MICHIGAN DEFENSE
QUARTERLY

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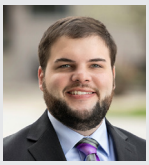

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Michigan Defense Quarterly is a publication of the MDTC. All inquiries should be directed to Madelyne Lawry, (517) 627-3745.

President's Corner

By: John Mucha, III, *Dawda, Mann, Mulcahy & Sadler, PLC*
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John Mucha III, is a Member of Dawda, Mann, Mulcahy & Sadler, PLC. He concentrates his practice in the areas of land use planning and general civil litigation, including commercial, construction, real property, tort and non-compete matters.

Mr. Mucha has considerable experience representing businesses and property owners in a broad range of general business litigation, including breach of contract disputes and claims involving the sale and leasing of real property. He has also litigated and successfully resolved land contamination matters as well as cases involving personal injury, property damage and other torts. Mr. Mucha has assisted both employers and executives with confidentiality and non-compete issues including the drafting of agreements and the resolution of disputes. His expertise encompasses all phases of the litigation process from initial pleading and discovery stages to trials, appeals and the negotiation of settlements.

With respect to land use, zoning and planning matters, Mr. Mucha has successfully guided owners, developers and retailers through the applicable governmental approval processes. He has also successfully litigated land use disputes in both administrative hearings and in court.

Mr. Mucha has also successfully argued cases before the Michigan Court of Appeals and is admitted to practice in all state and federal courts in Michigan. Mr. Mucha has served as the Chair of the State Bar of Michigan Litigation Section, which has over 1,900 members, and he currently serves as an elected representative to the State Bar of Michigan Representative Assembly. He is a member of the State Bar of Michigan, the Oakland County Bar Association and the American Bar Association, and has been recognized as a top Michigan lawyer by both DBusiness magazine and SuperLawyers.

Mr. Mucha earned his JD from the University of Michigan in 1987, where he received an award for writing and advocacy and was Contributing Editor to the Michigan Journal of Law Reform. He also earned a Masters of Public Policy degree in 1979 and a B.A., with distinction, in 1977 from the University of Michigan. Mr. Mucha is a frequent contributor to legal journals and publications and is also an active member of Rotary International, having served as the President of the Birmingham (Michigan) Rotary Club.

The Future Is Now – Training the Next Generation of Lawyers

The practice of law is evolving. Technological advances, in no small part made possible by the coming of age of the smartphone, have empowered even solo practitioners to have the ability to utilize and present sophisticated graphics in the courtroom. At the same time, increasingly powerful artificial intelligence continues to revolutionize computerized legal research. Online hearings and trials are no longer a rarity. "The times they are a changing", as Bob Dylan once sang.

But not everything is changing, nor should it. There are certain fundamentals that remain unchanged, and which will continue to the form the backbone of the practice of law. These include things such as ability to construct and tell a clear, organized and compelling story, the ability to clearly tie the law to the facts, and the ability to be persuasive. During the MDTC's recent Winter Meeting, as I saw each of these fundamentals referenced and emphasized over and over again by our speakers, I became increasingly aware of the duty that the more seasoned members of our profession have to train newer attorneys in these skills.

Tomorrow will be shaped by what we do today. The time spent today to teach and train new attorneys will determine whether the firms we are in and the practices we have will thrive, merely survive, or fade away. It will also determine whether the legal community will remain strong.

We are all continually building on the knowledge and experiences we have gathered along the way. For most of us, mentorship made it possible. This is no less true now than when I first started practicing law over 35 years ago. I will forever be grateful for the guidance given me by experienced attorneys, the patience that they needed at times, and their willingness to give me another chance when I did not get things right the first time. With this in mind, we must all recognize the obligation we have to "pay it forward" by being a mentor and teaching others the skills and insights we have acquired.

Training the next generation of lawyers is not only about teaching the skills to be a good lawyer, but also teaching professionalism and civility in the practice of law. It is disturbing to hear the increasing number of comments from judges and fellow lawyers about an apparent decrease in civility and professionalism. A skilled attorney does not need to display a hostile or demeaning side in order to win and, in fact, research has shown that juries consider such negative behavior to be a turn-off, not a plus. Jurors pay attention not only to verbal exchanges, but also nonverbal signals, and they do not like it when attorneys are rude to opposing counsel, as shown by unprofessional bickering, name-calling, eye-rolling, smirking, snickering or arrogance. If we want our profession and the rule of law to be respected, we must teach and demonstrate respect for each other and the legal institutions in which we practice.

An important goal of the MDTC is to foster and provide mentorship, with the objective of helping our members be better and more successful lawyers who practice in a civil and respectful manner. The MDTC champions these core values because we want a strong and well-respected defense bar. I encourage each of you to join the MDTC in the pursuit of this goal. The future is now, and what we do now will determine our future.

E-Sigs: As Bad as E-Cigs?

By: Deborah Brouwer and Anna Kozak, *Nemeth Bonnette Brouwer PC*

Executive Summary

Electronic signatures are increasingly common as society relies more on e-commerce and electronic communication. Anticipating this reliance, Michigan and the federal legislature enacted laws in 2000 recognizing the validity of electronic signatures. While electronic signatures add convenience to many aspects of everyday life, they also present issues regarding authentication, especially in early stages of litigation. As a result, where a party attempts to rely on an electronic signature when seeking an early resolution of a lawsuit, challenges to the authenticity of the electronic signature have become an effective strategy for delaying dismissal. Developing case law suggests that wet signatures are less vulnerable to such challenges because a party's wet signature is uniquely their own, whereas electronic signatures lack similar distinctive characteristics. Consequently, entities that take advantage of electronic signing may want to reconsider exactly what documents they choose to have signed electronically, the electronic signing procedures utilized to guarantee the identity of the signor, and whether they should require wet signatures on documents that could be important in future litigation.

Authentication Issues with Electronic Signatures.

In a rare moment of combined government foresight and action, Michigan and the federal legislatures enacted laws in October 2000 recognizing the validity of electronic signatures. At that time, the general public's access to the internet had become increasingly common, and it had become apparent that electronic contracting and signing were the future. Rather than resisting the inevitable—a world of digital commerce and contracting—Congress enacted the United States Electronic Signatures in Global and National Commerce Act (ESIGN), giving legal effect to what are typically referred to as electronic signatures.[1] Shortly thereafter, many states implemented the National Conference of Commissioners on Uniform State Laws' (NCCUSL) model law, the Uniform Electronic Transactions Act (UETA), which complemented and expanded upon the ESIGN Act.[2]

ESIGN and many of its state counterparts permit a wide range of signing methods. However, not all these methods render an electronic signature easily attributable to the signor. Issues with electronic signatures thus can arise where a party seeks to enforce a contract provision, or where ascertaining the validity of a signature would result in the early resolution of litigation. Consequently, challenges to the authenticity of electronic signatures may obstruct early resolution and prolong litigation that is otherwise ripe for early resolution.

Relevant Statutes Pertaining to Electronic Signatures

ESIGN became effective on October 1, 2000.[3] Under ESIGN, "A signature…may not be denied legal effect, validity, or enforceability solely because it is in electronic form."[4] Similarly, a contract in electronic form may not be denied "legal effect, validity, or enforceability" due to its electronic form.[5] ESIGN provides that states may pass laws that modify, limit, or supersede the validity rules outlined in ESIGN's general rules of validity only if the state's rule "constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended…by the National Conference of Commissioners on Uniform State Laws." However, any state instituted rules inconsistent with ESIGN's e-signature rules are pre-empted by ESIGN.[6]

Anna Kozak is an Associate Attorney at Nemeth Law P.C., practicing exclusively management-side labor and employment law. She received her J.D. from Wayne State University Law School in 2020, and her M.A. in American Politics and Government from Wayne State University in 2021. She has experience representing and counseling clients in employment disputes, including allegations of race, gender, age, and religious discrimination.

Deborah Brouwer, has been an attorney since 1980, practices exclusively in labor and employment law, with particular experience in the defense of lawsuits against employers, including claims of race, age, religion, national origin, gender and disability discrimination, harassment and retaliation, as well as FLSA, FMLA and non-competition suits. She also provides harassment training and conducts discrimination and harassment investigations for employers. She has extensive experience in appearing before administrative agencies, including the EEOC, MDCR, MIOSHA, OSHA and the NLRB. She also appears frequently before the Michigan Court of Appeals and the Sixth Circuit Court of Appeals. Her email address is dbrouwer@ nemethlawpc.com.

In response, the NCCUSL developed the UETA. While similar to ESIGN, the UETA has been touted as a more "comprehensive" statutory scheme than that which ESIGN provides, including more robust definitions and ratifying the use of electronic signatures for intrastate transactions as well.[7] To date, 49 states, the District of Columbia, and the Virgin Islands have adopted the UETA, with only New York and Puerto Rico choosing to abstain.[8] While New York did not adopt the UETA, it did amend its Electronic Signatures and Records Act in 2002 to eliminate any conflicts with ESIGN.[9]

> While electronic signatures may present more obstacles than wet signatures when it comes to authentication and early disposition, perhaps this added burden is the tradeoff we make for the ease e-signing brings to everyday life.

Shortly after ESIGN's passage, Michigan adopted the UETA, and on October 16, 2000, the Michigan Uniform Electronic Transactions Act (MUETA) became effective. The MUETA mirrors the ESIGN act's language, establishing that an electronic signature "shall not be denied legal effect" due to its electronic form, and "[i]f the law requires a signature, an electronic signature satisfies the law."[10] Both the MUETA and the ESIGN Act define "electronic signature" as "an electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."[11] Accordingly, the MUETA permits a broad range of methods by which a person can sign documents.

The MUETA anticipates authentication issues associated with electronic signatures and provides that an electronic signature is "attributable to a person if it is the act of the person."[12] Proving that a signature is the act of the person "may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic signature…was attributable."[13]

Thus, under ESIGN and MUETA, Michigan state and federal courts must recognize electronic signatures as legally valid. However, whether courts can truly treat electronic and wet signatures the same remains unclear due to the different methodologies employed when authenticating wet and electronic signatures. Specifically, where a party emphatically denies that an electronic signature is her own, counsel may face obstacles in proving to whom an electronic signature belongs.

Use of Affidavits to Create an Issue of Fact Regarding the Authenticity of E-Signatures

Recently, the Sixth Circuit Court of Appeals addressed the authenticity of electronic signatures at the summary-judgment stage. In *Boykin v Family Dollar Stores of Michigan, LLC.*,[14] the plaintiff alleged age and race discrimination. Family Dollar sought to compel arbitration. Family Dollar provided employees with virtual arbitration training that could be accessed only with an employee's unique username and password, at the end of which, employees are required to electronically review and sign an arbitration policy.[15] Family Dollar's records indicated that the plaintiff completed training, but it did not produce a signed copy of the arbitration agreement in response to the plaintiff's pre-suit request for his personnel records.[16] The plaintiff opposed the motion, filing one affidavit stating that he did not recall signing the arbitration agreement, and then filing another asserting that he "did not consent to, sign, acknowledge, or authorize any type of arbitration agreement…."[17] The district court concluded the plaintiff failed to establish a genuine dispute of material fact as to whether he had agreed to arbitration.[18]

The Sixth Circuit reversed, concluding that while "memory lapses do not create factual disputes that are genuine," an "'unequivocal denial" that takes the form of admissible 'evidence' can create a genuine issue of fact."[19] The court held that the plaintiff's denial created a factual dispute over whether he agreed to arbitrate his claims.

The Second Circuit Court of Appeals reached a similar result, relying in part on *Boykin.* In *Barrows v Brinker Restaurant Corporation*,[20] the plaintiff alleged various employment-law violations.[21] Brinker sought to compel arbitration, producing an arbitration agreement that appeared to be electronically signed by the plaintiff. The plaintiff claimed, however, that she had not signed the agreement, and attacked the security measures that Brinker had in place to ensure only the plaintiff could sign the document.[22] For an employee to access and sign the handbook, they had to set up an account using personal information, including their social security number and birthdate. Once the account was created, the employee could change his or her username and password.[23] The plaintiff asserted that she never created the account used to sign employment documents. She also pointed out that her employer possessed the personal information necessary to create an account on her behalf and may have electronically signed her name to the arbitration policy. The district court granted Brinker's motion to compel arbitration, reasoning that the plaintiff did not create a triable issue of fact.[24]

The Second Circuit reversed, concluding that the plaintiff's sworn declaration was sufficient to defeat the motion.[25] It further noted that, while the declaration alone was sufficient to create a triable issue of fact, the plaintiff also attacked the security measures in place. In response, the court observed that the personal information required to create an account was not "secure," because management had access to it.

In contrast, in *Reulbach v Life Time Fitness, Inc*, the Northern District of Ohio enforced an arbitration agreement despite the plaintiff's claim he did not sign the agreement. There, the plaintiff sued his employer for unpaid wages and

a hostile work environment due to age discrimination.[26] The defendant moved to compel arbitration supported by a declaration, stating that when employees logged into their employee portal, they were prompted to review and sign an arbitration agreement.[27] The declaration further indicated that the plaintiff signed the arbitration agreement on September 30, 2019. The plaintiff submitted an affidavit stating that he never signed the arbitration agreement, he was on medical leave at the time he allegedly signed the agreement, and he could not access the employee portal at home. The defendant responded with evidence that the plaintiff had logged into the employee portal three times on September 30, 2019—twice on his phone and once on his office desktop.[28] Further, the defendants submitted evidence showing that the plaintiff worked on September 30, 2019, producing records that he swiped his badge and entered time for teaching classes on that day.

Ultimately, the court held that the plaintiff's affidavit alone was insufficient to create a genuine issue of fact regarding whether he signed the agreement.[29] Although the opinion does not provide a robust analysis regarding the validity of electronic signatures or their authentication, the Court's opinion does not suggest that the plaintiff attempted to challenge the security measures in place with respect to ensuring the intended person signed the agreement. Further, even if the plaintiff had attempted to make this showing, it appears to have been sufficiently rebutted by the defendant's evidence that the plaintiff logged in from his phone—something the company would not have access to.

In *Boykin* and *Barrows*, the plaintiffs successfully created an issue of fact, avoiding early disposition of their cases, by denying that they had signed the arbitration agreements. While the court in *Reulbach* reached a different conclusion under similar facts, there, the defendant was able to successfully refute the plaintiff's assertion that he was not at work on the day the agreement was signed *and* that he could not access the employee portal from home to sign the agreement. Although it seems as if the plaintiffs in *Boykin* and *Barrows* defeated a motion to compel arbitration by proffering a simple denial that the electronic signatures at issue were their own, they took their argument one step further. In *Boykin*, the defendant's inability to produce a signed copy of the arbitration agreement in response to the plaintiff's pre-suit request coupled with the plaintiff's denial that he signed any such agreement rendered the defendant's arbitration claim unsustainable. Similarly, in *Barrows* the plaintiff raised questions about the sufficiency of the security measures in place in addition to her assertion she did not sign the agreement.

> Michigan state and federal courts must recognize electronic signatures as legally valid. However, whether courts can truly treat electronic and wet signatures the same remains unclear due to the different methodologies employed when authenticating wet and electronic signatures.

What is challenging about electronic signatures is that counsel cannot simply ask a signor whether she recognizes the signature as her own. Further, where electronic signatures and employment paperwork are involved, it is not uncommon for employees to complete new-hire paperwork in one sitting. Thus, the employer's ability to ascertain whether an employee recognizes a document during a judicial proceeding may be hindered by the fact that an employee may not be able to recall each, and every document signed on a specific day. Though memory lapses are insufficient to create a genuine issue of fact, an employee who recalls some documents and not others may truly but mistakenly believe that she did not sign a particular document.

Even more concerning is that even where security measures are in place to ensure the identity of the signor, those measures can be challenged quite easily. Even the signor's submission of his or her social security number at the time of signing is insufficient to demonstrate the signature's authenticity if any other party has access to that personal information. This in turn presents an additional issue—how is a company to ensure an electronic signature is authentic if it cannot have access to the personal information submitted as a security measure to confirm that the information does in fact belong to the signing party? Unless a party witnesses the signor electronically signing documents or otherwise requires an electronic notary in the signing of documents executed electronically, it seems as though signors have may the upper hand when challenging the validity of their electronic signatures. Further, employers must collect various forms of personal identifying information at the outset of employment in order to properly withhold taxes from an employee and to comply with the I-9 verification process, rendering it challenging to create a security measure aimed at ensuring the signor's identity while simultaneously maintaining adequate security measures.

Evidence Used to Create a Question of Fact Regarding the Authenticity of Wet Signatures

Wet signatures, on the other hand, appear less susceptible to an "unequivocal denial" challenge to authenticity. In *Randall v TT of C Louisville, Inc.*, the Sixth Circuit Court of Appeals held that the plaintiff failed to create a material question of fact regarding his assent to an agreement to arbitrate.[30] There, the plaintiff alleged Truth in Lending Act violations. The defendants filed a motion to compel arbitration, producing two copies of an arbitration agreement.[31] The plaintiff asserted the signatures were forgeries, pointing to discrepancies between the signatures at issue, and those on other documents signed the same day as the arbitration agreement.[32]

The court rejected the plaintiff's challenge, holding that he failed to provide sufficient evidence to permit a

trier of fact to conclude the signatures on the arbitration agreement were not his authentic signatures because the plaintiff did not claim or suggest that the signatures in question differed from his authentic signature.[33]

In contrast, in *CitiFinancial Mortgage Company v Comerica Bank*, the plaintiff successfully challenged the authenticity of the mortgagor's signature on a loan payoff statement.[34] There, a mortgagor took out two mortgages on her home, one from the plaintiff and one from the defendant. The plaintiff filed an action to determine the order of priority. At her deposition, the mortgagor testified that she did not recognize her signature on the payoff statement, which the plaintiff allegedly had sent to the defendant after it was executed. However, she did admit that she could not "swear" that she did not sign the document, because she signed so many documents that day and could not recall all of them.[35] The defendant produced a handwriting expert, who testified that the signature on the payoff statement was inconsistent with the mortgagor's authenticated signatures, and it was highly probable the signature was an attempt to "simulate" the mortgagor's signature.[36] Both parties filed cross-motions for summary disposition. The court denied the plaintiff's motion and granted the defendant's motion. The plaintiff then appealed, asserting that the mortgagor's conflicting testimony created an issue of material fact.[37]

The Michigan Court of Appeals affirmed, concluding that the defendant met its burden by submitting the mortgagor's testimony that she did not recall signing the document or recognize the signature as her own, along with the handwriting expert's conclusion that the signature was probably a forgery.[38] The Court of Appeals noted that the plaintiff was required to offer *more* than conclusory allegations that the mortgagor's signature was genuine. Instead, the plaintiff needed to offer evidence that the signature was authentic.

Where wet signatures are concerned, it seems the courts are less susceptible to "unequivocal denials" as sufficient to create a genuine issue of material fact, especially where an authenticated signature is in the record. Instead, it appears that a party challenging the authenticity of a wet signature needs to compare the alleged forgery against authenticated versions of the signature. Even an unequivocal denial that a wet signature belongs to the signor is insufficient where the signor fails to allege the forgery differs from his authenticated signature.[39] Perhaps the opportunity to personally view an authenticated signature and compare it against an alleged forgery provides judges evidence more readily quantifiable than a name typed in "Times New Roman," and a dissertation on the security measures used to ensure the identity of the signor. Whatever the case may be, the nuances that exist between authenticating electronic signatures and wet signatures are worth paying attention to as the case law continues to develop.

Conclusion

Although electronic signatures have expedited the contracting process by allowing people to execute contracts remotely, expanding the accessibility of various goods and services, and likely saving a few trees, the process is not without its flaws. While electronic signatures may present more obstacles than wet signatures when it comes to authentication and early disposition, perhaps this added burden is the tradeoff we make for the ease e-signing brings to everyday life. Regardless, those who rely on electronic signatures should be particularly cognizant of the potential issues that accompany utilizing electronic signatures on documents tailored towards avoiding or obtaining early resolution in the event of litigation. Specifically, it may be worth reassessing the processes in place for signing documents related to the litigation process or avoidance thereof.

Endnotes

1 Meehan & Beard, *What Hath Congress Wrought: E-Sign, the UETA, and the Question of Preemption*, 37 Idaho L. Rev. 389, 390 (2001).

2 *Id.*

3 15 USC 7001.

4 *Id.*

5 *Id.*

6 15 USC 7002.

7 https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=97560e15-8b54-1237-70ca-683b36af5f43&forceDialog=0

8 Electronic Transactions Act - Uniform Law Commission (uniformlaws.org)

9 *Naldi v Grunberg*, 80 AD3d 1, 12; 908 NYS2d 639, 646 (2010).

10 MCL 450.837.

11 15 USC 7006; MCL 450.832.

12 MCL 450.839.

13 *Id.*

14 *Boykin v Family Dollar Stores of Mich, LLC*, 3 F4th 832, 840 (CA 6, 2021).

15 *Id.* at 836.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Barrows v Brinker Rest Corp*, 36 F4th 45 (CA 2, 2022).

21 *Id.*

22 *Id.* at 45.

23 *Id.*

24 *Id.*

25 *Id.* at 45.

26 *Reulbach v Life Time Fitness, Inc*, unpublished opinion and order of the United States District Court for the Northern District of Ohio, issued June 23, 2021 (Docket No. 1:21 CV 1013); 2021 WL 2581565, *3.

27 *Id.*

28 *Id.* at *4.

29 *Id.* at *5.

30 *Randall v TT of C Louisville, Inc*, unpublished memorandum opinion of the United States District Court for the Western District of Kentucky, issued February 15, 2022 (Docket No. 3:21-CV-00378); 2022 WL 468052, *9.

31 *Id.* at *3.

32 *Id.* at *7-8.

33 *Id.* at *9.

34 *Citifinancial Mortg Co, LLC v Comerica Bank*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 2006 (Docket No. 270453); 2006 WL 3755230, *1.

35 *Id.* at *2.

36 *Id.*

37 *Id.* at *1.

38 *Id.* at *2.

39 *Randall*, *supra* at *8.

Affinity Bar Spotlight: D. Augustus Straker Bar Association

Ponce Clay, *United States Navy, Retired*. He graduated from **Morehouse College** where he earned a Bachelor of Arts Degree in Spanish. He attended Troy State University-Japan where he earned a **Master of Public Administration** (Public Personnel Management) and is certified as Senior Professional of Human Resources **(SPHR)**. He was formerly the Vice President of the Detroit Morehouse Alumni Association. **He earned a Juris Doctor and MBA from the University of Detroit Mercy.**

There is much work to be done to improve diversity, equity, and inclusion in the legal profession. One important step is to elevate diverse voices and provide a more inclusive environment. In this issue, the MDTC is honored to use its platform to promote the mission of the D. Augustus Straker Bar Association through a question and answer with its president—Ponce Clay:

When did you join the Straker Bar Association?

While I had been active in D. Augustus Straker Bar Association since my time in law school, I formally joined upon graduation in 2015.

What compelled you to get involved with the Straker Bar Association?

I was compelled to get involved because of the mission of increasing minority representation in the legal profession. I served in the United States Navy, attended Morehouse College, a Historically Black post-secondary institution, and call Detroit, arguably one of the nation's Blackest cities, my home. Though minorities have been breaking barriers and earning their seat at the table, there is still much work to be done, and I would like to be a part of that.

What is the mission statement of the Straker Bar Association?

The mission of the D. Augustus Straker Bar Association is to increase minority representation in the legal profession, support and encourage legal practice opportunities for minorities, and facilitate equal justice for all citizens.

What are the criteria for membership?

Members may be attorneys, judges, law students and other legal professionals who live and work in Michigan, with a special emphasis on attorneys in Oakland County.

How does membership with the Straker Bar Association benefit legal professionals?

Membership in the D. Augustus Staker Bar Association offers a strong network of legal professionals who are dedicated to diversity, opportunities to give back to the community through providing legal services, and mentorship opportunities. Each member brings a unique perspective to the practice of law through their lived experiences, and never hesitate to pass on their gems of wisdom.

Are there special events, volunteer opportunities, committee groups, or community relationships that the Straker Bar Association is particularly proud of?

A signature program of the Straker Bar Association is the Minority Bar Passage Program. This program offers live lectures from an actual member of the Michigan Board of Bar Examiners. With the transition of Michigan to the Uniform Bar Examination (UBE), our recent graduates need every advantage to ensure a passing score, and this program has proven over the years to do exactly that.

What inspired the establishment of the Straker Bar Association?

The Staker Bar Association's establishment was inspired by the lack of representation in the legal profession. D. Augustus Straker broke barriers as an attorney, one of them being the first African American attorney to appear before the Michigan Supreme Court. Minorities are still blazing trails, and making history with "firsts," but representation at every level, all the time, for everyone, is the goal.

As a leader of the Straker Bar Association, how do you define "diversity, equity, and inclusion"?

Those three words mean we must consider the entire person, not just the sum of their parts. We must recognize that everyone adds value to the practice of law, and that to truly thrive, we need different perspectives, personalities, and participants. We get those different perspectives by making the profession consider unique experiences and systemic barriers, then work to make systemic change that encourages the growth of participation in the legal profession by minorities.

What are some meaningful actions that law firms and legal employers can take to improve diversity, equity, and inclusion in their workplace (without simply "checking a box")?

Some meaningful actions employers can take to improve diversity are widening their recruitment areas/schools, providing mentorship in under-represented areas, and, most of all, to give attorneys with non-traditional backgrounds a chance. Law was my second career after 20 years in the United States Navy, and those 20 years gave me a unique perspective that has added significant value to my time in the legal profession.

How can individuals support the Straker Bar Association, its mission, and its members?

Individuals can support the D. Augustus Straker Bar Association through providing sponsorships to our signature programs, dedicating their time to pro bono service, and spreading the word about our fundraisers, initiatives, and programming.

What else would you like the *Michigan Defense Quarterly* readers to know about the Straker Bar Association?

The D. Augustus Straker Bar Association welcomes everyone who has an interest in increasing minority representation in the legal profession and ensuring access to justice for all citizens. Our members serve in every area related to the legal profession, and are always willing to lend a helping hand.

How can *Michigan Defense Quarterly* readers reach out if they are interested in joining or learning more about the Straker Bar Association?

Readers can reach out to info@strakerlaw.org, or they can complete a membership application online at www.strakerlaw.org.

MEMBER NEWS

Work, Life, and All that Matters

Member News is a member-to-member exchange of news of work (a good verdict, a promotion, or a move to a new firm), life (a new member of the family, an engagement, or a death) and all that matters (a ski trip to Colorado, a hole in one, or excellent food at a local restaurant). Send your member news item to Michael Cook (Michael.Cook@ceflawyers.com).

Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright, PLLC*

Issues Becoming Moot on Appeal

Although appellate courts are generally obligated to address the issues that are properly brought before them, that is not the case when it comes to issues that have been rendered moot by subsequent developments—either in the case or in the law.

General Rule

As the Michigan Court of Appeals explained in *B P 7 v Bureau of State Lottery*, 231 Mich App 356; 586 NW2d 117 (1998), an appellate court ordinarily "will not decide moot issues." *Id.* at 359. "A case is moot when it presents only abstract questions of law that do not rest upon existing facts or rights." *Id.* "An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief." *Id.* The Sixth Circuit has similarly recognized that "[i]f events occur during the case, including during the appeal, that make it 'impossible for the court to grant any effectual relief whatever to a prevailing party,' the appeal must be dismissed as moot." *Fialka-Feldman v Oakland Univ Bd of Trustees*, 639 F3d 711, 713 (CA 6, 2011).[1]

The mootness doctrine applies to both factual and legal developments. In *B P 7*, for example, it was a statutory amendment. *B P 7*, 231 Mich App at 359. In *Fialka-Feldman*, it was the fact that a learning-disabled student challenging a university's denial of his request for on-campus housing had "completed the program and left the University with no plans of returning." *Id.* at 713. See also *Can IV Packard Square, LLC v Packard Square, LLC*, 328 Mich App 656, 666; 939 NW2d 454 (2019) (dismissing the defendant's appeal from a judgment of foreclosure because the statutory redemption period expired while the appeal was pending).

Exception for Issues That are "Capable of Repetition, Yet Evading Review"

Courts may, however, overlook mootness if the case raises an issue that is "capable of repetition, yet evading review." *Chirco v Gateway Oaks, LLC*, 384 F3d 307, 309 (CA 6, 2004). For example, in *Turunen v Dir of Dep't of Natural Resources*, 336 Mich App 468; 971 NW2d 20 (2021), the Michigan Court of Appeals found that the plaintiff's challenge to a Department of Natural Resources ("DNR") invasive species order was not moot even though the plaintiff's eight pigs that were the subject of the order had died, because the plaintiff "continue[d] to raise and sell pigs for the main purpose that plaintiff raised and sold the eight dead ones," and thus would be subject to the potential for future DNR action. See also *Franciosi v Michigan Parole Bd*, 461 Mich 347, 348 n 1; 604 NW2d 675 (2000) ("Although plaintiff has apparently been paroled, we issue this opinion because the issue is capable of repetition while evading our review, the issue has been briefed, defendant has not argued the case is moot, and the Court of Appeals opinion is published.").

This exception is most commonly applied in cases involving the government. *Chirco*, 384 F3d at 309. "When the suit involves two private parties . . . the complaining party must show a reasonable expectation that he would again be subjected to the same action by the same defendant." *Id.* Moreover, speculating that an issue "could" recur is not sufficient. In *Mich Dept of Educ v Grosse Pointe Farms Public Schools*, 474 Mich 1117; 712 NW2d 445 (2006), the Michigan Supreme Court emphasized that the test is whether the issue is "likely to recur." See also *In re Sterba*, 383 BR 47, 51 (CA 6 BAP,

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2008) (holding that in order to avoid mootness, the appellant "must establish a demonstrated probability that the same controversy will recur").

> Courts may, however, overlook mootness if the case raises an issue that is "capable of repetition, yet evading review."

Public Interest Exception

There is one important area in which Michigan and federal courts appear to diverge. The Sixth Circuit has said that under the "case-or-controversy" requirement of Article III of the United States Constitution, mere "public interest" in an issue does not warrant review "when there is no reasonable expectation that the wrong will be repeated." *Fialka-Feldman*, 639 F3d at 715 (citation and internal quotation marks omitted). Michigan courts, however, appear to recognize a stand-alone "public interest" exception. See *Mead v Batchlor*, 435 Mich 480, 487; 460 NW2d 493 (1990) ("[T]he refusal of a court to decide a moot case or to determine a moot question is not based on lack of jurisdiction to do so. . . . [A] court will decide a moot case or determine a moot question where this appears to be in the public interest, as for guidance in future cases.") (citation and internal quotation marks omitted), abrogated on other grounds *Turner v Rogers*, 564 US 431(2011).

Conclusion

In summary, although there are exceptions, appellate courts generally will not consider issues that have become moot during the pendency of an appeal—the question then becomes whether to simply dismiss the appeal or dismiss and vacate the lower court decision.

Endnotes

1 Depending on the circumstances, an appellate court might also vacate the lower court decision. See, e.g., *League of Women Voters of Michigan v Secy of State*, 506 Mich 561, 588; 957 NW2d 731 (2020) (noting that "'the decision whether to vacate turns on 'the conditions and circumstances of the particular case'"), quoting *Azar v Garza*, 584 US ___; 138 S Ct 1790, 1792; 201 L Ed 2d 118 (2018). "One clear example where '[v]acatur is in order' is 'when mootness occurs through . . . the unilateral action of the party who prevailed in the lower court.'" *Azar*, 138 S Ct at 1792 (citation and some internal quotations omitted).

Legal Malpractice Update

By: David Anderson and James J. Hunter, *Collins Einhorn Farrell PC*

Statutes of limitation and repose bar legal-malpractice claims arising out of criminal matter.

Wiggins v Attorney Defendants, unpublished per curiam opinion of the Court of Appeals, issued August 11, 2022 (Docket No. 357895)

Facts

Attorney-defendant represented the plaintiff in a federal criminal case. The plaintiff entered into a plea agreement and the court entered a final judgment in 2014.

Attorney-defendant had also represented the plaintiff's husband in various matters. In 2020, the plaintiff sued the attorney-defendant, alleging legal malpractice based on her belief that the attorney-defendant had a conflict of interest during the underlying representation due to his previous representation of the plaintiff's husband. The trial court granted summary disposition, finding that the two-year malpractice statute of limitations and the statute of repose had expired.

Ruling

The Court of Appeals agreed that the statute-of-limitations had expired. The court emphasized that a legal-malpractice claim accrues when an attorney discontinues serving the plaintiff in a professional capacity *as to the matters out of which the claim for malpractice arose*. Since the attorney-defendant's legal services related to the criminal matter ended in 2014 and the lawsuit was not filed until 2020, the statute of limitations had expired.

Further, the court determined that the six-year statute of repose also expired. The plaintiff argued that the attorney-defendant sent her a letter in 2015, contending he still represented her at that time. But the letter related to licensing issues, which were separate from the criminal action from which the malpractice claim arose. The letter also included a copy of the final judgment in the criminal case from 2014, but the court reasoned that the attorney-defendant only "appeared to be tying up loose ends after his representation in the criminal matter," which did not amount to rendering legal services. Consequently, the plaintiff's claim was time-barred.

Practice Note

The statute of repose bars all claims asserted more than six years after the allegedly negligent conduct occurs. That is true irrespective of when the representation ends or the plaintiff discovers, or should have discovered, that a potential claim existed.

Attorneys hired to represent plaintiff in fiduciary capacity do not have attorney-client relationship with plaintiff in individual capacity.

Muvrin v Attorney Defendants, unpublished per curiam opinion of the Court of Appeals, issued August 11, 2022 (Docket No. 357566)

Facts

Plaintiff's family owned a farm. After the death of one of her brothers, the plaintiff became involved in the financial management of the farm. Attorney-defendants agreed to provide representation in probate court following the death of plaintiff's brother and petitioned to open an informal probate estate. The probate court appointed the plaintiff and her siblings as co-personal representatives of the estate.

David C. Anderson is a shareholder of Collins Einhorn Farrell PC, and has over 20 years of litigation experience. He has successfully defended a wide variety of professional liability claims, ranging from legal malpractice to claims against accountants, insurance agents, architects and engineers, real estate/title agents and even fine art appraisers. He has also successfully defended numerous corporations against product liability claims, including death cases. Over those years, David has gained considerable jury trial and arbitration experience.. His e-mail addresses are david.anderson@ceflawyers.com.

James J. Hunter is a member of Collins Einhorn Farrell PC's Professional Liability, Commercial Litigation, and Trucking & Transportation Liability practice groups. He has substantial experience defending complex claims in both practice areas. As a member of the Professional Liability practice group, Jim has successfully defended claims against attorneys, architects, real estate professionals, and others. Before joining Collins Einhorn, Jim worked on complex litigation and Federal white-collar criminal defense. He also served as an Assistant Prosecuting Attorney in Wayne County, Michigan.

The plaintiff subsequently discovered that one of her siblings—a co-personal representative—had been commingling assets, using estate funds as his own, and maintaining inaccurate records, thereby devaluing the estate. The plaintiff sued attorney-defendants, alleging legal malpractice for filing an incorrect inventory report, failing to amend an inventory report, and failing to file annual accounts. The attorney-defendants moved for summary disposition, arguing that the plaintiff did not obtain concurrence from the other co-personal representatives to file suit. The trial court granted the motion, holding that the plaintiff did not establish the existence of an attorney-client relationship, as attorney-defendants only represented her in her capacity as a co-personal representative.

Ruling

On appeal, the plaintiff argued that she established the existence of an attorney-client relationship and that she brought the action in her individual capacity seeking damages she suffered personally. The Court of Appeals disagreed with the plaintiff, holding that the attorney-defendants represented her only in her capacity as a personal representative.

In Michigan, a personal representative may hire an attorney to perform services to assist or advise the personal representative in the performance of the personal representative's administrative duties. Further, when two or more people are appointed as personal representatives, the concurrence of all is generally required to act for the estate.

Here, the scope of the attorney-defendants' responsibilities was limited to the plaintiff's role as a personal representative of the estate—not to the plaintiff in her individual capacity. Like prior cases in which the court has held that an attorney hired to provide legal services for a conservator represented the conservator only, an attorney hired to represent a personal representative only represents the personal representative in the context of their duties as a personal representative (See, e.g., *Maki v Coen*, 318 Mich App 532 (2017)).

The Court of Appeals also distinguished the plaintiff's argument from the line of cases in which Michigan courts have held that a beneficiary may bring a malpractice claim against attorneys who draft testamentary documents (See *Mieras v DeBona*, 452 Mich 278 (1996)). The court reasoned that testamentary drafting was not at issue, nor was there authority for that principle in the context of an estate's beneficiary bringing a malpractice claim against the attorney hired to represent the personal representatives.

Practice Note

The law distinguishes between representing an individual in their personal capacity and their capacity as a fiduciary, such as a personal representative for an estate. That line can sometimes be blurry. Ensure your engagement agreement clearly outlines the scope of representation and properly identifies the client to avoid any confusion.

Medical Malpractice Update

By: Jeff Feikens, *Ottenwess Law*

Brief Overview

In July 2022, the Michigan Supreme Court released its opinion in *Meyers v Rieck*, 509 Mich 460; 983 NW2d 747 (2022). The Court overruled previous case law and held that in a malpractice case, a defendant's internal protocols may be admissible at trial, but also held that the trial court was to be cautious in so admitting them. It remains to be seen how much plaintiffs and defendants will actually be permitted to utilize protocols in the future, but it will create the opportunity for several pretrial motions

Case Summary

Meyers concerned the admissibility of whether a standing order in a nursing home could be utilized as evidence of ordinary negligence or malpractice. That order indicated that a doctor needed to be notified if a patient had vomited more than once in a 24-hour period.

The plaintiff filed a motion to amend the complaint, alleging that the order was evidence of both ordinary negligence and malpractice. The defendant filed a motion to dismiss the ordinary-negligence claim and to preclude the standing order from being used as evidence of malpractice. The trial court permitted the amendment and denied the defendant's motion to dismiss the ordinary-negligence claim.

In an interlocutory appeal, the Court of Appeals reversed the trial court and held the case arose in medical malpractice only and dismissed the ordinary-negligence claim. The Court of Appeals also held that the standing order could not be used as evidence of malpractice, following previous Michigan appellate precedent.

The trial court is now to consider whether the internal rule meets general evidence standards such as MRE 402 and 403, and the jury is to be instructed as to the internal rule's proper use in determining the standard of practice

The Supreme Court, in lieu of granting appeal, issued an opinion. It partially affirmed the Court of Appeals in holding that claims of violating the standing order would still be a malpractice claim, not ordinary negligence.

The Court then went on to discuss the standing order. The Court confirmed previous case law that an institution's breach of its own internal rules is not negligence per se, and similarly that the institution following its internal rules was not evidence of conforming with the standard of practice per se. The Court confirmed that expert testimony was still required to explain the standard of care.

The Court then held that in some instances internal rules might be admissible to support claims of malpractice, differentiating *Jilek v Stockson* (*Jilek I*), 289 Mich App 291; 796 NW2d 267 (2010), rev'd on other grounds by 490 Mich 961 (2011) (*Jilek II*). The trial court is now to consider whether the internal rule meets general evidence standards such as MRE 402 and 403, and the jury is to be instructed as to the internal rule's proper use in determining the standard of practice. The Court noted that courts must be "cautious in admitting this evidence." And the Court acknowledged that earlier jurisprudence was in place so that institutions were not discouraged from instituting internal rules that were higher than the standard of care, such that they might be used against them. The Court also noted previous case law that a defendant should not automatically be permitted to present its internal rules as evidence of following the standard of practice.

Jeff Feikens joined Ottenwess Law in August 2021. He has handled hundreds of matters in civil litigation, including personal injury, medical malpractice, construction accident, legal malpractice, subrogation, and contracts. He has represented hospitals and physicians in medical malpractice cases throughout Michigan. He has also represented pharmaceutical companies, health maintenance companies, insurance companies, and other companies in state and federal court. He has tried cases to juries in Wayne, Oakland, and Livingston counties and maintains an active Michigan appellate practice.

Ultimately, the Court specifically did not decide the question of whether this standing order should be permitted as evidence at trial, only that it could be permitted in the pleadings.

At this point, it is unclear how often, if at all, internal rules will be permitted at trial. The Supreme Court's language suggests trial courts should be cautious in admitting them, but the guidance to the trial courts was minimal. Given that internal standards are now potentially admissible, defendants will plainly be aware of plaintiffs' attempts to use such standards. Defendants, however, should also consider if they can use such standards to supplement the evidence of complying with the standard of practice, now that the Supreme Court is potentially permitting their use at trial.

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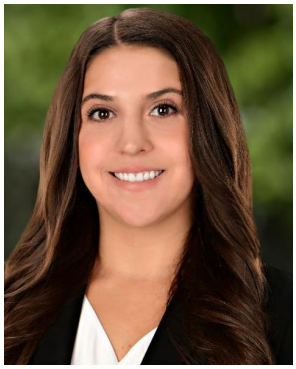

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