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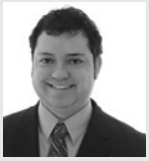

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All articles published in the Michigan Defense Quarterly reflect the views of the individual authors. The Quarterly always welcomes articles and opinions on any topic that will be of interest to MDTC members in their practices. Although MDTC is an 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).

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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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MDTC Behind the Scenes: Future Planning and Implementation

Like me, I'm sure many of you tuned in to watch the 2016 Olympic Games in August. Swimming and gymnastics are my personal favorites, and Rio did not disappoint. The most decorated Olympian of all time, Michael Phelps, added five gold medals and one silver medal to his repertoire. American gymnast Simone Biles tumbled her way to five medals in her Olympic debut. Their remarkable talent made excelling in their respective sports look easy. But what we saw on television was only the "implementation" part of the process; what television coverage failed to capture were the years of intense preparation leading up to the Olympic Games. In other words, the "planning."

The MDTC is not dissimilar. While you may only see the organization in action during its events, such as its conferences and receptions, there is intense planning occurring behind the scenes. And I'm not just talking about the planning for those events (even though that planning is essential). I mean planning on a more strategic, global scale: planning for the organization's future.

Credit for the creation of the MDTC Future Planning Meeting goes to MDTC Past Presidents José T. Brown (Cline Cline & Griffin PC) and James E. Lozier (Dickinson Wright PLLC), who held the first such meeting in 1995. Not only have annual future planning meetings continued since that time, they have become one of the most critical components of the MDTC's success. The purpose of the future planning meeting is to take a thoughtful look at the current legal landscape, identify what members care about now, predict what members will care about in the future, and create corresponding initiatives that can be implemented by the organization.

Our future planning meeting is held annually, typically in January. All current leaders of the organization (we now have 65!) are invited to attend. The importance of this meeting is evidenced by the great turnout of our leadership. The diversity of attendees, ranging from board members, regional and section chairs, to young lawyers, creates a sampling representative of our current membership. Free thought and communication is encouraged. There are no dumb ideas.

Case-in-point: out of our recent future planning meetings were born the following new strategic ideas, just to name a few:

- a facilitator/mediator database, which allows members to find recommendations and connect with other members who have worked with the facilitator/mediator in the past;
- a firm sponsorship program, which allows law firms and the MDTC to partner together for mutual benefit; and
- a host of new internal committees to help engage new members and retain current members, improve our educational platform, and utilize current technology to make our organization more accessible and user-friendly.

Of course, planning is only one step of the two-step process. As strategy execution

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author and consultant Jeroen De Flaunder observed, "[a] strategy, even a great one, doesn't implement itself." However, with the MDTC, De Flaunder would be pleased. I am happy to report that the organization continues to implement a great number of ideas created at its future planning meetings.

Thanks to the work of Vice President Richard W. Paul (Dickinson Wright PLLC) and Board of Directors member Gary S. Eller (Smith Haughey Rice & Roegge PC), you can find our facilitator/mediator database on the MDTC's website. The database provides the name and contact information of the facilitator and/or mediator, along with the name of an MDTC member "contact" who has used that professional in the past and can provide insight on his or her experience.

The firm sponsorship program launched in 2015, with 8 law firms participating. We are hopeful that even more law firms will participate this year. (If your law firm would like to become an MDTC law firm sponsor or you would like more information on firm sponsorship opportunities, please contact me or visit http://www.mdtc.org/Sponsors.aspx).

On the technology front, we have taken great strides to provide our members with ease of access to information utilizing advanced technology. Our various sections now host webinars and teleconferences on a variety of subject areas that you can watch from your computer without ever leaving your office (although I still encourage you to do so every so often. It is good for the soul.). Members now receive our e-newsletter via email. We have revamped our Facebook, Twitter, and LinkedIn accounts. And we have recently partnered with EventBrite to allow individuals to register for events online from their computers, smart phones, or tablets.

Finally, our recently formed internal committees, such as our relationship and education committees, are hard at work to determine new ways in which we can better serve membership.

I hope this gives you some insight into what the MDTC is doing behind the scenes to medal in the art of "giving its members what they want and need." If you have an idea to share, please let me know.

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Storytelling in Brief Writing[1]

By: John J. Bursch, *Bursch Law PLLC*

Stories resonate. To appreciate that fact, think about how quickly time seems to pass during a terrific movie, or count the number of times you have ignored more pressing deadlines because you simply could not put down a riveting book. Humankind has used stories for millennia to entertain, communicate, and teach, and with good reason: a good story pulls the audience in and does not let go until its conclusion, interpreting events and presenting truths that affect the way we think about life and each other.

Now, when was the last time you were similarly transported and transfixed by an appellate brief? Most likely, a very long time. Being an interesting (as well as persuasive) defense advocate is uniquely difficult, and writing a good appellate brief "may be the most difficult task of advocacy."[2]

Storytelling concepts can help. Storytelling, like appellate advocacy, is an art form for "transmitting ideas, images, motives and emotions with which everyone can identify."[3] And a storyteller, like the appellate advocate, is one who communicates to help an audience gain an understanding of those same ideas, images, motives, and emotions:

> This individual takes a story, original or already in existence, **adds his or her sense of humanity** to it, and **makes it come alive** for an audience of one or more. The storyteller **interprets life, presents truth** and **helps an audience** enter into other realities for enjoyment and **to gain understanding**.[4]

On appeal, it is not enough to simply craft a great legal argument. As Ninth Circuit Judge Alex Kozinski glibly notes, "[t]here is a quaint notion out there that facts don't matter on appeal—that's where you argue about the law; facts are for sissies and trial courts. The truth is much different. The law doesn't matter a bit, except as it applies to a particular set of facts."[5] In other words, an appellate brief must tell a good story. With Judge Kozinski's admonishment in mind, enter the realm of the storyteller.

The Theme

The first and most important ingredient of any good story is the theme. Movie storylines based on weak themes are an invitation for critical and commercial disaster. The same is true for appellate briefs. The best theme for a story is not a legal issue at all, but a commonly held premise or belief, "something most people believe in and with which they can identify."[6] For example, a colleague has been very successful crafting themes based on Robert Fulghum's best-selling book, *All I Really Need to Know I Learned in Kindergarten*. In a situation involving a purchaser's lawsuit against a seller to recover the costs of environmental remediation, he deftly adapted Fulghum's principle that "if you mess it up, you clean it up." Similar universal themes

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can be drawn from the Bible, children's stories and fairytales, commercial slogans, and even movies and books themselves, and it may be appropriate to have secondary themes for secondary issues or parties.

The importance of identifying a resonating theme for an argument is a concept at least as old as Aristotle's *Rhetoric*. As one scholar has explained:

> [T]o Aristotle, logical argument … is less about logic per se and less about form **than about knowing and connecting with the audience**. To Aristotle, logical arguments are persuasive not because of something inherently true about logic, but rather because the audience values and responds to logical arguments. … What's more, not just any logical arguments will do; the premise for the arguments **must be drawn from the experience and values of the audience**.[7]

In other words, the most airtight logic loses its persuasive force if it cannot be inextricably linked with a story that will resonate with the appellate-panel audience and its experience.

Unfortunately, there is a misconception that "telling a story" only works for plaintiffs. Good plaintiffs' personal-injury attorneys have elevated storytelling to a true art form. But corporate defendants also have stories to tell. Explain the painstaking efforts undertaken to keep a manufacturing plant open before the inevitable closure that simple economics demanded; detail every careful step of the quality-control process that ensures a defect-free product; develop the harm caused by a casual breach of a contractual promise; paint the plaintiff as just one more product of a litigation system that encourages meritless lawsuits filed with the hope of making a quick buck. From boxes of trial transcripts and exhibits, it is the appellate lawyer's first responsibility to cull the facts that personalize the client and develop a compelling story theme.

The Opening

With a simple, universal theme in hand, drafting can begin. Every portion of the brief must embody and enhance the theme, from the statement of issues right through the conclusion. Nowhere is the theme more important than in the introduction. Like the first 60 seconds of oral argument, an appellate brief's introduction is the one place virtually assured of the panel's (or the panel's clerks') undivided attention. If the value of real estate is all about "location, location, location," the appellate brief's introduction is its most valuable piece of real estate.

A good story opening should set the scene and introduce the major characters.[8] A principal problem with most appellate briefs is the myopic focus on character introductions, rather than setting the scene. Consider the following opening, which will sound all too familiar:

> The parties in this action are Plaintiff/Appellant Automotive Industry Supplier, Inc. ("Automotive Supplier") and Defendant/Appellee Independent Spring Manufacturer Corporation ("Spring Manufacturer"). Spring Manufacturer is a supplier of spring components for the automotive industry. Automotive Supplier purchased springs sold by Spring Manufacturer and incorporated them into parts that it sold to Automotive Producer, Inc. ("Automotive Producer"). The springs failed, and, following a recall, Automotive Supplier brought this lawsuit against Spring Manufacturer, claiming breach of warranty, among other things. The court below, correctly, dismissed all of Automotive Supplier's claims against Spring Manufacturer because Automotive Supplier failed to comply with the notice requirements of Section 2-607 of the Uniform Commercial Code (the "U.C.C.").

This introduction systematically introduces the relevant parties—and bores the reader to death, because it fails to set the scene. There is nothing in the first three sentences that even suggests what kind of case this is. Here is an alternative:

> This is a case of commercial betrayal that illustrates the wisdom of the Uniform Commercial Code's notice provision in Section 2-607. Appellant Automotive Supplier is seeking in this action to recover over $10 million from a supplier of about $50,000 worth of springs used in Automotive Producer vehicles. Automotive Supplier is pressing its claim even though it has never asserted—even in this litigation—that Spring Manufacturer defectively manufactured the parts. To the contrary, all parties agreed that the root cause of the problem with the springs was not some manufacturing mistake made by Spring Manufacturer, but a design change that Automotive Producer directed. Automotive Supplier never once suggested that Spring Manufacturer was responsible for this design change until filing this lawsuit, five years after the problem was discovered and nearly six years since the time of sale.

In contrast to the first example, which leads with party identification (as do most briefs), the second example starts with a colorful theme, "commercial betrayal." This theme sets the stage for the action to follow, and it leaves the audience wanting more. This is not the time for elaborate character

introductions, or even rote summaries of legal arguments. There will be plenty of time and pages to address such matters; be selective about the material you choose to use in this most valuable space.

Your theme does not have to be brash to be effective. Consider this opening line from a successful Brief in Opposition to a Petition for a Writ of Certiorari filed in the United States Supreme Court: "Petitioner seeks to invalidate a state law implied-in-fact contract simply because the contract relates to intellectual property." This is a simple statement. It does not identify any parties (the petitioner presumably took care of that task), and it does not attempt to cast moral aspersions. But it does sum up the parties' dispute in a simple way that will resonate with the audience. "Why should a contract be treated any differently simply because it involves intellectual property? Doesn't commercial exploitation of intellectual property rights depend on the right to contract?" Again, the audience is left wanting to more know.

If you are responding to a bombastic plaintiff's appeal brief, try this effective paraphrase from Shakespeare's *Macbeth*:

It is a tale told by [plaintiff], full of sound and fury, signifying nothing.

Then elaborate on why plaintiff's allegations, even if assumed true, are insufficient to state a claim as a matter of law, thus vindicating the trial court's decision to grant summary judgment in the defendant's favor. Again, it is unnecessary for the audience to even know who the characters are for this theme to be effective. In sum:

> It is not easy to write a good introductory paragraph. It takes great effort, but it is time well spent. A properly written introduction makes the rest of the brief-writing task comparatively easy. If you are unable to write a cogent, succinct, encompassing introduction, you probably do not have a solid grasp of the subject matter.[9]

Make sure you have a "solid grasp of the subject matter," then write a compelling introduction.

"Showing" the Story

If the theme has been successfully presented in the introduction, there should be little need to reiterate the theme again in the factual recitation. The facts should be organized in such a way that they themselves show the theme, so you do not need to tell it. This is not an easy technique, but it is an important one. As Professor James W. McElhaney notes, the more you try to "sell" your case, the more the audience will be inclined to treat you like a used car salesperson (and run in the opposite direction). You will fare much better by simply showing the story and letting the audience react to it.

For example, say you adopt the following as your appellate theme: "This dispute arises out of a terminated employee's attempt to extract millions of dollars from his former employer based on a fictitious oral 'agreement' to pay him annually a share of company profits as a bonus." Rather than making personal attacks on the plaintiff, or using argumentative language in the factual background, simply line up the key facts in a series of paragraphs, each with its own non-argumentative theme: defendant denies any agreement regarding a profit bonus; plaintiff admits the parties never discussed a profit bonus; the parties' past practice is inconsistent with the alleged profit bonus; and the plaintiff's pre-litigation claim for a profit bonus is inconsistent with the profit bonus he now claims. As this story unfolds, the audience will be able to discern for itself that the agreement is fictitious. And by the time the pre- and post-litigation inconsistencies in the alleged agreement are revealed, the audience will likely conclude the plaintiff is a liar. There is no need to say so explicitly, and doing so will make the defense brief sound shrill and exaggerated.

This concept is especially effective when the temptation arises to trash the plaintiff's brief for factual inaccuracies. One approach in such circumstances is to baldly accuse the plaintiff of misstating the record in an intentional effort to mislead the court, an oft-used and ineffective technique that may even implicate an attorney's ethical obligations to report misconduct.[10] A second and more effective approach is to simply show the misstatement and let the court draw its own conclusions: "Plaintiff claims X is true on appeal. But at trial, the plaintiff specifically testified that X is false. Moreover, all the documents show that X is false." This approach leaves the audience's focus of judgment on the plaintiff, rather than on the name-calling defendant. Resist the urge to explain the obvious, and show rather than tell.

Structure

A good story starts with the introduction of the protagonist and antagonist in enough detail so the audience can discern the "good guy" from the "bad guy." It then introduces an inciting incident that begins the rising action and suspense. The story reaches its climax, then uses the dénouement to show how life will be for the characters from now on.[11] This structure can be equally effective in an appellate brief.

Recall the hypothetical U.C.C. notice case used above. The key facts in the case for purposes of the notice issue are (1) the Automotive Supplier's pre-litigation conclusion that the product defect was a result of a design change implemented unilaterally by Automotive Producer, and (2) the subsequent delay before the Automotive Supplier finally decided to file suit. The first few pages of factual background should describe the

companies, their businesses, and their contractual relationship. If the Spring Manufacturer has never before had a product problem or been sued, highlight such facts, which scream "good guy."

The inciting event is the product recall. Suspense can be built by describing the atmosphere during the early stages of the recall investigation. No one knew what the problem was. Everyone was pointing the finger at someone else. Both the Automotive Producer and the Automotive Supplier blamed the Spring Manufacturer for faulty materials, faulty processes, or both. The situation looked dire for our hero.

The climax is the Automotive Supplier's announcement that the root cause of the problem is the design change. The dramatic effect can be enhanced with direct document quotations and lengthy deposition or trial testimony, all of which will lengthen the number of pages devoted to this key fact. Again, it is not necessary to tell the court how disingenuous the plaintiff's present lawsuit appears in light of its earlier conclusion as to root cause. Let the audience share the hero's sense of vindication without editorial comment.

Finally, the dénouement should explain the predicament in which the Spring Manufacturer finds itself as a result of the long delay between the Automotive Supplier's root cause announcement and its decision to file a lawsuit. Many of the relevant witnesses at both companies have moved on to other jobs. Some may be dead. Even witnesses that can be readily located will not be able to remember the facts and circumstances surrounding the recall with much clarity. And witnesses at the Automotive Supplier will be biased as a result of the interim settlement agreement with Automotive Producer in which the Supplier agreed to pay tens of millions of dollars that would have been earmarked for employee bonuses. Without a single legal argument, the purposes of the U.C.C.'s notice requirement have been revealed, and the revelation is packaged in a narrative that keeps the audience's interest from beginning to end. Things are looking bright for our Spring Manufacturer.

Sign Posts

Even an attentive audience enjoying a compelling story may have difficulty "staying with it" without sign posts to guide the journey. Just as a good trial attorney will use headlines to announce each change in topic when conducting a direct or cross-examination, a meticulous appellate attorney should similarly mark the appellate brief. Any time the factual background runs more than two pages without a sign post or headline, too much space has elapsed. A sign post every one to two paragraphs would not be excessive in a particularly complicated case. In addition to making the information presented more digestible, the sign posts approach allows the audience to discern nearly the entire story simply by skimming the Table of Contents. It also allows the audience to quickly find particularly important parts of the story when the opinion is prepared.

Inclusiveness

All good stories will contain any exposition or background necessary for a full understanding of the narrative.[12] The appellate story is no different. "Unless a fact is included in the statement of facts, it should not be used in the argument."[13] Whether explicitly noted or not, the introduction to argument following a good factual recitation should feel almost superfluous, i.e., "Once the facts are properly understood, there is really very little about the law over which to argue."

This does not mean that only those facts that are strictly related to the legal argument should be included in a background section. While a brief should be brief, it is the facts that give color and context and ultimately turn a factual recitation into a good story. In the U.C.C. notice case, for example, the Spring Manufacturer's flawless-historical-production record and the Automotive Supplier's early-performance accusations have nothing to do with the legal issue presented. But they are important for showing that the Spring Manufacturer is the protagonist, and that the Spring Manufacturer was not simply overlooked as a root cause of the product recall, but actually vindicated by its customer, the Automotive Supplier.

It is also critical that the story embrace and explain away the bad facts. Doing so enhances credibility, diminishes the sting, and eliminates an opportunity for the opponent to pounce. In addition, "[p]art of a law clerk's unarticulated job description is to find critical facts and case authorities that the lawyers have not addressed. Doing so proves to the judge the law clerk's worth."[14] If the clerk's (or judge's) discovery takes place after oral argument, there is no further opportunity to place the bad fact in context, and the storyteller has lost control of the story. It is much better to have anticipated every bad fact by making it part of a consistent story line.

Believability

Obviously, an appellate story must be plausible to be convincing. In other words, "[t]he characters and action should be believable within the framework of the story."[15] But what does this mean in the context of brief writing? First, annotate, annotate, annotate. Every factual recitation in a statement of facts must be supported by a specific record cite from the trial court. This may mean a citation after every sentence; it may mean multiple citations in a sentence. And every citation must be carefully checked to ensure that no liberties have been taken with the actual record. "Even the most experienced advocates cannot always anticipate accurately what fact an

appellate judge will find to be critical. Rather than take chances, it is best to cover all bases with record citations."[16]

Second, it is time to jettison the strategy of making alternative arguments. Storytellers do not give alternative explanations for why things happened, because doing so diminishes the believability of the story: "The Big Bad Wolf blew down the pig's house. And if he didn't blow it down, then he knocked it over with dynamite." It is similarly unbelievable to assert that the defendant did not breach an exclusive distributor agreement by using a competing distributor, while simultaneously claiming that the plaintiff knew about the competing distributor and did not object, thus waiving any objection.

Third, it is essential to not only anticipate but highlight the implausibilities in a story and explain them. In a case involving an ex-partner's claim for a share of 2003 company profits, why did the partnership abruptly change accounting methods in 2003 to push more income into 2004? It is not enough to say simply that the change resulted in tax savings; that begs the question, why wasn't this change made before now? The story must also explain that the partnership was not eligible to make the accounting switch under relevant IRS rules until 2003. This explains away the apparent ill motive and makes the defense account believable. This is another example where the underlying facts may have nothing to do with the legal argument, but have everything to do with the sense of which party plays the role of protagonist.

Elevate the Story Over the Storyteller

In the best storytelling performance, it is "difficult to separate the teller from the story."[17] This is equally true of the story appellate advocates weave in their briefs and at oral argument. If the audience's focus is on the storyteller, the story itself will be lost. Advocates need to leave their egos at the door and elevate the story, much as trial advocates must make the witness the focus on a direct examination at trial, not themselves.

The easiest way to accomplish this goal is to follow the above suggestions. Briefs that do more "telling" than "showing," inaccurately cite the record, and leave out key facts unintentionally invite the focus (and sometimes the wrath) of the panel toward the advocate, rather than the facts. By letting the facts tell their own story, accurately and completely, the attorney ensures that the story receives the panel's full attention.

Conclusion

"It is not unconstitutional to be interesting,"[18] and it does not violate any appellate rules for a brief to be entertaining. Quite the opposite, clients should expect their appellate advocates to possess the ability to tell compelling stories, both orally and in their legal writing.

Interesting stories are essential in the first instance to keep an appellate panel focused on a case. Judges are drowning in a sea of cookie-cutter and blasé briefs, and a good story is the perfect antidote to boredom. In addition, convincing stories result in a connection or even empathy between panel and party, a connection that will enhance the chances of an appellate victory. At bottom, appellate judges are no different than trial judges in their desire to dispense "justice," and the law gives them numerous means to reach the end to which justice directs them. Make sure it is your client's story, not the opponent's, that cries for justice to be done.

One final thought: more appellate victories mean more war "stories" to share around the water cooler. Let me tell you about the time I was hired for an appeal and, against all odds, successfully overturned an absolutely terrible result in the trial court …

Endnotes

1 Previously published in DRI, *For the Defense*, April 2004.

2 Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* § 2.4, at 24 (2d ed. 2003).

3 Cassady, *The Art of Storytelling* 12 (1994).

4 *Id.* at 15 (emphasis added).

5 Kozinski, *The Wrong Stuff*, 1992 BYU L Rev 325, 330 (1992).

6 Cassady, *supra*, at 115.

7 Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 The Scribes Journal of Legal Writing 61, 62 (2002) (emphasis added).

8 Cassady, *supra*, at 45.

9 William A. Bablitch, *Writing to Win*, 5 Compleat Law 8, 11 (Winter 1988).

10 See MRPC 3.3(a)(1) (lawyer shall not knowingly make a false statement of material fact to a tribunal); MRPC 8.3 (mandatory reporting requirement for ethical rules violations).

11 Cassady, *supra*, at 118-121.

12 Cassady, *supra*, at 47.

13 Aldisert, *supra*, at 169.

14 Aldisert, *supra*, at 169.

15 Cassady, *supra*, at 33.

16 Aldisert, *supra*, at 171.

17 Cassady, *supra*, at 16.

18 Aldisert, *supra*, at 168.

Valuing Past-Medical-Expense Damages after *Greer v Advantage Health*

By: Richard J. Joppich, *Kitch, Drutchas, Wagner, Valitutti & Sherbrook, P.C.*

Executive Summary
Where a jury verdict awards the total charges for healthcare provider services rendered, does the collateral-source rule allow reduction of the award for the amount paid by a health insurer at a discounted rate, and the additional remaining amount that constitutes the difference between the discount and the "total ordinary charges" of the provider? Specific to the private-health-insurance scenario, in the recent Greer v Advantage Health Michigan Court of Appeals case, the answer is "no." Does this apply to Medicare or Medicaid?

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On July 8, 2016, the Michigan Supreme Court vacated its order granting leave to appeal the May 13, 2014 Michigan Court of Appeals' opinion in the matter of *Greer v Advantage Health*, 305 Mich App 192; 852 NW2d 198 (2014). The pertinent portion of the Court of Appeals' decision to be discussed below is the appellate court's conclusion that where past-medical-expense evidence at trial is admitted with regard to the healthcare providers' full charges, there will be no post-verdict reduction for the difference between the full charge and what the healthcare providers had agreed to accept as full payment (the discount) from negotiated provider agreements with the plaintiff's private-healthcare insurers.

In other words, personal-injury plaintiffs will be able to recover the total amount of healthcare charges rather than the discounted amount of what was actually paid for the healthcare under a private-insurance plan.

The question that has recently been posed is whether the *Greer* opinion implies the same rule for Medicare and Medicaid covered healthcare items and services, which are governed under the statutes and regulations of both the United States and the State of Michigan rather than by privately negotiated health-plan contracts. The *Greer* opinion and rationale addresses only issues pertaining to private healthcare insurance plans and discounts available under their negotiated provider agreements. The statutorily mandated pricing of both Medicare and Medicaid and the rights of recovery in liability matters, are ultimately distinguishable from the *Greer* decision and, thus, there should be a setoff for the difference between healthcare provider charges and what they are mandatorily required to accept as payment in full.

Greer v Advantage Health, the Court of Appeals' Decision

Greer was a medical-malpractice case that involved issues of birth trauma to the newborn, Mackenzie Greer, and to her mother, Elizabeth Greer. Independent claims were filed by the mother and the father, in addition to the claims of the child, for injuries. Before trial, two of the co-defendants settled plaintiffs' claims and were dismissed, which gave rise to a second appellate issue on set-off calculations that is not of particular pertinence to this present discussion.

The remaining defendants, Advantage Health and Dr. Anita Avery, took the case to trial. At trial (in Kent County Circuit Court), the jury returned a verdict of no cause of action for the claims of the mother and father. The jury, however, returned a verdict in favor of the child against the defendants, which included an award of the entirety of the medical charges by the child's healthcare providers for past medical

expenses. This past-medical-expense-damages verdict was based upon the plaintiffs' introduction of medical-service invoices into evidence. The defense had acknowledged the accuracy of the medical bills, but maintained that the plaintiffs could only recover what the private health insurance companies had actually paid. The private-healthcare insurers, Aetna and Priority Health, asserted liens for the amounts they had paid.

The defendants' post-trial motions sought to reduce the award for past medical expenses to what the private health insurance plans had actually paid as opposed to what the physicians had actually billed so past-medical-expense damages would be measured by the amount the private insurers had asserted as liens for reimbursement. Based on *Zdrojewski v Murphy,* 254 Mich App 50; 657 NW2d 721 (2002), the trial court denied any reduction of the jury's award for past medical expenses because the private health insurance companies had asserted contractual subrogation liens against the proceeds of any judgment that plaintiffs might collect. The defendants' motion for reconsideration on this issue was also denied.

The Michigan Court of Appeals, in *Greer,* analyzed whether the insurance contracts for healthcare benefits, and the "discount" between the healthcare providers' total charges and the amount they negotiated through their provider agreements with the healthcare-insurance plans were both collateral sources.

At no point did the Michigan Court of Appeals address the implications of the federally mandated fee schedules under Medicare or Medicaid.

With regard to the healthcare plan insurance benefit, the Court of Appeals did not look to the definition of "collateral source" provided in subsection (4) of the statute (MCL 600.6303), but, instead, cited to subsection (1), which addresses evidence necessary to establish a collateral source and the mandate that the court shall reduce a judgment by damages paid or payable by a collateral source (with some additional limitations and requirements).

Despite the Court of Appeals' reliance upon the subsection explaining how collateral source reductions are to be determined and accomplished, the insurance benefits paid by the private healthcare insurance plans, Aetna and Priority Health, would constitute collateral sources as defined in 600.6303(4) as well. This subsection specifically states, "'collateral source' means benefits received or receivable from an insurance policy …."

The opinion next turned to whether the discounts in the negotiated provider agreements also were collateral sources. The *Greer* court, in addressing those discounts, concluded they constituted collateral sources as well. To reach this conclusion, the Court of Appeals referenced the subsection that defines "collateral source" and expressly noted such discounts that were obtained through contractual negotiation of provider agreements were "benefits received … from an insurance policy." MCL 600.6303(4).

Having read this opinion this far it would appear that both the insurance benefits paid, and the discounts from the total charges, would be reduced from the past-medical-expense award in the verdict as collateral sources.

However, the *Greer* Court of Appeals continued in its opinion to address section 6303(4) with regard to what a collateral source does not include. In relation to the contractual health insurance plans involved, the court recognized the language in this subsection that, "…collateral source does not include benefits paid or payable by a … legal entity entitled by contract to a lien against the proceeds of a recovery … if the contractual lien has been exercised pursuant to subsection (3)."

The statutorily mandated pricing of both Medicare and Medicaid and the rights of recovery in liability matters, are ultimately distinguishable from the Greer decision and, thus, there should be a setoff for the difference between healthcare provider charges and what they are mandatorily required to accept as payment in full.

Although subsection (3) only addresses liens asserted within 20 days after receipt of notice of a verdict, in the *Greer* matter, both Aetna and Priority Health had previously asserted their liens and maintained them throughout the case. As a result, the Court of Appeals recognized these healthcare plans were entities entitled by contract to a lien and they had asserted their contractual lien and, thus, their liens could not be included as collateral sources in reduction of the medical-expense-damages verdict.

With regard to the "discounts," the Court of Appeals had to do a little further analysis and maneuvering to link that "discount" into the statutory definition of what did not constitute a collateral source subject to reduction in the verdict. In this regard, the appellate court pointed out that, since the

collateral-source statute was "in derogation of the common law that permits a plaintiff's double recovery when a loss was also paid by insurance," statutory interpretation requires that the statute must be interpreted consistently with its plain terms to result in "'the least change in the common law.'" *Greer*, 305 Mich App at 207, citing *Velez v Tuma,* 492 Mich. 1, 16-17; 821 NW2d 432 (2012).

The Court of Appeals concluded that, because insurer discounts are benefits "received or receivable" under an insurance policy subject to subsection (1) of the statute, detailing what amounts were to be reduced from the verdict as collateral sources, they must also be "benefits paid or payable" as referenced in the final sentence of subsection (4), which details what collateral sources are not to be reduced against the verdict.

The Court of Appeals noted this interpretation is within the plain and ordinary meaning of the final sentence of subsection (4). To reach this conclusion, the court pointed out that the words "paid" and "payable" both derive from the word "pay" and, following from that, "pay" is defined in the Random House Webster's College Dictionary as "to discharge or settle (a debt, obligation, etc.) as by transferring money or goods, or by doing something." Relying on this definition, the Court of Appeals reached the final conclusion that the health plan insurance payments to the healthcare providers in conjunction with the insurance discounts discharged or settled plaintiffs' debt or obligation to the healthcare providers and, thus, the discount constituted a "benefit paid or payable."

The Court of Appeals' finding that both the insurance policy payments and the discounts fell under the definition of benefits "paid or payable" did not end the analysis. The court then had to link these conclusions to the terminology in subsection (4) that excluded these circumstances from being reduced against the verdict. To accomplish this, the Court of Appeals observed that the contractual liens asserted by both Aetna and Priority Health were for not only the cash payment but also for the discounts and, thus, both were excluded as statutory collateral-source benefits.

> The defendants' post-trial motions sought to reduce the award for past medical expenses to what the private health insurance plans had actually paid as opposed to what the physicians had actually billed so past-medical-expense damages would be measured by the amount the private insurers had asserted as liens for reimbursement.

Interestingly, the Court of Appeals pointed out that the Legislature did not limit the exclusion of validly exercised liens to just the "amount of" the contractual lien, and, thus, the Court of Appeals was reluctant to read that limitation into the statute.

As a result, the Court of Appeals, in the *Greer* matter, addressed only those provisions under the collateral-source rule pertaining to discounts that were negotiated in provider agreements between private healthcare insurance plans. At no point did the Michigan Court of Appeals address the implications of the federally mandated fee schedules under Medicare or Medicaid. Additionally, the Court of Appeals has not addressed the Medicare Secondary Payer Act, which gives Medicare a direct right of reimbursement, which is not equitable as opposed to a lien interest in any proceeds that is equitable.

We would differentiate Medicare and Medicaid from *Greer* on the basis that there is no "discount" contractually negotiated between healthcare providers and the Medicare or Medicaid programs. The rates and fees are set by statute and regulation and are annually updated by CMS through a very detailed process of analysis, data gathering, and comparisons to achieve the most economical yet highest quality care for Medicare beneficiaries, establishing what is a reasonable fee for, at this point, approximately 10,000 varied services. While comments are taken from healthcare providers in various CMS open door forums to be considered by Medicare in setting its fee schedules, this scenario is certainly a far cry from the scenario of contractual negotiations of provider agreements with private-healthcare insurers. We await the case in the Michigan courts where this issue will be addressed and determined.

The *Greer* Court of Appeals' decision is limited in scope to addressing collateral-source issues regarding private-insurance policies and any freely negotiated discounts in provider agreements with the private health insurance plans, such as Priority Health and Aetna. It does not address the provisions in the collateral-source statute applicable to Medicare or liens that arise by law, or the reduction of past-medical-expense awards by the difference between what a healthcare provider might charge and what Medicare or Medicaid have determined as reasonable and customary fees for quality healthcare.

The FLSA Changes Are Coming: Business Considerations and Implementation Strategies

By: Deborah Brouwer and Kellen Myers, *Nemeth Law, P.C.*

Attorneys and their business clients are likely well aware of the revisions to the Department of Labor's overtime regulations, effective December 1 of this year, given the level of publicity the changes have received. With implementation looming, it is becoming evident that the new overtime regulations will pose difficult decisions for companies and their legal counsel. In some cases, a company's entire business model may be impacted. Legal counsel for these companies will need to have answers not only for complex legal issues regarding exempt/non-exempt employee status, but also may need to play a larger role in counseling their clients on how to adapt to these regulations and implement them effectively.

Since the new regulation was announced in May, prudent companies have undergone strategic business planning and financial review to prepare for these changes and the impact they may have on the bottom line. That said, what may have been overlooked is how exactly an employer should implement any changes and how best to communicate these changes to employees. This article briefly reviews the changes to the overtime regulations, discusses what implementation plans most employers will have to consider, and suggests strategies for communicating changes to employees to minimize litigation and morale concerns.

The Overtime Changes – a Brief Review

The new overtime regulations adjust the salary level set by the Department of Labor for the "white collar" exemptions to apply to a worker. These exemptions (executive, administrative, highly compensated employee, and professional) are only available if an employee meets three requirements – the salary basis test, the salary level test, and the job duties test. The new regulations change only the salary level test, by increasing the minimum salary level from $455 per week ($23,660 annually) to $913 per week ($47,476 annually). The Department of Labor estimates that this change will impact around 4.2 million workers across the nation. The other two tests remain unchanged.

The white-collar exemptions are generally meant for employees whose primary duties are the performance of non-manual work in an office or professional environment. Each exemption's name is generally reflective of the job duties required and the type of employee it is meant to cover. Thus, executive employees are those who manage the business or enterprise, who customarily and regularly direct the

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work of at least two or more full-time employees (or their equivalents), and who have the authority to hire and fire employees or whose recommendations are given particular weight as to hiring or firing decisions. An administrative employee is one whose primary duties are the performance of non-manual work directly related to the management of the general business operations of the company (or its customers) in the areas of finance, accounting, human resources, advertising, purchasing, among others, and who exercises independent discretion with respect to matters of significance in those areas.

> [W]hat may have been overlooked is how exactly an employer should implement any changes and how best to communicate these changes to employees.

Lastly, the professional exemption is broken down to two categories: learned professional and creative professional. Learned professionals are those whose primary duties require advanced knowledge in a field of science or learning that is predominantly intellectual in character, and generally requires a prolonged course of specialized intellectual instruction. Some examples of professionals likely to qualify under this exemption are engineers, registered nurses, social workers, architects, etc. The creative-professional exemption covers employees whose primary duty requires invention, imagination, originality or talent in recognized artistic fields. Composers, writers, novelists and the like generally meet these requirements.

The new overtime regulations also raised the salary level required for an employee to be exempt under the highly compensated employee exemption from $100,000 per year to $134,000. These employees are a hybrid exemption of sorts. Thus, if an employee makes $134,000 a year or more in salary and regularly performs at least one of the duties of an exempt executive, administrative or professional employee, they are considered exempt.

What Options Does a Company Have?

Again, all three tests must be met for an employee to be exempt from overtime requirements. With the increase in the salary level test to $955/week, many employees previously exempt will become non-exempt. The issue then becomes how to respond.

The most straightforward option is to increase the salary of those currently exempt (but soon to become non-exempt) employees. Although simplest in execution, this option may be cost prohibitive for some companies. Alternatively, an employer could continue to pay these employees at their current salary level but implement and strictly enforce an overtime approval process (and associated payroll policies). Employees also would be required to record hours worked. If such an employee works over 40 hours, the employer would pay overtime for those hours, based on a calculation of their salary rate into an hourly rate (the Department of Labor regulations provide various examples of ways an employer can do this). Employees also should be advised that working non-approved overtime hours (which have to be paid if the employee did the work) will subject the employee to potential discipline. Lastly, an employer could reclassify these employees as non-exempt hourly employees. In other words, the employees would be turned into traditional hourly employees with a set hourly rate of pay. Again, the employer would have to track hours worked and pay the employees accordingly.

Each of these options has its advantages and disadvantages. What will work best for a company depends on factors such as budgeted payroll costs, the number of employees impacted, the roles or positions these employees play in the organization, whether the expected workload for these employees will change, and cost considerations.

Best Practices for Implementing/ Communicating these Changes

It is important to be mindful that salaried status may be of high social value to an employee. Employees may see it as a sign of their importance to the organization, in comparison to hourly employees who clock in/out and have their hours tracked closely. Thus, prior to implementing any changes, an employer should consider the impact these changes will have on employee morale and retention.

Develop the message that will be delivered to the affected employees. Consider how the chosen plan will affect these employees and their day-to-day activities. Make sure to explain what the changes are and why they are being made. Every employee who will be affected **must** be informed of the changes and what new policies or procedures he or she needs to follow (including whether any disciplinary steps will be taken for non-compliance). These communications should be structured with the help of counsel as much as possible. Name a primary resource to whom employees can go with questions – whether individual supervisors or the HR Department. Consider whether this contact will need direct communication with the company's legal counsel to address any issues needing immediate attention.

Train supervisors and employees. This is an essential and often overlooked issue. Many supervisors may not be aware of the importance of tracking employee work time, if they previously supervised

only exempt workers. They may not even know what activities are considered work time by the Department of Labor – such as travel time, time spent putting uniforms on, on-call time, lunchtime, or time spent answering work emails after hours. Supervisors who fail to abide by new policy changes or requirements could place the company in jeopardy of litigation if employees are not paid properly. In addition, supervisors need to know what information they are allowed to communicate to employees. It is worthwhile to have legal counsel prepare a presentation and training session for key supervisors and personnel.

Be prepared for one-on-one conversations with employees who are disappointed by these changes. Those employees who were previously salaried (or those who now have to closely report their hours) will have many questions. For example, he may ask why he was moved to hourly status but one of his co-workers (in a different classification) was not. He may ask if he still has flexibility in his schedule to take his children to daycare or to work from home if a child is sick. He also may ask whether this will affect vacation time or PTO policies. He could even inquire whether his workload will be reduced because it may be difficult for him to finish the assigned work in 40 hours. Employers will need to have answers for each of these questions, which will depend not only on the company's business structure and productivity considerations, but the type of work environment it wishes to provide for its employees.

Throughout this process, legal counsel should remind these organizations that this is not a one-time process. Under the new regulations, the salary level test will be adjusted every three years beginning January 1, 2020. The Department of Labor will give approximately 150-days' notice prior to the new salary levels taking effect – which is not a significant amount of time. Thus, following these upcoming changes, legal counsel should discuss a continuous review strategy with their clients to prepare for these future adjustments.

Attorney-Judgment Rule from A to Z

By: David M. Saperstein, *Maddin Hauser Roth & Heller, PC*

On those cold, winter days growing up in Los Angeles, nothing was tastier than a warm bowl of Campbell's Alphabet Soup. Lately, the alphabet is back in the news. Alphabet, Inc. (GOOGL) has overtaken Apple, Inc. (AAPL) as the world's most valuable company. So, in honor of this news, this is a summary of Michigan's attorney-judgment rule from A to Z.

Michigan, like most states in this country, protects lawyers from malpractice liability for many of their discretionary decisions. The seminal Michigan decision on the attorney-judgment rule, sometimes known as judgmental immunity, continues to be *Simko v Blake*, 448 Mich 648; 532 NW2d 842 (1995). In *Simko*, the Michigan Supreme Court established the general rule by which the standard of care for attorneys is measured: all attorneys have a duty to act as an attorney of ordinary learning, judgment, or skill would act under the same or similar circumstances. *Id*. at 656. The Court continued that a lawyer is not a guarantor of the most favorable possible outcome for his client. *Id*. at 655-656. Rather, an attorney is not required to exercise extraordinary diligence or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession. *Id.*

To flesh out what this standard means in practice, the *Simko* Court held that where "an attorney acts in good faith and honest belief that his acts and omissions are well-founded in law and are in the best interest of his client, he is not answerable for mere errors in judgment." *Id*. The Court understood that any other rule would mean that any losing litigant would then sue his or her attorney with the benefit of hindsight:

> There can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment. This is a sound rule. Otherwise every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight. [*Id*.]

The doctrine of judgmental immunity or the "attorney judgment rule" provides attorneys broad protection from *post hoc* examination of most legal decisions that arise in the course of litigation. *Id*. In *Babbitt v Bumpus*, 73 Mich 331; 41 NW 417 (1889), a case cited with approval by the *Simko* Court, the Michigan Supreme Court emphasized the caution to be applied with respect to claims for legal malpractice, stating:

> [G]reat care and consideration should be given to questions involving the proper service to be rendered by attorneys when they have acted in good faith, and with a fair degree of intelligence, in the discharge of their duties when

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> employed under the usual implied contract. **Under such circumstances, the errors which may be made by them must be very gross before the attorney can be held responsible.** They should be such as to render wholly improbable a disagreement among good lawyers as to the character of the services required to be performed, as to the manner of their performance under all the circumstances in the given case, before such responsibility attaches. [*Id.* at 337-338 (emphasis added).]

The facts of *Simko* demonstrate the extent of the Michigan Supreme Court's broad interpretation of an attorney's discretion. The plaintiff in *Simko* had been represented by the attorney defendant in a criminal trial and sentenced to life imprisonment. After an appeal by a successor attorney, the plaintiff's sentence was reduced to a two-year term. The plaintiff alleged in his legal-malpractice complaint that his criminal defense trial attorney was not prepared for trial and failed to produce appropriate witnesses. Despite the seemingly substantial factual issues present in the case, the Supreme Court upheld the trial court's grant of summary disposition **on the pleadings**. In so holding, the *Simko* Court ruled that the allegations of the plaintiff, at worst, were nothing more than mere errors in judgment with respect to trial tactics, and therefore not actionable. The Court reasoned further that "[p]erhaps defendant made an error of judgment in deciding not to call particular witnesses, and perhaps another attorney would have made a different decision; however, tactical decisions do not constitute grounds for malpractice actions." *Simko*, 448 Mich at 660.

Given the broad scope of *Simko,* it is no surprise that it has been applied to a wide variety of an attorney's tactical decisions. In fact, Michigan courts have dismissed legal-malpractice claims as a matter of law involving virtually every decision from A to Z:

Evaluation of claim and pleading

- Whether to sue potential parties;[1]
- Failure to plead alternative theories of causation;[2]
- Pursuit of claims without merit;[3]
- Reliance on unqualified experts for evaluation;[4]
- Referral to improper physician for evaluation;[5]
- Improper evaluation of injury;[6]
- Failure to keep client informed[7]
- Failure to consult with client before limiting the scope of representation;[8]
- Improper assessment of expenses;[9]

Discovery

- Failure to contact fact witnesses;[10]
- Failure to investigate;[11]
- Decision of which doctor to depose;[12]
- Failure to take discovery depositions of opposing experts;[13]
- Failure to compel pretrial disclosure of expert opinions;[14]
- Failure to properly prepare experts;[15]

Motion practice

- Whether to enter a default judgment;[16]
- Whether to raise a statute-of-limitations defense;[17]
- Whether to file a dispositive motion before the end of discovery;[18]
- Failure to properly defend against a statute-of-limitations motion;[19]
- Failure to defend against other motions; [20]
- Failure to properly pursue recusal of judge;[21]

Trial

- Whether to recommend settlement;[22]
- Whether to recommend waiver of jury trial;[23]
- Failure to present evidence or exhibits;[24]
- Abandonment of theory of liability during trial;[25]
- Failure to call particular witnesses, including experts; [26]
- Failure to make a variety of objections at trial; [27]
- Failure to obtain additional testimony or cross-examination;[28]
- Whether to offer particular rebuttal evidence;[29]
- Failure to support requested jury instructions with briefs;[30]
- Failure to move for directed verdict;[31]

Post-trial

- Whether to file post-trial motions;[32]
- Whether to raise particular issues on appeal;[33]
- Whether to seek reconsideration of an appellate decision;[34]
- Whether to use a trust to manage settlement proceeds.[35]

Although Michigan's attorney-judgment rule is most frequently applied in the context of underlying litigation, that is not always the case. For example, in *Fifth Third Bank v Couzens Lansky Fealk Ellis Roeder & Lazar, PC*, unpublished opinion per curiam of the Michigan Court of Appeals, issued Jan. 12, 2016 (Docket No. 323654), the attorney-judgment rule was applied to bar a legal-malpractice claim arising out of the attorney's recommendation to offer a full credit bid at a sheriff's sale rather than a deficiency bid.

Michigan's attorney-judgment rule is one of the first defenses that should be examined when analyzing the merits of a legal-malpractice claim. In appropriate circumstances, the rule may be invoked either at the pleadings stage or following

discovery to bar all or part of a plaintiff's legal-malpractice claim.

Endnotes

1 *Estate of Mitchell v Dougherty*, 249 Mich App 668, 676; 644 NW2d 391 (2002); *Gibbons v Thompson, O'Neil & Vanderveen, PC*, unpublished opinion per curiam of the Court of Appeals, issued Mar. 27, 2007 (Docket No. 271628); 2007 WL 914297; *JMS & Associates v Schwartz*, unpublished opinion per curiam of the Court of Appeals, issued Oct. 3, 2000 (Docket No. 214765); 2000 WL 33406802.

2 *Badalamenti v Miller*, unpublished opinion per curiam of the Court of Appeals, issued Nov. 17, 2005 (Docket No. 254790); 2005 WL 3077146; *Fifth Third Bank v Couzens Lansky Fealk Ellis Roeder & Lazar, PC*, unpublished opinion per curiam of the Michigan Court of Appeals, issued Jan. 12, 2016 (Docket No. 323654); 2016 WL 146308 (pursuit of foreclosure by advertisement instead of judicial foreclosure).

3 *Lebedovych v Hadley*, unpublished opinion per curiam of the Court of Appeals, issued Nov. 22, 2005 (Docket No. 255797); 2005 WL 3116083.

4 *Gibbons v Thompson, O'Neil & Vanderveen, PC,* unpublished opinion per curiam of the Court of Appeals, issued Mar. 27, 2007 (Docket No. 271628); 2007 WL 914297.

5 *Woods v Gursten*, unpublished opinion per curiam of the Court of Appeals issued Dec. 15, 1998 (Docket No. 194523); 1998 WL 1988581.

6 *Id*.

7 See *Messenger v Heos*, unpublished per curium of the Court of Appeals, issued Dec. 9, 2008 (Docket No. 279968); 2008 WL 5158901 (theory dismissed by trial court, but not addressed on appeal).

8 *Id*.

9 *Id*.

10 *Schubiner v Sommers Schwartz*, unpublished per curium of the Court of Appeals, issued June 26, 2007 (Docket No. 274775); 2007 WL 1828892.

11 See *Messenger*, *supra*.

12 *Woods*, *supra*.

13 *Beztak Co v Vlasic*, unpublished per curium of the Court of Appeals, issued Aug. 19, 2003 (Docket Nos. 236518, 236519, 236520); 2003 WL 21978749.

14 *Id*.

15 *Id.*

16 *Caudill v Sheldon Miller Law Firm*, unpublished opinion per curiam of the Court of Appeals, issued Nov. 19, 2013 (Docket No. 310714); 2013 WL 6083720.

17 *Wickham v Lepley*, unpublished opinion per curiam of the Court of Appeals, issued Mar. 30, 2006 (Docket No. 258429); 2006 WL 827858.

18 *Berryman Properties v O'Dea*, unpublished opinion per curiam of the Court of Appeals, issued Sept. 23, 2004 (Docket No. 248718); 2004 WL 2125682.

19 See *Messenger*, *supra*.

20 *Id*.

21 *Id*.

22 *Woods*, *supra*; *Heller v Donaldson*, unpublished opinion per curiam of the Court of Appeals, issued Mar. 13, 1998 (Docket No. 194219); 1998 WL 2016612; *Kauer v Clark*, unpublished opinion per curiam of the Court of Appeals, issued July 9, 1996 (Docket No. 175138); 1996 WL 33324098; *Fifth Third Bank v Couzens Lansky Fealk Ellis Roeder & Lazar, PC*, unpublished opinion per curiam of the Michigan Court of Appeals, issued Jan. 12, 2016 (Docket No. 323654); 2016 WL 146308 (recommendation to offer full credit bid rather than deficiency bid at sheriff's sale).

23 *Trakhtenberg v McKelvy*, unpublished opinion per curiam of the Court of Appeals, issued Oct. 27, 2009 (Docket No. 285247); 2009 WL 3465436, vacated on other grounds by *Trakhtenberg v McKelvy*, 493 Mich 946; 828 NW2d 18 (2013).

24 *Id*.; *Schubiner*, *supra*.

25 *Messenger*, *supra*.

26 *Trakhtenberg*, *supra*; *Schubiner*, *supra*; *Grace v Leitman,* unpublished opinion per curiam of the Court of Appeals, issued Mar. 16, 2006 (Docket No. 257896); 2006 WL 664228, lv app gtd, 477 Mich 1064; 728 NW2d 861, lv app vacated, 480 Mich 913; 739 NW2d 634 (2007); *Messenger*, *supra*.

27 *Beztak Co*, *supra*; *Po v Benefiel*, unpublished opinion per curium of the Court of Appeals, issued Sept. 27, 2005 (Docket 255546); 2005 WL 2323823.

28 *Trakhtenberg*, *supra*; *Messenger*, *supra*.

29 *Crutcher v Breck,* unpublished opinion per curiam of the Court of Appeals, issued Mar. 20, 2007 (Docket No. 271599); 2007 WL 840127.

30 See *Messenger*, *supra*.

31 *Trakhtenberg*, *supra*.

32 *Po*, *supra*.

33 *Kandalaft v Peters*, unpublished opinion per curiam of the Court of Appeals, issued Apr. 17, 2007 (Docket No. 267471); 2007 WL 1138395; *Flanigan v Herschfus*, unpublished opinion per curiam of the Court of Appeals, issued Feb. 1, 2002 (Docket No. 226997); 2002 WL 181061.

34 *Kandalaft*, *supra*.

35 *Stanke v Stanke,* unpublished opinion per curiam of the Court of Appeals, issued Mar. 20, 2007 (Docket No. 263446); 2007 WL 838934, rev'd 480 Mich 927; 740 NW2d 300 (2007).

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MDTC Legislative Report

As I complete this report on the eve of the Labor Day weekend, the summer recess is drawing to a close and our legislators are expected to be back in Lansing next week to continue their work for a few session days before their next recess in October. Things have remained relatively peaceful and quiet in Lansing throughout the summer months, which have included only two session days – one in July and one in August – since my last report in June. Major controversies have been avoided as many of the candidates for election to the House have focused on performing the delicate dance of running for office while hoping to avoid discussion of their party's candidate at the top of the ticket. Soon the general election of 2016 will be history and most of us will be glad of that, whatever the outcome may be.

2016 Public Acts

As of this writing, there are 280 Public Acts of 2016. The 47 additional Public Acts filed since my last report have resulted from the subsequent approval of bills passed before the summer recess, as no activity of substance occurred during the sessions conducted in July and August. The few which may be of interest include:

2016 PA 235 – House Bill 5442 (Iden – R), to be known as the "Public Threat Alert System Act," will require the State Police to establish and maintain a new public-threat-alert-system plan to rapidly disseminate useful information to radio and television stations and wireless communication devices concerning "public threats" – defined as "a clear, present, persistent, ongoing, and random threat to public safety," including, but not limited to, acts of terrorism and unresolved mass shooting events. To prevent abuses of the new system, the act provides that a person who intentionally makes a false report of a public threat will be guilty of a felony, punishable by imprisonment for up to 4 years and/or a fine of up to $2,000, and may also be required to pay the costs of the governmental and media responses to the false report. This new act will take effect on September 22, 2016.

2016 PA 242 – Senate Bill 207 (Jones – R) and **2016 PA 243 – Senate Bill 434 (Casperson – R)**, these acts, which will also take effect on September 22, 2016, will amend the Vehicle Code to add several new sections authorizing the State Police to initiate a program of pilot projects for roadside testing – a "preliminary oral fluid analysis" – administered by officers who have been certified as a "drug recognition expert" to detect the presence of controlled substances when the officer has reasonable cause to believe that a person has been operating a vehicle under the influence of a controlled substance. The results of this analysis will be admissible in evidence for limited purposes, and a person refusing a peace officer's request to submit to the preliminary analysis will be responsible for a civil infraction. The pilot projects initiated pursuant to this program will be limited to a period of one year, and the State Police will be required to submit reports to the legislature describing each project and its results within 90 days after the project's completion.

Public Act 242 will also add a new section, MCL 257.625s, regarding admission of evidence of field sobriety tests in general, and the horizontal gaze nystagmus test in particular. That new provision states that "A person who is qualified by knowledge, skill, experience, training, or education, in the administration of standardized field

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The new sections would add new provisions, modeled after existing sections of FOIA.

sobriety tests, including the horizontal gaze nystagmus (HGN) test, shall be allowed to testify subject to showing of a proper foundation of qualifications. This section does not preclude the admissibility of a nonstandardized field sobriety test if it complies with the Michigan Rules of Evidence."

Old Business and New Initiatives

The 98th Legislature is entering its final phase, with only 20 more session days scheduled in the House and 23 in the Senate. Thus, it is once again time for interested observers to make their predictions of what may or may not be taken up in the lame duck session – a process which is always fraught with uncertainty, to say the least. As usual, a great deal may depend upon the outcome of the upcoming election. If the GOP retains control of the House, there will not be any real urgency with respect to most of the pending initiatives, which may be re-introduced in the next session. If the Democrats win control of the House, we may expect a great deal of activity with some long days and a late-night session or two before it's all over, and in that event, most any Republican-sponsored proposal could sprout legs for a sprint to final passage before the last adjournment.

There are a number of bills, in addition to those previously discussed, which could be addressed in the last days of this session. These and other bills of interest include:

House Bill 5503 (Tedder – R), this bill is a necessary companion bill to **Senate Bill 632 (Schuitmaker – R)**, which was enacted into law as **2016 PA 186** in June, before the summer recess. As discussed in my last report, **2016 PA 186** 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 which 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.

House Bill 5503 proposes consistent amendments to the Estates and Protected Individuals Code. It was reported by the Senate Judiciary Committee without amendment on August 3, 2016, and awaits consideration by the full Senate on the General Orders Calendar. The effective date of this package remains to be determined by the expected prompt enactment of this tie-barred companion bill.

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. It has been included on the agenda for the committee's hearing on September 6, 2016.

House Bills 5469 through 5478 (Republicans McBroom, Howrylak, Bizon, Barrett, Chatfield and Sheppard; and Democrats Rutledge, Guerra and Moss), this bipartisan package of bills proposes amendment of the Freedom of Information Act (FOIA) to add a new Part 2, to be known as the "Legislative Open Records Act" (LORA). The new sections would add new provisions, modeled after existing sections of FOIA, requiring disclosure of records of legislators and legislative-branch agencies and employees previously exempted from disclosure under FOIA, subject to specified exclusions and the privileges and immunities provided under Article IV, Section 11, of the State Constitution. The new sections provide for a limited review of decisions of the "LORA Coordinator" denying requests for production of documents by appeal to the Administrator of the Legislative Council. These bills also propose amendments to existing sections of FOIA to eliminate the existing exemptions of the Governor, the Lieutenant Governor, their executive offices, and the employees thereof, from the act's definition of "Public Body," thereby extending the coverage of the act to their records, subject to specified exemptions. These bills were reported by the House Committee on Oversight and Ethics in May, and await consideration by the full House on the Second Reading Calendar.

House Bill 5802 (Singh – D) proposes the creation of a new "Death with Dignity Act," which would establish new procedures to allow terminally-ill persons to end their lives with the assistance of medication prescribed for that purpose under carefully limited circumstances. This bill, modeled after similar legislation enacted

[N]ew sections authorizing the State Police to initiate a program of pilot projects for roadside testing – a "preliminary oral fluid analysis" – administered by officers who have been certified as a "drug recognition expert" to detect the presence of controlled substances.

in other states and a proposed initiated law rejected by the voters several years ago, is unlikely be taken up this fall, but its introduction may signal the beginning of a new discussion of physician-assisted termination of life.

Senate Bill 993 (Casperson – R), this highly controversial bill, now well known as "the bathroom Bill," proposes to amend the Revised School Code to add a new section, MCL 38.1181, which would require public schools to make reasonable accommodations for the restroom needs of transgendered students while also requiring that public school restrooms, locker rooms, and shower rooms that are designated for use by pupils and accessible for use by multiple pupils at the same time must be designated for and used only by pupils of the same biological sex. It is probably unlikely that this bill will be taken up before the election, but it may well provide an occasion for some spirited discussions in the lame duck session.

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

Interlocutory Appeals in the Michigan Court of Appeals

Most appeals in the Michigan Court of Appeals are appeals as of right after the entry of a final judgment or order. But occasionally, a party may wish to challenge an interlocutory order – such as a discovery order, an order denying summary disposition, or an order regarding a pretrial motion in limine. With limited exceptions (such as an order denying governmental immunity), such orders are appealable only by leave of the Court.

When to File

MCR 7.205 governs applications for leave to appeal. To be timely, an application for leave to appeal must be filed within 21 days after entry of the order being appealed, or within 21 days after the entry of an order denying a timely motion for reconsideration or other relief from the order being appealed. MCR 7.205(A)(1)-(2). Depending on the circumstances, such as an impending trial, it may not be advisable to wait until the last day to file the application. When time truly is of the essence, the application should be filed as soon as possible. If action is required within 56 days, the application should be designated an "emergency" on the caption. See MCR 7.205(F)(1). A motion for immediate consideration should be filed if the order being appealed will have consequences within 21 days of the filing of the application. MCR 7.205(F)(2).

What to File

It is important to remember that unlike a claim of appeal, an application for leave to appeal is a full appeal brief on the merits. This means that it must comply with the rules applicable to an appellant's brief. See MCR 7.212(C). Applications should be narrowly focused, typically raising one issue, maybe two, and should explain as concisely as possible why leave to appeal should be granted. In short, what was the plain error that the trial court committed, and why should the Court of Appeals correct it before trial?

As to the latter point, MCR 7.205 expressly requires an application for leave to appeal from an interlocutory order to set forth "facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal." See MCR 7.205(B)(1). In other words, why should the appeal be heard immediately as opposed to waiting until the end of the case? Some orders, such as orders involving preliminary injunctions or those denying discovery or the admission of critical evidence, lend themselves more readily to an argument that an immediate appeal is necessary. But interlocutory appeals are certainly not limited to such orders. In an appropriate case, it might make sense to seek leave to appeal from an order denying summary disposition, such as if the motion raised a statute of limitations issue or some other legal issue that would dispose of the case in its entirety and avoid the need for discovery and a time-consuming and expensive trial.

It is also important to carefully consider what should be attached to the application. MCR 7.205(B) sets out the basics: the judgment or order being appealed

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To be timely, an application for leave to appeal must be filed within 21 days after entry of the order being appealed, or within 21 days after the entry of an order denying a timely motion for reconsideration or other relief from the order being appealed.

and either the relevant transcript or, if it is not yet available, a court reporter certificate or statement by the appellant's attorney that the transcript has been ordered. If the appeal is an emergency, consider expediting the transcript request and explaining in the application the status of that request. Alternatively, if the transcript is not crucial to the Court of Appeals' review of the application, be sure to let the Court know that as well.

Also consider attaching other materials (key contract provisions, deposition testimony, etc.) that are critical for the Court's review. It is important to remember that the Court of Appeals will not order the lower court record and will decide the application based on whatever the parties supply.

Available Relief

In seeking leave to appeal from an interlocutory order, parties should also keep in mind that the Court of Appeals has authority to enter a final decision at the application stage, in lieu of granting leave to appeal. See MCR 7.205(E)(2) ("The court may grant or deny the application; enter a final decision; [or] grant other relief."). As a result, a party might consider making a specific request that the Court enter a peremptory order (e.g., granting summary disposition) as an alternative to granting leave to appeal.

Stays

Finally, it is important to remember that filing an application for leave to appeal, like claiming an appeal of right, does not automatically stay proceedings in the lower court. Again, there are exceptions, such as in appeals from orders denying governmental immunity. But in most cases, a party seeking a stay must first request it from the trial court, and then from the Court of Appeals if the trial court denies a stay. While there are no specific requirements for seeking a stay, the key is to show that harm would result without one. It also can't hurt to explain why the opposing party would not be prejudiced by a stay. Typically, the Court of Appeals will consolidate the motion for stay with the application and decide them at the same time. If the application is granted, a stay will usually be granted as well.

A Primer on Formatting Electronic Documents for Michigan's Appellate Courts

A recurring theme at Michigan's Appellate Bench-Bar Conference has been that appellate lawyers need to format briefs to be read onscreen and on iPads. Michigan's judges and justices are increasingly going paperless and they expect briefs to be formatted appropriately. That means lawyers **must** file PDF copies of briefs and those PDFs should be bookmarked.

Fortunately, you need nothing more than Microsoft Word to produce a properly bookmarked brief (although bookmarking appendices may require additional software). There are two main ways to add bookmarks in Word: inserting one word bookmarks or using Word's "Styles" to add headings.

1. Bookmarking with the "insert" function

To insert a one-word bookmark, begin by highlighting a term in your document. Click "insert" located in the upper left corner of the screen and then select "bookmark." (Figure 1).

You can then label the highlighted term—unfortunately, using only a single word—and select "add." With that, you've added a bookmark. Repeat as necessary.

2. Bookmarking using Styles

Instead of using single-word bookmarks, you can also add bookmarks using Word's Styles. Highlight a word, or series of words, and select "Heading 1" located in the upper right corner of the screen. (Figure 2)

This text is now a "heading" that will automatically generate a bookmark. Word can add multiple layers of headings and, thus, multiple bookmarks. If you can't find the heading level you need in the "Styles" box, select the text, then press control-shift-S and type the name of the heading level you want (e.g., "Heading 2" or "Heading 3").

3. Keeping your bookmarks when you convert to a PDF

You're now ready to convert your document to a bookmarked file. Michigan's appellate courts only accept files in PDF or "portable document format." Although there are programs that will convert your Word file to a PDF, Word itself should suffice.

Click the Windows icon located in the upper left of your screen, select "Save As" and then select "PDF or XPS." (Figure 3).

When a new dialog box opens, select "Options" and make sure that you have selected "Create bookmarks using." If you created bookmarks with the "insert" function (the first option discussed above), select "Word bookmarks." If you used headings, select "headings." (Figure 4).

Word will then save your document as a PDF with bookmarks. You'll need to

Michigan's judges and justices are increasingly going paperless and they expect briefs to be formatted appropriately. That means lawyers must file PDF copies of briefs and those PDFs should be bookmarked.

select a location in which to save your file. With that, you'll have a bookmarked PDF of your brief.

4. What about appendices?

Michigan's appellate judges want bookmarking in both briefs and appendices. For briefs, you can follow the methods outlined above. Appendices are a different matter. You'll need software that will allow you to compile PDFs into a single file and then bookmark the beginning of each separate exhibit. Some examples of this software include Adobe Acrobat or Nitro PDF.

Although there may be a temptation to try to combine briefs and exhibits into a single PDF, the Michigan Supreme Court and Michigan Court of Appeals currently prefer to keep briefs and appendices separate.[1] Filing briefs and exhibits separately might seem to create a need to switch back-and-forth between documents, but applications like iAnnotate allow multiple tabs onscreen. This feature allows users to easily switch from one electronic document to another while reading on an iPad.

5. Using hyperlinks

The Michigan Supreme Court and Michigan Court of Appeals encourage the use of **internal** hyperlinks (which take the reader to another location in the same document) but discourage the use of **external** hyperlinks (which take the reader to a location outside the document).[2] The rationale for this distinction is straightforward: the internet is a vast and sometimes dangerous place. External hyperlinks could lead your reader to malware or compromise the security of courts' internal records. Internal hyperlinks have no such issues, since they only jump to another location in your document.

Hyperlinks are created in Word before you save your document as a PDF. Select the text you want to use as a launching point, click "insert," and then "hyperlink." In the dialog box that appears, a column on the left side includes various options under "Link to," one of which is "Place in this document." (Figure 5).

Selecting "Place in this document" will open a dialog box of the headings or bookmarks you created using methods (1) or (2) above. By selecting a heading or bookmark, you will link the highlighted text to that destination. (Figure 6).

6. The final step

There is a critical final step to this process. Before submitting your brief, read the PDF onscreen and make sure that navigation is easy. And given the likelihood that your brief will be read on an iPad, try reading and navigating through your own brief on an iPad, if possible. That will alert you to any dead links or unwieldy bookmarks.

7. The future of appellate briefs?

This process—bookmarking and hyperlinking—is a way to accommodate electronic reading of traditional appellate briefs. One of the breakout sessions at Michigan's 2016 Bench-Bar Conference involved a discussion on how new mediums require lawyers to rethink how they present arguments in the electronic age. Although those strategies are beyond the scope of this article, practitioners should be sure to think about ways to make their briefs more user-friendly when read onscreen.

Endnotes

1. See *Frequently Asked Questions (FAQs)*, available at: http://courts.mi.gov/Courts/MichiganSupremeCourt/Clerks/ClerksOfficeDocuments/e-filing%20docs/TrueFiling%20FAQs.pdf (last visited September 5, 2016)
2. *Id.*

Michigan's judges and justices are increasingly going paperless and they expect briefs to be formatted appropriately. That means lawyers must file PDF copies of briefs and those PDFs should be bookmarked.

Figure 1

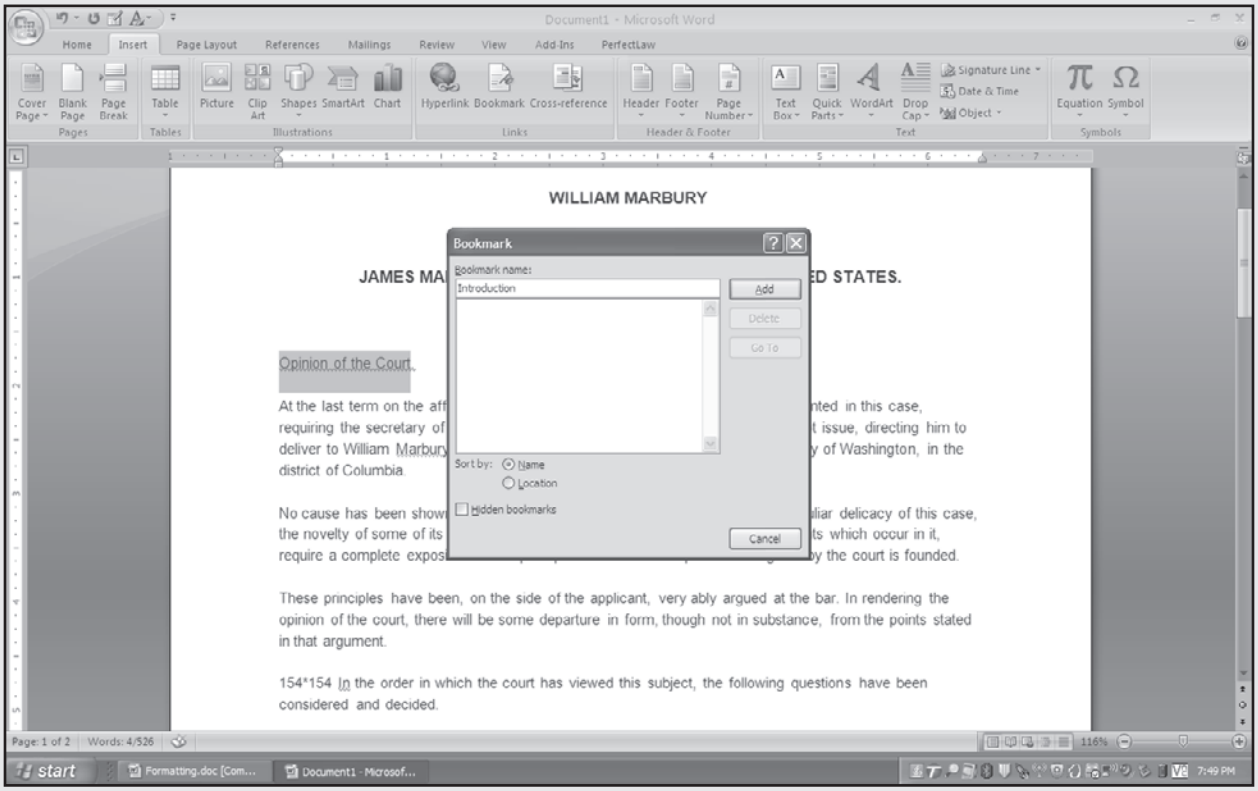
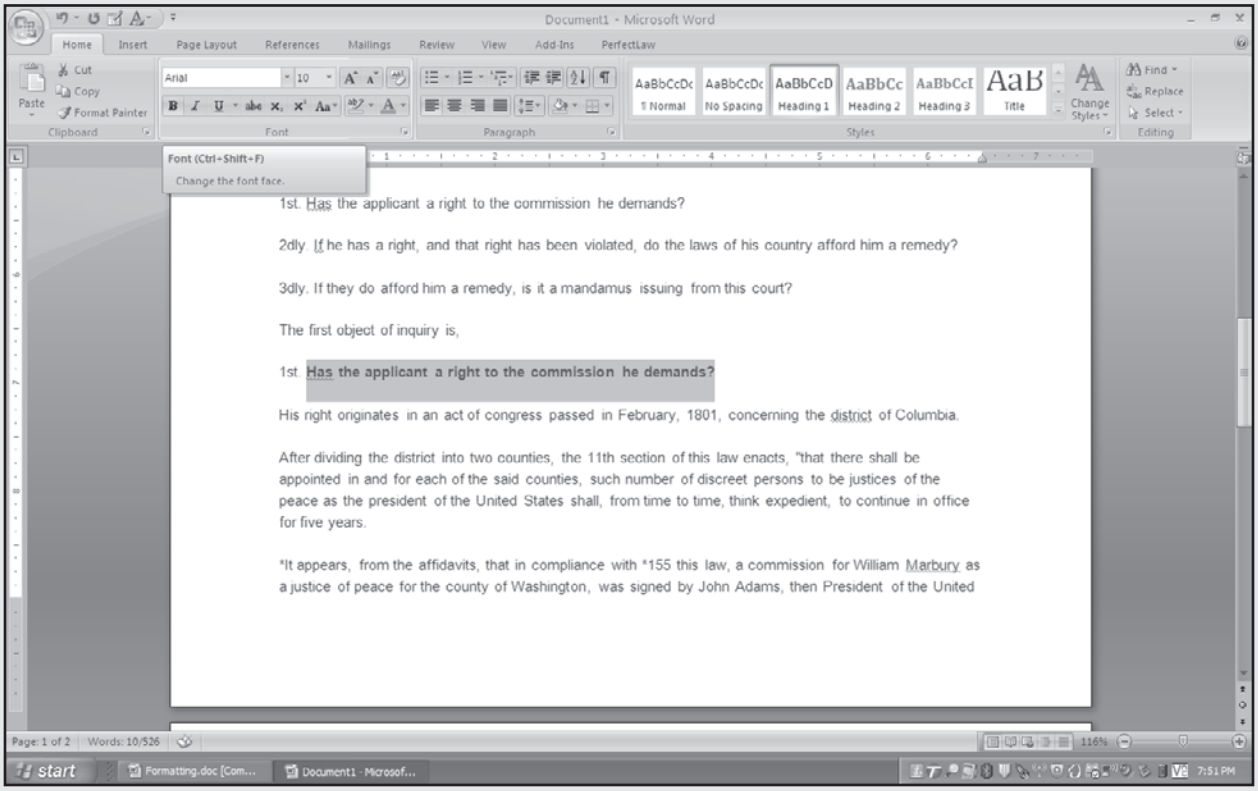


Figure 2



It is also important to carefully consider what should be attached to the application.

Figure 3

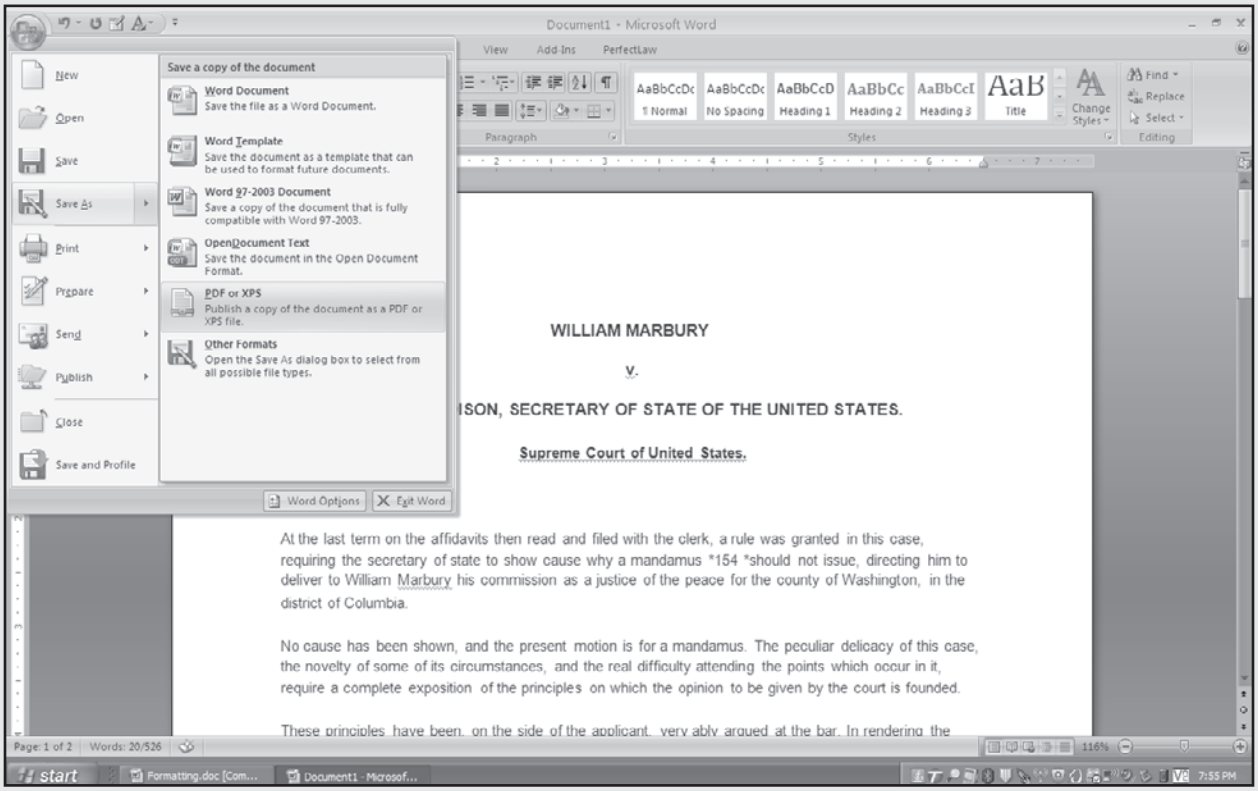
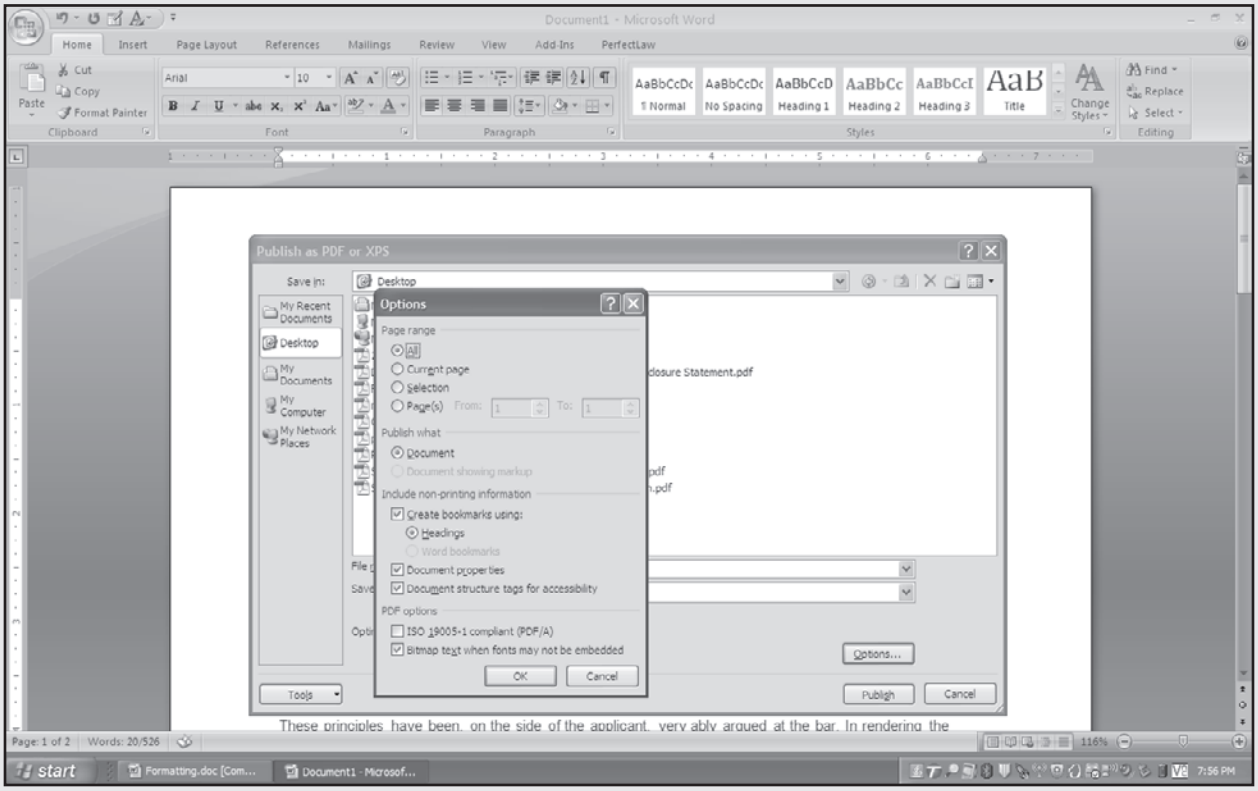


Figure 4



Michigan's appellate judges want bookmarking in both briefs and appendices.

Figure 5

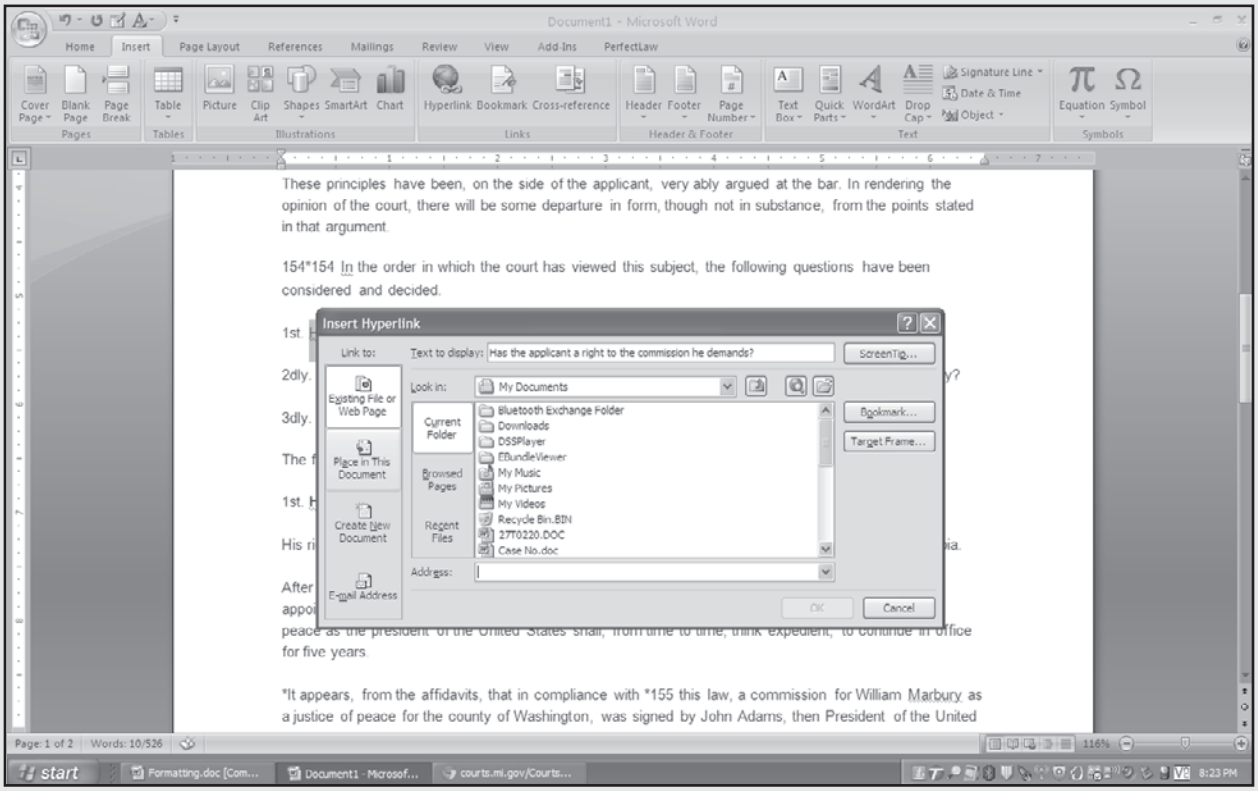
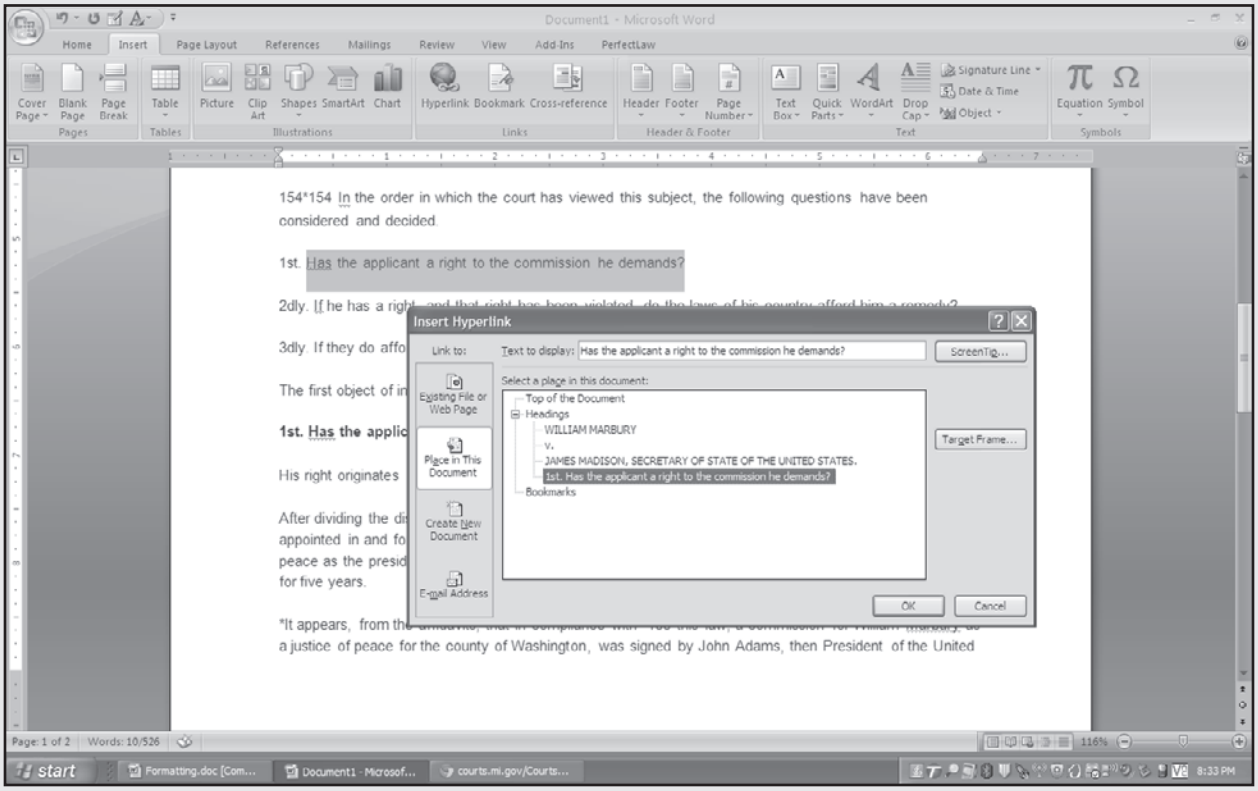


Figure 6



MDTC E-Newsletter
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September	August 1

For information on article requirements, please contact:

Alan Couture
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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

For information on article requirements, please contact:

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Professional Liability & Health Care

Trial Practice

Young Lawyers

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

The two-year statute of limitations barred the defendant's legal-malpractice claim alleged in response to a law firm's complaint to collect unpaid fees. The statute of limitations also barred the defendant's breach-of-contract and negligent-infliction-of-emotional-distress claims, as they were indistinguishable from the legal-malpractice claim. The defendant's dismissal request under the doctrine of *forum non conveniens* was also properly denied where the only fact in support of request was that the defendant relocated to a different state.

Law Firm v Finch, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2016 (Docket No. 327400), 2016 WL 3749388.

Facts: The plaintiff law firm represented the defendant in post-judgment proceedings after his divorce. While the plaintiff represented the defendant for several years in various custody-related matters, the plaintiff eventually filed a motion to withdraw as the defendant's counsel, and the Court granted the motion on March 2, 2012. Over two years later, the plaintiff filed a complaint on April 29, 2014, seeking unpaid attorney fees. The defendant then filed a counterclaim on November 24, 2014, alleging legal malpractice, breach of contract, and negligent infliction of emotional distress. The defendant also requested that the lawsuit be dismissed based on the doctrine of *forum non conveniens* because he had relocated to Texas.

The plaintiff moved for summary disposition pursuant to MCR 2.116(I), arguing that the statute of limitations barred all of the defendant's claims (the Court of Appeals commented in a footnote that it was odd that the motion was brought under MCR 2.116(I), as opposed to MCR 2.116(C)(7), although it was still properly considered under MCR 2.116(I)). The Court granted the motion, and the defendant appealed.

Ruling: The Court of Appeals affirmed the trial court's ruling, holding that the statute of limitations contained in MCL 600.5838b and 600.5805(6) barred all of the defendant's claims. The Court rejected the defendant's argument that the statute of limitations for malpractice cases is six years. The Court cited MCL 600.5838b, which provides in pertinent part:

(1) An action for legal malpractice against an attorney-at-law or a law firm shall not be commenced after whichever of the following is earlier:
(a) The expiration of the applicable period of limitations under this chapter.
(b) Six years after the date of the act or omissions that is the basis for the claim.
(2) A legal malpractice action that is not commenced within the time prescribed by subsection (1) is barred.

The Court also quoted MCL 600.5805(6), which states "the period of limitations is 2 years for an action charging malpractice," and cited well-established case law demonstrating the applicable statute of limitations for legal-malpractice claims is two years. *Id.* at *2, citing *Sam v Balardo*, 411 Mich 405, 417; 308 NW2d 142 (1981); *Kloian v Schwartz*, 272 Mich App 232, 237; 725 NW2d 671 (2006).

The Court found the defendant's contention that the statute of limitations was six years confused the statute of limitation with the statute of repose. Explaining the

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The two-year statute of limitations for legal-malpractice claims applies equally to a plaintiff's claims, regardless of how artfully pled or titled, if the claims are based on inadequate representation.

difference between the two, the Court stated:

> While statutes of repose and statutes of limitation both create temporal barriers to a claim's viability, each functions differently. A statute of repose prevents a cause of action from ever accruing when the injury is sustained after the designated statutory period has elapsed. A statute of limitation, however, prescribes the time limits in which a party may bring an action that has already accrued. Unlike a statute of limitation, then, a statute of repose may bar a claim before an injury or damage occurs. [*Id*., quoting *Frank v Linkner*, 310 Mich App 169, 179; 871 NW2d 363 (2015), lv gtd, 499 Mich 859; 873 NW2d 591 (2016).]

Having dismissed the defendant's legal-malpractice claim, the Court then dismissed the defendant's breach-of-contract and negligent-infliction-of-emotional-distress claims for the same reason. The Court reasoned that the two claims were "indistinguishable" from the legal-malpractice claim, and were "based entirely on plaintiff's alleged failure to adequately represent [defendant]"—consequently, the claims were legal-malpractice claims even though they were titled differently.

In making its decision, the Court cited the specific language in the defendant's counterclaims. The defendant's breach-of-contract claim alleged that "plaintiff breached the parties' contract by failing 'to provide ethical and competent legal representation,'" while the negligent-infliction-of-emotional-distress claim alleged that the plaintiff failed "to fulfill its 'general obligation and duty to Defendant with respect to representation and conduct of the relationship' by failing to act 'with the appropriate care and diligence required.'" *Id*. at *3. The legal-malpractice claim was all too similar, alleging that the "plaintiff committed legal malpractice by failing to fulfill its 'professional obligation and duty to Defendant with respect to representation' by failing to act 'with the degree of professionalism, diligence, and care required.'" The Court stated that "'[t]he type of interest harmed, rather than the label given the claim, determines what limitations period controls,'" and held the two-year statute of limitations applied to the claims. *Id*., quoting *Seebacher v Fitzgerald, Hodgman, Cawthorne & King, PC*, 181 Mich App 642, 646; 449 NW2d 673 (1989).

Last, the Court addressed the defendant's contention that the case should be dismissed under the doctrine of *forum non conveniens*. The Court described the doctrine as giving "discretionary power to decline jurisdiction when the convenience of the parties and the end of justice 'would be better served if the action were brought and tried in another forum.'" *Id*., quoting *Hernandez v Ford Motor Co*, 280 Mich App 545, 551; 760 NW2d 751 (2008). The Court set out the required considerations of the doctrine, which are "(1) whether the forum is inconvenient and (2) whether a more appropriate forum exists," and explained that within such a framework, the courts should give attention to "the private interest of the litigants, matters of public interest, and the defendant's promptness in making the request." *Id*. (internal citations omitted).

The defendant's only argument to invoke the doctrine was that he relocated to Texas, and therefore Texas would be a more convenient forum. The Court disagreed, upholding the trial court's reasoning that Michigan was the most convenient because "the contract between plaintiff and defendant was executed in Michigan, all legal representation performed by plaintiff on behalf of defendant was in Michigan, and all anticipated witnesses were in Michigan." *Id*. at *4.

Practice Note: The two-year statute of limitations for legal-malpractice claims applies equally to a plaintiff's claims, regardless of how artfully pled or titled, if the claims are based on inadequate representation. As a separate note, it is a good business practice to wait two years after representation ends to bring an action to collect fees, as former clients may file retaliatory malpractice claims which might then be dismissed on statute of limitation grounds.

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 Qualification Dependent Upon Specific Experience

Walworth v Markiewicz, unpublished opinion per curium of the Court of Appeals, issued July 28, 2016 (Docket No. 327795); 2016 WL 4071174.

Facts: In *Walworth*, the plaintiff underwent a specialized otorhinolaryngologic procedure known as a canaloplasty. The canaloplasty was intended to address bony growths from the temporal bone, which were protruding into the plaintiff's ear canal. The ENT surgeon used a device called a Skeeter drill to remove the bony growths. After the surgery, the plaintiff developed total and permanent hearing loss in his operative ear. He sued the surgeon alleging that he hit the plaintiff's eardrum with the Skeeter drill, causing his hearing loss. The defendant denied liability and specifically denied that he hit the plaintiff's eardrum with the Skeeter drill during the canaloplasty procedure. Defendant also asserted that hearing loss was a known risk of the canaloplasty, as well as any other ENT surgery.

The plaintiff's complaint was accompanied by an affidavit of merit signed by a board-certified otolaryngologist. His credentials matched that of the defendant physician in that the plaintiff's expert practiced in the same specialty and had the same board certification as the defendant physician.

When the plaintiff's expert was deposed, he testified that he had never performed the canaloplasty procedure, had never used a Skeeter drill, and had last observed one of a total of six canaloplasty procedures he had ever observed during his residency training 27 years before the deposition (many years before the treatment at issue). The plaintiff's expert further testified that, if a patient in his practice needed a canaloplasty, he would refer that patient to another provider because he lacked the experience and training to perform the surgery. Likewise, he did not perform any surgical procedures involving the temporal bone, the source of the bony growths within plaintiff's right ear canal.

Five months after the plaintiff's expert's deposition and a couple of months before trial, the defendants brought a motion for summary deposition under MCR 2.116(C)(10) on the basis that there was no genuine issue of material fact that the expert was unqualified to offer opinion testimony under MCL 600.2169(2), (3)[1] and MRE 702.[2] The defendants relied upon the expert's own testimony that he lacked the requisite experience and training to offer a reliable opinion pertaining to the standard of care of the defendant in carrying out the canaloplasty procedure.

The plaintiff contested the motion on three bases: (1) the expert was qualified based on his own testimony as well as matching specialties and board certifications; (2) the plaintiff did not require an outside expert since the defendant had "admitted" that he breached the standard of care in his own deposition; and (3) at the hearing, the plaintiff argued that the court should allow him the opportunity to substitute expert witnesses.

The trial court quickly rejected the plaintiff's claims that the defendant admitted negligence since the plaintiff relied upon a singular statement in the defendant's deposition in which he "admitted" knowledge of the standard of care. The trial court found that while the defendant admitted familiarity with what the standard of

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Walworth is in some respects a "wake up call" with reference to analyzing the qualifications of expert witnesses.

care required, he emphatically denied breaching the standard of care, and explained that singular answer, in detail, in other portions of the deposition. The trial court also rejected the plaintiff's request for an opportunity to add another expert since the plaintiff's counsel knew, or should have known, of the problems he had with the retained expert for several months and the trial date was imminent.

The trial court relied upon MCL 600.2169(2)-(3) and MRE 702 in granting the defendant's motion to strike the expert. The judge found that the plaintiff's expert lacked the requisite qualifications to offer an opinion at trial based on the fact that he had never done the surgical procedure at issue and had merely observed a half a dozen or so of the procedures almost 30 years prior. In addition, the witness had never researched, wrote about, or presented any information to his peers regarding canaloplasty. He had never used the Skeeter drill utilized by the defendant. The trial court found that the expert's lack of experience was so significant that he could not allow the expert to offer opinions, finding that a jury should not be allowed to decide the weight of the unsubstantiated testimony. In light of the plaintiff's inability to carry the burden of proof without an expert to testify on standard of care, the trial court dismissed the case.

The plaintiff filed a claim of appeal, asserting that the trial court abused its discretion in striking the plaintiff's sole expert witness and dismissing the case.

Ruling: The Michigan Court of Appeals, in an unpublished *per curium* opinion, found that the trial court had not abused its discretion in vetting the qualification of the plaintiff's expert as well as the admissibility of his opinions. Absent an abuse of discretion, the Court of Appeals deferred to the trial court, finding that the outcome was reasonable and principled.

The Court of Appeals also rejected the plaintiff's argument that he could call the defendant physician as an expert against himself based on their own detailed review of the defendant physician's deposition testimony. Finally, the Court of Appeals agreed with the trial court's conclusion that the plaintiff knew or should have known from the time the deposition testimony was elicited from his own expert, that the expert's qualifications were questionable. Based on a lack of diligence in seeking new expertise at that time, the Court of Appeals felt that the trial court's decision to deny plaintiff the opportunity to substitute experts was also a reasonable and principled outcome.

The plaintiff relied heavily upon MCL 600.2169(1)[3] to support the position that the expert was qualified to offer opinions about the standard of care. Neither the defendants, the trial court, nor the Court of Appeals had offered any justification under section 2169(1) to strike the expert. Consequently, those arguments were ineffective. The Court of Appeals pointed out that in its appellate submissions, the plaintiff had failed to address the provisions of sections 2169(2) and (3) whatsoever. In failing to address the applicability of those statutory provisions, the plaintiff had abandoned any claim of error with reference to the rulings that relied upon those provisions.[4]

The Court of Appeals clarified that the analysis regarding experts and the opinions that they may offer does not end with matching specialties. The plaintiff relied only on section 2169(1) and MRE 702, arguing that the qualifications of their expert made his opinions essentially *ipso facto* sufficiently reliable. The plaintiff contended that the expert's familiarity with ear anatomy and his professed knowledge of the standard of care pertaining to canaloplasty rendered him qualified and his opinions reliable. The Court of Appeals held that the expert's self-professing of expertise without foundation was insufficient to find his opinions reliable. The mere appearance of expertise based on matching backgrounds was not enough to make the expert's opinion reliable.

The plaintiff also attempted to argue that the trial court's decision contradicted the case of *Albro v Drayer*.[5] In *Albro*, three defense experts were found to be qualified to testify regarding a specialized ankle reconstruction procedure even though none of them performed that specific procedure. The Court of Appeals in *Walworth* found that the plaintiff's reliance on *Albro* was misplaced. In *Albro*, the expert orthopedic surgeons offered by the defense all regularly did ankle reconstructions, all were familiar with the specific procedure at issue, and all had discussed the procedure in publications that they had authored or co-authored. The experts in *Albro* had demonstrated their knowledge of the procedure and had performed similar procedures numerous times. In *Albro*, the issue was whether the experts were qualified to discuss a specific type of ankle reconstruction even though the experts performed their own ankle reconstructions in a different way than the defendant physician.

The *Walworth* court further distinguished *Albro*, stating that the plaintiff's expert ENT had never performed a canaloplasty procedure and had never even operated on a temporal

The judge found that the plaintiff's expert lacked the requisite qualifications to offer an opinion at trial based on the fact that he had never done the surgical procedure at issue and had merely observed a half a dozen or so of the procedures almost 30 years prior.

bone. In addition, he had never used the drill at issue and admittedly lacked the training and experience to perform a canaloplasty. Finally, he had never published or spoken on the canaloplasty procedure, demonstrating a significantly greater lack of expertise than that purported to be present in the *Albro* case.

In *Walworth*, the Court of Appeals found that the trial court made the correct decision based on analyzing the expert's qualifications and the reliability of his opinions under MCL 600.2955[6] (in addition to sections 2169(2), (3) and MRE 702). They agreed that the proposed expert lacked sufficient knowledge, skill, experience, training and education regarding the specific procedure to render a reliable opinion on standard of care. Under MCL 600.2955, an expert opinion is not admissible unless the court determines that it is reliable. The determination of reliability is based upon the opinion itself and the basis for the opinion. The statute provides a non-exhaustive list of factors the court may consider in determining whether an opinion is reliable.

Section 2955(3) specifically provides that in a malpractice action, its provisions are in addition to, and not independent of, the criteria for experts and expert testimony set forth in MCL 600.2169. The Court of Appeals called section 2955 the "codification of *Daubert*,"[7] emphasizing that the Court must apply *Daubert* standards in analyzing the reliability of scientific expert opinions offered in Michigan courts. The Court of Appeals also relied upon the case of *Greathouse v Rhodes*[8] for the proposition that statutory sections 600.2955 and 600.2169 work in harmony for purposes of determining the admissibility of expert opinions.

When looking at MCL 600.2169(2), the Court of Appeals determined that the trial court had properly evaluated the qualifications of an expert according to the factors set forth in subsections 2(a)–(d). Specifically, the trial court properly evaluated the expert's education, training, specialization, experience and the relevancy of his opinions. In *Walworth*, the expert lacked education, training, and experience with reference to the canaloplasty procedure. He had never performed the surgery, observed a handful of the procedures about 30 years prior, and admittedly was not trained to perform the surgery. The Court also pointed out that the trial court was not limited by the provisions of section 2169(2), since section 2169(3) provides that the trial court has the power to disqualify an expert on grounds other than the specific factors listed in the statute.

Relying upon MRE 702, the Court of Appeals again expressed the opinion that this Rule of Evidence requires that the trial court determine that proffered expert testimony will assist the trier of fact and that the witness offering the opinion is qualified by "knowledge, skill, experience, training or education." MRE 702 also directs that an expert's opinions must be based on sufficient facts or data, be the product of reliable principles and methods, and demonstrate reliable application of the principles and methods to the facts of the particular case.

In the Court of Appeals' view, the overriding *Daubert* issue central to the outcome in *Walworth,* was the foundation from which the expert could rationally render opinion testimony. The trial court was responsible to ensure that the expert testimony was relevant and also rested on a reliable foundation. The qualifications under MRE 702 to render a reliable opinion are knowledge, skill, experience, training and education. The plaintiff's proffered expert lacked the requisite skill and training in the surgical procedure at issue to offer an opinion.

Without the foundation for reliability, the Court of Appeals stated that expert's opinions are merely speculation or the particular beliefs of the expert:

> It is axiomatic that an expert, no matter how good his credentials, is not permitted to speculate. * * * [T]he word 'knowledge' connotes more than subjective belief or unsupported speculation. * * * The standard of care represents 'generally accepted standards,' within the 'relevant expert community,' * * * and not the personal opinion of the particular expert. [citations omitted]

In *Walworth*, the Court of Appeals found that the plaintiff failed to satisfy the burden of showing the expert had adequate foundation for his professed knowledge regarding the standard of care for performance of a canaloplasty procedure. The trial court's finding that this expert was not qualified to offer reliable expert opinion testimony on standard of care was within the range of reasonable and principled outcomes.

With reference to the trial court's dismissal of the complaint based on striking the plaintiff's only standard of care expert, the Court of Appeals commented that since the plaintiff could not meet the burden of proof in the case without the expert testimony, dismissal

The Court of Appeals held that the expert's self-professing of expertise without foundation was insufficient to find his opinions reliable. The mere appearance of expertise based on matching backgrounds was not enough to make the expert's opinion reliable.

of the complaint was appropriate. They rejected the plaintiff's suggestion that he could call the defendant physician as an expert against himself, since the defendant's deposition testimony did not support such a conclusion. The Court of Appeals commented that the plaintiff took one singular response by the defendant in isolation in an attempt to establish he had "admitted" liability.

The Court further commented on the plaintiff's attempt to justify "cherry picking" one statement from the defendant's deposition, which justification was based on the standard for ruling on motions brought under MCR 2.116(C)(10). Plaintiff argued that the Court must view all facts in the light most favorable to the non-moving party, including that singular statement by the defendant physician. The Court of Appeals commented that the defendant had fully explained and even modified his answer to that singular question and that his deposition testimony must be viewed as a whole. Finally, the plaintiff had relied upon pre-1993 tort reform cases or other inapplicable authority in arguing that he should be allowed to use the defendant physician as an expert.

The Court of Appeals also supported the trial court's decision to deny the plaintiff the opportunity to substitute experts citing the length of time that elapsed (five months) between the deposition and the filing of defendant's motion. The Court further observed that the plaintiff only made an oral motion at the time of hearing, one month after the dispositive motion was filed, to substitute experts. The Court of Appeals agreed with the trial court that the plaintiff had failed to demonstrate diligence in identifying a different expert.

Practice Note: Although *Walworth* is unpublished, it is still very persuasive, particularly in cases involving highly specialized procedures. It is also significant in demonstrating that it is possible to successfully challenge the qualifications of an expert witness beyond the issue of matching specialties and board certifications. The Court of Appeals' analysis under MCL §§600.2169(2),(3) and 2955, as well as MRE 702 was noteworthy, particularly when an expert lacks specific training and experience relevant to the procedure or treatment at issue.

Walworth also establishes that an expert cannot merely profess to have knowledge of the applicable standard of care without any foundation based upon the expert's training, education and experience. The Court of Appeals also determined that it was appropriate to challenge an expert's qualification shortly before trial[9] and that dismissal is an appropriate remedy when a plaintiff's only standard of care expert is unqualified. It was beneficial to the defendants' position that many months had elapsed since the time that it should have been apparent to the plaintiff that the expert lacked specific, relevant expertise.

Walworth is in some respects a "wake up call" with reference to analyzing the qualifications of expert witnesses. This is the first significant appellate opinion since *Albro* to address a particular procedure and whether an expert is qualified to discuss it based on his own experience and training. Counsel on both sides of a case should carefully vet the specific expertise of any potential expert; any potential problems with distinctive, relevant expertise should be addressed as soon as they become apparent.

Endnotes

1 MCL 600.2169 (2), (3) provides:
(2) In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:
(a) The educational and professional training of the expert witness.
(b) The area of specialization of the expert witness.
(c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.
(d) The relevancy of the expert witness's testimony.
(3) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

2 Michigan Rule of Evidence 702 provides:
Rule 702 Testimony by Experts
If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

3 MCL 600.2169(1) provides:
(1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
(a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
(b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
(i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
(ii) The instruction of students in an accredited

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health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.
(c) If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
(i) Active clinical practice as a general practitioner.
(ii) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed.

4 "The failure to brief these related bases for the trial court's decision results in abandonment of any claim of error with respect to these other grounds for the trial court's decision. See *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 16; 592 NW2d 379 (1998), citing *Mitcham v Detroit*, 355 Mich 182, 203, 94 NW2d 388 (1959)." The Court of Appeals statement regarding abandonment of arguments may be a significant impediment to success on further appeal should the plaintiff seek leave with the Michigan Supreme Court.

5 Albro v Drayer, 303 Mich App 758, 762-763; 846 NW2d 70 (2014).

6 MCL 600.2955 provides:
(1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
(a) Whether the opinion and its basis have been subjected to scientific testing and replication.
(b) Whether the opinion and its basis have been subjected to peer review publication.
(c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
(d) The known or potential error rate of the opinion and its basis.
(e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
(f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.
(2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.
(3) In an action alleging medical malpractice, the provisions of this section are in addition to, and do not otherwise affect, the criteria for expert testimony provided in section 2169.

7 *Daubert v Merrell Dow Pharmaceuticals Inc,* 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

8 *Greathouse v Rhodes,* 242 Mich App 221, 238; 618 NW 2d 106 (2000), rev'd on other grounds, 465 Mich 885; 636 NW2d 138 (2001).

9 And within the parameters set forth in the trial court's scheduling order.

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No-Fault Report

Not Dead Yet - The Current Status of the "Innocent Third Party Doctrine"

In our last article, we discussed at some length the Court of Appeals' long-awaited decision in *Bazzi v Sentinel Ins Co*, __ Mich App __; __ NW2d __ (June 14, 2016) (Docket No. 320518). In that case, the Court of Appeals, in a controversial 2-1 decision, determined that the "Innocent Third-Party" doctrine did not survive the Michigan Supreme Court's ruling in *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012). As a result, no-fault insurers were free to rescind coverage, even as it may have affected the rights of "innocent third parties" and their claims for first-party, no-fault insurance benefits, arising out of any given loss.

Over the summer, there has been a flurry of activity at the Michigan appellate court level regarding the rights of "innocent third parties" under policies of insurance that are subject to rescission, based upon a fraud perpetrated by the policyholder. This article shall bring the reader up to date as to where matters stand on various cases that have been decided since *Bazzi* was released on June 14, 2016.

The *Bazzi* Case Itself

Following the release of the Court's opinion on June 14, 2016, plaintiff Ali Bazzi and intervening-plaintiff Citizens Insurance Company filed motions for reconsideration. In an order dated August 5, 2016, the Court of Appeals, in a 2-1 decision, denied both motions for reconsideration. Judge Beckering would have granted both motions for the reasons set forth in her dissenting opinion in *Bazzi*. As a result, the Court's decision in *Bazzi* remains the final word but, in mid-September, the plaintiff filed an application for leave to appeal with the Michigan Supreme Court.

Cases Held in Abeyance Pending *Bazzi – Frost v Progressive Michigan Ins Co,* and *State Farm v Michigan Municipal Risk*

Readers of this column will recall that in September 2014, the Court of Appeals, in *Frost v Progressive Michigan Ins Co* (Court of Appeals Docket No. 316157) ruled that a no-fault insurer could rescind coverage, even as to an "innocent third party," based upon the Supreme Court's decision in *Hyten*. The Court's previous opinion was subsequently vacated by the Michigan Supreme Court and remanded back to the Court of Appeals for reconsideration following its decision in *Bazzi*. See *Frost v Progressive Michigan Ins Co*, 497 Mich 980; 860 NW2d 636 (2015).

On July 28, 2016, the Court of Appeals issued its decision on remand. In a unanimous unpublished decision, the Court of Appeals (Judges Owens, Jansen, and O'Connell) reaffirmed its earlier decision allowing the no-fault insurer to rescind coverage even as to an "innocent third party." In doing so, the Court recognized that it was bound by its earlier decision in *Bazzi*. Accordingly, the matter was remanded back to the Wayne County Circuit Court in order for Progressive Michigan Insurance Company to "establish proper grounds for rescission." As of the date that this article is being prepared, the plaintiff has not filed an application for leave to

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appeal with the Michigan Supreme Court.

With regard to the *State Farm v Michigan Municipal Risk* decision (Court of Appeals Docket No. 319710), readers will recall that in that case, the Court of Appeals had earlier determined that the no-fault insurer could **not** rescind coverage even as to an "innocent third party." Judge Boonstra was on the Court of Appeals' panel in *State Farm*, and was also on the panel that decided *Bazzi*. In fact, in *Bazzi*, Judge Boonstra issued a concurring opinion in which he explained how he had changed his mind on this issue, given the extensive briefing submitted by both parties in *Bazzi*. Readers will recall that the Supreme Court likewise vacated the Court of Appeals' earlier decision and remanded this matter back to the Michigan Court of Appeals for reconsideration, once *Bazzi* had been decided. See *State Farm Mut'l Ins Co v Michigan Municipal Risk Mgmt Authority*, 498 Mich 870; 868 NW2d 898 (2015).

The Court of Appeals issued its **published decision**, on remand, on August 30, 2016. In its decision, the Court of Appeals affirmed the ability of the no-fault insurer to rescind coverage even as to the "innocent third party" and remanded the matter back to the circuit court in order to allow QBE Insurance Company to establish proper grounds for rescinding coverage, based upon its insured's failure to disclose the actual ownership of the vehicle being insured under the QBE policy.

Of more interest is Judge Murphy's concurring opinion, which reads almost like a dissent. In his concurring opinion, Judge Murphy points out that in *Hyten*, the Michigan Supreme Court expressly recognized that an insurer's ability to rescind coverage may be "limited in relation to statutorily-mandated insurance coverage and benefits." Specifically, Judge Murphy pointed out that at the end of the Court's opinion in *Hyten*, the Supreme Court stated:

> Should Titan prevail on its assertion of actionable fraud, it may avail itself of a traditional legal or equitable remedy to avoid liability under the insurance policy, notwithstanding that the fraud may have been easily ascertainable. However, as discussed earlier in this opinion, the remedies available to Titan may be limited by statute. *Titan Ins Co v Hyten*, 491 Mich 547, 572; 817 NW2d 562 (2012).

Judge Murphy then made note of the footnote that was attached to the end of this sentence, "For example, MCL 500.3009(1) provides the policy coverage minimums for all motor vehicle liability insurance policies."

The minimum insurance policy limits specified in the cited statute, of course, are $20,000/$40,000. As noted by Judge Murphy:

> When footnote 17 is read in conjunction with the sentence to which it was appended, it necessarily signified the Supreme Court's stance that the $20,000.00/$40,000.00 residual liability coverage mandated by MCL 500.3009(1) cannot be diminished or limited by legal or equitable remedies generally available to an insurer for actionable fraud. There can be no other reasonable construction of the sentence and corresponding footnote. Optional insurance coverage above the minimum liability limits contained in a policy procured by fraud might not be reached by an injured third party seeking damages arising out of a motor vehicle accident, but footnote 17 in *Titan* makes abundantly clear that the mandatory liability minimums are to be paid by the insurer under the policy despite any fraud. [*State Farm*, slip op at pp 1-2 (Murphy, J., concurring).]

Judge Murphy then observed that like the minimum policy limits set forth in MCL 500.3009, PIP benefits are likewise mandated under MCL 500.3101(1). Therefore, according to Judge Murphy:

> Given the mandatory nature of PIP coverage under the No-fault Act, and considering the logic gleaned from examining footnote 17 of *Titan*, one can reasonably extrapolate that MCL 500.3101(1) (requiring PIP coverage) would be another example, along with MCL 500.3009(1), of a statute that limits the availability of remedies for actionable fraud.
>
> In sum, *Bazzi*'s construction of *Titan* must be honored, and thus I concur in the majority's holding. It is my belief, however, that the opinion in *Titan* cannot be interpreted as abolishing the 'innocent third-party' rule in the context of statutorily-mandated automobile insurance coverage, as

Given the opinion of Judge Ronayne Krause and Judge Stephens in *Southeast Michigan Surgical Hosp,* requesting that a conflict panel be convened pursuant to MCR 7.215(J), and the concurring opinion by Judge Murphy in *State Farm,* it certainly appears that this issue may very well end up being addressed by the Michigan Supreme Court.

> to reach such a conclusion would require a wholesale disregard of *Titan*'s footnote 17. [*State Farm*, slip op at pp 2-3 (Murphy, J., concurring).]

Like the plaintiff in *Bazzi*, the Michigan Municipal League has filed an application for leave to appeal with the Michigan Supreme Court.

As counsel for Titan Insurance Company in *Titan Ins Co v Hyten*, I would like to offer the following thoughts on the issue raised by Judge Murphy. First, there is a fundamental difference between recovery on a tort claim and recovery on a PIP claim. On a tort claim, unless the injured person has purchased uninsured or underinsured motorist coverage, there are no other sources of recovery for non-economic damages (or excess economic losses) from a tortfeasor, other than whatever insurance policy limits the tortfeasor may have carried on his or her insurance policy. The "innocent third party" doctrine was designed to prevent an injured party from being "left out in the cold" completely, with no source of recovery for the damages suffered as the result of another's negligence. Therefore, it only makes sense that if the tortfeasor was insured (no matter how much fraud may have been involved in the procurement of the policy), limiting the injured party's recovery to the minimum policy limits of $20,000/$40,000 at least provided a modicum of recovery for the injured party.

By contrast, an injured "innocent third party" always has other sources of recovery for payment of his or her PIP benefits – lower priority insurers or the Michigan Assigned Claims Plan, as "the insurer of last resort." An injured "innocent third party" should never be "left out in the cold" when it comes to payment of PIP benefits. Thus, a no-fault insurance carrier should be permitted to rescind coverage even as to an "innocent third party," as the injured party should be able to obtain benefits from lower-priority insurers or the Michigan Assigned Claims Plan.

***Southeast Michigan Surgical Hosp v Allstate Ins Co*, __ Mich App __; __ NW2d __(Aug. 9, 2016 (Docket No. 323425)**

The divisions in the Court of Appeals regarding the current status of the "Innocent Third-Party" doctrine are exemplified in the Court of Appeals' 2-1 decision in *Southeast Michigan Surgical Hosp LLC v Allstate Ins Co,* __ Mich App __; __ NW2d __ (Aug. 9, 2016) (Docket No. 323435). In *Southeast Michigan Surgical Hosp,* Judges Ronayne Krause and Stephens issued an opinion, indicating that but for the binding nature of the Court of Appeals' earlier decision in *Bazzi*, they would have held that the "Innocent Third Party" doctrine remains viable in Michigan, and that a no-fault insurer cannot be permitted to rescind coverage as to "innocent third parties." In this regard, Judges Ronayne Krause and Stephens adopted Judge Beckering's dissent in *Bazzi*, and concurred in her reasoning. Therefore, the Court of Appeals majority requested that a conflict panel be convened, pursuant to MCR 7.215(J) to resolve the conflict.

In addition to its arguments regarding the continuing viability of the "Innocent Third-Party" doctrine, the plaintiffs also raised an estoppel argument. The accident itself occurred on December 12, 2010. The plaintiffs did not file suit against Allstate until December 18, 2011, more than one year post accident. However, the plaintiff claimed that it gave notice to Allstate in a timely manner, and because the fraud perpetrated by Allstate's insured was not discovered until discovery was well under way, Allstate should be estopped from denying coverage. However, the Court of Appeals noted that the plaintiff's claims against any other insurers were already time barred by the time suit was filed against Allstate. Therefore, the plaintiffs were not prejudiced by Allstate's decision to rescind coverage more than one year post accident:

> Other than Allstate, there is no evidence that any no-fault insurer in the chain of priority to pay Plaintiffs' claims was ever identified, or that such insurer made a payment of PIP benefits or received written notice of Letkemann's injuries. Likewise, there is no evidence that Allstate ever made a payment of PIP benefits for Letkemann's injuries (LCF), but it was, within a year of the accident, evidently provided with notice of the injuries. The accident at issue occurred on December 12, 2010, and Plaintiffs did not file suit against Allstate until December 18, 2011. Because this was more than one year after the accident causing Letkemann's injuries, they evidently relied on the notice exception in MCL 500.3145(1).

As a consequence, Plaintiffs were **already** time-barred by the time Allstate became a priority. Had Allstate asserted a valid affirmative defense immediately,

Over the summer, there has been a flurry of activity at the Michigan appellate court level regarding the rights of "innocent third parties" under policies of insurance that are subject to rescission, based upon a fraud perpetrated by the policyholder.

the result would have been the same: it would have been too late for Plaintiffs to file a new claim against a different insurer, MCL 500.3145(1), and also too late to file the requisite notice for an ACF claim, MCL 500.3174, *Spencer* [*v Citizens Ins Co*, 239 Mich App 291, 608 NW2d 113 (2000)]. Accordingly, whether or not Allstate's delay in asserting the claim could be considered good practice, it did not have a practically prejudicial effect . . . .

Plaintiffs also assert that Allstate is equitably estopped from rescinding the policy. Plaintiffs argue that Allstate's initial representations that it insured the vehicle induced Plaintiffs to believe that it was in fact insured, Plaintiffs justifiably relied on that belief, and if Allstate could not deny that it insured the vehicle, Plaintiffs would be prejudiced because it was too late for them to file a claim seeking payment of no-fault benefits for the accident from the ACF. As discussed, Plaintiffs were already time-barred from pursuing an ACF claim before the Complaint was filed in this action. Prejudice is an essential element of establishing an equitable estoppel. [Citation omitted]. The party seeking equitable estoppel bears 'a heavy burden' of proving its applicability. [Citation omitted]. Because Plaintiffs cannot establish prejudice, they cannot establish an equitable estoppel. [*Southeast Michigan Surgical Hosp*, slip op at p 4 (italics in original).]

Having decided that estoppel did not apply under the facts of this case, the Court of Appeals then addressed the "Innocent Third-Party" doctrine, and how it should not apply under the facts of this case, notwithstanding the Court of Appeals' earlier decision in *Bazzi*. Ironically, Judge David Sawyer, who authored the lead opinion in *Bazzi*, was also on the panel in *Southeast Michigan Surgical Hosp*. Judge Sawyer dissented from the majority's opinion, and stated that because *Bazzi* was correctly decided, there was no need to convene a conflict panel at all.

On August 30, 2016, the plaintiff filed a motion for reconsideration, which has not yet been addressed by the Court of Appeals. On August 31, 2016, the Court of Appeals declined to convene a conflict panel. Absent a change in the Court's ruling on reconsideration, it appears that this matter may be headed to the Michigan Supreme Court.

Concluding Remarks

Given the opinion of Judge Ronayne Krause and Judge Stephens in *Southeast Michigan Surgical Hosp*, requesting that a conflict panel be convened pursuant to MCR 7.215(J), and the concurring opinion by Judge Murphy in *State Farm*, it certainly appears that this issue may very well end up being addressed by the Michigan Supreme Court. In the meantime, smart practitioners will place every conceivable no-fault insurer, in any order of priority, on notice of any claim for no-fault benefits. The MACP and its assigned insurers will undoubtedly be seeing an increase in the number of filings, as injured claimants and their attorneys scramble to protect the "innocent third party" claimants from being "shut out" of a claim for no-fault benefits if the insurer subsequently determines, more than one year post-accident, that the policy of insurance was procured by fraud. It is imperative that practitioners in this area, on both sides of the aisle, keep a careful eye on any developments that occur on this issue at the appellate court level.

Supreme Court

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

Coordination and Reduction of Former Employee's Worker's Compensation Benefits Years after His Retirement Was Proper Where He Had No Vested Right to Uncoordinated Benefits.

On July 15, 2016, the Michigan Supreme Court held that it was not unlawful for General Motors to reduce a retiree's worker's compensation benefits by coordinating them with disability benefits when the uncoordinated workers' compensation benefits were not vested. *Arbuckle v General Motors LLC*, ___ Mich ___; ___NW3d___ (2016); 2016 Mich LEXIS 1411 (Docket No. 151277).

Facts: Plaintiff was injured while working for General Motors (GM) in 1991. He formally retired in 1993 and began receiving disability-pension benefits and worker's compensation benefits. Michigan's Worker's Disability Compensation Act allowed employers to avoid paying twice for employees' injuries by allowing employers to reduce any obligation to pay an employee's worker's compensation benefits by coordinating those benefits with the employee's disability-pension benefits. See MCL 418.354. Nonetheless, in a 1990 collective-bargaining agreement (CBA), GM and plaintiff's union (the UAW) agreed not to coordinate worker's compensation benefits with disability-pension benefits for GM employees. The CBA provided that the ban on coordination of benefits would continue until termination or earlier amendment of the 1990 CBA. The 1990 CBA expired on November 15, 1993, but GM and the UAW negotiated a new CBA containing the same ban on coordination of benefits. This ban was renewed in every new CBA until 2007 when GM and the UAW agreed to lift the ban on coordination of benefits with respect to all employees injured in the future. In 2009, amidst GM's impending bankruptcy, GM and the UAW agreed to lift the ban with respect to "all retirees who retired prior to January 1, 2010, regardless of their date of retirement or injury." In November 2009, GM informed plaintiff that his worker's compensation benefits would be coordinated with his disability-pension benefits, and therefore reduced.

Plaintiff requested a hearing before the director of the Workers' Compensation Agency, and the agency found that GM's reduction of plaintiff's benefits was improper. Albeit on different grounds, a worker's compensation magistrate also held that GM was prohibited from reducing plaintiff's worker's compensation benefits. The Michigan Compensation Appellate Commission (MCAC), however, ruled that GM was permitted to coordinate plaintiff's benefits. In an unpublished opinion, the Michigan Court of Appeals reversed the MCAC. The court stated that a contract cannot be amended with respect to a particular party when that party had no representation during the amendment process. Since there was no evidence that plaintiff authorized the UAW to act as his representative to modify the 1990 agreement under which he retired, the court found the modification to have been invalid.

Ruling: The Michigan Supreme Court reversed the Court of Appeals' judgment, and reinstated the MCAC's order allowing GM to coordinate plaintiff's benefits. After addressing a threshold jurisdictional issue and concluding that the Court must apply federal law, the Court explained that, under federal law, a union may represent

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[T]he Michigan Supreme Court held that it was not unlawful for General Motors to reduce a retiree's worker's compensation benefits by coordinating them with disability benefits when the uncoordinated workers' compensation benefits were not vested.

and bargain for already-retired employees, but only with respect to non-vested benefits. The Court further explained that benefits are not vested if they are subject to an express durational limit. Since the 1990 CBA expressly extended the prohibition on coordination of benefits only "until termination or earlier amendment of the 1990 Collective Bargaining Agreement" it was subject to an express durational limit. In fact, every subsequent agreement that prohibited coordination had a similar durational limit. By providing a duration, GM and the UAW clearly reserved the power to modify the policy regarding coordination at some point in the future. Since plaintiff's right to uncoordinated benefits was modifiable, his benefits were not vested. Because the benefits were not vested, GM and the UAW had the authority to coordinate plaintiff's benefits under the 2009 CBA.

Practice Note: The Court made it clear that unions have the ability to bargain for and affect the unvested benefits of retirees. This decision will be welcomed by employers and unions alike, who benefit from the freedom to bargain regarding past and present employee benefits.

The Highway Exception to the Governmental Tort Liability Act Does Not Apply to Parallel-Parking Lanes Adjacent to Highways.

On July 27, 2016, the Michigan Supreme Court held that governmental immunity applied to a tort claim brought against the Michigan Department of Transportation for injuries that a pedestrian sustained while walking in a parallel-parking lane beside a state-maintained highway because the lane was not "designed for travel" within the meaning of the highway exception to governmental tort immunity. *Yono v DOT*, ___ Mich ___; ___NW3d___ (2016); 2016 Mich LEXIS 1587 (Docket No. 150364).

Facts: Plaintiff was injured when she stepped into a pothole while walking to her car, which was parked alongside state highway M-22. She was parked in a space specifically designated for parallel parking. MCL 691.1402 provides that "[a] person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency." Relying on MCL 691.1402, plaintiff brought an action in the Court of Claims against the Michigan Department of Transportation (MDOT), alleging breach of duty to maintain the improved portion of M-22 in a condition reasonably safe and convenient for public travel. MDOT moved for summary disposition, claiming immunity under the Governmental Tort Liability Act (GTLA), which provides that "[e]xcept as otherwise provided in [the GTLA], a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1401(b). The Court of Claims denied MDOT's motion, reasoning that plaintiff's claim fit within the highway exception to the GTLA, which makes a governmental agency liable for failing to maintain in reasonable repair the improved portions of highways designed for vehicular travel. See MCL 691.1402(1). A divided Court of Appeals affirmed, agreeing with the Court of Claims that the portion of the highway designated for parallel parking was designed for vehicular travel and therefore the highway exception to governmental immunity applied to plaintiff's claim.

Ruling: The Michigan Supreme Court reversed the Court of Appeals' judgment, and remanded the case to the Court of Claims for entry of summary disposition in favor of MDOT. The Court disagreed with the Court of Appeals' conclusion that the parking lane was designed for vehicular travel. The Court reasoned that "travel" within the meaning of the GTLA is not broad enough to include traversing a short distance, including entering and exiting a parking lane. The Court further explained that governmental immunity is to be broadly construed, whereas the exceptions are to be narrowly construed. Therefore, since the Court could not conclude that the exception clearly applies to the act of parking, which is only incidental to travel and does not itself constitute travel, the Court held that MDOT was entitled to governmental immunity.

Practice Note: There are very few legislative exceptions to governmental tort immunity. This decision by the Supreme Court makes it abundantly clear that these few exceptions are to be very narrowly construed. The Court's statement that the highway exception must **clearly** apply in order to avoid governmental immunity makes this evident.

Amicus Committee

By: Kimberlee A. Hillcock, *Willingham & Coté, P.C.*
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Amicus Report

The MDTC is currently participating as amicus in several matters pending before the Michigan Supreme Court. Were it not for the volunteer efforts of its members, the defense bar's answer to the Michigan Trial Lawyers Association would not have an active voice in appellate matters. The efforts of these individuals benefit all members of the defense bar and must be recognized.

First, there is the amicus committee itself. Amicus Committee Members are Nicolas Ayoub with Hewson & Van Hellemont PC, Irene Bruce Hathaway with Miller Canfield Paddock & Stone PLC, Anita Comorski with Tanoury Nauts McKinney & Garbarino PLLC, Grant Jaskulski with Hewson & Van Hellemont PC, Carson Tucker with Law Offices of Carson J. Tucker, and Kimberlee Hillock with Willingham & Coté, PC. For each amicus request that comes in, committee members review the request as well as the underlying briefs to determine whether the issues are something that the MDTC should weigh in on. However, these members do more than simply review requests for amicus support. Irene, Carson, and Nick have actually volunteered to write amicus briefs. And Anita drafts all the press releases after amicus briefs are filed. So far in 2016, the committee has approved eight amicus requests, four of which have already been filed.

Once the amicus committee has approved a request, it is forwarded to the Executive Committee for final approval. Current Executive Committee Members are Lee Khachaturian with the Law Offices of Diana Lee Khachaturian, Hillary Ballentine with Plunkett Cooney, Irene Bruce-Hathaway with Miller Canfield Paddock & Stone PLC, Josh Richardson with Foster Swift Collins & Smith PC, and Richard Paul with Dickinson Wright PLLC.[2]

Another large component of MDTC's amicus success is its contingent of volunteer amicus writers. We thank our volunteer writers for donating their time on behalf of the MDTC. While Anita's press releases provide much more detail, the following is a brief description of the cases, the issues, and the volunteer authors pertaining to the amicus requests received so far in 2016.

In *Nexteer Automotive Corp v Mando America Corp*,[3] the issue is whether a party can waive a contractual right to arbitrate in the early stages of litigation before a plaintiff's theories of the case are fully known. Phil DeRosier with Dickinson Wright, PLLC, authored the brief on behalf of the MDTC and filed it with the Supreme Court on June 8, 2016.

In *Spectrum v Westfield*,[4] the Michigan Supreme Court granted mini oral argument on the application and directed the parties to address "(1) whether *Miller v Auto-Owners Ins Co*, 411 Mich 633 (1981), remains a viable precedent in light of *Frazier v Allstate Ins Co*, 490 Mich 381 (2011), and *LeFevers v State Farm Mut Auto Ins Co*, 493 Mich 960 (2013); and (2) if so, whether *Miller* should be overruled." Paul A. McDonald and Jennifer Anstett with Magdich Law, PC authored and filed the brief with the Supreme Court in favor of Westfield Insurance Company on April 1, 2016.

In *Lowery v Enbridge Energy Ltd Partnership*,[5] the Michigan Supreme Court granted leave to appeal and directed the parties to address "(1) whether the plaintiff in this toxic tort case sufficiently established causation to avoid summary disposition

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So far in 2016, the committee has approved eight amicus requests, four of which have already been filed.

under MCR 2.116(C)(10); and (2) whether the plaintiff was required to present expert witness testimony regarding general and specific causation." On behalf of the MDTC, Mary Massaron with Plunkett Cooney authored and filed the brief with the Supreme Court in favor of Enbridge on August 23, 2016.

In *Estate of Simpson v Pickens*,[6] the Supreme Court has granted oral argument on the application and directed the parties to address "whether, in order to bring a wrongful-death action under MCL 600.2922 for the death of a fetus or embryo, a plaintiff must meet the affirmative-act requirement of MCL 600.2922a." Irene Bruce-Hathaway with Miller Canfield Paddock & Stone, PLC, authored and filed the brief with the Supreme Court in favor of Pickens on May 17, 2016.

In *Covenant v State Farm*,[7] the Michigan Supreme Court granted leave to appeal and directed the parties to address, "(1) whether a healthcare provider has an independent or derivative claim against a no-fault insurer for no-fault benefits; (2) whether a healthcare provider constitutes 'some other person' within the meaning of the second sentence of MCL 500.3112; and (3) the extent to which a hearing is required by MCL 500.3112." Nicolas Ayoub with Hewson & Van Hellemont PC, has volunteered to author the amicus brief on behalf of the MDTC. The Supreme Court has granted the MDTC's motion to file an amicus brief. The brief is due October 6, 2016.

Amicus briefs have been requested in several more cases, including *Lancia Jeep Hellas SA v Chrysler Group Internat'l*,[8] *Iliades v Dieffenbacher North America, Inc*,[9] and *Estate of Skidmore v Consumers Energy Co*.[10]

Anyone seeking amicus support should visit the MDTC webpage and download the application for amicus briefs at: http://www.mdtc.org/documents/Sections/Amicus/MDTC-Proposed-Revised-Amicus-Application.pdf. Once the form is filled out, it should be submitted to Amicus Committee Co-Chair, Kimberlee A. Hillock at khillock@willinghamcote.com.

Anyone interested in volunteering as an amicus writer for the Michigan Defense Trial Counsel should likewise send inquiries to Amicus Committee Co-Chair, Kimberlee A. Hillock at khillock@willinghamcote.com.

Endnotes

1 Kimberlee A. Hillock is a shareholder and the chairperson of Willingham & Coté, P.C.'s Appellate Practice Group. Before joining Willingham & Coté, P.C., Ms. Hillock worked as a research attorney and judicial clerk 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 more than 50 times in both the Michigan Court of Appeals and the Michigan Supreme Court. She has more than 13 years' experience in appellate matters and is a member of the Michigan Supreme Court Historical Society Advocates Guild.

2 It should be noted that both the Amicus Committee and the Executive Committee follow a strict conflict of interest policy. If anyone in a committee member's firm is involved in the case either as a defendant or as a plaintiff, the committee member immediately notifies the other members and recuses himself or herself. He or she is then excluded from any further discussion of the case.

3 Michigan Supreme Court Docket No. 153413.

4 Michigan Supreme Court Docket No. 151419.

5 Michigan Supreme Court Docket No. 151600.

6 Michigan Supreme Court Docket No. 152036.

7 Michigan Supreme Court Docket No. 152758.

8 Michigan Supreme Court Docket No. 153937.

9 Michigan Supreme Court Docket No. 154358.

10 Michigan Supreme Court Docket No. 154030.

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

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.

ADOPTED AMENDMENTS

2014-27 - Issuance of subpoenas

Rule affected: MCR 2.305
Issued: 5-25-16
Effective: 9-1-16

Adds the following to Rule 2.305: "Subpoenas shall not be issued except in compliance with MCR 2.306(A)(1)." That subrule specifies that depositions may be taken only after an appearance or other action by the attorney for defendant, or 28 days have passed since the defendant was served.

2014-04 - Communicating with deponent during deposition

Rule affected: MCR 2.306(C)(5)
Issued: 5-25-16
Effective: 9-1-16

Subrule (C)(5)(b) amended. The word "confer" is replaced with "communicate."

Subrule (C)(5)(c) added to provide that electronic forms of communication are included.

As a result, an attorney may also not use any form of electronic communication with a witness while a question is pending.

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MEMBER NEWS

Work, Life, and All that Matters

Collins Einhorn Farrell PC announced that 15 of its attorneys have been named to the *2016 Michigan Super Lawyers* list. An additional four attorneys from Collins Einhorn were named to the *2016 Michigan Rising Stars* list. Super Lawyers, a Thomson Reuters business, is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement.

The following Collins Einhorn Farrell PC attorneys are included on the *2016 Michigan Super Lawyers* list: David C. Anderson, Theresa M. Asoklis, Donald D. Campbell, Timothy F. Casey, Trent B. Collier, Brian D. Einhorn, Clayton F. Farrell, Melissa E. Graves, Deborah A. Hebert, Deborah A. Lujan, Kevin P. Moloughney, Noreen L. Slank, Michael J. Sullivan, Robert C. Tice, and Nicole E. Wilinski.

The following Collins Einhorn Farrell PC attorneys are included on the *2016 Rising Stars* list: Michael J. Cook, Patrick D. Crandell, Kellie Howard-Goudy, and Kari L. Melkonian.

In addition, Melissa E. Graves, Deborah A. Hebert, and Noreen L. Slank have been named to the *Top 50: 2016 Women Michigan Super Lawyers* list. Graves and Hebert were also listed on the *Top 25: 2016 Women Business Michigan Super Lawyers* list.

"The firm is honored once again to have so many of our attorneys selected as Super Lawyers and Rising Stars," said firm president Michael J. Sullivan. "This is a great illustration of the depth of talent that we have at Collins Einhorn."

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).*

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September 21-23	SBM Annual Meeting – 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, Grand Rapids
February 4	Board Meeting – Amway Grand Plaza Hotel, Grand Rapids
March 9	Legal Excellence Awards Banquet – Detroit Historical Museum
April 20	Board Meeting – Hampton Inn & Suites, Okemos
June 22-24	Annual Meeting – Shanty Creek, Bellaire
September	Golf Outing
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, CA
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

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