31KRS); 2007 WL 2209250, *8-9.

7 See, e.g., *Sporck v Peil*, 759 F2d 312, 316 (CA 3, 1985) (holding that counsel's selection of certain documents to prepare a client for deposition was protected as opinion work product); *United States ex rel. Bagley v TRW, Inc*, No. CV94-7755-RAP(AJWx) (CD Cal, Dec. 11, 1998) (protecting a lawyer's selection of documents from an opposing party's production as opinion work product).

8 FR Civ P 26(b)(3)(A).

9 *Hickman*, 329 U.S. at 519 (Jackson, J., concurring).

10 FR Civ P 26(b)(3)(A). See *In re San Juan Dupont Plaza Hotel Fire Litig*, 859 F2d 1007 (CA 1, 1988) (permitting the discovery of a deposition exhibit list that was fact work product).

11 *Kodak Graphic Commc'ns. Can Co v E I du Pont de Nemours & Co*, unpublished decision and order of the United States District Court for the Western District of New York, issued February 8, 2012 (Docket No. 08-CV-6553T); 2012 WL 413994, *4-5, quoting *Sporck v. Peil*,

759 F2d 312, 316 (CA 3, 1985).

12 *Hickman*, 329 US at 513 (observing that it would indeed be "a rare situation justifying production of these matters."). The Supreme Court has confirmed this precedent multiple times, most notably in *Upjohn*, 449 US at 397-98.

13 FR Civ P 26(b)(3)(B). Various courts have embraced and even extended the protections from *Hickman* and Rule 26(b)(3), declaring that opinion work product is "absolutely privileged." *Caremark, Inc v Affiliated Computer Servs, Inc*, 195 FRD 610, 616 (ND Ill, 2000). Those courts that have not done so have nonetheless held that production of this category of work product should be limited to "rare and extraordinary circumstances." *Upjohn*, 449 US at 399-402; *United States, ex rel. Bagley v TRW, Inc*, No. CV94-7755-RAP(AJWx) (CD Cal, Dec. 11, 1998).

14 FR Civ P 26(b)(3)(A).

15 *Siani v State Univ of New York at Farmingdale*, unpublished order of the United States District Court for the Eastern District of New York, issued August 20, 2010 (Docket No. CV09–407 (JFB)(WDW)); 2010 WL 3170664.

16 See *CAT3, LLC v Black Lineage, Inc*, unpublished memorandum and order of the United States District Court for the Southern District of New York, issued Jan. 12, 2016 (Docket No. 14-cv-5511); 2016 WL 154116 ("Rule 37(e) does not purport to create a duty to preserve. The new rule takes the duty as it is established by case law, which uniformly holds that a duty to preserve information arises when litigation is reasonably anticipated.").

17 *Siani*, unpub at *5.

18 *Sanofi-Aventis Deutschland GmbH v Glenmark Pharma Inc*, 748 F3d 1354, 1361-63 (CA Fed, 2014) (affirming an adverse-inference instruction as a discovery sanction for the defendant's failure to preserve ESI in compliance with its duty to preserve that was established by certain of its work-product claims).

19 *Siani*, unpub at *5.

20 *Id*.

21 *Id*.

22 *Id*. (emphasis added).

23 *Id*. at *9 (denying the plaintiff's motion for an adverse-inference sanction because he failed to establish the relevance of the deleted emails).

24 See, e.g., *LendingTree, LLC v Zillow, Inc*, unpublished order of the United States District Court for the Western District of North Carolina, issued March 31, 2014 (Docket No. 3:10–cv–00439–FDW–DCK); 2014 WL 1309305 (finding that the duty to preserve arose six years before litigation actually commenced in 2010 due to the plaintiff's assertion of work product over documents created in 2004).

25 *Sanofi-Aventis Deutschland GmbH v Glenmark Pharma Inc*, 748 F3d 1354 (CA Fed, 2014).

26 *Id*. at 1361-63.

27 H. Christopher Boehning & Daniel J. Toal, *No Disclosure: Why Search Terms Are Worthy Of Court's Protection*, New York Law Journal (Dec. 3, 2013), https://www.paulweiss.com/media/2209977/5dec13edisc.pdf (asserting that search terms may reflect attorney work product and that courts should not default to routinely ordering their disclosure).

28 *Romero v Allstate Ins Co*, 271 FRD 96, 110 (ED Pa, 2010).

29 *Id*.

30 *Id*. at 109-10.

31 *Id*. at 109-10, n.9.

32 *Id*. at 110, n.9.

33 See *Sporck v. Peil*, 759 F2d 312, 316 (CA 3, 1985), quoting *James Julian, Inc v Raytheon Co*, 93 FRD 138, 144 (D Del, 1982)). The defendants relied on *Sporck* to support their argument on this issue. *Romero*, 271 FRD at 110, n.9.

34 *Romero*, 271 FRD at 110, n.9.

35 *Id*. at 110.

36 *Id*. at 110, n.9.

37 *Id*. at 110 .

38 See *Apple Inc v Samsung Elecs Co*, unpublished order of the United States District Court for the Northern District of California, issued May 9, 2013 (Docket No. 12-CV-0630-LHK (PSG)); 2013 WL 1942163 ("During their meetings, Google maintained that its search terms and choice of custodians were privileged under the work-product immunity doctrine, an argument it has abandoned no doubt in part because case law suggests otherwise."); *FormFactor, Inc v Micro-Probe, Inc*, unpublished order of the United States District Court for the Northern District of California, issued May 3, 2012 (Docket No. C-10-03095 PJH (JCS)); 2012 WL 1575093, *7, n.4 (holding that search terms were "not subject to any work product protection because [they are] underlying facts of what documents are responsive to Defendants' document request, rather than the thought processes of Plaintiff's counsel").

39 See Charles Yablon & Nick Landsman-Roos, *Predictive Coding: Emerging Questions and Concerns*, 64 SC L Rev 633, 644 (2013) (describing seed set development and its impact on the need "to identify those documents that are most relevant").

40 See generally Hon. John M. Facciola (Ret.) & Philip J. Favro, *Safeguarding The Seed Set: Why Predictive Coding Seed Sets May Be Entitled To Work Product Protection*, 8 Fed Cts L Rev 1 (2015) (describing the arguments advanced by opposite sides on the issues).

41 See, e.g., Elle Byram, *The Collision of the Courts and Predictive Coding: Defining Best Practices and Guidelines in Predictive Coding for Electronic Discovery*, 29 Santa Clara Computer & High Tech LJ 675, 699 ("Courts will look more favorably upon a party who discloses its key custodians and how it will [search] for the requested documents. Where a party is transparent, 'opposing counsel and the Court are more apt to agree to your approach . . . .'").

42 *Da Silva Moore v Publicis Groupe*, 287 FRD 182, 192 (SDNY, 2012) (discussing various issues associated with the use of predictive coding in an order approving the parties' stipulation to use that search methodology).

43 See also Transcript of Record at 13-15, *Fed Hous Fin Agency v JP Morgan Chase & Co, Inc*, 11-cv-06188-DLC (SDNY July 24, 2012) ECF No. 128 (insisting the parties jointly develop the predictive coding workflow, including seed documents); Karl Schieneman & Thomas Gricks, *The Implications of Rule 26(g) on the Use of Technology-Assisted Review*, 7 Fed Cts L Rev 239, 262 n.92 (2013) (questioning whether seed sets are entitled to work product protection).

44 See Dana Remus, *The Uncertain Promise of Predictive Coding*, 99 Iowa L Rev 1691, 1716 (2014) ("requiring seed-set transparency threatens core protections for attorney work product"); Yablon, *supra* note 39, at 644 ("If . . . the seed set is made up of documents selected or coded by a producing party as relevant, production of that seed set has a much higher probability of disclosing attorney impressions of the case.").

45 See Facciola, *supra* note 40, at 26-30.

46 See generally *In re Biomet M2a Magnum Hip Implant Products Liability Litig*, No. 3:12-MD-2391 (ND Ind, Apr. 18, 2013); *Romero v Allstate Ins Co*, 271 FRD 96, 109-10 (ED Pa, 2010).

47 See Hon. Patrick J. Walsh, *Rethinking Civil Litigation in Federal District Court*, 40 Litig 6, 7 (2013) (explaining that lawyers should use predictive coding and other search methodologies to "sift through the millions of documents and distill and organize the hundreds or thousands of documents that are critical to the case . . . ."); Yablon, *supra* note 39, at 644.

48 See Facciola, *supra* note 40, at 30-33.

49 See, e.g., *Mathis v John Morden Buick, Inc*, 136 F3d 1153, 1155 (CA 7, 1998) (affirming an order of judgment against the plaintiff despite the defendant's destruction of relevant evidence and expressing "surprise" at the "perplexing failure" of the plaintiff's counsel to formally move for discovery sanctions).

Predictive Coding: Where Are We Now?

By: Ariana F. Pellegrino, Scott A. Petz, and Salina M. Hamilton[1]

Executive Summary
With hundreds of billions of electronic documents being exchanged every day, predictive coding and other technology-assisted review protocols continue to gain growing acceptance from practitioners and courts facing overwhelming amounts of data. Predictive coding combines human review with teachable algorithms to review and analyze large amounts of electronically-stored information without requiring attorneys or other reviewers to put eyes on every document. When used correctly, predictive coding is a game-changer for the discovery practice, saving substantial time, energy, and valuable resources.

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Introduction

In 2015 alone, the number of e-mails exchanged **every day** totaled over 205 billion and that figure is expected to grow to 246 billion e-mails per day by 2019.[2] Authorities estimate that upwards of 90 percent of all business documents are created electronically, with many of those documents never being reduced to paper form.[3]

The need to use discovery tools to efficiently and effectively search this ever-growing mass of electronically-generated data is evident, and predictive coding is rapidly gaining momentum as the tool-of-choice for large-scale discovery matters. Over four years ago, the Southern District of New York in *Moore v Publicis Groupe*[4] approved the use of predictive coding to search for relevant electronically-stored information ("ESI") in appropriate cases. Since coming to the forefront in *Moore*, the need to employ technologies like predictive coding—and judicial acceptance of such technologies—continues to grow.[5]

Predictive coding is here to stay, and those in the legal market should know what it is and when and how to use it.

Predictive Coding: What is it?

Predictive coding[6] is a technological tool that uses advanced algorithms in conjunction with human review to determine the relevancy of ESI.[7] In practice, using predictive coding during the document review process involves a series of steps that begins with subject-matter experts—typically the senior attorney and his or her core team—manually reviewing a sample set of documents, known as a "seed set."[8] The seed set is then used to train the predictive-coding software to recognize the properties of relevant documents, which are used to electronically code other documents.[9]

In short, the predictive-coding software will learn to evaluate the content, order, and arrangement of documents to identify and distinguish relevant documents from irrelevant documents, and it can do so in a way that goes far beyond simple keyword-searching. The review team then manually reviews these additional documents for accuracy, adding documents to the seed set to further enhance the software's capability and accuracy. In other words, predictive coding software is capable of iterative learning—meaning that the software continues to refine the coding of documents based upon input over time.

Eventually, after the manual reviewers' coding and the software's coding "sufficiently coincide," the software may be deemed to have learned enough to confidently predict the coding for any remaining documents.[10] To that end, through

the use of such technology, the review team "needs to only review a few thousand documents to train the computer,"[11] thereby potentially saving thousands of hours and resources that would otherwise need to be devoted to a full, manual review.

[P]redictive coding is rapidly gaining momentum as the tool-of-choice for large-scale discovery matters.

Predictive Coding: When and How to Use It?

In the 2012 landmark decision in *Moore*, the Southern District of New York held that predictive coding is "an acceptable way to search for relevant ESI in appropriate cases."[12] Since *Moore*, predictive coding has largely been approved by those courts that have considered its use.[13]

The increased acceptance of predictive coding is largely unsurprising given that empirical data shows that predictive coding produces significantly better results than manual review—which is subject to human-error and inconsistency amongst review teams—at a fraction of the time and expense.[14] Notwithstanding, questions remain regarding the practical use of predictive coding.

Since *Moore*, courts have grappled with whether the use of keyword searches to narrow the pool of potentially relevant documents prior to the application of predictive-coding software is appropriate. Moreover, courts have considered to what degree litigants must engage in transparency and cooperation with respect to the use of the technology.

Use of Keyword Searches Prior to Using Predictive Coding

Courts generally agree that keyword searches may be performed before using the predictive-coding process. As one court explained, the practice of permitting parties to begin compiling responsive documents comports with the principle that "[r]esponding parties are best situated to evaluate the procedures, methodologies, and techniques appropriate for . . . producing their own electronically stored information."[15] However, keyword searches, standing alone, are likely insufficient to identify all responsive material. Instead, keyword searches should be combined with statistical sampling or other testing to ensure that responsive ESI has been sufficiently identified.

For example, in *Biomet*, the Northern District of Indiana held that a party's initial keyword search to narrow the pool of documents was appropriate and that the party would not be required to start over by using predictive coding on the whole pool.[16] In that case, before utilizing predictive coding to identify relevant ESI, Biomet narrowed the pool of documents from 19.5 million documents to 2.5 million documents by using keyword searches and removing duplicates.[17] Statistical sampling projected that only "between .55 and 1.33 percent" of the documents excluded as a result of keyword searching would be responsive.[18] Notwithstanding, the plaintiffs refused Biomet's offer to suggest additional keyword search terms and argued that the initial keyword search "tainted the process."[19]

Courts generally agree that keyword searches may be performed before using the predictive-coding process.

Accordingly, the plaintiffs argued that Biomet should be required to repeat the initial search for responsive documents by applying predictive coding to all of the 19.5 million documents.[20] The court rejected the plaintiffs' position, holding that Biomet would not be required to "go back to Square One" where the large financial burden associated with uncovering a small number of responsive documents would violate the proportionality standard under the Federal Rules of Civil Procedure.[21]

The increased acceptance of predictive coding is largely unsurprising given that empirical data shows that predictive coding produces significantly better results than manual review—which is subject to human-error and inconsistency amongst review teams—at a fraction of the time and expense.[14]

In contrast to *Biomet*, other courts have found keyword searching insufficient when applied alone because "the use of keywords without testing and refinement (or more sophisticated techniques) will in fact not be reasonably calculated to uncover all responsive material."[22] Given these contrasting principles, whether or not initial keyword searches will withstand scrutiny may depend on case-specific factors, such as the scope of the issues in the case and the scope of the potentially responsive ESI.

Cooperation and Transparency in Using Predictive Coding

While the use of predictive coding has been regularly approved by courts, case law in the post-*Moore* legal landscape generally stresses the importance of cooperation and transparency in its use.

For example, in *Bridgestone Americas, Inc v International Business Machines*

Corp,[23] the Middle District of Tennessee granted a party's request to use predictive-coding technology on documents that were previously identified using mutually agreed-upon search terms. The producing party, IBM, was "between one-third and one-half completed" with its manual review of the ESI when it requested approval to employ predictive coding.[24] The court recognized that the decision to permit predictive coding was a "judgment call" and permitted the use of the technology, in part because the producing party offered to provide its training documents to opposing counsel.[25] In its holding, the court reiterated the importance of communicating "on a frequent and open basis" regarding the production.[26]

> In contrast to *Biomet,* other courts have found keyword searching insufficient when applied alone because "the use of keywords without testing and refinement (or more sophisticated techniques) will in fact not be reasonably calculated to uncover all responsive material."[22]

Similarly, in *In re Actos*,[27] the Western District of Louisiana permitted the use of predictive coding where the predictive-coding protocol was sufficiently transparent. Specifically, the court ordered that the parties' experts would "have access to the entire sample collection population to be searched," that they would lead the computer training, and that they would identify privileged documents.[28] The court further ordered the parties to meet to review a random sample of documents for quality-control purposes.[29]

The role of cooperation and transparency with respect to seed sets is often a hot topic with parties. Indeed, *Moore* and its progeny left unanswered whether parties must produce their seed sets in order to satisfy the transparency requirement. While some courts avoid the need to answer this question where the producing party voluntarily discloses its seed set,[30] other courts have specifically rejected attempts to obtain the producing party's seed set, holding that the discoverability of such information is subject to the traditional limitations of relevancy under the Federal Rules of Civil Procedure.[31]

In *Biomet*, for example, the court held that a party's request for production of the seed set "reache[d] well beyond the scope of any permissible discovery by seeking irrelevant or privileged documents used to tell the algorithm what not to find."[32] Thus, where Biomet had produced all relevant and discoverable documents used in its seed set, the court held that the opposing party was not entitled to know "how [Biomet] went about identifying and selecting the documents . . . that it has produced" or "how Biomet used certain documents before disclosing them."[33]

Similarly, in *Freedman v Weatherford International Limited*, the Southern District of New York rejected a party's motion to compel the production of seed searches, holding that "discovery on discovery" would not remedy the perceived discovery defects.[34] In *Freedman*, the plaintiffs alleged improper tax practices in a class action against Weatherford.[35] Weatherford engaged an auditor to conduct an investigation of its earning statements and announced it would correct any errors in such statements. The plaintiffs, in turn, sought to compel the production of eighteen e-mails uncovered in the investigation along with the seed documents, even though they conceded that only three of the e-mails were likely to be responsive.[36] Plaintiffs additionally sought the production of a "'report of the documents 'hit' by search terms used in connection with the . . . [investigation].'"[37] The court denied the plaintiffs' request, holding that, while "[i]t is unsurprising that some relevant documents may have fallen through the cracks, … the Federal Rules of Civil Procedure do not require perfection."[38] Accordingly, because a significant percentage of the relevant documents would have already been identified by the contemplated searches, the plaintiffs were not entitled to additional discovery vis-à-vis the seed set.[39]

While courts have issued predictive-coding protocols requiring the producing party to disclose its seed set to opposing counsel,[40] Magistrate Judge Peck—who rendered the seminal decision in *Moore*—has explained that the production of a seed set is not the only means of ensuring transparency.[41] Rather, a party can show that predictive coding was used appropriately by several methods, including "statistical estimation of recall at the conclusion of the review," seeking "gaps in the production" and "quality control review of samples from the documents categorized as non-responsive."[42]

Conclusion

While the law on predictive coding is still developing, one thing is certain: predictive coding is here to stay. As Magistrate Judge Peck has proclaimed: "[I]t is black letter law that where the producing party wants to utilize [predictive coding] for document review, courts will permit it."[43]

Endnotes

1 The authors would like to thank Alma Sobo for her contributions to this article as a 2015 Dickinson Wright PLLC Summer Associate.

2 The Radicati Group, *E-mail Statistics Report, 2015-2019.*

3 See Ronald J. Hedges, Daniel Riesel, Donald W. Stever & Kenneth J. Withers, *Taking Shape: E-Discovery Practices Under the Federal Rules*, SN085 ALI-ABA 289, 292 (2008); Robert M. Vercruysse, Gregory V. Murray, *Electronically Stored Information and the New Federal Rules of Civil Procedure Regarding Discovery* (2007), *available at* http://www.vmclaw.com/articles/3_Electronic_discovery.pdf; *NALA Manual for Paralegals and Legal Assistants* (6th ed. 2014), p. 321.

4 *Moore v Publicis Groupe*, 287 FRD 182 (SDNY, 2012) (Mag. J. Peck). Magistrate Judge Peck's opinion was adopted by Judge Andrew L. Carter, Jr. *Moore v Publicis Groupe*, unpublished opinion and order of the United States District Court for the Southern District of New York, issued April 25, 2012 (Docket No. 11-CV-1279); 2012 WL 1446534.

5 See, e.g., *Rio Tinto PLC v Vale SA*, 306 FRD 1245, 127 (SDNY, 2015); *Green v Am Modern Home Ins Co*, unpublished order of the United States District Court for the Western District of Arkansas, issued November 24, 2014 (Docket No. 1:14-CV-04074); 2014 WL 6668422; *Gabriel Technologies Corp v Qualcomm Inc*, unpublished order of the United States District Court for the Southern District of California, issued February 1, 2013 (Docket No. 08CV1992 AJB MDD); 2013 WL 410103; *Hinterberger v Catholic Health Sys, Inc*, unpublished decision and order of the United States District Court for the Western District of New York, issued May 21, 2013 (Docket No. 08-CV-380S F); 2013 WL 2250591; *Global Aerospace, Inc v Landow Aviation, LP*, unpublished order of the Circuit Court of Virginia, Louden County, issued April 23, 2012 (Docket No. CL 610040); 2012 WL 1431215; *In re Biomet M2a Magnum Hip Implant Products Liab Litig*, unpublished order of the United States District Court for the Northern District of Indiana, issued April 18, 2013 (Docket No. 3:12-MD-2391); 2013 WL 1729682, *2; *Kleen Products LLC v Packaging Corp of Am*, unpublished memorandum opinion and order of the United States District Court for the Northern District of Illinois, issued September 28, 2012 (Docket No. 10 C 5711); 2012 WL 4498465, *5; *In re Actos (Pioglitazone) Products Liab Litig,* unpublished order of the United States District Court for the Western District of Louisiana, issued July 27, 2012 (Docket No. 6:11-MD-2299); 2012 WL 7861249; *Bridgestone Americas, Inc v Int'l Bus Machines Corp,* unpublished order of the United States District Court for the Middle District of Tennessee, issued July 22, 2014 (Docket No. 3:13-1196); 2014 WL 4923014, *2; *but see EORHB, Inc v HOA Holdings LLC*, unpublished order of the Court of Chancery of Delaware, issued May 6, 2013 (Docket No. CIV.A 7409-VCL); 2013 WL 1960621, *1 (refusing to require the use of predictive coding where it "would likely be outweighed by any practical benefit" due to the "low volume of relevant documents expected to be produced").

6 Predictive coding technology is also commonly referred to as computer-assisted review ("CAR") or technology-assisted review ("TAR"). But see Paul Burns & Mindy Morton, *Technology-Assisted Review: The Judicial Pioneers*, Sedona Conf J, vol. 15, Fall 2014, *available at* http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014_sac/2014_sac/technology_assisted_review_the_judicial_pioneers.authcheckdam.pdf (discussing the technical meaning and use of terms like predictive coding, CAR, and TAR).

7 See Scott A. Petz & Thomas D. Isaacs, *Predictive Coding: The ESI Tool Of The Future?*, Michigan Defense Quarterly, vol. 29, no. 1, July 2012, for an overview of predictive coding technology.

8 *Id.*

9 *Id.*

10 *Id.*, citing and quoting Andrew Peck, *Search, Forward*, L. Tech. News (Oct. 2011), http://www.law.com/jsp/lawtechnologynews//PubArticleLTN.jsp?id=1202516530534 (registration required to access).

11 *Id.*, quoting Andrew Peck, *Search, Forward*, L. Tech. News (Oct. 2011), http://www.law.com/jsp/lawtechnologynews//PubArticleLTN.jsp?id=1202516530534 (registration required to access).

12 *Moore*, 287 FRD at 183.

13 *See*, n 5 *supra*.

14 Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted review in E-Discovery Can Be More Effective and More Efficient than Exhaustive Manual Review*, XVII Rich JL & Tech 11 (2011), http://jolt.richmond.edu/v17i3/article11.pdf

15 *Kleen Products*, 2012 WL 4498465 at *5, citing The Sedona Conference, *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 Sedona Conf J 189, 193 (Fall 2007).

16 *Biomet*, 2013 WL 1729682 at *2.

17 *Id.* at *1.

18 *Id.*

19 *Id.* at *2.

20 *Id.*

21 *Id.*

22 *Nat'l Day Laborer Org Network v US Immigration & Customs Enforcement Agency*, 877 F Supp 2d 87, 110 (SDNY, 2012).

23 *Bridgestone Americas, Inc v Int'l Bus Machines Corp.*, unpublished order of the United States District Court for the Middle District of Tennessee, issued July 22, 2014 (Docket No. 3:13-1196); 2014 WL 4923014.

24 *Id.* at *2.

25 *Id.*

26 *Id.*

27 *In re Actos,* 2012 WL 7861249.

28 *Id.* at *4.

29 *Id.* at *7.

30 See *Bridgestone.*, 2014 WL 4923014 at *2; see also *Rio Tinto PLC*, 306 FRD at 129.

31 See *Freedman v Weatherford Intern Ltd*, unpublished memorandum and order of the United States District Court for the Southern District of New York, issued September 12, 2014 (Docket No. 12 CIV. 2121-LAK-JCF); 2014 WL 4547039, *1; see also *Biomet*, 2013 WL 6405156 at *1.

32 *Biomet*, 2013 WL 6405156 at *1.

33 *Id.* at *1-2.

34 *Freedman*, 2014 WL 4547039 at *1.

35 *Id.*

36 *Id.* at *2.

37 *Id.* at *3.

38 *Id.*, quoting *Moore*, 287 FRD at 191.

39 *Id.*

40 See *Actos*, 2012 WL 7861249 at *4 (issuing a predictive-coding protocol stating: "[a]ttorneys representing Takeda (a related pharmaceutical drug) will have access to the entire sample collection population to be searched and will lead the computer training, but they will work collaboratively with Plaintiffs' counsel during the Assessment and Training phases.").

41 See *Rio Tinto PLC*, 306 FRD at 128 (delineating procedures for evaluating documents in the event of non-cooperation by the producing party, including statistical estimation of recall and random sampling); see also *In re Lithium Ion Batteries Antitrust Litig*, unpublished order of the United States District Court for the Northern District of California, issued February 24, 2015 (Docket No. 13-MD-02420-YGR (DMR)); 2015 WL 833681, *2 (holding that random sampling of documents is the best way to refine searches and improve precision).

42 *Id.*, citing Maura R. Grossman & Gordin V. Cormack, *Comments on "The Implications of Rule 26(g) on the Use of Technology-Assisted Review,"* 7 Fed Cts L Rev 285, 298 (2014).

43 *Id.* at 127.

The Unenviable But Inevitable Document Dump

By: Brandon Hubbard, Nolan Moody, and Cole Lussier

Executive Summary

In litigation, a common tactic employed to both save money and burden the opposition is to produce far more information than is requested in (or relevant to) the lawsuit. This is commonly referred to as a "document dump." A document dump provides the requesting party with the relevant information sought, but also mass amounts of data and documents with no meaning to the lawsuit. It oftentimes leaves the party receiving the information without the time or resources to review the material. This article explores the foregoing and also addresses the best practices in helping to avoid "document dumps."

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Introduction

The days (or, weeks) of attorneys busting a room full of discovery boxes containing printed material is a thing of the past—at least it should be. Does it still happen? Sure. Sometimes by necessity? Yes. But when somebody today suggests they're going to undertake that endeavor, we're reminded of the final dogfight in the 1986 movie Top Gun. You know, the scene where Maverick tells his RIO that he's going to bring the enemy in closer so he can hit the brakes: "You're gonna do what!?!?" Movie reference aside, we have a responsibility to balance this reaction with reality—large litigation matters are more document intensive today than ever before. And we all know why.

Enter ESI. The three letter acronym that you either love or hate.

Modern discovery practice is often written about, particularly ESI. And with ESI comes many advantages, not the least of which includes the ability to word search for meaningful and relevant documents as opposed to manual review. Some argue—yes, persuasively—that if done right, electronic word searching is more accurate than a seven-hour manual document review, no matter how skilled the eye. But with ESI also comes increased access to information, and we can find ourselves back in the place we long ago left: A "document dump" akin to a room full of boxes, only this time in front of a computer. This computer contains not just a room full of boxes, but a warehouse. And for better or worse, the increased access to information sometimes incentivizes a party to produce far more ESI than is relevant or necessary.

This article explores the most effective procedural tools for preventing a document dump, or otherwise obtaining relief from Michigan courts once a party finds itself reviewing a document dump. The term "document dump" has taken on many meanings, but most understand that it entails either: (1) a failure to identify responsive documents in a mass of otherwise irrelevant documents; or (2) the providing of such vague and inadequate descriptions of the documents produced that the requesting party is unable to locate the meaningful documents. In either instance, the producing party effectively: (1) obstructed the requesting party's ability to identify salient issues by burying responsive documents in terabytes of irrelevant information; and (2) avoided the costs of a more precise and responsive production process.[1]

Michigan case law on document dumps is sparse, which leaves

burdened parties without an easy answer. But with proper use of the Michigan Court Rules and corresponding case law (along with support from recent amendments to the Federal Rules of Civil Procedure), a requesting party can avoid major headaches by preventing a producing party from drowning the relevant in the irrelevant.

Pre-Production Tools

The first opportunity to avoid document dumps occurs before serving a single discovery request. Litigants that expect a lawsuit to require mass production of ESI are in a stronger position to seek relief from the court upon receipt of a document dump if they first raise the issue at a pre-trial conference before discovery. Discussing document dumps at this stage offers two primary advantages: (1) it discourages a producing party from utilizing a document dump, particularly close in proximity to raising the issue with the court; and (2) it makes the court aware of the issue in the event that a motion is later filed.

> The term "document dump" has taken on many meanings, but most understand that it entails either: (1) a failure to identify responsive documents in a mass of otherwise irrelevant documents; or (2) the providing of such vague and inadequate descriptions of the documents produced that the requesting party is unable to locate the meaningful documents.

A significant practical hurdle in Michigan is that, unlike the Federal Rules of Civil Procedure, the Michigan Court Rules do not require a pretrial conference.[2] Local court rules are also unlikely to assist in this process, as only two counties in Michigan presently require a pretrial conference for civil cases.[3] Thus, while in federal court a party is provided an opportunity at the front end to raise the possibility of document dumps, an equivalent mechanism is not a certainty in most Michigan state courts.

MCR 2.401(A) is helpful, however. It provides the court with discretion to schedule a pretrial conference, which may be initiated "at the request of a party." If a conference is scheduled, the Michigan Court Rules also provide that the court should specifically consider "discovery, preservation, and claims of privilege of electronically stored information."[4] Therefore, a proactive litigant can still take advantage of an early opportunity—with opposing counsel and the court—to focus attention on the e-discovery process and establish a cooperative tone, while simultaneously expressing concerns about the desire to avoid document dumps.

It is true that much of the responsibility relative to document dumps lies with the producing party. But it is important to recognize that responsibility also lies with the requesting party. A party serving document requests should make a concentrated effort to narrow the requests with sufficient enough specificity. Otherwise, the producing party may be left with no reasonable option but to produce information that indeed may be irrelevant, even if out of an abundance of caution. As they say, be careful about what you ask for. For example, in *Smith v Michigan Dept of Corrections*,[5] the Court of Appeals affirmed the trial court's refusal to impose a default judgment against the defendant for failure to follow a discovery order because the plaintiff failed to sufficiently specify the documents sought. Thus, a requesting party will place itself in the best possible position to obtain relief from a document dump if it first ensures that its document requests are narrow enough to preclude the producing party from effectively arguing that a mass document production is appropriate in light of the documents requested.

Post-Production Tools

It has been said that "the greatest pleasure is relief from pain." Yes, it's a bit morbid. But any litigator that disagrees has never experienced a real document dump. Once received, tools to remedy a document dump become truly desired. You'll need relief. And consideration of certain court rules and case law is important to navigate such situations.

To start, it is essential to recognize that the Michigan Court Rules prohibit a wide array of conduct that is often inherent in a document dump, and a requesting party's use of those court rules in addition to relevant case law places that party in a much stronger position to seek relief. For example, MCR 2.310(B) permits a party to serve a request for the inspection of documents, and MCR 2.313(D) allows imposition of sanctions for failing to respond to such a request. These court rules, even though seemingly basic, serve as the foundation to seeking relief through judicial intervention.

Courts traditionally analyze alleged failures to comply with document requests by first asking whether the producing party provided all responsive material. But a document dump is uniquely different. The aggrieved party is not seeking relief based upon the producing party's failure to produce all documents, but rather the producing party's hindrance of the aggrieved party's ability to analyze the documents produced. When phrasing the issue with the court, the aggrieved party should argue that the lack of specificity, coupled with the mass amount of irrelevant

information provided, prevents it from readily learning or otherwise sorting the relevant information, which in turn constitutes a failure by the producing party to "respond to the request." A party seeking relief from a document dump may thus rely on MCR 2.310(C)(3), which authorizes the requesting party to "move for an order … with respect to … a failure to respond to the request." If, after an order is entered requiring an appropriate response, the producing party fails to comply with the order, appropriate sanctions may be entered under MCR 2.313(B)(2).

The foregoing argument is supported by *Bass v Combs*,[6] where the Court of Appeals affirmed the trial court's dismissal of an action because the plaintiff failed to respond to discovery requests with adequate specificity. Specifically, the court rejected the plaintiff's position that she **did** respond to the discovery requests, because the court found that plaintiff's answers were not specific enough. The court explained: "While plaintiff supplied extensive documentation in response to [defendant's] requests for production of documents," this did not render insignificant plaintiff's persistent failure to provide "specific" information in response to defendant's discovery requests.[7] The holding in *Bass* supports the proposition that it is inappropriate to answer discovery in a fashion so generalized that it is evasive or prejudicial to a party's ability to learn facts relevant to the case.[8] Accordingly, *Bass*, coupled with the Court of Appeals' approval of sanctioning "conscious dilatory behavior" that delays or interferes with a party's right to discoverable information,[9] offers support for the principle that document dumps disguising relevant information warrant appropriate sanctions.

Obtaining appropriate relief is a difficult endeavor, particularly due to the lack of case law discussing the issue. Traditionally, courts impose one of the following sanctions depending on the severity of a party's conduct: (1) presuming that facts relating to a discovery order are now established in favor of the other party; (2) refusing to allow the disobedient party to support or defend certain claims or defenses; (3) striking or staying certain pleadings until the order is obeyed, dismissing the action, or entering a default judgment against the disobedient party; or (4) holding a disobedient party in contempt of court.[10] Further, "either in lieu of or in addition to the other sanctions," a court may "require the party disobeying the order … to pay the reasonable expenses, including attorney fees, caused by the failure," unless the court determines the failure was "substantially justified or other circumstances make an award of expenses unjust."[11]

The holding in *Bass* supports the proposition that it is inappropriate to answer discovery in a fashion so generalized that it is evasive or prejudicial to a party's ability to learn facts relevant to the case.

Absent entry of a default judgment, the above sanctions, while perhaps helpful to prosecuting or defending a party's case, do not necessarily remedy the massive amount of unorganized information that must still be reviewed prior to trial. Depending on the circumstances, an appropriate remedy may be a request to "sample" the ESI in the possession of the adverse party, under MCR 2.310(B)(1)(a)(ii). There is little, if any, Michigan precedent interpreting the boundaries relative to "sampling" ESI under MCR 2.310(B)(1). However, because the Michigan Court Rules are modeled after the Federal Rules of Civil Procedure, Michigan courts may use federal decisions interpreting analogous rules as persuasive authority.[12]

Under the corresponding Federal Rules, federal courts have allowed the sampling of large electronic data sets when courts found it too costly to require a party to produce the entirety of the requested information.[13] If "sampling" is permitted by the court, and after a review of the relevant data deduced from the sampling, a requesting party could request that the producing party produce documents consistent with the sampling searches. Federal courts have reached similar conclusions.[14]

Additional Information

While much is already written on this topic, it is still noteworthy that on December 1, 2015, the Federal Rules of Civil Procedure were amended with an eye towards reining in the scope, burden, and cost of answering discovery requests. These amendments are of the utmost relevance to document dumps.

FRCP 26(b)(1) defines the scope of discovery in general and now provides that discovery must be "*proportional* to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relevant access to information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[15] It must be remembered that FRCP 26(b)(1) defines the scope of discovery *in general*. Put differently, the "in general" nature of FRCP 26(b)(1) arguably permits a party to invoke "proportionality" when facing excessive production of non-responsive

documents, and show that the producing party exceeded the permissible scope of discovery. The federal rules thus indicate an increased concern about focusing on those issues most salient to a particular case and avoiding the overburdening of a party through use of a document dump.

Conclusion

Preventing document dumps is best achieved through two interrelated methods. First, a party should attempt to use a pre-trial conference to address document dumps in advance of propounding discovery. Second, a party should be careful to narrowly draft specific document requests in order to later obtain adequate and necessary relief from the court. While the aforementioned "best practices" are recommended, document dumps will still occur. In that instance, appropriate use of the Michigan Court Rules and corresponding case law to accentuate the producing party's unresponsiveness and non-compliance with its discovery obligations is appropriate. The use of document dumps to avoid discovery obligations is not a regularly litigated issue. As such, a litigant may find it difficult to obtain appropriate relief. Nevertheless, use of the aforementioned tools will place a requesting party in the best position possible to obtain the required documents in an organized and manageable format.

Endnotes

1 See Grossman & Cormack, *Some Thoughts on Incentives, Rules, and Ethics Concerning the Use of Technology in E-Discovery*, 12 Sedona Conference J 89 (2011).

2 Compare MCR 2.401 with FR Civ P 26(f).

3 See 24th Circuit (Sanilac), LCR 2.401; 40th Circuit (Lapeer), LCR 2.401.

4 MCR 2.401(B)(1)(d).

5 *Smith v Michigan Dept of Corrections*, unpublished opinion per curiam of the Court of Appeals, issued December 1, 2009 (Docket No. 284744); 2009 WL 4348834.

6 *Bass v Combs*, 238 Mich App 16; 604 NW2d 727 (1999), overruled on other grounds by *Dimmit & Owens Financial, Inc. v Deloitte & Touche (ISC), LLC*, 481 Mich 618; 752 NW2d 37 (2008).

7 *Bass*, 238 Mich App at 34-36.

8 *Mejabi v Wayne State University, Bd of Regents for State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued August 19, 2010 (Docket No. 290535); 2010 WL 3296082, *3 (applying *Bass* when affirming the trial court's sanction of dismissal where the plaintiff provided evasive answers and prejudiced the defendant's ability to learn relevant facts of the case).

9 See *Edge v Ramos*, 160 Mich App 231, 235; 407 NW2d 625 (1987).

10 See MCR 2.313(B)(2)(a)-(d).

11 MCR 2.313(B)(2).

12 *Brenner v Marathon Oil Co*, 222 Mich App 128, 133; 565 NW2d 1 (1997).

13 See *Zubulake v UBS Warburg LLC*, 216 FRD 280 (SDNY, 2003); *Hagemeyer North America Inc v Gateway Data Sciences Corp*, 222 FRD 594 (ED Wis, 2004).

14 See *Zubulake v Warburg LLC*, 217 FRD 309, 324 (SDNY, 2003).

15 FRCP 26(b)(1) (emphasis added).

Trade-Secrets Litigation under Michigan Law and the New Defend Trade Secrets Act

By: Deborah Brouwer and Nicholas Huguelet, *Nemeth Law, P.C.*

In this increasingly knowledge-based economy, protection of trade secrets and confidential information has become a more critical issue for employers. The importance of protecting trade secrets is no longer exclusive to mega-corporations like KFC maintaining the secrecy of the Colonel's recipe or Coca-Cola protecting its formula. Rather, employers of all sizes and in all industries may well possess information constituting a trade secret, such as proprietary manufacturing methods, pricing lists, customer lists and preferences, and financial data. At the same time, it is becoming increasingly difficult for a company to protect these trade secrets, given today's highly mobile workforce, which has access to ever-evolving methods of copying and transmitting data. Now, it can take mere seconds for an employee with a cell phone to snap a picture of a confidential customer pricing sheet, or use a flash drive to copy proprietary design specifications.

To protect trade secrets, every state and the District of Columbia have adopted some form of trade-secrets law. For example, Michigan enacted the Uniform Trade Secrets Act (MUTSA) in 1998.[1] Trade secrets litigation thus has been typically a matter of state law, reaching federal court only in diversity cases or when combined with a separate federal claim (often a claim under the Computer Fraud and Abuse Act).[2] That has now changed.

After receiving nearly unanimous support in Congress, the Defend Trade Secrets Act (DTSA) was signed by President Obama in May 2016. For the first time, the DTSA provides a federal civil cause of action for the misappropriation of trade secrets. Previously, employers had to rely on a patchwork of state laws to bring such claims. Now, employers will have access to the federal judiciary and federal law and remedies. Not only will this allow the federal court system to craft a more consistent body of law, it will make it easier for companies to protect trade secrets across the nation. In addition, the DTSA provides a host of new remedies for employers, as well as new protections for employees.

Importance of Trade-Secrets Law to MDTC Members

At first blush, it may seem odd to discuss a new cause of action and how that cause of action could benefit clients of MDTC members. We are, after all, **defense** counsel. Nevertheless, the DTSA and MUTSA are laws designed to be used by the clients that we are most likely to represent – businesses. Accordingly, it is important to be aware of these laws and how they benefit our clients even if that requires us to step outside of a purely defense-counsel role.

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What are "trade secrets"?

The DTSA and MUTSA define "trade secrets" similarly. Generally, "trade secrets" include information (e.g. formulas, patterns, compilations, methods, techniques, processes, etc.) that (1) the owner has taken reasonable efforts to keep secret, and (2) derives independent economic value from not being generally known or readily ascertainable by others.[3] Under MUTSA, trade secrets historically have included: knowledge of vendors, vendor capabilities, and pricing;[4] strategies and techniques for obtaining governmental certification;[5] manufacturing design specifications; [6] and customer lists, marketing and sales strategies, contractual details for customers, regional pricing lists and profit margins.[7] Such information is of enormous significance to many companies and, in some instances, can be worth millions (or billions) of dollars.

Protecting Trade Secrets through Litigation

Under both MUTSA and DTSA, trade secrets such as those described above are protected from "misappropriation," which includes acquisition of the trade secret through improper means, improper disclosure to another, or the improper use of a trade secret.[8] To enforce this protection, the DTSA and MUTSA permit owners of trade secrets to bring a lawsuit within 3 years after the misappropriation is discovered or should have been discovered.[9] To state a claim for misappropriation under MUTSA, the plaintiff must establish that (1) the information at issue amounted to "trade secrets," and (2) that the defendant did not have the express or implied consent to disclose or use the information.[10]

Remedies

Under both statutes, a wide range of remedies are available to the owner of trade secrets. The DTSA includes a new, relatively expansive remedy – the ability to seek, *ex parte*, a civil seizure order. It is not uncommon for an employee with knowledge of a trade secret to leave a company for a competitor, and to take a trade secret with him. Non-compete agreements provide one method of avoiding this, but enforcement of such agreements can be costly and time-consuming and often come into play only after the trade secret has been disclosed. Even a preliminary injunction may not be effective at preventing the disclosure of trade secrets. As a result, the DTSA now allows an employer to petition a federal court (without notice to the employee or possible defendant) to have the government seize all property in the possession of the defendant necessary to prevent dissemination of a trade secret.[11] The seized property is held in the custody of the court under "appropriate measures to protect the confidentiality of the seized materials" until a hearing can be held.[12]

> [I]t is becoming increasingly difficult for a company to protect these trade secrets, given today's highly mobile workforce, which has access to ever-evolving methods of copying and transmitting data.

A court may order such an *ex parte* civil seizure upon a showing of (1) the requirements for an injunction (imminent irreparable harm, weighing of respective harms, and likelihood of success on the merits), (2) that an injunction would be inadequate to prevent the dissemination of the trade secret, (3) the defendant has actual possession of the trade secret, (4) the materials to be seized are identified with particularity, (5) the defendant would destroy, move, hide, or make the trade secret inaccessible to the court with prior notice of the action, and (6) the application for seizure has not been publicized.[13] Such an order may even permit police to use force to access locked areas.[14] While *ex parte* seizure orders are available only in "extraordinary circumstances," they do offer a new remedy for the employer.[15]

> Now, employers will have access to the federal judiciary and federal law and remedies. Not only will this allow the federal court system to craft a more consistent body of law, it will make it easier for companies to protect trade secrets across the nation.

If an individual is subject to a wrongful or excessive civil seizure order, the DTSA provides a cause of action against the applicant for the seizure order.[16] Damages for a wrongful or excessive seizure could include lost profits, costs of materials, loss of good will, punitive damages for bad faith, reasonable attorneys' fees, and prejudgment interest.[17]

Ex parte civil seizure orders are available only under the DTSA, and not under MUTSA. Accordingly, if a threat of trade secret misappropriation presents "extraordinary circumstances" that requires an immediate and severe response, employers should consider an action under the DTSA.

The DTSA and MUTSA also provide for injunctive relief (affirmative and negative), damages, and attorneys' fees in certain circumstances. Damages include actual economic loss, unjust

enrichment, or the payment of a reasonable royalty to the owner of a trade secret.[18] Unlike MUTSA, the DTSA also permits recovery of exemplary damages up to two times actual damages.[19] Exemplary damages may be awarded under the DTSA in cases where the trade secret is willfully or maliciously misappropriated.[20] Accordingly, in certain cases, the DTSA may provide greater damages than would otherwise be available under Michigan law.

Inevitable-Disclosure Doctrine

Some avenues of relief for employers are narrower under the DTSA than under some state trade-secrets laws. For example, while the DTSA allows an employer to sue to prevent a former employee's employment with a competitor – often allowed under state trade secret laws – under the DTSA, the employer first must demonstrate "evidence of threatened misappropriation."[21] Under many state-law trade-secret statutes, employers have been able to bring similar suits under an "inevitable disclosure claim," arguing that misappropriation is likely simply because of the information held by a former employee and the former employee's employment in a similar position by a competitor. In this regard, the DTSA is friendlier towards employee mobility and limits an employer's ability to pursue such claims.

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Courts in Michigan have been critical of the doctrine, however. In *Degussa Admixtures, Inc v Burnett*, the Western District of Michigan noted that "the doctrine has never been adopted in Michigan and, even where it has been discussed, it has only been suggested to be applicable to high executives and key designers of the company's strategic plans and operations."[22] In *CMI International, Inc v Internet International Corp*, the Michigan Court of Appeals required that parties must show more than a competitor's employment of a former employee who has knowledge of a trade secret.[23] The *CMI* court also ruled that "[e]ven assuming that the concept of 'threatened misappropriation' of trade secrets encompasses a concept of inevitable disclosure, that concept must not compromise the right of employees to change jobs."[24] Accordingly, while the lack of a cause of action under the DTSA based on inevitable disclosure doctrine may be significant in some jurisdictions, the refusal of courts in MUTSA cases to apply the doctrine undercuts the importance in cases arising solely in Michigan.

Other Considerations

Before commencing a trade secrets action under the DTSA, attorneys should consider the potential benefits offered by filing under state law. Because MUTSA was enacted in 1998, the courts have had an opportunity to interpret and apply the law. With a better-defined body of case law, MUTSA litigants may be offered a greater degree of certainty as to how their case will be adjudicated. On the other hand, because the DTSA is a recent enactment, there are no case decisions interpreting its provisions. Instead, until a body of case law is developed, parties will be required to rely upon statutory interpretation arguments and the persuasiveness of state court decisions with similar provisions.

Additionally, claims under MUTSA must be filed in business court, where the appropriate circuit has a business court. Procedurally, this means that the plaintiff must verify on the complaint that the case meets the requirements to be assigned to the business court.[25] Practically, this means that the parties can expect quicker resolutions with an emphasis on alternative dispute resolution, particularly mediation scheduled early in the proceeding.[26]

Whistleblower Protections

In addition to providing federal remedies for employers, the DTSA also includes express protection for employee whistleblower activities. This immunity provision protects individuals from civil and criminal liability when disclosing a trade secret "in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney and solely for the purpose of reporting or investigating a suspected violation of law" or "in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal."[27] The DTSA also permits the disclosure of a trade secret to an attorney or to a court under seal in a lawsuit alleging retaliation for a whistleblower report.[28] No such immunity is provided under MUTSA.

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Importantly, the DTSA requires employers to post or provide notice of the immunity provision (i.e., a whistleblower notice) before collecting exemplary damages or attorney fees under the statute in a suit against an employee for a trade-secret violation under the DTSA.[29] In other words, if an employer sues an employee for a trade-secret violation under the DTSA, and notice of the statute's immunity

provision was not provided to the employee, the employer is foreclosed from seeking these remedies. The requisite notice can be provided in any contract or agreement with an employee governing the use of a trade-secret or other confidential information, such as a non-compete agreement, employment contract, or employee handbook.[30] Further, under the immunity provision of the DTSA, the term "employee" includes contractors or consultants for an employer.[31] Thus, the whistleblower notice should also be included in any independent-contractor agreements.

This notice requirement applies to all contracts and agreements "entered into or updated" after the date of enactment of the DTSA – which occurred when the President signed the law on May 11, 2016.[32] Employers should immediately have all applicable documents and contracts reviewed by counsel to ensure compliance. Absent this provision, an employer likely will not be able to recover significant damages even if successful in an action under the DTSA.

Endnotes

1 1998 Public Act 448, MCL 445.1901, *et seq*.
2 18 USC 1030.
3 18 USC 1839(3); MCL 445.1902(d).
4 *Wysong Corp v MI Indus*, 412 F Supp 2d 612, 630 (ED Mich, 2005).
5 *Giasson Aerospace Science, Inc v RCO Eng'g, Inc*, 680 F Supp 2d 830 (ED Mich, 2010).
6 *Mike's Train House, Inc v Lionel, LLC*, 472 F3d 398 (CA 6, 2006).
7 *Kelly Servs v Eidnes*, 530 F Supp 2d 940 (ED Mich, 2008).
8 18 USC 1839(5); MCL 445.1902(b).
9 18 USC 1836(d); MCL 445.1907.
10 *Sherman & Co v Salton Maxim Housewares, Inc*, 94 F Supp 2d 817, 821-22 (ED Mich, 2005).
11 18 USC 1836(b)(2).
12 18 USC 1836(b)(2)(D)(iii).
13 18 USC 1836(b)(2)(A)(ii).
14 18 USC 1836(b)(2)(B)(iv)(II).
15 18 USC 1836(b)(2)(A)(i).
16 18 USC 1836(b)(2)(G).
17 *Id.*
18 18 USC 1836(b)(3)(B); MCL 445.1904.
19 18 USC 1836(b)(3)(C).
20 *Id.*
21 18 USC 1836(b)(3)(A)(i)(I).
22 *Degussa Admixtures, Inc v Burnett*, 471 F Supp 2d 848, 856 (WD Mich 2007), aff'd 277 Fed Appx 530 (CA 6, 2008).
23 *CMI International, Inc v Internet International Corp*, 251 Mich App 125; 649 NW2d 808 (2002)
24 *Id.* at 133-34.
25 MCR 2.112(O)(1).
26 Administrative Order No. 2013-6.
27 18 USC 1833(b)(1).
28 18 USC 1833(b)(2).
29 18 USC 1833(b)(3).
30 18 USC 1833(b)(3)(A), (B).
31 18 USC 1833(b)(4).
32 18 USC 1833(b)(3)(D).

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MDTC Legislative Report

As I finish this report in late June, things are pretty quiet at the State Capitol. Our legislators completed their spring session on June 9th, and are now enjoying their summer recess. They will, of course, continue their work on pending legislation and constituent matters during the summer months, but only two session days – July 13th and August 4th – are currently scheduled before the resumption of their normal schedule in September. The seats in the House are up for election in November, and thus, a great many of the incumbent representatives will also be doing some campaigning for re-election in this election year like no other. Our state senators are undoubtedly grateful that they are not required to run for re-election this year, when the fallout from the presidential campaign is uncertain for members of both parties.

The Legislature passed a significant volume of bills addressing a variety of subjects in a flurry of activity leading up to the summer recess. That activity included, most notably, work on the completion of the budget for the next fiscal year, legislation to save the Detroit Public Schools, and the public acts and initiatives discussed below.

2016 Public Acts

As of this writing, there are 233 Public Acts of 2016. The few that may be of interest include:

2016 PA 186 – Senate Bill 632 (Schuitmaker – R), which will amend provisions of the Revised Judicature Act defining the jurisdiction of the Court of Appeals and the probate courts to provide that the Court of Appeals will have jurisdiction over all appeals from final orders and judgments of the probate courts, and provide the statutory authority required for previously proposed court rule changes that would confer jurisdiction upon the Court of Appeals over all appeals from interlocutory orders of the probate court as well. The amendments will also replace the automatic stay provision of MCL 600.867 with new language consistent with the court rules governing other appeals to the Court of Appeals, providing for an automatic stay of enforcement of the order appealed from for a period of 21 days only, unless a motion for stay is granted.

A companion Bill **– House Bill 5503 (Tedder – R) –** proposes consistent amendments to the Estates and Protected Individuals Code. It was passed by the House on June 2, 2016, and now awaits review in the Senate Judiciary Committee. 2016 PA 186 is slated to take effect 90 days after its enactment, but is tie-barred to House Bill 5503, so the actual effective date remains to be determined by the expected enactment of that bill, which may not be taken up and passed until September.

2016 PA 187 – Senate Bill 672 (Hansen – R) will amend the Estates and Protected Individuals Code, MCL 700.5109, which allows parents and guardians of minors to release sponsors and organizers of recreational activities, and paid or volunteer coaches conducting such activities, from liability for injuries sustained by the minor in the course of those activities. The proposed amendments will expand the statute's definition of "recreational activity" to include active participation in a "camping activity," defined as "a recreation activity planned and carried out by the

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owner and operator of a camp," in addition to "active participation in athletic or recreational sport." This amendatory act will take effect on September 19, 2016.

2016 PA 149 – House Bill 4787 (Price – R) will amend the Penal Code to create a new section, MCL 750.213, providing new criminal penalties for coercing a woman to have an abortion against her will. The new penalties will be made applicable to coercion of several specific kinds, with the severity of the penalty in each case being determined based upon the precise nature of the conduct involved. The provisions of this new section will take effect on September 7, 2016.

2016 PA 142 – Senate Bill 776 (Robertson – R) has amended the Michigan Election Law, MCL 168.472a, to provide that: "The signature on a petition that proposes an amendment to the constitution or is to initiate legislation shall not be counted if the signature was made more than 180 days before the petition is filed with the office of the secretary of state." This amendment eliminated the prior language which had required the application of a rebuttable presumption that signatures older than 180 days were stale and void. This amendatory legislation was approved by the Governor on June 6, 2016, and took effect the following day upon filing with the Secretary of State.

Old Business and New Initiatives

The pending bills of interest include:

Senate Bill 289 (O'Brien – R), which would create a new "bad-faith patent infringement claims act" to provide new protections against "patent trolls" – individuals or entities that assert unfounded claims of patent infringement in bad faith to extort payments of royalties from businesses, which often feel compelled to acquiesce rather than bear the considerable cost of defending threatened infringement litigation. After languishing for nearly a year on the Senate Session Calendar, the bill was passed by the Senate as a Bill Substitute (S-3) on June 9, 2016, and has now been referred to the House Judiciary Committee. The same initiative has also been introduced in the House as **House Bill 4587 (Callton – R).**

Senate Bill 1020 (Bieda – D) proposes the creation of a new Michigan False Claims Act, to establish procedures for pursuit of qui tam actions similar to those authorized under the Federal False Claims Act against those who present false or fraudulent claims to obtain money, property, or services from the state or a local unit of government. This bill was introduced on June 8, 2016, and referred to the Senate Judiciary Committee. The same initiative has been introduced in the House as **House Bill 4494 (Heise – R).**

Senate Bill 982 (Schuitmaker – R) proposes a variety of amendments to the Uniform Fraudulent Transfer Act, MCL 566.31, *et seq*. This bill was introduced on May 24, 2016, and referred to the Senate Judiciary Committee.

House Bill 5546 (Somerville – R) proposes an amendment of the Revised Judicature Act, MCL 600.5801, to increase the statute of limitations for actions seeking recovery or possession of real property in cases where the defendant asserts a claim to the property based upon adverse possession or acquiescence, from 15 to 30 years. This bill was introduced on April 13, 2016, and referred to the House Judiciary Committee.

HJR GG (Hovey-Wright – D), this House Joint Resolution proposes an amendment of the equal protection provision of the Michigan Constitution, Const 1963, art 1, § 2, to prohibit discrimination based upon sex. This joint resolution was introduced on April 12, 2016, and referred to the House Judiciary Committee.

What Do You Think?

Our members are again reminded that the MDTC Board regularly discusses pending legislation and positions to be taken on bills and resolutions of interest. Your comments and suggestions are appreciated, and may be submitted to the Board through any officer, board member, regional chairperson or committee chair.

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Appellate Practice Report

Superintending Control in Michigan's Appellate Courts

Michigan's appellate courts can exercise superintending control over lower courts. Although it's rare for an appellate court to do so, superintending control can be an effective and even necessary remedy under the right circumstances. To determine whether superintending control is a possible remedy, however, it's important to understand the difference between superintending control in the Michigan Supreme Court and in the Court of Appeals.

In the Michigan Supreme Court

Article VI of the Michigan Constitution establishes the Michigan Supreme Court's authority to entertain requests for superintending control:

> The supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge.[1]

The power of superintending control is "separate, independent and distinct from [the Court's] original jurisdiction and appellate powers…."[2] This superintending authority has "great breadth":

> The power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise. It is so general and comprehensive that its complete and full extent and use have practically hitherto not been fully and completely known and exemplified. **It is unlimited, being bounded only by the exigencies which call for its exercise.** As new instances of these occur, it will be found able to cope with them. Moreover, if required, the tribunals having authority to exercise it will, by virtue of it, possess the power to invent, frame, and formulate new and additional means, writs, and processes whereby it may be exerted. This power is not limited by forms of procedure or by the writ used for its exercise. Furthermore, it is directed primarily to inferior tribunals, and its relation to litigants is only incidental.[3]

Though its scope is broad, superintending control is available only when an "application for leave to appeal cannot be filed."[4] In other words, if an application for leave is an option, superintending control isn't.

Superintending-control procedures in the Michigan Supreme Court begin with Michigan Court Rule 7.306. Parties invoke the Court's superintending-control authority by filing a complaint. Parties must submit a brief with their complaint, along with a proof of service and the filing fee.[5] The responding party's answer is due in 21 days, and the petitioner can file a reply brief up to 21 days after receiving the answer.

Michigan Court Rule 7.306(H) lists various actions that the Court may take in response to a complaint for a writ of superintending control. The Court may "set

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Although it's rare for an appellate court to do so, superintending control can be an effective and even necessary remedy under the right circumstances. To determine whether superintending control is a possible remedy, however, it's important to understand the difference between superintending control in the Michigan Supreme Court and in the Court of Appeals.

the case for argument as on leave granted, grant or deny the relief requested, or provide other relief that it deems appropriate, including an order to show cause why the relief sought in the complaint should not be granted."[6]

In the Court of Appeals

The Court of Appeals' authority to grant superintending control is more limited than the Michigan Supreme Court's authority.[7] The Court of Appeals' superintending control authority "has nothing to do with the general supervisory superintending control over all courts given to the Supreme Court by art. 6, § 4 of the 1963 Constitution or the supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the Supreme Court …."[8]

The Michigan Supreme Court recognized the more limited nature of the Court of Appeals' superintending control authority when it drafted Michigan Court Rule 7.203. This rule states that the Court of Appeals may exercise "superintending control over a lower court or a tribunal immediately below it arising out of an action or proceeding **which, when concluded, would result in an order appealable to the Court of Appeals** …."[9]

The bolded language has important implications. It means that the Court of Appeals can exercise superintending control only "in an actual case."[10] In other words, the Court of Appeals doesn't exercise superintending control to oversee Michigan's judiciary but to correct specific errors in specific cases. This distinction explains *Lapeer County Clerk,* where the Michigan Supreme Court held that the Court of Appeals "lacked jurisdiction to issue an order of superintending control to the circuit court regarding its plan for the implementation of the family division."[11]

Although superintending control in the Court of Appeals serves a different purpose than in the Supreme Court, it looks much the same as a procedural matter. Michigan Court Rule 7.206 states that the rules governing superintending control in the Supreme Court also apply to the Court of Appeals. So a party seeking superintending control in the Court of Appeals should file a complaint, accompanying brief, and proof of service as Michigan Court Rule 7.306 directs.

Citing Unpublished Opinions

While only published decisions have precedential value, it may sometimes be appropriate to cite an unpublished opinion – such as if there are no applicable published decisions, or if an unpublished opinion contains a particularly helpful discussion of an issue. The practice of citing unpublished opinions differs depending on whether you are in the Sixth Circuit or the Michigan Supreme Court or Court of Appeals.

Sixth Circuit

The Sixth Circuit's local rules broadly permit the citation of "any unpublished opinion, order, judgment, or other written disposition."[12] But if such a decision is "not available in a publicly accessible electronic database, the party must file and serve a copy as an addendum to the brief or other paper in which it is cited."[13]

Michigan Supreme Court and Court of Appeals

The rule governing the citation of unpublished opinions in the Michigan Supreme Court and Court of Appeals is more restrictive. Until recently, there was no express limitation on citing unpublished Court of Appeals' opinions. Effective March 23, 2016, however, the Supreme Court amended MCR 7.215(C) to clarify the circumstances under which unpublished opinions may be cited.

The rule now provides that "[unpublished opinions should not be cited for propositions of law for which there is published authority."[14] In addition, "[i]f a party cites an unpublished opinion, the party shall explain the reason for citing it and how it is relevant to the issues presented."[15] The Staff Comment provides examples of when "an unpublished [opinion] may be cited," such as "if there is no published authority on a given legal proposition or if it is necessary to demonstrate a conflict in interpretation of the law."

As under prior practice, "[a] party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears."[16]

Submitting Supplemental Authority

As there can often be a delay of several months between the time that briefs are filed and oral argument is held, there are times when a party may want to supplement the authorities in its brief with a decision that came out after

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Michigan Supreme Court and Court of Appeals

Submitting supplemental authority in the Michigan Supreme Court and Court of Appeals is governed by MCR 7.212(F).[17] The rule explains that without leave of court, a party may submit a one-page "communication" titled "supplemental authority," subject to certain conditions. **First**, it must be for the purpose of "call[ing] the court's attention to new authority released after the party filed its brief."[18] **Second**, a supplemental authority "may not raise new issues."[19] **Third**, it "may only discuss how the new authority applies to the case, and may not repeat arguments or authorities contained in the party's brief."[20] **Finally**, a supplemental authority "may not cite unpublished opinions."[21]

As further explained in the Court of Appeals' Internal Operating Procedures (IOPs):

> Such a filing may only cite and discuss new published authority released subsequent to the date the party filed its last brief or supplemental authority. New issues may not be raised in a supplemental authority. The body of the supplemental authority cannot exceed one page. The caption may be on a preceding page and the signature block alone may be on a subsequent page. But the *text* of the supplemental authority cannot exceed one page.[22]

Should a party seek to exceed the one-page limit or cite newly-discovered authority that was released **before** the party filed its brief, then a motion is required:

> Unless accompanied by a motion, a supplemental authority will be returned if it (1) fails to comply with the requirement that it not exceed one page, (2) cites other than new published authority.[23]

Finally, the IOPs provide one last word of caution. A supplemental authority must include **all** new authorities that the party wishes to raise. In other words, multiple supplemental authorities are not permitted, unless "a party files a supplemental authority after the filing of the brief, and then another **new** case is released after filing of the first supplemental authority."[24] In that case, "the subsequent supplemental authority will be accepted."[25]

Note that neither MCR 7.212(F) nor the IOP specifically provide for a **response** to a supplemental-authority filing. Doing so, however, is simply a matter of the opposing party filing its own "supplemental authority" addressing the new case.

Sixth Circuit

Supplemental authority filings in the Sixth Circuit are governed by Rule 28(j) of the Federal Rules of Appellate Procedure. The rule provides that a party may send a "letter to the circuit court clerk" advising the court of any "pertinent and significant authorities [that] come to a party's attention after the party's brief has been filed—or after oral argument but before decision." Thus, a party is not limited to decisions issued after the party's brief has been filed. The letter must "state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally." The "body of the letter must not exceed 350 words." A party wishing to respond must do so "promptly" in a letter that it is "similarly limited."

Endnotes

1 Const 1963, art 6, § 4.
2 *Matter of Probert,* 411 Mich 210, 229-30; 308 NW2d 773 (1981), citing *In re Huff,* 352 Mich 402; 91 NW2d 613 (1958).
3 *Probert,* 411 Mich at 229-30 (emphasis added).
4 MCR 7.306.
5 *Id.*
6 *Id.*
7 *Lapeer County Clerk v Lapeer Circuit Judges,* 465 Mich 559, 567-568; 640 NW2d 567 (2002).
8 *Id.* at 569.
9 MCR 7.203(C) (emphasis added).
10 *Lapeer County Clerk,* 465 Mich at 569.
11 *Id.* at 574.
12 6th Cir R 32.1(a).
13 6th Cir R 32.1(a).
14 MCR 7.215(C)(1).
15 *Id.*
16 *Id.*
17 MCR 7.302(F), which governs supplemental authority in the Supreme Court, provides that "a party may file a supplemental authority as provided in MCR 7.212(F)."
18 MCR 7.212(F).
19 MCR 7.212(F)(1).
20 MCR 7.212(F)(2).
21 MCR 7.212(F)(3).
22 IOP 7.212(F)-1 (emphasis in original).
23 *Id.*
24 *Id.* (emphasis in original).
25 *Id.*

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Legal Malpractice Update

Attorney Defendant did not commit malpractice where no causal nexus existed between his advice and the financial damages resulting from the fire that destroyed Plaintiffs' restaurant, necessitating summary disposition under MCR 2.116(C)(10). Further, Plaintiff Shamoon's existing knowledge as to his illegal alien status precluded Attorney's advice from being the proximate cause of Plaintiff's removal from the United States.

Yousif v Attorney Defendant, unpublished opinion per curiam of the Court of Appeals, issued Feb. 18, 2016 (Docket No. 324097); 2016 WL 683137.

Facts: Plaintiffs Hanna Yousif and Behnam Shamoon were naturalized Canadian citizens who were born in Iraq and living illegally in Michigan. Shamoon contacted Defendant Attorney, who specialized in immigration, in 2002 to discuss visas to reside in the United States. Notably, in order to qualify for the visas that Yousif and Shamoon sought, they could not currently live in the United States. During their meeting, Defendant Attorney advised Shamoon that "he and his family could qualify for E-2 treaty investor visas if he made a substantial investment in an American business employing at least two full-time employees who were American citizens or permanent residents." No other substantive work came from the meeting and Defendant Attorney did not hear from Yousif and Shamoon for approximately three to four years after that. In the interim period, Yousif and Shamoon purchased a restaurant in Detroit without notifying, contacting, or discussing the investment with Defendant Attorney. Then, in 2006, Yousif and Shamoon again contacted Defendant Attorney about the investor visas. Defendant Attorney provided them with a list of documents that he needed to establish eligibility for the visas, including financial records and business documents verifying that the business employed at least two full-time employees. However, Yousif and Shamoon never provided complete documents, notwithstanding approximately five written requests from Defendant Attorney to do so over the course of three years, from 2006-2009.

In September 2010, the restaurant that Yousif and Shamoon purchased was destroyed by a fire. Yousif and Shamoon filed an insurance claim that was denied. Then, in December 2010, Plaintiff Shamoon was detained while trying to re-enter the United States after a visit to Niagara Falls, Canada. United States custom officials ultimately determined, after Shamoon lied about his reasons for entering the country, that he was an undocumented illegal alien residing in the United States. Thus, they excluded him from entering and barred him from reentering for five years.

Following the fire, denial of their insurance claim, and subsequent exclusion of Shamoon from entering the United States, Yousif and Shamoon sued Defendant Attorney for malpractice. They asserted both economic and noneconomic damages, claiming: (1) that their economic damages associated with loss of the restaurant were attributable to Attorney Defendant's advice to invest in a business in the United States, "even though they could not qualify for [investment] visas as long as they resided in the United States and were subject to immediate removal due to their unlawful status;" and (2) their noneconomic damages were caused by Attorney Defendant's "failure to advise them of the potential consequences for continuing to reside unlawfully in the United States and crossing the Canada-United States

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Ultimately, the Court held the fire was the cause of Yousif and Shamoon's loss, and it was not the result of Defendant Attorney's conduct or other intervening causes that were foreseeable.

border," even though Shamoon lied about the reasons he was reentering because he knew that he could be removed.

Defendant Attorney moved for summary disposition pursuant to MCR 2.116(C)(10) on the ground that his alleged professional negligence was not a proximate cause of Yousif and Shamoon's losses. The motion was granted and Yousif and Shamoon appealed.

Ruling: The Court of Appeals affirmed the trial court's ruling, holding Attorney Defendant did not commit malpractice because his actions were not a proximate cause of Yousif and Shamoon's claimed damages.

The Court began its analysis with a thorough discussion and citation of cases addressing foreseeability. Of course, a plaintiff in a legal malpractice case must establish proximate causation, which is composed of the two separate elements of "cause in fact" or "but-for causation," and "legal causation," which is dependent on foreseeability. To establish legal cause, a plaintiff must show his injury was the "natural and probable result of the negligent conduct." The Court focused on the foreseeability, or lack thereof, between Attorney Defendant's advice and the injuries suffered. In doing so, the Court honed in on the concept of "intervening" or "superseding" causes, holding that an "intervening cause breaks the chain of causation and constitutes a superseding cause which relieves the original actor of liability, unless it is found that the intervening act was 'reasonably foreseeable.'" Citing *Auto Owners Ins Co v Seils*, 310 Mich App 132, 157-158; 871 NW2d 530 (2015).

As to Yousif and Shamoon's claim that they lost their investment in the restaurant because of Attorney Defendant's advice, the Court reasoned that Yousif and Shamoon's claim was based purely on but-for causation, "without consideration of whether a business loss caused by fire was a natural and probable result of [Defendant Attorney's] allegedly erroneous advice." Ultimately, the Court held the fire was the cause of Yousif and Shamoon's loss, and it was not the result of Defendant Attorney's conduct or other intervening causes that were foreseeable. The Court noted that Attorney Defendant had no role in the fire or the subsequent denial of Yousif and Shamoon's insurance claim. Neither was foreseeable under the circumstances:

> It is significant to note that plaintiffs' reasoning would hold defendants liable for any adverse outcome that may result from investing in a business, including financial failure and physical proper[ty] damage, because 'opening a business always creates a risk that the owner may lose what he or she invested,' regardless of the investors' purpose in investing or the investors' residency status. However, contrary to plaintiffs' claims, these adverse events are not the **probable** and *natural* results of investing in a business, based on an attorney's advice, **for the purpose of obtaining visas**. [(Emphasis in original).]

As to Yousif and Shamoon's other theory that Shamoon's removal was caused by Attorney Defendant's lack of advice, the Court similarly found there was no proximate cause between the removal and Defendant Attorney's advice. The Court stated "the gravamen of plaintiffs' claim is a lack of knowledge regarding the consequences of their ongoing residence in the United States due to [Defendant Attorney's] drafting of the letter and failure to inform them of specific consequences of living in the United States." The problem, however, was that the "Record of Sworn Statement in Proceedings" taken when Shamoon was detained at the border demonstrated otherwise. Shamoon, instead of not knowing of the consequences of his continuing residence in the United States, confirmed that he knew that "(1) he did not have any legal status that would allow him to work and live in the United States; (2) he '[did not] have any legal papers' indicating a legal right to hold a permanent residence in the United States;" and (3) he made a false statement and told his brother to make a false statement to the border official. In light of such evidence, the Court found Shamoon's claim—that Defendant Attorney's advice led Shamoon to believe that he had legal authorization to enter the United States—was not supported by the record. "[Shamoon's] conduct revealed unequivocal knowledge of his illegal status and lack of proper documentation," and thus Defendant Attorney's advice could not be a proximate cause of his removal from the United States.

Practice Note: An attorney will not be liable for allegedly negligent advice that is the "but for" cause of a plaintiff's damages if those damages are not a probable and natural result of the advice.

Endnotes

1 The authors acknowledge the valuable assistance of Jason M. Renner, an associate of the firm.

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Medical Malpractice Report

Expert Qualifications and Extraneous Liability Allegations

Rock v Crocker, ____ Mich; __ NW2nd ___; 2016 WL 3147637 (June 6, 2016) (Supreme Court No. 150719).

Facts: In *Rock*, it was alleged that defendant orthopedic surgeon was negligent in the performance of a trimalleolar fracture repair of plaintiff's right ankle. Twelve separate allegations of medical malpractice were set forth in plaintiff's complaint and affidavit of merit. Plaintiff moved after the repair surgery and was treated by a different orthopedic surgeon. The subsequent treating physician agreed to serve as an expert witness. Although the subsequent treater was board certified at the time of the alleged malpractice (September/October 2008), he was no longer board certified at the time of trial.

Based upon the statutory language in MCL 600.2169(1)(a) pertaining to qualifications of board-certified experts, defendants moved to preclude the treater's trial testimony. The statute uses the present tense and requires that a board certified expert "be" a specialist who "is" board certified, suggesting that the requirement applies at the time the expert testifies. Defendants argued that the treater should be precluded from offering trial testimony based on the lack of current board certification. The trial court agreed with defendants' position and plaintiff sought relief with the Court of Appeals on an interlocutory basis.

Defendants also requested, via a motion in limine, that plaintiff be precluded from seeking recovery for damages on two of the twelve allegations of malpractice. Plaintiff's expert had testified that those two alleged breaches of the standard of care did not cause any injury to the plaintiff. The trial court denied defendants' motion in limine, finding the evidence could be relevant to the defendant surgeon's competency. The trial court concluded that the evidence was part of the *res gestae* (or essential facts) of the case. Consequently, defendants cross-appealed that ruling in the Court of Appeals.

The Court of Appeals interpreted MCL 600.2169(1)(a) as providing that plaintiff's subsequent-treating orthopedic surgeon could testify at trial, as an expert witness given that he was board certified at the time of the alleged malpractice. The Court of Appeals also allowed the expert testimony on the extraneous claims of breach of the standard of care, finding that the testimony might be relevant to the jury's understanding of the case and determination as to the defendants' competency as an orthopedic surgeon.

Defendants sought leave to appeal with the Michigan Supreme Court on both issues.

Ruling: Following oral argument, the Michigan Supreme Court vacated the Court of Appeals' ruling regarding admissibility of the allegations of breaches of the standard of care that did not cause injury and remanded the case back to the trial court for further analysis under MRE 404. The Supreme Court upheld the Court of Appeals' conclusion that the board-certification-qualification requirement in MCL 600.2169(1)(a) is based on board certification at the time of the malpractice and not at the time of the expert's testimony.

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The Supreme Court upheld the Court of Appeals' conclusion that the board-certification-qualification requirement in MCL 600.2169(1)(a) is based on board certification at the time of the malpractice and not at the time of the expert's testimony.

With regard to the admissibility of testimony surrounding allegations of malpractice that admittedly did not cause harm, the Supreme Court considered plaintiff's argument that the testimony might be relevant to defendants' expertise and competency. The Supreme Court noted that the trial court had done only a partial analysis of the issue. That is, the trial court only considered the balancing test contained in MRE 403 in determining that the testimony was relevant and not outweighed by unfair prejudice. The Supreme Court found the Court of Appeals' analysis to be missing the essential step of considering the legal, as opposed to logical, relevance of the evidence.

The Supreme Court considered MRE 401 and 402, stating that the relevance contemplated in those rules is "logical" relevance. *People v VanderVliet,* 444 Mich 52, 60; 508 NW2d 114 (1993). The Court noted that even if evidence is logically relevant under MRE 401 and 402, it may still be subject to exclusion under MRE 404. The Court described MRE 404 as a "rule of legal relevance, defined as a rule limiting the use of evidence that is logically relevant." *VanderVliet,* 444 Mich at 61-62.

MRE 404 entitled "Character Evidence Not Admissible to Prove Conduct," is what most practitioners know as the "other acts" rule. It is used substantially more in criminal cases than civil cases. However, MRE 404(a) and (b)(1) are applicable to civil proceedings. As the Supreme Court commented, "[C] ourts have barred propensity evidence in the context of medical malpractice." *Rock*, __ Mich at __ n7, citing *Wlosinski v Cohn*, 269 Mich App 303, 312; 713 NW2d 16 (2005). The *Wlosinski* court barred propensity evidence on the basis that it diverts the jury's attention from the facts and focuses it on the probability that the defendant, "who has made so many mistakes before, made one again." *Id.*

In analyzing whether other-acts evidence would be admissible in *Rock*, the Supreme Court noted that it must be offered for a proper purpose (not a propensity to act a certain way), be logically relevant, and not unfairly prejudice the defendants. The Supreme Court expressly stated that "other acts" or propensity evidence can never be admissible to prove that somebody had an inclination for wrongdoing in general.

The Supreme Court held that the testimony on the non-injury-producing alleged malpractice passed the "logical" relevance test under MRE 401 and 402 since it tended to demonstrate that the defendant had a propensity for negligence, including that which caused plaintiff's injuries. That is, evidence of the defendant's shortcomings and other acts over the course of the surgery and post-surgical care painted a picture of general incompetence making it appear more probable than not that the defendant was negligent when providing the care that caused plaintiff's injuries.

The Court went on to conclude that what made the evidence logically relevant under MRE 401 and 402, may make it legally irrelevant under MRE 404(b), because in *Rock* the proposed evidence would be used to show that the defendant physician had a propensity to breach the standard of care. The Supreme Court vacated the Court of Appeals' judgment that the evidence was admissible and directed the trial court to perform an analysis under MRE 404(b).

On the issue of board certification, the Supreme Court held that, despite the use of the present tense in MCL 600.2169(1)(a), the statute requires that an expert be board certified at the time of the alleged malpractice, not at the time of his or her testimony. The dispute concerning the statutory language was based on the fact that the statute, in describing the specialty requirement, contains the phrase "at the time of the occurrence that is the basis for the action," whereas the board-certification requirement does not contain such a phrase. That portion of the statute simply states that an expert must "**be**" a specialist who "**is**" board certified in that specialty, implying that the requirement is to be construed in the present tense i.e., at the time the testimony is offered. The trial court agreed with defendants' position on this issue, but both the Court of Appeals and Supreme Court disagreed.

In defendants' Supreme Court submission, the defense argued that the Court of Appeals essentially rewrote the statute in reaching its conclusion. The Supreme Court agreed that the Court of Appeals' analysis was flawed. It noted that in addition to strict construction of statutory language, a statute must be read and understood in its grammatical content and "read together to harmonize meaning." The Supreme Court's opinion was based on the plain language of the statute and "contextual clues from the surrounding provisions."

With reference to the statute's use of the present tense, i.e., that the expert "is"

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board certified, the Supreme Court noted that the statute also uses the present tense in describing the specialty requirement, which clearly refers to the time of the alleged malpractice; by definition, an event that has already occurred. The Supreme Court also relied upon the almost identical language that introduces the specialty and board-certification requirements. According to the *Rock* Court, "this suggests that the board certification requirement mirrors the specialty requirement and should be understood as an addition to the specialty requirement." The Supreme Court noted that the requirement of board certification at the time of the occurrence was consistent with its opinion in *Woodard v Custer,* 476 Mich 545, 560; 719 NW2d 842 (2006).

The Supreme Court looked back on its decision in *Halloran v Bhan,* 470 Mich 572, 578; 683 NW2d 129 (2004), in analyzing the Legislature's use of the word "however" as a transitional phrase between the specialty and board-certification requirements. The Supreme Court relied on *Halloran* to find that the board-certification requirement is additional and complementary to, rather than independent from, the specialty requirement. "[R]eading of the word 'however' thus supports reading the two sentences together so that both relate to the time of the occurrence that is the basis for the action."

The Supreme Court also looked to other contextual clues to support the interpretation of the requirement and the overall statutory scheme of MCL 600.2169, including the fact that subsections (1)(b) and (1)(c) both look back in time. The Court believed that, given the language in those subsections, as well as the first sentence of subsection (1)(a) in referring back to the time of occurrence, it was unlikely that the Legislature intended to refer to the time of testimony with respect to only the board-certification requirement portion of the statute. The Court concluded that it would have been an illogical departure from the remainder of the statutory scheme. The Court also looked at the pre-1993 version of the statute, which referred only to the time of the occurrence which was the basis for the action.

The Court pointed out that the Legislature could have repeated the phrase "the time of the occurrence" in the second sentence of 2169(1)(a), but chose not to since the rest of the statute makes it clear that the time of the occurrence is the relevant point in time. To repeat the phrase in every potential instance would have created an "unduly cumbersome statute."

Finally, the Supreme Court felt that its interpretation of MCL 600.2169(1)(a) was consistent with the medical-malpractice statute at section 600.2912d(1) with reference to qualifications of experts who sign affidavits of merit. Interpreting the board-certification requirement as applicable at the time of the occurrence allows plaintiffs to assure that their experts are qualified to sign those affidavits.

Practice Note: With reference to the extraneous breaches of the standard of care that admittedly did not cause harm, the most significant part of the Supreme Court's ruling was its rejection (in footnote 9) of the trial court's *res gestae* rationale for allowing the testimony. The Supreme Court took the "opportunity to highlight" (for both the trial court and the Court of Appeals) that it had ruled, in *People v Jackson,* 498 Mich 246, 274; 869 NW2d 253 (2015), that MRE 404(b)(1) does not have a "*res gestae* exception."

The Court held that to prevail on admission of the evidence, plaintiff must first show that "other acts" evidence is legally relevant under MRE 404(b). The rule expressly prohibits the use of evidence to show a general propensity for certain conduct. Plaintiffs must articulate another purpose for admission of the evidence. It is our belief that in the vast majority of medical-malpractice cases, plaintiffs will be hard pressed to articulate a proper purpose for admission of such evidence. The exemplar appropriate purposes contained in MRE 404(b)(1) include motive, opportunity, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident. Those concepts do not come into play naturally in medical-malpractice actions.

While the Supreme Court's decision on the expert qualifications issue could be deemed a "loss" for the defendants, it is actually a win for all practitioners in medical-malpractice litigation. Further, while the Court of Appeals was upheld in this instance, the Supreme Court opinion is a vast improvement over that of the Court of Appeals, which essentially rewrote the statute. The Supreme Court opinion was more directly rooted in, and faithful to, the statutory text. It also relied upon precedent appropriately and achieved clarity in the law. This clarity about the

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board-certification requirement, and the time at which it applies, will assist both sides in the future.

In summary, the *Rock* case, through the trial court's opinion, potentially opened the door for allowing evidence of extraneous claims of malpractice, which admittedly did not cause harm, as *res gestae* or essential to the case. Now, a plaintiff must first prove that such acts have legal relevance under MRE 404(b)(1) which specifically prohibits admission of evidence to prove character or propensity to act in a certain way. *Rock* will also provide guidance to both sides in future medical-malpractice actions regarding the qualifications of expert witnesses.

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No-Fault Report

Death Knell for the "Innocent Third Party" Rule—Insurer's Rescission of Coverage Extends to PIP Benefits for Innocent Third Parties!

By way of background, the author was counsel for Titan Insurance Company in the seminal Michigan Supreme Court case of *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012). In *Titan*, the Michigan Supreme Court ruled that a no-fault insurer could avail itself of the traditional-common-law remedies, including rescission and reformation, in cases involving misrepresentations in an insurance application.

In *Titan*, the insured misrepresented the status of her driver's license in an application for benefits. Due to the fraud that was perpetrated by the insured, Titan Insurance Company was allowed to reform its bodily-injury-liability limits down to the statutorily required minimum policy limits of $20,000/$40,000, notwithstanding the fact that the recovery of an "innocent third party" (in that case, the claimant who was injured as a result of the negligence of the insured) was affected. In ruling that Titan could reform or rescind coverage to the minimum $20,000/ $40,000 policy limits, the Supreme Court indicated that the insurer was free to utilize whatever common-law defenses were available, unless expressly prohibited by statute. The Supreme Court pointed out in a footnote that in the context of a bodily-injury claim, MCL 500.3009 requires that all policies sold in Michigan have liability limits of at least $20,000 per person or $40,000 per occurrence.

Titan was admittedly not a PIP case. Since *Titan* was decided, though, the author has been asked by a number of prominent defense attorneys and clients as to whether the rationale expressed by the Supreme Court in *Titan* could be extended to claims for first-party, no-fault insurance benefits involving "innocent third parties." Obviously, the stakes were substantial.

Imagine, for example, that the insured strikes a motorcyclist, resulting in serious injuries (or even death) to the motorcyclist. Under MCL 500.3114(5)(a), the insurer of the owner or registrant of the motor vehicle involved in the accident would occupy the highest order of priority for payment of the motorcyclist's no-fault benefits, which could easily be in the catastrophic range. However, if the policy is rescinded, due to a fraud in the application, why should the insurance company still face the prospect of paying out millions of dollars on a claim for the injured motorcyclist under a policy that never should have been issued?

The countervailing argument, of course, is that the innocent third party would need to then resort to a lower priority insurer or the Michigan Assigned Claims Plan, as the insurer of last resort. If the claim ends up with the Michigan Assigned Claims Plan, it will necessarily result in a higher assessment being charged to all Michigan motorists (who, after all, pay for the MACP claims), due to the influx of PIP claims involving an "innocent third party."

The Michigan Supreme Court weighed in on this issue when it instructed the Court of Appeals to hear an interlocutory appeal, filed by Sentinel Insurance

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Having disposed of the claim that the innocent-third-party rule is separate and distinct from the easily-ascertainable rule, the Court of Appeals then addressed the "public policy" rationale for maintaining the innocent-third-party rule.

Company, in *Bazzi v Sentinel Ins Co*, 497 Mich 886; 854 NW2d 897 (2014). The Michigan Supreme Court subsequently vacated two decisions of the Court of Appeals that had reached opposite conclusions regarding this issue. See *Frost v Progressive Mich Ins Co*, 497 Mich 980; 860 NW2d 636 (2015) (in which the Court of Appeals held that the carrier could rescind PIP coverage for an innocent third party) and *State Farm v Michigan Municipal Risk Mgmt Authority*, 498 Mich 870; 868 NW2d 898 (2015) (in which the Court of Appeals held that the carrier could not rescind PIP coverage for the innocent third party). The Supreme Court instructed the Court of Appeals to hold its decision in those cases in abeyance, pending its decision in *Bazzi*. Therefore, all eyes were on *Bazzi.*

Oral argument took place on December 9, 2015. Six months later, June 14, 2016, the Michigan Court of Appeals released its published opinion in *Bazzi v Sentinel Ins Co*, __ Mich App __; __ NW2d __; 2016 WL 3263905 (June 14, 2016) (Docket No. 320518). In a 2-1 decision, the Court of Appeals ruled that, in light of the broad holding in *Titan,* a no-fault insurer could rescind PIP coverage, even as to an "innocent third party," based upon the misrepresentations made by the insured. **In other words, the innocent-third-party rule has now been abrogated.**

The facts in *Bazzi*, as noted in the majority opinion authored by Judge David H. Sawyer, were as follows:

> Plaintiff Ali Bazzi ("plaintiff") is seeking PIP benefits for injuries sustained in an automobile accident while driving a vehicle owned by third-party defendant Hala Bazzi (plaintiff's mother) …. The vehicle driven by Bazzi was insured under a commercial automobile policy issued by defendant Sentinel Insurance to Mimo Investments, LLC. Sentinel maintains that the policy was fraudulently procured by Hala Bazzi and Mariam Bazzi (plaintiff's sister and resident agent for Mimo Investments) in order to obtain a lower premium due to plaintiff's involvement in a prior accident. Sentinel maintains that the vehicle was actually leased to Hala Bazzi for personal and family use, not for commercial use by Mimo, and, in fact, that Mimo was essentially a shell company that had no assets or employees or was not otherwise engaged in actual business activity. Sentinel also alleges as fraud that it was not disclosed that plaintiff would be a regular driver of the vehicle. In fact, Sentinel successfully pursued a third-party complaint against Hala and Mariam Bazzi seeking to rescind the policy based upon fraud. [*Bazzi*, slip opinion at p. 1.]

For purposes of its decision, the Court of Appeals assumed that Ali Bazzi was truly an "innocent third party." Given these facts, the Court of Appeals then held as follows:

> Resolution of this case begins and ultimately ends with our Supreme Court's decision in *Titan*. Although *Titan* did not involve a no-fault insurance claim for PIP benefits, we nonetheless are convinced that *Titan* compels the conclusion that there is no innocent third-party rule as to a claim for those benefits. That is, if an insurer is entitled to rescind a no-fault insurance policy based upon a claim of fraud, it is not obligated to pay benefits under that policy even for PIP benefits to a third party innocent of the fraud. [*Bazzi*, slip opinion at p. 3.]

The Court of Appeals' rationale for extending *Titan* into PIP claims is very interesting. First, the Court of Appeals had to address the issues raised by Judge Beckering's dissent. Judge Beckering argued that the innocent-third-party rule was separate and distinct from the "Easily Ascertainable" rule, which was abrogated by the Supreme Court in *Titan*. The easily-ascertainable rule prevented an insurer from rescinding optional coverages as to innocent third parties where the misrepresentation was "easily ascertainable." This rule, in turn, had its origins in the Court of Appeals' decision in *State Farm v Kurylowicz*, 67 Mich App 568; 242 NW2d 530 (1976). The Court of Appeals' majority concluded that, in fact, these "rules" were one and the same. The Court of Appeals noted that even if the easily-ascertainable rule and the "innocent-third-party rule were separate and distinct, they both had their origins in the *Kurylowicz* decision, which was overruled by the Supreme Court in *Titan*. The Court of Appeals noted that *Kurylowicz*'s progeny included *Ohio Farmers Ins Co v Michigan Mut'l Ins Co*, 179 Mich App 355, 445; NW2d 228 (1989), which did rely on the innocent-third-party rule. Therefore, because *Kurylowicz* was overruled, so too was *Ohio Farmers* and, with it, the innocent-third-party rule was abrogated.

Having disposed of the claim that the

In conclusion, what had been accepted as settled law for 30 years (according to Judge Beckering's dissent) has now been abrogated by the Michigan Court of Appeals.

innocent-third-party rule is separate and distinct from the easily-ascertainable rule, the Court of Appeals then addressed the "public policy" rationale for maintaining the innocent-third-party rule. In this regard, the Court of Appeals first quoted extensively from the Supreme Court's decision in *Titan* itself, regarding the proper role of the Judiciary *vis-à-vis* the Legislature:

> First, *Kurylowicz* justified the 'easily ascertainable' rule on the basis of its understanding of the 'public policy' of Michigan. In light of the Legislature's then recent passage of the no-fault act, MCL 500.3101 et seq., *Kurylowicz* reasoned that
>
> > 'the policy of the State of Michigan regarding automobile liability insurance and compensation for accident victims emerges crystal clear. It is the policy of this state that persons who suffer loss due to the tragedy of automobile accidents in this state shall have a source and a means of recovery. Given this policy, it is questionable whether a policy of automobile liability insurance can ever be held void *ab initio* after injury covered by the policy occurs.' [*Kurylowicz*, 67 Mich App at 574.]
>
> This 'public policy' rationale does not compel the adoption of the 'easily ascertainable' rule. In reaching its conclusion, *Kurylowicz* effectively replaced the actual provisions of the no-fault act with a generalized summation of the act's 'policy.' Where, for example, in *Kurylowicz's* statement of public policy is there any recognition of the Legislature's explicit mandate that, with respect to insurance required by the act, 'no fraud, misrepresentation, . . . or other act of the insured in obtaining or retaining such policy . . . shall constitute a defense" to the payment of benefits? MCL 257.520(f)(1). We believe that the policy of the no-fault act is better understood in terms of its actual provisions than in terms of a judicial effort to identify some overarching public policy and effectively subordinate the specific details, procedures, and requirements of the act to that public policy. In other words, it is the policy of this state that all the provisions of the no-fault act be respected, and *Kurylowicz's* efforts to elevate *some* of its provisions and *some* of its goals above other provisions and other goals was simply a means of disregarding the stated intentions of the Legislature. The no-fault act, as with most legislative enactments of its breadth, was the product of compromise, negotiation, and give-and-take bargaining, and to allow a court of this state to undo those processes by identifying an all-purpose public policy that supposedly summarizes the act and into which every provision must be subsumed, is to allow the court to act beyond its authority by exercising what is tantamount to legislative power. Third-party victims of automobile accidents have a variety of means of recourse under the no-fault act, and it is to those means that such persons must look, not to a judicial articulation of policy that has no specific foundation in the act itself and was designed to modify and supplant the details of what was actually enacted into law by the Legislature. [*Bazzi*, slip opinion at pp. 8-9.]

Given this observation, the Court of Appeals noted, in line with recent Michigan Supreme Court precedent, that public-policy decisions are left up to the Legislature, not the judiciary:

> The policy concerns raised by Citizens [the insurer assigned by the Michigan Assigned Claims Plan to adjust Ali Bazzi's claim for no-fault benefits] may well have merit. But it is for the Legislature, and not by this Court, to determine whether there is merit to those concerns and, if so, what is the appropriate remedy. While the Legislature might conclude that the appropriate response is to create an innocent third-party rule, it may choose to address the issue differently. While we can envision any number of policy issues, as well as solutions to those issues, we are judges, not legislators. It is for the Legislature, not this Court, to consider these issues and determine what, if any, response represents the best public policy. We decline the invitation to legislate into existence an innocent third-party rule that, thus far, the Legislature has chosen not to adopt. [*Bazzi*, slip opinion at p. 9.]

Accordingly, the Court of Appeals remanded the matter back to the Wayne County Circuit Court for a determination as to whether or not the misrepresentations made by Hala and Mariam Bazzi conclusively established fraud, or whether there were genuine

Given this observation, the Court of Appeals noted, in line with recent Michigan Supreme Court precedent, that public-policy decisions are left up to the Legislature, not the judiciary:

issues of material fact regarding the fraud issue.

The Court of Appeals majority again summarized its holding as follows:

> In sum, regardless whether there is one rule or two, and whether we consider a case involving liability coverage or PIP benefits, it all leads back to *Kurylowicz*, and the Supreme Court in *Titan* overruled *Kurylowicz* because *Kurylowicz* ignored the Supreme Court's decision in *Keys v Pace,* 358 Mich 74; 99 NW2d 547 (1959), which had itself involved arguably easily ascertainable fraud and an innocent third party. Accordingly, we conclude that: (1) there is no distinction between an "easily ascertainable rule" and an "innocent third-party rule," (2) the Supreme Court in *Titan* clearly held that fraud is an available defense to an insurance contract except to the extent that the Legislature has restricted that defense by statute, (3) the Legislature has not done so with respect to PIP benefits under the no-fault act, and, therefore (4) the judicially created innocent third party rule has not survived the Supreme Court's decision in *Titan*. Therefore, if an insurer is able to establish that a no-fault policy was obtained through fraud, it is entitled to declare the policy void *ab initio* and rescind it, including denying the payment of benefits to innocent third parties. [*Bazzi*, slip opinion at p. 10.]

Given the Court of Appeals' extensive reliance on *Titan* in the majority opinion, including the majority's express deferral of "public policy" concerns to the Legislature, it seems unlikely that the Michigan Supreme Court would entertain an application for leave to appeal, although one never knows.

Judge Boonstra issued an interesting concurring opinion. Judge Boonstra was on the panel of the Court of Appeals that decided *State Farm v Michigan Municipal Risk Mgmt Authority*, unpublished opinion per curiam of the Court of Appeal, issued February 19, 2015 (Docket No. 319710); 2015 WL 728652, which held that a no-fault insurer could not rescind PIP coverage even as to an "innocent third party." Judge Boonstra went to great lengths to explain his change of opinion. He explained that, after examining the briefs submitted by the parties on appeal (including the *amicus* briefs) and closely examining the Michigan Supreme Court's decision in *Titan*, he became convinced "that the judicially-created doctrine that has become known as the 'innocent third party rule' is indeed part and parcel of the 'easily ascertainable rule' that the Supreme Court abrogated in [*Titan*]." Judge Boonstra explained that an insurer is only obligated to pay benefits pursuant to a contract, and it makes no sense to enforce contractual liabilities against an insurance company in a case where, simply put, no contract exists! As stated by Judge Boonstra:

> Said differently, if, as *Titan* says, we must construe the insurance policy and the statute (here, the no-fault statute) together as though the statute is part of the contract, *id.*, and there is nothing in the statute to the contrary, the common-law fraud defense remains available to effect a rescission of the policy, and with it, the applicability of the statutory provisions that are otherwise incorporated into the contract. After all, if an insurer only has PIP obligations because it entered into a contract with its insured, and if it is entitled to rescind the contract because of the insured's fraud, then there is no basis for enforcing against this contracting insurer the statutory PIP liabilities that only derive (as to that insurer) from the contract that has been rescinded. [*Bazzi*, slip opinion at p. 4 (Boonstra, J. concurring).]

Lastly, Judge Boonstra pointed out that the innocent-third-party rule was based, in part, on a now-repealed statutory provision that used to be incorporated into fire insurance policies regarding the defense of fraud by the insured. See *Morgan v Cincinnati Ins Co*, 411 Mich 267; 307 NW2d 53 (1981). Simply put, Judge Boonstra, like Judge Sawyer, found no basis to continue to apply the innocent-third-party rule in the context of a claim for PIP benefits.

Judge Beckering authored a 19-page dissent. In her opinion, she expressed concerns over the timeliness of any given insurer's decision to rescind coverage even as to "innocent third parties," and alluded to the possibility that many individuals who would otherwise be entitled to no-fault benefits could be left without a claim for no-fault benefits, should the insurer rescind after the one-year notice provision set forth in MCL 500.3145(1). As noted by Judge Beckering:

> Furthermore, I am not convinced that it is equitable to require the innocent third-party otherwise covered by a policy to seek PIP

In a 2-1 decision, the Court of Appeals ruled that, in light of the broad holding in *Titan*, a no-fault insurer could rescind PIP coverage, even as to an "innocent third party," based upon the misrepresentations made by the insured. **In other words, the innocent-third-party rule has now been abrogated.**

benefits through the assigned claims plan in the event the insurance carrier claims fraud by the procurer and seeks rescission, as Sentinel contends should occur in this case. As Sentinel impliedly concedes in its briefing, the payment of benefits through the assigned claims plan might be unavailable for certain innocent third parties. And I note that statutory deadlines for giving notice of claimed PIP benefits could prevent an innocent third party, through no fault of his or her own, from receiving mandatory PIP benefits. Notably, a person claiming benefits through the assigned claims plan "shall notify" the assigned claims plan of his or her claim within one year. See MCL 500.3174; MCL 500.3145(1). See also *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219, 225-226; 779 NW2d 304 (2009) (examining MCL 500.3145(1) and MCL 500.3174). I pose the question of: what happens when an innocent third party tries to obtain PIP benefits through the insurer listed on the policy, only to have that insurer subsequently rescind the policy based on fraud in which the innocent third party did not participate, and the innocent third party then misses the one-year deadline for notifying the assigned claims plan? At least one panel on this Court has held that, unless notice is given to the assigned claims plan within one year of the accident, the claim is barred, even when the injured person first sought benefits from what she thought was the correct insurer. See *Visner v Harris*, unpublished opinion per curiam of the Court of Appeals, issued December 6, 2012, (Docket No. 307507). This bolsters the position that permitting the remedy of rescission with regard to PIP benefits payable to innocent third parties has the potential to work an inequitable result. Moreover, allowing insurance companies to rescind their contracts with respect to PIP benefits owed to innocent third parties could encourage gamesmanship and delay tactics on the part of an insurer; insurance companies are the recipients of claims under the assigned claims plan, and waiting to rescind an insurance policy until after the assigned claims plan claim deadline passes means fewer claims filed under the assigned claims plan. This also runs afoul of the no-fault act's purpose of ensuring prompt and adequate payment for the types of injuries and losses encompassed under the category of PIP benefits. [Citation omitted]. Put simply, I do not agree that the equitable remedy of rescission trumps the equitable remedy of the innocent third-party rule such that it is appropriate to apply to first-party statutorily mandated PIP benefits, and I decline to extent *Titan* in such a fashion. [*Bazzi*, slip opinion at pp. 18-19 (Beckering, J. dissenting).]

Instead, Judge Beckering would reaffirm case law dating back 30 years and maintain the innocent-third-party rule as is.

So Now What?

First, it is unknown at this time whether the claimants or the MACP-assigned insurer will file an application for leave to appeal with the Michigan Supreme Court. For our part, we will be monitoring further filings on this case in the next few weeks. Claimants and the MACP-assigned insurer filed motions for reconsideration.

Second, the insurer is still obligated to prove that it has a valid basis for rescinding coverage. Generally speaking, an insurer must demonstrate some type of fraud or misrepresentation (and these are not necessarily one and the same) in the application, and show that if the true state of affairs had been made known, the insurance company either would not have accepted the risk, or would have charged a higher premium. See, e.g., *21st Century Ins Co v Zufelt*, __ Mich App __; __ NW2d __; 2016 WL 2992523 (May 24, 2016) (Docket No. 325657) (holding that a failure to disclose moving violations in an application for insurance justified rescission of the policy, even though the policy had been subsequently renewed).

Third, the timing of the insurer's decision to rescind coverage should be carefully examined. For those claims that are less than a year old, an insurer is now free to rescind coverage as to "innocent third parties." In the rescission letter sent to the "innocent third party," the no-fault insurer should, as a matter of good business practice, provide the "innocent third party" with the contact information for the Michigan Assigned Claims Plan. If a lower priority insurer is known to the rescinding insurer, it would probably be a good idea to point out that information to the claimant as well.

Fourth, what about claims that are over one-year old? This remains an open question. At this point, it is too early to

Judge Beckering authored a 19-page dissent. In her opinion, she expressed concerns over the timeliness of any given insurer's decision to rescind coverage even as to "innocent third parties,"

tell whether the Michigan Assigned Claims Plan will agree to accept claims that are over one-year old from rescinding insurers. After all, MCL 500.3174 makes it clear that the Michigan Assigned Claims Plan must be placed on notice of a claim for no-fault benefits within one year from the date of accident. If the Michigan Assigned Claims Plan were to agree to accept these claims notwithstanding the one-year notice provision (referenced above), so much the better. If, however, the MACP declines to accept such claims, would Judge Beckering's predictions about "innocent third parties" suddenly having no coverage become true? What about the argument that because rescission is an equitable remedy, the rescinding insurer cannot have "unclean hands"? The author recommends that an insurance company faced with this decision should be on the watch for a counter-argument to the effect that it is acting "inequitably" when it rescinds coverage, and it is too late for the injured Claimant to obtain his or her benefits from another source.

Perhaps the middle ground in cases where the insurer attempts to rescind more than one year post-accident is for the MACP or the next higher priority insurer to pick up the claim, so that a legitimately injured "innocent third party" is not left without benefits. The MACP or next highest priority insurer would have to agree to waive application of the one-year notice provision set forth in MCL 500.3145(1) (as to policy insurers) and MCL 500.3174 (as to MACP insurers). At that point, the lower priority insurer or the MACP would file a subrogation action against the rescinding insurer, challenging its ability to rescind more than one year post-accident. Given the scope of the *Bazzi* decision, it will be interesting to see how these issues work themselves out.

Finally, we can expect to see more claims being filed with the Michigan Assigned Claims Plan. Contrary to Judge Beckering's opinion, not all insurers participate in the Michigan Assigned Claims Plan system. Currently, there are only seven insurers who participate as assigned insurers for the MACP. Those insurers can certainly expect to see an increase in the claims being handled by the MACP and, of course, more litigation.

In conclusion, what had been accepted as settled law for 30 years (according to Judge Beckering's dissent) has now been abrogated by the Michigan Court of Appeals. As noted above, there are certainly competing public policy perspectives from the points of view of the rescinding insurer, the MACP, and the injured "innocent third party." For rescinding insurers, they are no longer "on the hook" to pay potentially millions of dollars in claims to "innocent third parties" under a policy that either never should have been issued in the first place, or would have been issued only in exchange for payment of a higher premium. From the standpoint of the MACP and its assigned insurers, we can expect to see higher claims payouts, as the responsibility for handling claims of "innocent third parties" are shifted away from rescinding insurers and on to either a lower priority insurer or, more likely, the MACP as the insurer of last resort. To the extent that the MACP assumes handling of these claims, we can expect to see an increase in the statutory assessments that are utilized to fund the operation of the MACP and its claims payments. From the standpoint of the injured "innocent third party," it remains to be seen whether or not the insurer will actually rescind coverage on a claim that has been paid for more than one year and, if so, how the MACP or a lower priority insurer will react to such a move. It will be interesting to see how matters shake out in the next few years. Whatever perspective the reader may have, perhaps the following quote from Joseph Chamberlain says it all:

> I think that you will all agree that we are living in most interesting times. I never remember myself a time in which our history was so full, and which day by day brought us new objects of interest, and let me say also, new objects for anxiety.

By: Emory D. Moore, Jr., *Clark Hill, PLC*
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Supreme Court Update

A Former Law Firm Member Cannot Avoid a Mandatory Arbitration Clause by Suing Law Firm Leadership in Their Individual Capacities.

On June 13, 2016, the Michigan Supreme Court held that a binding arbitration agreement between a law firm and a former member applies to a dispute between the former member and other members when the dispute relates to actions the other members took as agents of the firm. *Altobelli v Hartmann*, ___ Mich ___; ___ NW3d___ (2016); 2016 WL 3247615 (Docket No. 150656).

Facts: Upon joining the law firm Miller, Canfield, Paddock and Stone, P.L.C. ("the firm"), plaintiff Dean Altobelli signed an Operating Agreement that included a clause mandating arbitration of disputes between the firm and any current or former members. In 2010, plaintiff requested a 7 to 12-month leave of absence to take a position as an assistant coach for the University of Alabama football team. The request was made to the firm's CEO and the head of the firm's litigation group. When the CEO rejected the request, plaintiff sent the request to the firm's managing directors. Asserting that this request was a voluntary withdrawal from equity ownership in the firm, the managing directors ultimately terminated plaintiff's membership. Claiming that such termination was wrongful, plaintiff filed a demand for arbitration in accordance with the Operating Agreement's mandatory arbitration clause. Despite having requested arbitration, and while in the process of selecting arbitrators, plaintiff filed a lawsuit against the CEO, the head of litigation, and the managing directors. He alleged that they engaged in tortious conduct with respect to his leave request, including breach of fiduciary duty, illegal shareholder oppression, conversion, bad-faith misrepresentation, tortious interference with a business relationship or expectancy, and civil conspiracy. The lawsuit did not name the firm as a defendant.

Defendants moved for summary disposition and for an order compelling arbitration pursuant to the mandatory arbitration clause. The trial court denied defendants' motions and granted a motion for partial summary disposition that plaintiff filed. The Court of Appeals, in a published opinion, affirmed the denial of defendants' motion to compel arbitration, finding that the arbitration clause only mandated arbitration of disputes between "the Firm" and "a Principal" and that plaintiff's claims were against defendants in their individual capacities. The Court of Appeals, however, reversed the trial court's grant of partial summary disposition to plaintiff, finding that genuine issues of fact remained.

Ruling: The Michigan Supreme Court reversed the Court of Appeals' ruling on the motion to compel arbitration, and vacated the decision relating to plaintiff's motion for partial summary disposition. As a matter of first impression, the Court found that agency principles apply when determining who is covered under arbitration agreements. Under agency principles, because a firm is not a physical being and cannot act on its own, the acts of its agents, within the scope of their employment, are the acts of the firm. Because members of limited liability companies are considered managers and agents of the companies under the Michigan Limited Liability Company Act (MCL 450.4101 - 450.5200), the defendants are agents of

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[A] binding arbitration agreement between a law firm and a former member applies to a dispute between the former member and other members when the dispute relates to actions the other members took as agents of the firm.

the law firm and must be included within the meaning of "the Firm" in the arbitration clause. Each of plaintiff's allegations being either based upon the Operating Agreement or actions/decisions defendants made as agents of the firm, the dispute falls within the scope of the broad arbitration clause. Thus, the Court concluded that plaintiff's dispute is subject to binding arbitration and the lower courts should not have reached the merits of plaintiff's motion for partial summary disposition.

Practice Note: The Supreme Court corrected potentially dangerous precedent set by the Court of Appeals that could have significantly eroded the protections members of limited liability entities rely upon in managing such entities.

Overturning Precedent from 1923, the Michigan Supreme Court Rules That It Is Not Unconstitutional for Municipalities to Enact Prevailing Wage Laws.

On May 17, 2016, the Michigan Supreme Court held that municipalities are not precluded by the Michigan Constitution from enacting ordinances that control the wages and benefits contractors performing work for the municipality must pay their workers. *Associated Builders & Contrs v City of Lansing*, 499 Mich 177; ___NW2d___ (2016); 2016 WL 2888719 (Docket No. 149622).

Facts: The City of Lansing ("the city") enacted an ordinance requiring that contractors with construction contracts with the city pay workers the prevailing wages and fringe benefits for the corresponding classes of workers, as determined by the U.S. Department of Labor. The plaintiff, a trade association, filed a lawsuit challenging the ordinance as unconstitutionally exceeding the city's authority. The trial court granted summary disposition to plaintiff based on *Attorney General ex rel Lennane v Detroit*, 225 Mich 631; 196 NW 391 (1923), an analogous case holding that a city may not enact ordinances governing wages paid to third-parties working on municipal-construction contracts.

In a published, split opinion, the Court of Appeals reversed. The court recognized *Lennane*'s holding, but declined to apply it. The court reasoned that *Lennane* was obsolete and inapplicable because developments in the law had undercut the decision, including the ratification of a new state constitution in 1963 which does not support *Lennane* like the Constitution of 1908 did. The dissent argued that the court was required to follow *Lennane* because it was never overturned by the Supreme Court or legislatively.

Ruling: The Michigan Supreme Court affirmed the result, but vacated the opinion of the Court of Appeals. The Court expressly overruled *Lennane*, stating that "if *Lennane*'s holding was ever on firm constitutional ground, it no longer had sound footing after the people ratified the 1963 Constitution." The Court explained that, while it was possible for the Court in *Lennane* to read the 1908 Constitution as providing municipalities with only those powers expressly granted to them, such a reading of the 1963 Constitution would not be reasonable. The 1963 Constitution expressly provides that provisions of the Constitution concerning municipalities "shall be liberally construed in their favor" and powers granted to them "shall include those fairly implied and not prohibited by this constitution." More importantly, the Constitution of 1963 provides that a municipality "shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law." In light of this, the Court found that "the wages paid to employees of contractors working on municipal contracts have a self-evident relationship to 'municipal concerns, property, and government.'" As such, the Court found that nothing in Lansing's prevailing-wage ordinance is unconstitutional. Nonetheless, the Court vacated the Court of Appeals' opinion, because the Court of Appeals had no authority to anticipatorily ignore *Lennane*, and was bound to follow it since it was never explicitly superseded by legislative action or overruled by the Michigan Supreme Court.

Practice Note: While providing useful clarification of the constitutional authority municipalities possess in governance, the impact of this decision as to municipal-prevailing-wage laws is lessened by legislation enacted which prohibits local governmental bodies from adopting such prevailing wage laws unless by voluntary agreement with the contractor. See MCL 123.1385 and 123.1386. This legislation, however, does not apply to ordinances adopted prior to January 1, 2015. As such, and in light of this decision, Lansing and many other municipalities will be allowed to maintain their prevailing-wage laws.

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Court Rules Update

By: M. Sean Fosmire, *Garan Lucow Miller, P.C.*
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Michigan Court Rules Adopted and Rejected Amendments

For additional information on these and other amendments, visit the Court's official site at

http://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Pages/default.aspx

ADOPTED AMENDMENTS

2014-09 — Citation to unpublished decisions of the Michigan Court of Appeals

Rules affected: MCR 2.119, 7.212, 7.215
Issued: March 23, 2016
Effective: May 1, 2016

The substance of the amendment is to discourage but not prohibit citation to unpublished decisions. The following language was added to MCR 7.215-C:

Unpublished opinions should not be cited for propositions of law for which there is published authority. If a party cites an unpublished opinion, the party shall explain the reason for citing it and how it is relevant to the issues presented.

As proposed, the amendment would have affected only MCR 7.215, and thus would be applicable only to appellate briefs. As adopted, the order also amends MCR 2.119, extending the same rule to briefs filed before trial courts.

2014-27 — Timing of subpoenas

Rule affected: MCR 2.305-A-1
Issued: May 25, 2016
Effective: September 1, 2016

Extends the current rule under MCR 2.306-A-1, prohibiting depositions of a party until the party has had a reasonable time to secure the assistance of an attorney, to subpoenas.

2014-04 — Communicating with client during deposition

Rule affected: MCR 2.306
Issued: May 25, 2016
Effective: September 1, 2016

The prohibited communication between attorney and client while a question is pending is extended to text messages, email messages, and other electronic communication.

Rejected

Proposal 2014-13, which would have reduced the time for acceptance or rejection of case evaluation from 28 days to 14 days, was not adopted.

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

Meet the MDTC Leaders

A key component of MDTC's mission is facilitating the exchange of views, knowledge, and insight that our members have obtained through their experiences. That doesn't happen without interaction. And interaction doesn't typically happen until you've been introduced. So, in this section, we invite you to meet the new (and, possibly, some not-so-new) MDTC leaders who have volunteered their time to advance MDTC's mission.

MEET: Kimberlee Hillock

Kimberlee A. Hillock is a shareholder and a co-chairperson of Willingham & Coté, P.C.'s Appellate Practice Group. She is a former associate editor of and regular contributor to the Michigan Defense Quarterly, and she is currently chairperson of the MDTC Amicus Committee. Before joining Willingham & Coté, P.C., Ms. Hillock worked as a research attorney and judicial clerk for the Honorable Donald S. Owens of the Michigan Court of Appeals, and as a judicial clerk for the Honorable Chief Justice Clifford W. Taylor of the Michigan Supreme Court. Since joining Willingham & Coté P.C., in 2009, Ms. Hillock has achieved favorable appellate results for clients 48 times in both the Michigan Court of Appeals and the Michigan Supreme Court in areas such as premises liability, negligence, insurance coverage, no-fault, tax, probate, family law, child custody, and equine liability. Her most notable successes have included *Spectrum Health Hosp v Farm Bureau Mut Ins Co*, 492 Mich 503; 821 NW2d 117 (2012), and *Admire v Auto-Owners Ins Co*, 494 Mich 10; 831 NW2d 849 (2013). She has more than 12 years' experience in appellate matters and is a member of the Michigan Supreme Court Historical Society Advocates Guild. Ms. Hillock is a veteran of the United States Marine Corps, and she served during Operation Desert Storm. She currently volunteers as a Veteran Mentor in the Ingham and Eaton County Veteran's Treatment Courts.

More about Kimberlee

Q: *Why did you become a lawyer?*

A: I decided in ninth grade, with all the idealism ninth graders possess, that I needed to make a difference in the world, not merely exist. Given my lack of artistic ability, and my general dislike of math and science, I decided that the best way to make a difference was to become a lawyer.

Q: *What's the most unusual thing in your desk drawer?*

A: A challenge coin I received from the Michigan State Commander of the American Legion, and a challenge coin I received from the Ingham County Veterans' Treatment Court. For those without a military background, a challenge coin is a small coin bearing an organization's insignia, and carried by the organization's members. These coins are used by the modern U.S. military to recognize acts worthy of recognition but without sufficient import to merit a medal.

Q: *If you weren't doing what you do today, what other job would you have?*

A: I would love to be a landscape architect. There is something imminently satisfying about having one's hands in the dirt and creating something beautiful.

Q: *What "lesson from mom" do you still live by today?*

A: What others do reflects on them. What I do reflects on me.

Q: *What are your hobbies and interests outside of work?*

A: Landscaping, gardening, painting, and participating in Tough Mudder events. With regard to Tough Mudder, I do this with a bunch of veterans from all across the country. We pick a military organization to support, and wear the shirt of that organization. The first one was in Michigan, and we supported the Chris Kyle Foundation. Last year was in Virginia, and we supported Marcus Luttrell's Lone Survivor Foundation, with its motto, "Never Quit." This year, we are running the Tough Mudder in New Hampshire. We are supporting the Nine Line Foundation, which is a charitable organization dedicated to meeting the financial and specialized needs of severely injured military and their families. In combat, a Nine Line is an emergency medevac request. Our team name this year is "Kicking 6 4 22." "22" refers to the 22 veterans who commit suicide every day. "Kicking 6" loosely means kicking butt. (In the military, direction is indicated as if one is standing in the middle of a clock. 12 o'clock is directly in front of a person, 3 o'clock is to the person's right, etc.).

Q: *What has been your greatest challenge or reward in your practice?*

A: I live for the win. The adrenaline rush is addictive.

How to contact Kimberlee

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MEET: Michael J. Pattwell

Michael J. Pattwell is a Member in Clark Hill's Litigation, Political Law, and Environment, Energy, & Natural Resources Groups. His practice focuses primarily on complex commercial, environmental, and political litigation and due diligence matters. He has served both the State of Michigan as a Special Assistant Attorney General and the State of West Virginia as Minority Counsel to House of Delegates. He is a board member of the Federalist Society and has been named a rising star by Super Lawyers. Prior to joining Clark Hill, Michael served as Law Clerk to the Honorable David A. Faber, U.S. District Court for the Southern District of West Virginia.

More about Michael

Q: *Why did you become a lawyer?*

A: Besides a litany of John Grisham books, Aaron Sorkin's "A Few Good Men," and generally wanting to be able to get my friends out of speeding tickets, I had always liked strategy and problem solving. Also, growing up, I was fortunate to have mentors who were themselves lawyers. So, while doing odds and ends around their law offices, I was able to develop an appreciation for the trust and responsibility embodied in the attorney-client relationship and the effectiveness of the rule of law.

Q: *What's the most unusual thing in your desk drawer?*

A: Most definitely, the shot glass gifted to me by the office janitors . . . . Great guys.

Q: *If you weren't doing what you do today, what other job would you have?*

A: Hands down, high school football coach. Always wanted to coach.

Q: *What "lesson from mom" do you still live by today?*

A: Organization. Organization. Organization.

Q: *If you could be any animal what would it be and why?*

A: I have no idea. Probably a dog. They seem to have a very relaxed life.

Q: *What are your hobbies and interests outside of work?*

A: A few months ago, I would have told you golfing, skiing, fishing, etc. But now, as a new father, I've got to admit that hanging out with my son Jack is the best hobby ever.

Q: *What has been your greatest challenge or reward in your practice?*

A: The most rewarding part of my practice has actually not been the big cases and deals you find at a larger law firm. For whatever reason, the small day-to-day stuff for friends and family has been the most rewarding.

How to contact Michael

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MDTC Calendar of Events

2016

March 29	Board Meeting - Okemos
April 7	MDTC – Defense Network – Lansing
May 12-14	Annual Meeting – The Atheneum, Greek Town
June 9	General Liability Law Section – Webinar
September 9	Golf Outing - Mystic Creek Golf Club, Milford
September 26	Board Meeting – Okemos
September 21-23	SBM Annual Meeting – Grand Rapids
September 21	Respected Advocate Award Presentation – Grand Rapids
October 1	EID/Golden Gavel Award Deadline
October 6	MDTC Meet the Judges – Sheraton, Novi
October 19-23	DRI Annual Meeting – Sheraton, Boston, MA
November 10	MDTC Board Meeting – Sheraton, Novi
November 10	Judicial Award Recipient Selected
November 10	Past Presidents Dinner – Sheraton, Novi
November 11	Winter Meeting – Sheraton, Novi

2017

February 3	Future Planning – Amway Grand Plaza Hotel
February 4	Board Meeting – Amway Grand Plaza Hotel
March 2	Board Meeting – TBA
March 2	Awards Banquet – TBA
June 22-24	Annual Meeting – Shanty Creek, Bellaire
Sept 27-29	SBM – Annual Meeting – Cobo Hall, Detroit
October 4-7	DRI Annual Meeting – Sheraton, Chicago
November 9	MDTC Board Meeting – Sheraton, Novi
November 9	Past Presidents Dinner – Sheraton, Novi
November 10	Winter Meeting – Sheraton, Novi

2018

May 10-11	Annual Meeting & Conference – Soaring Eagle, Mt. Pleasant
October 17-21	DRI Annual Meeting - Marriott, San Francisco
November 8	MDTC Board Meeting – Sheraton, Novi
November 8	Past Presidents Dinner – Sheraton, Novi
November 9	Winter Meeting – Sheraton, Novi

2019

June 20-22	Annual Meeting – Shanty Creek, Bellaire

MDTC Member Profile

Name: Lindsay Dangl

Law Firm/Employer: Murphy & Spagnuolo, P.C.

1. Why did you become a lawyer? I first had interest in the profession when my uncle, who is a trial lawyer, took me to court for a "take your daughter to work day" event. A courtroom just felt like the right place for me. It is a job that requires a lot of creative thinking and I like to be challenged.

2. What is the nature of your practice? I focus my practice on civil litigation and most of my practice involves insurance defense. I enjoy this work because I get to learn about a lot of different situations. I've been involved in everything from personal injury fraud to sewer litigation to farming equipment to go karts. Always interesting and keeps me on my toes.

3. Tell us something you're passionate about (personal or professional). My biggest passion is doing what I can to ensure those in our community, especially children, never want for basic needs and giving back to the community. I am active with the Junior League of Lansing and our current focus on ensuring individuals in our community have access to food and shelter. Through my volunteer work I've learned that many who live within a few minutes of my house do not have access to these basic things I often take for granted.

4. What do you like about practicing law? Always learning something new and facing a new challenge.

5. What don't you like about practicing law? The hours away from my family.

6. What has been your greatest challenge or reward in your practice? The biggest challenge is probably working with clients with unrealistic expectations or who have goals which cannot be accomplished by litigation. Working through those procedural issues while still accomplishing the best result I can for the client is a big challenge.

7. What has been one of your most significant accomplishments (personal or professional?) Professionally, the most significant accomplishment to me was getting a no cause jury verdict at my first jury trial. There was no bigger professional rush than knowing after all of that hard work, I could persuade six other individuals to understand my client's position. Personally, my most significant accomplishments are my close relationships with family and friends.

8. What are your hobbies and interests outside of work? I participate in numerous groups like the Junior League of Lansing, the Ingham County Bar Association, and Women Lawyers of Michigan. I enjoy volunteering at the MSU College of Law and assisting law students starting out their legal careers. My "me time" is spent working out. I completed a marathon last year and have a triathlon planned for this summer. I also spend time with my family every chance I get.

MDTC E-Newsletter Publication Schedule

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

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Michigan Defense Quarterly Publication Schedule

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

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MDTC Member Victories

MDTC members are among the best and most talented attorneys in Michigan. In this section, we highlight significant victories and outstanding results that our members have obtained for their clients. We encourage you to share your achievements. From no-cause verdicts to favorable appellate decisions and everything in between, you and your achievements deserve to be recognized by your fellow MDTC members and all of the *Michigan Defense Quarterly*'s readers.

No-Cause Verdict—Richard A. Joslin, *Collins Einhorn Farrell, PC*

A Macomb County jury returned a no-cause-of-action verdict in favor of an insurance agency on February 4, 2016. In the case of *Sheeran v Brinch Agency*, the plaintiff was a landlord who discovered that a tenant died in one of her apartments at least two weeks before the body was discovered. The plaintiff hired a company called Aftermath to clean the apartment after the body was removed. Aftermath charged more than $62,000 to remediate the apartment. The insurance company denied the claim and the plaintiff sued her insurance agent, claiming that the agent should have sold her an "All-Perils" policy and that the agency had negligently misrepresented to her that the cost of cleanup would be covered under her policy. The insurer was dismissed by way of summary disposition and the case proceeded to trial against the agent only.

Defendant, represented by Collins Einhorn Farrell attorney Rick Joslin, argued that its records showed the claim was first reported after the Aftermath remediation was complete and that the agency could not have told plaintiff the cost of cleanup was covered because the agency was closed for the long holiday weekend.

After three hours of deliberation, the jury returned a no-cause-of-action verdict.

MEMBER NEWS

Work, Life, and All that Matters

The Land Conservancy of West Michigan is excited to introduce **Joe Engel**, who will be starting as the new Executive Director in August. A native of Muskegon, Joe spent much of his youth exploring the dunes and shoreline just over the hill from his back dunes home. His love of nature–and a like-minded family–led to fishing, camping, and hiking throughout both peninsulas and ultimately fostered a lifelong love of the outdoors that has taken him to all 50 states. Having seen Mt. Denali on a clear day in Alaska, and soaked his feet in the Colorado River at the bottom of the Grand Canyon, Joe will tell you it's still tough to match the beauty of a brown trout rising through the morning mist on the Pere Marquette River.

> "The Land Conservancy is blessed to have talented, passionate staff–and donors and volunteers–who are second to none. I am excited about building on their past efforts and look forward to moving ahead with incredible new opportunities for engaging folks in conserving the many, natural gifts in our eight county piece of heaven."

An attorney by training and vocation, Joe has been involved in numerous environmental and conservation organizations throughout his life. He has been a supporter of the Land Conservancy for the past decade, and more recently has served on its board and executive committee. Joe is passionate about protecting our forests and watersheds, and is committed to working with staff, volunteers, and donors in making sure our children will always have access to "nature nearby" in West Michigan.

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 Michael Cook (Michael.Cook@ceflawyers.com) or Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).*

MDTC Member Victories

No-Cause Verdict—Gary C. Rogers and Shaina Reed, *Fraser Trebilcock Davis & Dunlap, P.C.*

An Ingham County jury returned a no-cause-of-action verdict in favor of a downtown Lansing bar doorman and a bartender on June 23, 2016. The 11-day trial was tried as a wrongful-death action. The successful defense of the doorman and bartender was carried out by Gary C. Rogers and Shaina Reed, both of Fraser Trebilcock Davis & Dunlap, P.C., and Christian Odlum of Hackney Grover.

The plaintiff's complaint demanded $5,000,000, alleging that the defendants, together with a third, previously defaulted defendant, were negligent in evicting the decedent from the bar, and for participating in a brawl that proceeded from the sidewalk in front of the bar down the street. The alleged brawl occurred in the early morning hours of January 1, 2012. Plaintiff's decedent, a 30-year-old male, sustained an 11 cm skull fracture with an impact point behind his right ear and was declared brain dead on January 3, 2012. Plaintiff sought damages for conscious pain and suffering, fright and shock, economic damages relating to medical expenses and funeral costs, as well as loss of society and companionship to the present and the future. The estate consisted of decedent's father, mother, and three younger siblings.

The jury found the defaulted defendant 80% liable for the wrongful death, and decedent 20% comparatively negligent for his own death. The jury awarded the plaintiff $378,000 against the defaulted defendant, which reduced to present value was approximately $200,000.

Testimony suggested that there was a verbal confrontation between the decedent and members of another group of patrons inside the bar. There was testimony that in response to the confrontation, the defaulted defendant approached the decedent and his group brandishing a collapsible baton. The decedent and his group were then escorted from the bar without further confrontation. There was testimony that the defaulted defendant was also either escorted out, or left on his own around the same time.

Once outside the bar, there was an additional verbal confrontation. The defendants presented evidence that the decedent approached and likely head-butted the bartender, which lead to a further altercation. The plaintiff argued that the head-butt never occurred and suggested a cover up by the defendants. The plaintiff further argued that the defendants chased after the decedent, throwing punches and/or kicks at him as the brawl continued down the street. The plaintiff argued that the decedent did nothing to provoke this attack, and that the defendants descended upon the decedent and collectively beat him to death. The defendants argued that the altercation was precipitated by the decedent's head-butt to the bartender. The doorman admitted to delivering a single punch to the mouth of decedent after blocking a punch from him. The plaintiff argued that this punch sent decedent to the ground, causing the skull fracture. The defendants argued that this street fight was unforeseeably escalated to a murder by the defaulted defendant, who independent witnesses observed striking decedent in the head with a baton. Both the doorman and bartender admitted at trial that they were not initially truthful when interviewed by investigating police officers. The defaulted defendant was convicted of second-degree murder prior to the civil trial and is serving a lengthy prison sentence. The plaintiff argued in accordance with the pathologist's autopsy report, that the skull fracture was likely caused by an acceleration/deceleration injury such as falling from a standing height. The treating critical-care surgeon testified that of the 9,000 critical-care patients he had treated, only 6 had similar skull fractures and none of those were caused by a fall from a standing height.

To share an MDTC Member Victory, send a summary to Michael Cook (Michael.Cook@ceflawyers.com).

MEMBER TO MEMBER SERVICES

This section is reserved for the use of MDTC members who wish to make services available to other members.
The cost is $75 for one entry or $200 for four entries. **To advertise, call (517) 627-3745 or email Michael.Cook@ceflawyers.com**.

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

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