MICHIGAN DEFENSE UARTERIY Volume 42, No. 1 | 2025



Reports
President's Corner | Amicus Report | Legal Malpractice Update | Appellate Practice
Plus
Member to Member Services | Schedule of Events | Welcome New Members





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Promoting Excellence in Civil Litigation

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President's Corner

By: Frederick V. Livingston, MB&L, PLLC

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Frederick Livingston is known throughout the insurance industry for zealously investigating and litigating against fraud in a wide array of property and casualty claims, whether perpetrated by individuals or corporations.

Frederick focuses his practice on insurance defense litigation, with an emphasis on premise liability matters, automobile negligence cases, workers' compensation, and First-Party No-Fault cases, many of which involve fraud and excessive medical treatment. He is known for aggressively defending his clients in litigation while always communicating to his clients any obligations that may be owed to an injured party.

He has a long history of outstanding successes from successful motion practice that has saved clients millions of dollars along with successfully trying several cases to verdict.



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A New Chapter with Gratitude and Vision

I am incredibly honored and humbled to serve as President of the Michigan Defense Trial Counsel. As I step into this role, I carry with me the lessons and support of those who came before me. I want to begin by expressing heartfelt gratitude to the leaders who inspired and uplifted me on this journey. Michael Jolet – a mentor from my very first insurance defense job – got me involved with MDTC early on and showed me what a supportive professional community looks like. John Hohmeier, a close friend and an endless source of knowledge, has always been there to share wisdom and encouragement. I truly would not be here without the guidance of leaders like Mike and John, and I thank them for paving the way.

I also want to recognize and thank the outstanding colleagues who continue to make MDTC exceptional today. Our Executive Director, Madelyne Lawry, keeps this organization running smoothly with dedication and care. I am grateful for the leadership of our officers – Mike Cook, Rick Joppich, and Regina Berlin – and the service of board members and committee chairs like Scot Garrison, David Porter, Lindsey Peck, and Dan Campbell. Each of you has contributed time, energy, and ideas to move MDTC forward. It is a privilege to work alongside such talented and passionate professionals who believe in our mission.

With an appreciation for our past and present leaders, I am excited to lay out my priorities for the year ahead. My focus this year will be on working with the membership to:

- Foster a community that feels like home: At MDTC, we are more than a professional organization—we are a community where you can find your footing, your people, and your purpose. Whether you are fresh out of law school or have decades of litigation experience, whether you are at a large firm, in-house counsel or a solo shop, there is a seat at the table for you. From the moment you join, we want you to feel like you belong. Our strength lies in the richness of our collective experience and the range of perspectives we bring.
- Create more dialogue and platforms to exchange litigation strategies: From conversations at regional mixers and networking events to dialogue on the list serve, I want to encourage open conversations about our trial experiences, successes, and challenges. By learning from each other, we all become better advocates for our clients.
- Offering more opportunities for young attorneys: The next generation of defense lawyers is the future of MDTC. Expanding mentorship programs, skills workshops, and networking events that help newer attorneys sharpen their craft and feel supported as they grow in their careers will set the MDTC up for success for years to come.
- Continuing to offer discussion panels with judges and in-house counsel: It is vital to bridge the gaps between the defense bar, the bench, and our clients. Q&A sessions where trial and appellate judges share their insights into effective advocacy, and where in-house counsel can discuss what they value in outside counsel provide crucial developmental opportunities for all members.

I believe that by staying focused on our core priorities, MDTC will continue to thrive as Michigan's leading civil defense organization—not just because of what we do, but because of who we are together.

I have the honor of building upon the strong foundation laid by those who came before me. For decades, MDTC has been a place where defense attorneys sharpen their skills, build lasting relationships, and support one another through every stage of their careers. I am committed to honoring that tradition while helping us grow in ways that reflect the evolving demands of our profession. Whether you are a seasoned litigator or just beginning your journey, the MDTC should feel like a professional home—where you can find mentorship, camaraderie, and a shared sense of purpose. When we say we are "Promoting Excellence in Civil Litigation," that means more

than strong briefs and trial wins. It means integrity, collaboration, and showing up for each other.

"Community is much more than belonging to something; it's about doing something together that makes belonging matter." – Brian Solis

That spirit of action and togetherness is what makes MDTC special. When we mentor a colleague, volunteer our time, or simply pick up the phone to help another member, we strengthen not only this organization but the entire defense bar. Thank you for the opportunity to serve. I am proud to be part of this legacy—and excited for what we will achieve together in the year ahead.

- Frederick V. "Fred" Livingston, President, MDTC



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Amicus Report

By: J. Scot Garrison, Vandeveer Garzia and David Porter, Kienbaum Hardy Viviano Pelton & Forrest sgarrison@vgpclaw.com | dporter@khvpf.com

The Michigan Supreme Court recently issued decisions on two matters where the Court had the benefit of an amicus brief filed on behalf of the MDTC. First, in Mann v City of Detroit, ___ Mich ___; ___ NW2d ___ (2025), the plaintiff had tripped over a metal pole protruding from a sidewalk in the City of Detroit and later sued the City for negligence. The Court asked whether the defendant, typically immune from tort claims, is nonetheless subject to suit under the "sidewalk exception" to governmental immunity, MCL 691.1402a. The Court issued an Order after hearing argument on the application for leave to appeal in lieu of granting the application. The Court found the pole created "a vertical discontinuity defect of 2 inches or more" which rebutted the statutory presumption that the sidewalk in reasonable repair, citing MCL 691.1402a(3)(a). The case was remanded to the trial court for further proceedings. The MDTC's amicus brief was authored by Brianna Combs of Plunkett Cooney.

As noted in the previous update from the Amicus Committee, the MDTC filed an amicus brief in *Stefanski v Saginaw Co 911 Communications Cen Auth*, ___ Mich ___; ___ NW2d ___ (2025). The Court was asked to determine whether a person reporting a violation of the common law has participated in protected activity under the Whistleblowers' Protection Act. The Court ultimately held that a reported violation of the common law constitutes a "violation of law" under the Whistleblowers' Protection Act. However, the Court remanded the case to the Court of Appeals to permit the appellate court and the parties to address whether "gross negligence is a violation of 'a' law[.]" *Id.*, p ____. The MDTC's amicus brief was authored by Phil DeRosier and Daniel Ziegler of Dickinson Wright PLLC,

As previously reported, the MDTC filed an amicus brief in *Abdulla v Auto Club Group* (No. 167532). In *Abdulla*, the Court of Appeals held that the plaintiff, a commercial truck driver who had exclusive use of and dominion over this semi-truck tractor, was not an "owner" of the tractor because it was titled in the name of a limited liability company. It was noted the plaintiff was the sole owner of the limited liability company, which was treated as a separate and distinct entity. As the plaintiff was not an "owner" under the statute, he was therefore not disqualified from receiving PIP benefits under the Act. The matter has not been scheduled for oral argument on the application seeking leave to appeal. The MDTC's amicus brief was authored by David Porter and Sean Dutton of Kienbaum Hardy Viviano Pelton & Forrest, PLC,

The MDTC has been asked to file amicus briefs in two cases wherein the



J. Scot Garrison

Scot Garrison is a Partner with the Firm. He practices in the areas of First-Party and Third-Party Auto Negligence, product liability, recreational boating, property loss, and general civil matters. Prior to joining Vandeveer Garzia, Scot was a Judicial Staff Attorney in Oakland County Circuit Court for over twenty-two years, where he gained valuable experience in practically every area of the law. He also serves as an adjunct faculty member at Oakland University and Oakland Community College, where he teaches legal research and writing as part of the paralegal programs. He currently serves as the co-chair for the Amicus Committee for Michigan Defense Trial Counsel.



David Porter

David Porter works in the firm's employment and commercial litigation practice, bringing substantial appellate experience to the group. Before joining KHVPF, Mr. Porter was an Assistant Attorney General at the Michigan Attorney General's Office, handling civil and criminal appeals. He has briefed and argued dozens of appeals in state and federal court, including several involving complex issues of constitutional law in the U.S. Court of Appeals and a case of first impression in the Michigan Supreme Court. He is the recipient of the 2020 Distinguished Brief Award, recognizing outstanding advocacy in the Michigan Supreme Court. Mr. Porter previously served as law clerk to Judge Richard A. Griffin of the U.S. Court of Appeals for the Sixth Circuit and Justice David F. Viviano of the Michigan Supreme Court.

Amicus Report, cont.

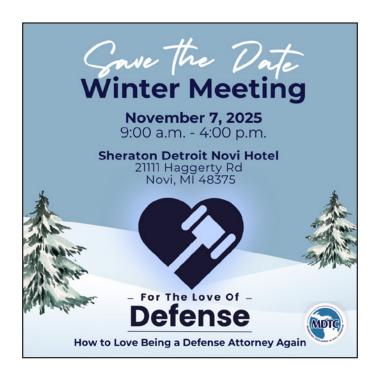
Supreme Court will address whether the traditional classification of individuals as a trespasser, licensee, or invitee in premises liability cases should be replaced. The secondary issue is whether such a change in the law would comport with the doctrine of stare decisis. The MDTC's amicus briefs will be authored by Nathan Scherbarth of Zausmer, PC, who has volunteered to assist in the very interesting and important cases of *Radke v Swenson*, (Docket No. 167162) and *Molitoris v Saint Mary Magdalen Catholic Church* (Docket No. 166699).

In *Radke*, the plaintiff and the defendant were long-time friends. The plaintiff had agreed to help install lights on the front porch of the defendant's home which was under construction. While on the premises, the plaintiff was walking backward in the garage and fell through what was intended to be a stairway to the basement. But the stairs had not yet been installed and there was not any barrier preventing such a fall. Upon finding the plaintiff was a licensee, the Court of Appeals found the defendant owed only a duty to warn of hidden dangers, and the stairwell opening was not a hidden danger. The Court of Appeals affirmed summary disposition in favor of the defendant.

In *Molitoris*, the plaintiff was serving as a volunteer at the defendant church when she slipped and fell on ice in the parking lot while leaving the event. The plaintiff testified she had been watching where she was walking, but did not see any snow or ice prior to her fall. The Court of Appeals affirmed the trial court's summary disposition in favor of the church, holding the plaintiff as a volunteer was a licensee as a matter of law. The defendant was not required to inspect or to take any affirmative care to provide for the plaintiff's safety. Both cases are pending oral argument on the applications for leave to appeal.

The Supreme Court has also invited the MDTC to submit an amicus brief in *Central Home Health Care Servs v MAIPF* (No. 167421). In this case, the plaintiff provided services to a Michigan resident who was injured while she was a passenger involved in an automobile accident which occurred in Ohio. The plaintiff sought payment of benefits through the MAIPF, which in turn argued benefits were payable only when the accident occurs in Michigan, citing MCL 500.3172(1) which contains the phrase "in this state" as a requirement for benefits. The Court of Appeals agreed and affirmed summary disposition in favor of the defendant. The Michigan Supreme Court has invited amicus briefs to address whether the plaintiff must show the accident occurred within Michigan in order to qualify for benefits through the MAIPF. The MDTC's amicus brief will be authored by John Hohmeier of Scarfone & Geen, PC.

The final invitation from the Supreme Court requesting an amicus brief came in the case of Bowerman v Red Oak Mgmt Co (No. 167718). The plaintiff in this matter fell and fractured her ankle when she stepped in a trench which was recently created by the co-defendant Westveld Services, LLC. The codefendant had been hired by Red Oak Management to install a concrete slab in the parking lot, where the trash dumpster was placed. The trench was to be filled in by another co-defendant, Bob's Asphalt & Paving, Inc. The plaintiff filed a statutory claim against Red Oak Management and a negligence claim against Westveld. The Court of Appeals found Red Oak Management was entitled to summary disposition as the parking lot was fit for its intended purpose. The Court of Appeals also found Westveld was entitled to summary disposition as its action in creating the trench did not breach Westveld's general duty to perform its services under the contract without creating an unreasonably dangerous condition. The Court of Appeals found the trench was not an unreasonable condition and could have easily been avoided. The Supreme Court has requested amicus briefs on whether Westveld breached any duty owed to the plaintiff and whether Red Oak Management breached its statutory duty to properly maintain the premises. The MDTC's amicus brief will be authored by Drew Broaddus of Smith Haughey.





Legal Malpractice Update

By: James J. Hunter and David C. Anderson, Collins Einhorn Farrell PC james.hunter@ceflawyers.com david.anderson@ceflawyers.com

Law Firm v. L.K. v Attorney, unpublished per curiam opinion of the Court of Appeals, issued May 27, 2025 (Docket No. 368417); 2025 WL 1508642.

Facts

Attorney represented L.K. in an underlying divorce matter. After the conclusion of the divorce, the law firm sued against L.K. seeking payment of legal fees.

The underlying divorce matter came after a marriage that L.K. described as a "business relationship" in order to obtain insurance and tax benefits. After L.K. was able to obtain disability benefits, the two decided to divorce. L.K. argued that he had a mental disability and his wife took advantage of him. After a trial, the trial court issued an order dividing the couple's property so that L.K. obtained the couple's Florida home and two horses, while his wife received her Michigan home.

After the divorce was complete, L.K. failed to pay his attorney. The law firm sued him for breach of contract and for account stated. L.K. filed a counterclaim against the law firm and a third-party complaint against the attorney-defendant for malpractice. The attorney moved for summary disposition of the claims, and in response L.K. relied on testimony from an expert regarding the standard of care. The trial court granted the attorney's motion for summary disposition, dismissing the malpractice claims. At that point, a first appeal ensued. The Court of Appeals agreed with L.K. that the trial court erred in granting the attorney's motion and remanded the case, instructing the trial court to address each of L.K's claims individually.

Back in the trial court, L.K. filed an amended third-party complaint and a second amended countercomplaint. He alleged, specifically, in nine separate counts that the attorney: refused to depose his wife before trial; improperly filed a quitclaim deed for the Michigan home; failed to obtain an appraisal of the horses; did not properly question L.K.'s treating mental health professional at trial; failed to file a motion to retrieve L.K.'s personal property from his wife's home; failed to establish that L.K.'s mental disability made him vulnerable to manipulation; failed to communicate with the appraiser of the Florida home or learn about applicable Florida law (dismissed as a discovery sanction); violated her duty and standard of care. The complaint also alleged that the attorney failed to pursue an annulment of the marriage.

The attorney again filed a motion for summary disposition. She argued that most of L.K.'s claims fail under the attorney-judgment rule. She further argued that L.K. failed to prove any damages related to his quitclaim deed and personal property



James J. Hunter

Jim is a member of the firm's Professional Liability and Commercial Litigation practice groups. He has extensive experience defending lawyers and other professionals in malpractice claims. Jim's practice also concentrates on representing lawyers and judges in ethics matters.

Before joining the firm, Jim worked on complex litigation and federal white-collar criminal defense. He has experience representing clients in healthcare fraud cases and antitrust investigations. He also served as an Assistant Prosecuting Attorney in Wayne County, Michigan, where he gained valuable trial experience.



David Anderson

David C. Anderson is a share- holder of Collins Einhorn Far- rell 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.

Legal Malpractice Update, cont.

claims. And additionally, that L.K. could not have succeeded on a claim for annulment. The trial court granted her motion—finding that several counts were barred by the attorney-judgment rule and L.K. failed to show that the attorney breached the standard of care, on other counts L.K. failed to demonstrate damages, that attorney had addressed the value of the horses during the divorce proceedings, and that attorney demonstrated that L.K. could not have obtained an annulment. At that point, L.K. filed this appeal (the second appeal).

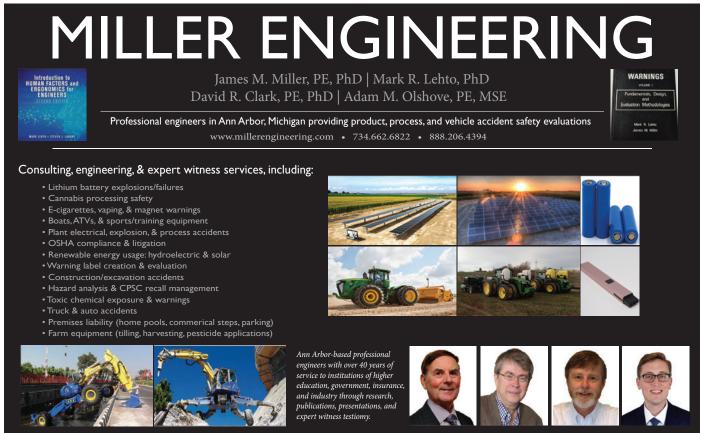
Ruling

The court analyzed L.K.'s claims one-by-one, ultimately agreeing with the trial court and affirming its ruling. In reaching this decision, the court relied heavily on the attorney-judgment rule, which provides that when "an attorney acts in good faith and in honest belief that [her] acts and omissions are well founded in law and are in the best interest of the client, the attorney is not answerable for mere errors in judgment." *Estate of Mitchell*, 259 Mich App at 396. Several of the Attorney's decisions, like the decision not to depose the wife prior to trial (thus revealing her trial strategy) were tactical decisions well founded in law. The court further reasoned that several of the counts were properly dismissed, because L.K. failed to show that any error by the attorney was the proximate cause of his damages.

Practice Note

A legal malpractice case will necessarily include a postmortem of the underlying case. Particularly in fact-intensive cases where you are making several judgment calls about how to handle evidence/strategy, make sure that you keep a well-maintained client file that can be used to support your defense(s).







Appellate Practice Report

By: Phillip J. DeRosier, Dickinson Wright pderosier@dickinsonwright.com

Michigan Supreme Court Amends Court Rules on Taxation of Costs on Appeal

The prevailing party in a civil appeal may be entitled to tax costs. See MCR 7.115 (appeals to circuit court); MCR 7.219 (Court of Appeals); MCR 7.318 (Michigan Supreme Court). Costs are precluded only if the court expressly states that a prevailing party is not entitled to costs. The process for seeking costs has changed somewhat under court rule amendments that took effect on January 1, 2025.

In the Supreme Court and Court of Appeals, a certified or verified bill of costs must be filed "[w]ithin 49 days after the dispositive order, opinion, or order denying reconsideration is mailed." MCR 7.219(B); MCR 7.319(A) (directing that the procedure for taxing costs in the Supreme Court "is as provided in MCR 7.219"). Formerly it was 28 days, and it remains 28 days for appeals to circuit court. MCR 7.115(B).

Another new wrinkle in the Court of Appeals is that "[i]f the Supreme Court reverses the decision of the Court of Appeals, then within 28 days of the Supreme Court decision, the new prevailing party may file a certified or verified bill of costs with the Court of Appeals clerk and serve a copy on all other parties." MCR 7.219(B).

The opposing party may file an objection within 7 days after service of the bill of costs. MCR 7.219(C); MCR 7.115(C). The clerk must "promptly" verify the prevailing party's costs and tax as appropriate. MCR 7.219(D); MCR 7.115(D). A party wishing to challenge the clerk's action may file a motion "within 7 days from the date of taxation." MCR 7.219(F); MCR 7.115(F). Review, however, is limited to "those affidavits or objections which were previously filed with the clerk." Id.

The most significant change to the procedure for taxing costs, which applies equally in appeals to the circuit court and to the Court of Appeals, is that the enforcement of any award of costs is now stayed pending any further appellate review that may be sought, including by application for leave to appeal. MCR 7.219(E); MCR 7.115(E). In the Supreme Court, if the Court "retains jurisdiction in a case, the clerk must stay the enforcement of an award taxing costs until the Supreme Court no longer has jurisdiction over the case." MCR 7.319(C).

When it comes to available costs, they are relatively limited. In appeals to circuit court, the following costs on appeal may be taxed:

- (1) printing of briefs, or if briefs were typewritten, a charge of \$1 per original page;
- (2) obtaining any stay bond;



Phillip J. DeRosier

Phil DeRosier has more than 20 years' experience representing industry-leading corporations, banks, insurance companies, and individuals in the Michigan Supreme Court, Michigan Court of Appeals, and U.S. Courts of Appeals. Phil has briefed and argued a wide variety of appeals, ranging from commercial contracts to insurance to business torts. He also devotes a significant part of his practice to briefing dispositive motions and working with trial counsel on pre- and post-trial motions, jury instructions, and preserving issues for appeal.

Phil is a past Chair of the Governing Council of the State Bar of Michigan's Appellate Practice Section, and is consistently recognized in Best Lawyers and Michigan Super Lawyers in the area of appellate practice. Phil is co-chair of the Michigan Appellate Bench Bar Conference and a contributing author to the Institute for Continuing Legal Education's Michigan Appellate Handbook. Before joining the firm, Phil served as a law clerk for former Michigan Supreme Court Chief Justice Robert P. Young, Jr., and was a staff attorney at the Michigan Court of Appeals.



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- (3) the transcript and necessary copies of it;
- (4) documents required for the record on appeal;
- (5) fees paid to the clerk or to the trial court clerk incident to the appeal;
- (6) taxable costs and fees allowed by law in appeals under MCL 600.2441;
- (7) the additional costs incurred when a party to an appeal under the Administrative Procedures Act unreasonably refused to stipulate to shortening the record as provided in MCL 24.304(2); and
- (8) other expenses taxable under applicable court rules or statutes.

MCR 7.115(G).

In the Court of Appeals, the taxable costs on appeal include:

- (1) a charge of \$1 per original page for the prevailing party's costs associated with preparation of appellant's brief, appellee's brief, a supplemental brief or a reply brief, not including any attachments or appendices;
- (2) any appeal or stay bond;
- (3) the transcript and necessary copies of it;
- (4) documents required for the record on appeal;
- (5) fees paid to the clerk or to the trial court clerk incident to the appeal;
- (6) taxable costs allowed by law in appeals to the Supreme Court (MCL 600.2441); and
- (7) other expenses taxable under applicable court rules or statutes.

MCR 7.219(G).

Finally, the following costs on appeal are taxable in the Supreme Court:

- (1) \$375 for an application for leave to appeal or an original action;
- (2) \$150 for a motion for immediate consideration or a motion to expedite appeal, except that a prosecuting attorney is exempt from paying a fee under this subdivision in an appeal arising out of a criminal proceeding if the defendant is represented by a court-appointed lawyer;
 - (3) \$75 for all other motions;
- (4) 50 cents per page for a certified copy of a paper from a public record or a copy of an opinion;

- (5) \$5 for certified docket entries; and
- (6) \$1 for certification of a copy presented to the clerk.

MCR 7.319(D). Under the Supreme Court's internal operating procedures, the prevailing party may also tax "\$1.00 per original page at the application stage. No amount may be taxed for attachments to the application. For briefs in cases where leave was granted or argument was held on the application, the prevailing party may tax \$2.00 per original page of the brief and the appendixes." MSC IOP 7.319(B)(1).

In addition to the costs incurred on appeal, prevailing parties on appeal in the circuit court and Court of Appeals may also tax any "costs awarded in the court below as permitted by MCL 600.2445(4)." MCR 7.219(G); MCR 7.115(G). This is another new provision effective May 1, 2025.

In some appeals, the recoverable costs will be less than the attorney fees for compiling a bill of costs—which means that pursuing costs may not be worthwhile economically. Still, costs in some appeals may be large enough to justify their pursuit. When an attorney receives an order allowing a client to tax costs incurred in an appeal, they should provide their client with a realistic picture of the likely expense of pursuing costs, as well as the likely recovery, before pursuing an order taxing costs. Doing these calculations upfront allows a client to make an informed judgment about whether pursuit of costs is worthwhile.

MDTC Schedule of Events

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2025

Golf Outing

Friday, September 12, 2025 8:00 a.m. - 3:00 p.m. @ Mystic Creek Golf Course

Winter Meeting

Friday, November 7, 2025 8:00 a.m. – 5:00 p.m. @ Sheraton Detroit Novi Hotel

Legal Excellence Awards

Thursday, March 19, 2026 6:00 - 9:00 p.m. @ Gem Theatre

Annual Meeting & Summer Conference 2026

Friday, June 12, 2026

9:00 a.m. - 5:30 p.m. @ Double Tree Hotel, Detroit

Winter Meeting

Friday, November 6, 2026

8:00 a.m. – 5:00 p.m. @ Sheraton Detroit Novi Hotel

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Please note that the advice and opinions shared on the IASIU Listserv do not constitute legal advice. Always consult with a qualified legal professional for specific legal guidance. Access to the IASIU Listserv is available for an additional fee of \$25 per year, in addition to your current membership. This small investment provides you with a valuable resource to enhance your knowledge and professional network. However, for the first year only, we're offering it free for all members!

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