MICHIGAN DEFENSE
# QUARTERLY
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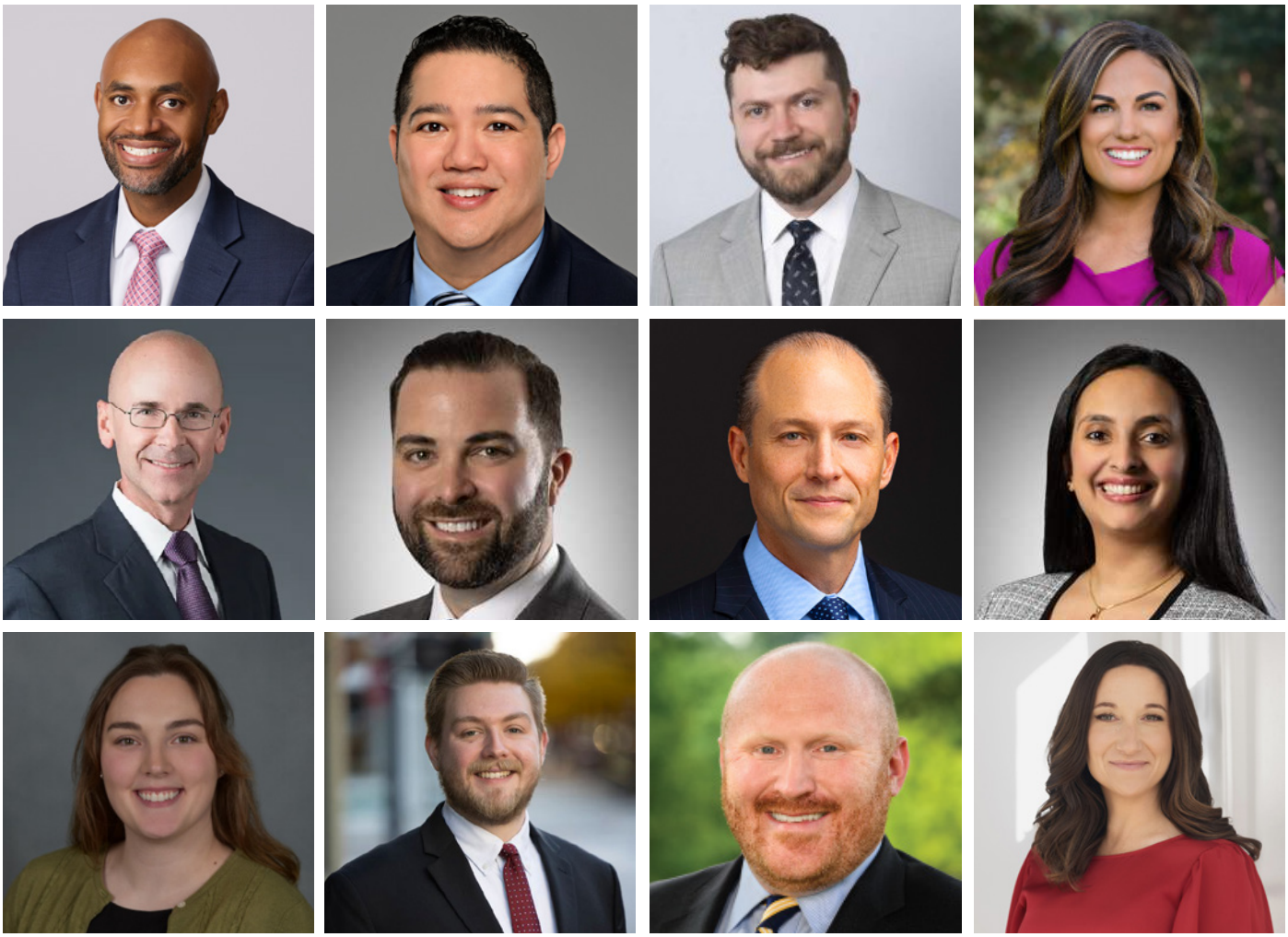

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Articles published in the Michigan Defense Quarterly reflect the views of the individual authors. The Quarterly welcomes articles and opinions on any topic that will be of interest to MDTC members in their practices. Although MDTC is an association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

# President's Corner

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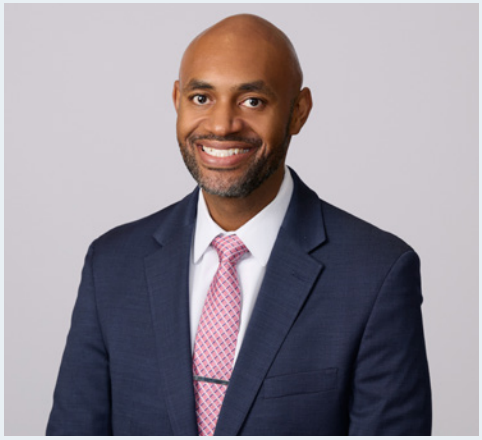

Frederick Livingston is known throughout the insurance industry for zealously investigating and litigating against fraud in a wide array of property and casualty claims, whether perpetrated by individuals or corporations.

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.



## Passing the Gavel: A Few Words of Thanks at Year's End

A year ago, when I took office, I told you what I hoped this year would be about: building community, getting people talking to one another, opening doors for our younger attorneys, and holding fast to the standard of excellence that has always defined MDTC. Now, as my term winds down, I keep coming back to those four ideas, and mostly what I feel is grateful. It has been a year of building, and what we built together turned out stronger than I dared to hope. None of it was the work of any one person. It happened because our members, our leaders, our sponsors, and our staff showed up and gave this organization their very best.

### From Ideas to Action

We started the year thinking big. On January 16, leaders from across MDTC gathered at the Sheraton Detroit Novi for our Future Planning Meeting, and the room was full of energy and good ideas. What I am proudest of is what happened next: those ideas did not stay on the whiteboard.

Our new **Section Webinar Program** is up and running. We set out to have each of our sections deliver real, practical content on the issues our members face every day, and they have done exactly that. The Appellate section led the way this spring, and the turnout and feedback from members told us we were onto something. Starting up a brand-new program and delivering on it in the same year is no small feat for an all-volunteer organization, and I could not be prouder of the section chairs who rolled up their sleeves and made it real. This is the kind of programming that will keep paying off for our members long after this year is over.

We also had some honest conversations about the things every organization has to wrestle with, like growing our membership and keeping us on solid financial footing. We launched a Fundraising Task Force and started seriously exploring ways to welcome law students into the fold, because the best time to invest in the next generation of MDTC leaders is right now.

### A Tenth Anniversary to Remember

In March, we filled the GEM Theatre in Detroit for the **Tenth Annual Legal Excellence Awards**. Ten years ago, we started this night on a simple premise: the defense bar deserves an evening to celebrate its own. Look at what it has become. A heartfelt thank you to our Planning Committee Chair, **Megan Mulder,** and to **Tom Isaacs**, **Quendale Simmons**, and **Brandon Schumacher**, who put months of work into making the night feel effortless. Thanks as well to our emcee, **Roop Raj** of Fox 2 Detroit, to our sponsors, and to every honoree who reminded us of what excellence in this profession really looks like.

### A Strong Finish: Our Annual Meeting and Summer Conference

On June 12, we closed out the year together at our Annual Meeting and Summer Conference at the **DoubleTree Suites Detroit Downtown at Fort Shelby**. It was a full, rich day: real substance from the podium, lively panels, and the kind of hallway

conversations you simply cannot get over a screen. A lot of people made that day happen, and I want to name them.

My thanks to our Program Committee Chair, **Stephen Madej**, and to **Andrew Spica**, **Scot Garrison**, and **Kent Risen**, who built an agenda that was both timely and genuinely useful. I am especially grateful to **Shawn J. Lewis** of **Hewson & Van Hellemont, PC**, one of our top sponsoring firms this year, who helped me kick off the morning and welcome everyone in.

What really made the day was our speakers, who gave their time and shared what they know with the rest of us. My sincere thanks to **Robert S. Abramson, Karen E. Beach, Laura M. Canfield, Scott R. Carvo, Andrew A. Cascini, L. Ladd Culbertson, Carlos A. Escurel, Cameron R. Getto, Michael Huntsman, Dan Klimek, Rick J. Patterson, Jack Sanders, John W. Whitman**, and **Noah Zeidan**, and to the judges who gave us their candor from the bench, the Honorable **Susan K. DeClercq**, the Honorable **David A. Groner (Ret.)**, the Honorable **James S. Jamo**, and the Honorable **Michael D. Warren, Jr.**.

It was also a real privilege to watch MDTC present its **Regional Judicial Award** to the Honorable **Brock A. Swartzle** of the Michigan Court of Appeals, honored for the courtesy, integrity, and consistency he brings to the bench. Thank you to **Scot Garrison** for presenting the award, and to regional chair **Michael Pattwell** for the gracious words he sent along for Judge Swartzle.

And none of this happens without the firms and vendors who put their faith and their dollars into this organization. With real appreciation, thank you to our Annual Meeting sponsors: **Butzel Long, CED Technologies, Inc., Clark Hill PLC, Cline, Cline & Griffin P.C., Collins Einhorn Farrell PC, Digistream Investigations, Dr. Ernest Chiodo, ExamWorks, Executive Language Services, Explico, Exponent, Inc., Fortz Legal Support LLC, Hewson & Van Hellemont, PC, Highstreet ProLaw Group, JAMS, Kitch Attorneys & Counselors, PC, LCS Record Retrieval, Lexitas, MD Panel, Michigan Evaluation Group / Medlogix, Robert F. Riley PC, Sherlock Investigations, Smith Haughey Rice & Roegge PC, Superior X Investigations, Support Claim Services, US Legal Support, and Veritext**. Your partnership is what keeps the lights on and the doors open.

## Passing the Gavel

This year's meeting also came with a changing of the guard. It is my honor to hand the gavel to **Rik Joppich**, who spent this past year as our Vice President working as hard as anyone in this organization, with a real gift for following through. He kept us on track all year long, and I can tell you with complete confidence that MDTC is in good hands. Give him the same support you gave me, and we will all be better for it.

## With Gratitude

I cannot sign off without thanking the people who keep this whole thing running, usually without anyone noticing. To **Kate Pojeta** and **Madelyne Lawry**, thank you for the late nights, the endless logistics, and the hundred small details behind every meeting and every event that our members feel even when they never see them. The two of you are a big part of why things run as smoothly as they do, and I am grateful to you. To our Board, our officers, our section chairs, and our committee leaders, thank you for showing up and doing the work. And to our sponsors and member firms, thank you for believing in this organization enough to invest in it.

Serving as your President has been one of the real honors of my career. If this year taught me anything, it is that leadership is not a title. It is a willingness to do the work, and I saw that willingness in every corner of this organization. MDTC is not standing still. We are building something worth being proud of, and honestly, I think the best is still ahead of us.

> *"A society grows great when old men plant trees in whose shade they shall never sit." – Greek proverb*

Thank you for the chance to lead and thank you for everything you give to make MDTC the premier civil defense organization in Michigan. It has been my privilege to serve.

# Insurance Coverage Report

**By: Nathan Scherbarth,** *Zausmer, August & Caldwell, P.C.*
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While my last column came out only a couple months ago, Michigan's appellate courts have issued several recent decisions with significant coverage implications:

*Swoope v Citizens Ins*, __ Mich __; __ NW3d __ (2026)

In *Swoope*, the Michigan Supreme Court considered the unlawful takings exception to no-fault coverage, MCL 500.3113(a). In a unanimous opinion, the Supreme Court held that to invoke the MCL 500.3113(a) bar on recovery of PIP benefits, the insurer must establish that the driver *took* the vehicle unlawfully. It is not sufficient to establish that the driver *operated* the vehicle unlawfully, for example by driving without a license.

In other words, the inquiry to determine whether PIP benefits are barred under 3113(a) requires consideration of the circumstances at the time the vehicle was taken to determine whether the taking was unlawful. If the driver took the vehicle contrary to express prohibition of the vehicle's owner, this would be a bar to coverage. However, if the driver was operating a vehicle that was in fact unlawfully taken but was *not* taken against the owner's express prohibition, this would require further inquiry into the driver's intentions at the time the vehicle was taken and would not be a *per se* bar to coverage.

This decision will likely introduce a lot more subjectivity into the determination of an unlawful taking, and plaintiffs will likely attempt to avoid summary disposition on this issue by injecting evidence of subjective intent.

*Mary Free Bed v Esurance*, __ Mich App __; __ NW3d __ (2026)

This Court of Appeals opinion has serious ramifications for motorcycle priority disputes. Where a motorcyclist is injured in an auto accident, the MCL 500.3114(5) order of priority operates such that a motorcyclist may exhaust benefits under one policy, then may claim additional benefits under another policy that is lower in the order of priority that lower order of priority policy provides greater coverage than the exhausted policy. In *Mary Free Bed*, the motorcyclist exhausted a 250K PIP policy on the motor vehicle involved in the accident (issued by Esurance), and the Court of Appeals held that the motorcyclist (or his medical providers) can now claim benefits under a USAA policy issued to the motorcycle's operator.

Ultimately, the policy-stacking holding *only* applies to motorcycle claims, but it opens significant potential exposure on catastrophic motorcycle claims where an unlimited policy has been issued but is lower in the order of priority. The opinion suggests that if a lower order of priority policy has the same or a lower limit, then the in-

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jured party would not be entitled to coverage under that policy. That issue is only addressed in dicta, however, and will likely be litigated further going forward in other matters.

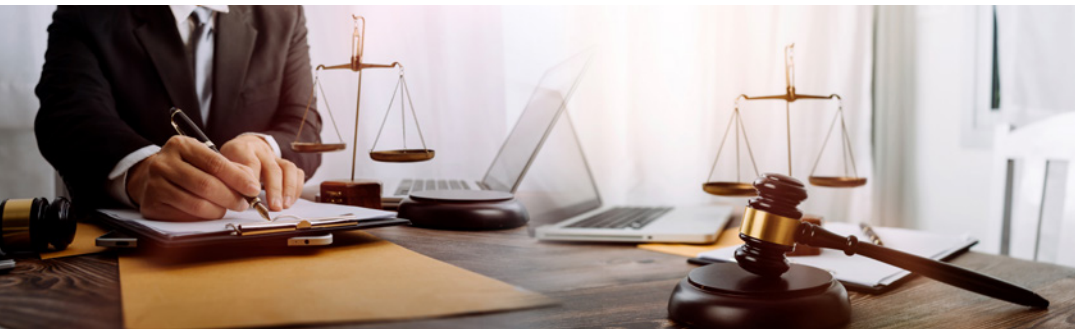
*Northland Radiology v Allstate Ins Co*, __ Mich App __; __ NW3d __ (2026)

In *Northland*, the named insured elected to opt out of PIP medical benefits and paid $0 in PIP medical premium as a result. The named insured had Qualified Health Coverage (QHC), made the election on the appropriate forms, and certified that all resident relatives had QHC. As it turns out, the named insured's son lived with her and did *not* have QHC. This was not disclosed to the insurer and was contrary to the named insured's averments in the application.

The Court of Appeals held that because the son/resident relative did *not* have QHC, the named insured made an ineffective election, and therefore, the policy had to be reformed to provide unlimited PIP coverage to anyone who could claim under the policy (including the mother who misrepresented that all resident relatives had QHC in the first place). The opinion also specifically notes that there is no rebuttable presumption in the statute applicable when a named insured makes an ineffective election on an opt-out policy, unlike on defined limit policies like 50K, 250K, 500K.

Judge Swartzle wrote a short concurrence which highlights the perverse incentives inherent in the majority's opinion. That is, a named insured can misrepresent the health insurance status of resident relatives or fail to disclose the existence of resident relatives without QHC, and as a result get unlimited PIP coverage. But the Judge concluded nonetheless that the majority's statutory interpretation was correct.

However, the Court specifically noted that its conclusion does *not* preclude raising any fraud defenses (i.e., rescinding the policy based on misrepresentations regarding QHC or resident relative status). The applicability of fraud defenses nonetheless would still involve an equitable analysis when applied to a provider as in this case or any other "innocent third party."



# Authenticating the Machine; the Federal Rules of Evidence Tackle AI-Generated Evidence

**By: Drew P. Branigan,** *Bowman and Brooke LLP*
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## Introduction

Artificial Intelligence ("AI") has dominated the public's interest over the past few years. Stakeholders argue that the burgeoning technology will optimize entire industries, cut costs, and drive compounding advancement as AI becomes more intelligent. Even today, AI technology has progressed to a point where it is almost impossible to discern whether content has been fully or partially fabricated without special scrutiny. It also operates with revolutionary independence, distinguishing itself from conventional computational functions.[1] This poses a significant problem for courts, which must act as gatekeepers of evidence presented to the factfinder.

Not all AI evidence is made with malicious intent, and there is a space for legitimate use of AI-generated content in the courtroom.[2] Courts will be challenged with determining (1) whether evidence is partially or fully generated by AI, and if so, (2) whether the evidence is sufficiently relevant and reliable for admission. How the Federal Rules of Evidence address these issues will be a critical component of litigation moving forward.

## Efforts To Regulate AI in the Courtroom

Where does the legitimate use of AI in the courtroom stop, and where are the risks for ensuring evidence is reliable? The results of confronting AI in the courtroom so far are mixed. To begin, there is clear consensus that courts must exclude evidence fabricated or altered with the intent to deceive. But many believe the current rules make it too easy for proponents to submit such deepfake evidence to the jury, evading this basic principle. And courts have struggled to employ uniform methods of scrutiny when confronted with AI-evidence that is genuinely proffered to assist the trier of fact, resulting in significant inconsistencies.[3]

These concerns have prompted the Advisory Committee on the Federal Rules of Evidence to consider several proposed changes to address these emerging and imminent issues. These include (1) an amendment to the current Rule 901 to permit challenges to authenticity of suspected AI evidence; and (2) the creation of a new Rule 707 to require machine-generated evidence to pass the rigors of Rule 702 when proffered without expert support. The proposed amendment to Rule 901 is designed to target "deepfakes"- evidence that is generated or altered with the intent to deceive. The proposed new Rule 707 is designed to ensure the reliability of AI-generated evi-

## Drew Branigan

Drew Branigan is a trial-hardened litigator whose practice focuses on high exposure personal injury cases involving automobiles, recreational vehicles, and personal watercraft. He has extensive experience defending driver assistance (ADAS) technology and passive restraint systems in automobiles, and he has represented clients in over ten federal and state jurisdictions across the country. Drew's proficiency with technology strengthens his ability to address complex technical evidence and emerging technology in the automotive industry.

Clients rely on Drew's experience in advancing matters to conclusion, from the pre-suit investigation stage through trial or settlement. He routinely engages in fact witness, plaintiff, and expert depositions, works with opposing counsel to resolve discovery disputes, and handles pre-trial motion practice, including drafting dispositive motions, evidentiary motions, and expert challenges. Drew also works closely with experts to develop a technical understanding of cases and drive high level case strategy. He also advises clients on alternative resolution, including preparing mediation statements and representing clients in private mediation and arbitration.

In addition to his automotive defense work, Drew also assists clients with eDiscovery and complex litigation issues and has been involved in mass torts and class action litigation for major utility companies and automotive and medical device manufacturers across the country.

In his free time, Drew enjoys swimming, cooking and exploring national parks with his wife. He recently completed his second triathlon and is currently training for an 8-mile relay race around Mackinac Island.

dence that operates in a very similar fashion to expert opinion testimony.

## Proposed Amendment to Fed. R. Evid. 901

The most apparent threat posed by AI today is intentional deception. Given the ease with which AI can alter or fabricate evidence in a realistic manner, there is concern that the current burden of authentication imposed by Rule 901 is ineffective. For this reason, the normal methods of perception (seeing or hearing things or people) may be insufficient to distinguish between authentic and fabricated evidence. Some have pointed out that a proponent of evidence could proffer an individual familiar with an item to authenticate fake or altered evidence without even knowing it.[4]

To address these concerns, the Advisory Committee has considered the following amendment to Rule 901:

Rule 901- Authenticating or Identifying Evidence

(c) Potentially Fabricated Evidence Created by Artificial Intelligence.
  (1) *Showing Required Before an Inquiry into Fabrication*. A party challenging the authenticity of an item of evidence on the ground that it has been fabricated, in whole or in part, by generative artificial intelligence must present evidence sufficient to support a finding of such fabrication to warrant an inquiry by the court.
  (2) *Showing Required by the Proponent*. If the opponent meets the requirement of (1), the item of evidence will be admissible only if the proponent demonstrates to the court that it is more likely than not authentic.
  (3) *Applicability*. This rule applies to items offered under either Rule 901 or 902.

This amendment provides a mechanism to force proponents of evidence to take further steps to endorse authenticity if concerns of alteration or fabrication are raised. It also maintains the ordinary burden of proof to protect litigants from encountering additional expense for merely proffering evidence. Thus, proponents are only forced to satisfy a higher burden if an opponent makes a showing supporting claims of fabrication.[5] The Committee stressed the importance of maintaining this structure to, among other things, avoid creating a "liars dividend," whereby jurors start to question *all* evidence by mere consequence of litigants baselessly alleging that evidence is fake or altered.[6]

Though this proposal seems to be a subtle tweak in harmony with the current procedure of challenging evidence, the Advisory Committee decided to pause consideration until more data on attempted admission of deepfakes in courts is available for study. The Committee also seems confident in the judiciary's ability to adapt to evolving technology without the need to amend the current rules. Notably, the Committee observed that in the few cases addressing allegations of alteration or fabrication of evidence, courts resolved the issue consistent with the proposed Rule 901(c). In other words, opponents were required to show "something beyond allegations" of fabrication to warrant an inquiry by the court after the proponent satisfied its burden under Rule 901.[7] Thus, Proposed Rule 901(c) will likely remain on the sidelines until the Advisory Committee observes serious issues with how courts handle deepfakes.

## Proposed New Fed. R. Evid. 707- Regulating Machines as Experts

At a high level, the purpose of AI technology is to develop a system that thinks like or even smarter than a human, and to do so with independence. This poses a unique problem for the courts – when evidence generated by intelligent AI is offered in court, how can it be admissible? When an AI system "thinks" (draws inferences or makes predictions from sets of data), should the system's outputs be considered opinion testimony subject to Rule 702? Moreover, how can the reliability of such evidence be assessed, especially as AI processes become more independent? These questions have posed challenges for courts, which have to date failed to adopt a uniform answer. Observing these issues, the Advisory Committee has considered a proposed rule that would superimpose existing Rule 702 onto the admission of AI-generated evidence when proffered without supporting expert testimony:

Rule 707- "Machine-Generated Evidence":

> When machine-generated evidence is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court may admit the evidence only if it satisfies the requirements of Rule 702(a)-(d). This rule does not apply to the output of simple scientific instruments.

The intent of Rule 707 is to provide a mechanism of scrutiny that broadly covers any form of AI evidence and gives courts flexibility to assess that evidence on a case-by-case basis. In doing so, the Committee endeavors to address resounding public concern that AI remains in an unreliable nascent state. [8]

Rule 707 is not a perfect solution, and the Committee has discussed prevailing concerns expressed during the public common period. For instance, while the rule would permit AI evidence to be offered without supporting expert testimony, commentors have pointed out that it would be very difficult to pass the rigors of Rule 702 without an expert, and that Rule

702 would already apply when accompanied with expert testimony. For this reason, some have called Rule 707 premature. [9]

Similarly, the Committee acknowledged that some machine learning will become so advanced that even an expert or the author of the system may be unable to explain its methodology to survive a Rule 702 challenge. One proposed solution is to make an alternative showing involving the rate of error and information concerning how the machine was trained.[10] Yet others have raised issues associated with attempting to simplify AI reliability down to a single-dimensional rate of error measurement. For example, the definition of success and failure may vary depending on the functional goal of the AI system:

> [i]n a lip-reading algorithm, is an inelegant but understandable translation a success or a failure? And if it is only a partial success, how partial is it? The answer, which will inform the error rates, is ultimately a human judgment, and there may be no consistency from one programmer to another. For purely binary outcomes, like the task of identifying a defendant, no such thing as partial success would exist, because the individual the algorithm is identifying in a video, photo, or recording either is the defendant or is not.[11]

It is for this reason that machine learning evidence is particularly susceptible to violating Rule 702(d)'s requirement that the evidence be reliably applied the principles and methods to the facts of the case.[12]

Regardless of any imperfections, the Advisory Committee's persistence with Rule 707 signals its recognition of the demand for AI-generated evidence to aid the fact finder in manners not believed to be possible in the past.[13] And in the absence of a new rule, courts have clearly struggled to tackle AI evidence with uniformity – which will invariably lead to the admission of unreliable evidence. Poignantly, in November of 2025, the Committee explained its view that the benefits of Rule 707 clearly outweigh the concerns:

> It is probably true that Rule 707 will be hard to meet. Without an expert, it will be hard to qualify, under Rule 702 standards, any output of a machine learning system. But that hardly seems like a bad thing. In fact it is the whole point of the rule. Machine learning outputs are universally believed to be subject to significant reliability problems. It would be absurd if the output of a machine learning system got a pass because the proponent seeks to admit it without an expert. Indeed, without Rule 707, a party has an incentive to introduce machine learning evidence without an expert.[14]

Moreover, the modern form of Rule 702 has displayed spectacular flexibility in its ability to filter evidence covering a vast spectrum of science throughout decades of technological advancement. Absent a fatal flaw, which has yet to be identified during the rulemaking process, Rule 702 seems the most sensible way to tackle what is simply the next step in scientific progress.

Proposed Rule 707 was published for public comment in August, 2025, which closed on February 16, 2026. In May of 2026, the Committee decided to pause publication at this time. While the Committee's interest in proposed Rule 707 is apparent, it expressed the desire to receive additional vetting by technology experts and stakeholders at its Fall, 2026 meeting. Nevertheless, given the Committee's strong interest in regulating AI evidence proffered without expert support, it is anticipated that the Committee will submit Proposed Rule 707 to the Standing Committee for publication in the near future.

## Existing Tools to Handle AI Evidence

The aforementioned proposals reflect an attempt to competently *facilitate* the admission of reliable AI-generated evidence rather than to exclude it. As of January, 2026 the Committee seems inclined to pause efforts to amend Rule 901(c) and focus on finalizing the Proposed Rule 707. However, in the absence of any amendment, litigants still possess powerful tools to handle issues pertaining to AI evidence.

The discovery phase is a crucial opportunity to sniff out deepfakes: parties should always demand that material (photos, videos, or other record) be produced in native format. Requesting metadata or taking records custodian depositions are also effective methods of ensuring authenticity of evidence. If the proponent of material is unable to comply with these requests, it should be a sign that the evidence is potentially unreliable and should be the subject of a motion *in limine*.

Separately, courts can preemptively root out disputes involving AI by requiring parties to confer about and identify any potential AI evidence at the Rule 26 Conference or initial disclosure stage. While scrutiny of such evidence remains inconsistent across jurisdictions, early disclosure allows parties to conduct discovery on generative evidence to ascertain whether and how material will present evidentiary or reliability problems.[15] This includes the disclosure of any AI-generated Illustrative Aids that parties intend to show juries under the new Fed. R. Evid. 107.[16]

In their present state, the Federal Rules– principally Federal Rules of Evidence 901, 702, and 403 – *can* serve as an effective firewall against unreliable or intentionally deceptive AI-generated evidence. However, an amendment such as Proposed Rule 707 would provide much needed clarity on admitting AI-generated evidence that, with the right guardrails, could significantly aid jurors and litigants alike.

**Endnotes**

1 In essence, AI takes the "input-output" process of traditional computation and adds an extra level of reasoning based on the universe of information provided to the system. This process entails guiding and enhancing computation by providing data and employing unconventional guidance (i.e. looser algorithms rather than rigid coding) to allow the system to generate outputs based on the totality of circumstances and with greater independence. In that sense, AI learns and thinks like a human.

2 For example, a party may wish to rely on AI to forecast future damages in lieu of an economist, to generate reconstructions of incidents, or to recreate evidence that has been lost or destroyed (i.e. photos, video, etc...) based on real data points.

3 For example, the Sixth Circuit has allowed AI enhanced images into evidence as long as they were authenticated and the steps taken to alter the images were documented. *See United States v. Roberts*, 84 F.4th 659, 670-71 (6th Cir. 2023). However, other courts have applied Rule 702 to exclude similar media where AI was used to enhance brightness and sharpness, reasoning that the proponent could not establish that the methodology used to create the material was reliable. *See State of Washington v. Puloka*, No. 21-1-04851-2 (Wash. Super. Ct. March 29, 2024).

4 The authors of *AI-Generated Voice Evidence Poses Dangers in Court* tested the effectiveness of Rule 901 under various scenarios. Their studies showed that humans could effectively filter out evidence using simple methods of identification (i.e. correctly judging a person portrayed in a video or audio clip as being familiar or unfamiliar based on voice or appearance). *See* Rebecca Wexler, Sarah Barrington, Emily Cooper, & Hany Farid, *AI-Generated Voice Evidence Poses Dangers in Court*, Lawfare (March 10, 2025), https://www.lawfaremedia.org/article/ai-generated-voice-evidence-poses-dangers-in-court. However, when subjects were presented with two samples, one real and one AI clone version, eighty percent failed to discern the clone from the real person. *Id*.

5 The Committee soundly rejected imposing a higher initial burden in response to other proposed rules: "surely, the better procedure is to require the opponent to establish foundation before something special is required of the proponent." November 5, 2025 Advisory Committee Agenda Book at Page 174.

6 *See* May 2 2025 Agenda Book at pages 192-198.

7 This is largely consistent with comments suggesting that existing Rule 104(b) would be the proper channel for shifting the burden under proposed Rule 901(c). *See* ("Agenda Book") at 20-21, 33-34.

8 A real-world example of AI unreliability is the use of Facial Recognition Technology ("FRT") in criminal cases. In *Johnson v. State of Maryland,* the state appellate court overturned a defendant's conviction in part because the state failed to disclose in discovery that it had used FRT to identify the defendant. 2025 WL 2237582 at *3 (Md. App. August 6, 2025). In rejecting the state's argument that reversal would give the defendant a windfall, the court broadly cautioned against the use of AI, citing at least six other instances of individuals wrongly accused due to FRT misidentification within the previous year. *Id* at *5-6 It added that:

> [t]he very real prospect that AI could hallucinate evidence, as it does text and citations when it can't find an answer ... places all the greater imperative on allowing FRT- and AI-generated evidence to be tested appropriately, and we cannot give the State a pass here where it failed even to identify the technology it used to identify the suspect it pursued and prosecuted.

*Id*.

9 And as one critic succinctly put it:

> [a]ny proponent that went through the trouble to put together such evidence would want the jury (or other factfinder) to give it the full weight that the proponent thinks it deserves, and expert validation would be much more persuasive than some lay witness who would be destroyed on cross examination by being unable to explain the technology.

James Beck, *Federal Judicial Conference Evidence Rules Committee Releases Possible New Rule Pertaining to Artificial Intelligence*, Drug & Device Law Blog (June 2, 2025), https://www.druganddevicelawblog.com/.

10 *See* Agenda Book at Page 145 (comparing the issue to admissibility of canine drug detection).

11 *See* Patrick Nutter, *Machine Learning Evidence: Admissibility and Weight*, 21 U. Pa. J. Const. L. 919 at 934 (2019) (discussing the danger of relying on conventional rates of error in assessing AI).

12 Again, the Committee seems to appreciate the need for courts to focus the reliability inquiry on how a machine is trained, especially with respect to what and how data is collected and presented to the system. *Id* at 935-939; *see* Agenda Book at 145-146.

13 *See* Committee Note to Proposed Rule 707 (expert testimony in modern trials increasingly relies on software or other machine-based conveyances of information).

14 Advisory Committee November 5, 2025 Meeting Agenda Book at 121-122.

15 Likewise, the Advisory Committee suggests similar early disclosure requirements for AI evidence in the event Rule 707 is adopted. *See* Proposed Fed. R. Evid. 707 Committee Note.

16 In the interim, this latter rule will provide an accessible avenue for parties to show juries AI-generated products like accident reconstruction diagrams or VR walkthroughs of scenes where such material may not be admissible under the federal rules.

# Appellate Practice Report

**By: Phillip J. DeRosier,** *Dickinson Wright*
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## "A Word" About the Precedential Effect of Older Michigan Court of Appeals Decisions

MCR 7.215(J)(1) provides that "[a] panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals." The Court of Appeals' recent decision in *Plachta v Plachta*, ___ Mich App ___; ___ NW2d ___; 2026 WL 151934 (Ct. App. Jan. 20, 2026) (Docket No. 374260), serves as a good reminder that although current Court of Appeals panels are not *required* to follow a published decision issued *before* November 1, 1990, they are still "binding, precedential decisions under stare decisis."[1]

*Plachta* involved a trial court's determination in a child custody dispute that a change in the child's ("AP's") custody was required because the parents were unable to make joint decisions about AP's care. The Court of Appeals found there to be ample support for the trial court's finding that the parents had "an established history of hostility when dealing with issues involving the child, and that there was no end in sight to this acrimony."[2] This triggered application of a principle recognized years ago in *Fisher v Fisher*, 118 Mich App 227; 324 NW2d 582 (1982). In *Fisher,* the Court of Appeals recognized that "[i]f two equally capable parents whose marriage relationship has irreconcilably broken down are unable to cooperate and to agree generally concerning important decisions affecting the welfare of their children, the court has no alternative but to determine which parent shall have sole custody of the children."[3]

This, the *Plachta* Court observed, was "precisely what the trial court found" to justify its decision to award sole custody to the child's mother.[4] Nevertheless, because the trial court failed to explain the burden of proof it applied to its custody determination, the Court of Appeals remanded for the trial court to "articulate whether the proposed change to sole legal custody changed AP's established custodial environment, and if so, whether it had granted defendant sole legal custody based upon clear and convincing evidence."[5]

As relevant here, the *Plachta* Court then paused to provide "a word about *Fisher*, a pre-November 1, 1990 decision."[6] The Court explained that under the "plain terms" of MCR 7.215(C)(2), such decisions "are binding, precedential decisions under stare decisis," and "are *not* merely persuasive and are not on par with unpublished decisions.[7] On the contrary, "these pre-November 1, 1990 decisions are binding unless

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.

the Court is convinced that a decision is no longer correct, and warrants reversal under the relevant stare decisis considerations."[8] Put another way, "older published opinions should be followed by this Court unless 'important prudential considerations' compel us to do otherwise."[9] *Plachta* summarized:

> Under these rules, there is no difference in the precedential effect of a pre- versus post-1990 decision. Instead, the only difference between a pre- and post-November 1, 1990 decision is that the latter must be followed by a subsequent panel unless it is overruled by a conflict panel or the Supreme Court, while the former must be followed unless a subsequent three-judge panel concludes it is distinguishable or warrants reversal. MCR 7.215(C)(1) & (2). This is unlike unpublished opinions, which are not required to be followed under any circumstance.[10]

*Plachta* certainly is not the first time in recent years that the Court of Appeals has addressed the precedential value of pre-November 1, 1990 decisions, while also reiterating an unpublished decision's *lack* of precedential value. In fact, *Plachta* cited a couple of those decisions.[11] That the Court did so once again suggests that it saw a continuing need to provide guidance. Indeed, there can be a tendency among some practitioners to view older published Court of Appeals decisions as being of lesser value than more recent ones, even if the recent decision is unpublished. *Plachta* serves as a reminder that this is not the case.

**Endnotes**

1 *Id*., 2026 WL 151934, *3.
2 *Id*. at *2.
3 *Id*. at 233.
4 Plachta, 2026 WL 151934, *2.
5 *Id*. at *3.
6 *Id*.
7 *Id*. (emphasis in original).
8 *Id*.
9 *Id.* (citation modified).
10 [*Id*.]
11 See *Hudson v Dep't of Corrections*, ___ Mich App ___, ___; ___ NW3d___; 2025 WL 2147427 (2025) (Docket No. 367902), slip op at 5; *People v Sims*, ___ Mich App ___, ___; ___ NW3d ___; 2026 WL 118585 (2026) (Docket No. 371876), slip op at 5 n 3; see also MCR 7.215(C)(1) ("An unpublished opinion is not precedentially binding under the rule of stare decisis.").

# *Berk v Choy* and Its Impact on the Sixth Circuit and Michigan

**By: Simonne Kapadia,** *Collins Einhorn Farrell PC*
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In *Berk v Choy*, __ US __ (2026) (Docket No. 24-440), the United States Supreme Court recently held that Delaware's medical-malpractice affidavit-of-merit requirement does not apply in federal diversity suits because it conflicts with Rule 8 of the Federal Rules of Civil Procedure. Although *Berk* settled a circuit split among federal courts, *Berk* does not change the status quo in the Sixth Circuit. *Berk* is also unlikely to result in successful analogous challenges to Michigan's affidavit-of-merit requirement in Michigan courts.

**Under *Berk*, state affidavit-of-merit requirements do not apply in federal court.**

Many states require medical-malpractice plaintiffs to file their complaint with an affidavit from an expert supporting their claim, commonly called an "affidavit of merit." In *Berk v Choy*, __ US __ (2026) (Docket No. 24-440), the United States Supreme Court recently considered whether Delaware's medical-malpractice affidavit-of-merit requirement applies in federal court.[1] The Court held that the state-law affidavit-of-merit requirement does not apply in federal court because it conflicts with the pleading standards of Rule 8 of the Federal Rules of Civil Procedure.[2]

In *Berk*, the plaintiff brought a federal medical-malpractice diversity suit against the defendant providers in the United States District Court for the District of Delaware.[3] The alleged malpractice occurred in Delaware, and the plaintiff sued under Delaware law.[4]

Under Delaware law, a medical-malpractice complaint must be accompanied by an affidavit of merit "signed by an expert witness . . . stating that there are reasonable grounds to believe that there has been health-care medical negligence committed[.]"[5] A court may, upon a timely motion from the plaintiff and a showing of good cause, grant a 60-day extension for the time for filing the affidavit of merit.[6] And if a plaintiff fails to include the affidavit, or a timely motion to extend, with their complaint, the court clerk must reject the complaint.[7]

Defendants are not required to take any action regarding the complaint until 20 days after the plaintiff files the affidavit of merit.[8] Further, defendants may move the court to determine *in camera* if the affidavit satisfies the statutory requirements.[9]

The plaintiff in *Berk* did not file an affidavit of merit with his complaint.[10] Instead, the plaintiff timely moved for a 60-day extension of time to file his affidavit.[11] Despite the extension, the plaintiff was unable to file a timely affidavit and instead filed his medical records under seal.[12]

## Simonne Kapadia

Simonne Kapadia is an associate attorney in the appellate practice group at Collins Einhorn Farrell PC. Simonne's practice focuses on civil appeals and dispositive motion practice in federal and state courts. Simonne's practice areas largely consist of professional liability defense and general liability defense.

The defendants moved the district court to determine whether the plaintiff's submissions complied with the affidavit-of-merit requirement.[13] And the plaintiff argued that the Delaware pleading requirement is not enforceable in federal court under the Federal Rules of Civil Procedure.[14] The district court dismissed the plaintiff's suit for failing to comply with the affidavit-of-merit requirement.[15] The Third Circuit affirmed.[16]

The Supreme Court granted certiorari and reversed the Third Circuit.[17] The Court reasoned that under the Rules of Decision Act and the Rules Enabling Act, valid Federal Rules of Civil Procedure displace contrary state law, even if the state law is substantive.[18] Determining whether a Federal Rule of Civil Procedure is valid involves a two-step process: (1) determining whether the rule answers the disputed question, and (2) if the rule answers the disputed question, determining whether the rule governs.[19] The rule governs, "unless it exceeds statutory authorization or Congress's rulemaking power."[20]

As to step one, the Court held that Federal Rule 8 answers the disputed question here — namely, whether the plaintiff's "lawsuit may be dismissed because his complaint was not accompanied by an expert affidavit."[21] The Court held that under Federal Rule 8(a)(2), a plaintiff must only provide "a short and plain statement of the claim showing that [they are] entitled to relief."[22] Under Federal Rule 8, evidence supporting the claim's merit is not required.[23]

The Court further reasoned that Federal Rule 12 reinforces that Federal Rule 8 doesn't require evidence of the claim because under Federal Rule 12, there is only one ground to dismiss a claim on the merits: "failure to state a claim upon which relief can be granted."[24] Unless the Federal Rules, like Federal Rule 9, provide for heightened pleading requirements, Federal Rule 8 "sets a ceiling on the information that plaintiffs can be required to provide about the merits of their claims."[25]

The Court held that Delaware's affidavit-of-merit requirement conflicts with Federal Rule 8 because they both address what "information . . . a plaintiff must provide about the merits of [their] claim at the outset of litigation," but the two authorities arrive at different outcomes.[26] Delaware law requires a plaintiff to make a prima facie showing that they have sufficient *evidence* for their claim.[27] Federal Rule 8, conversely, only requires a plaintiff to make sufficient *factual* allegations at the outset of litigation.[28]

As to step two, the Court held that Federal Rule 8 is valid under the Rules Enabling Act because it regulates only procedure, although Federal Rule 8 "may have some practical effect on the parties' rights."[29] Accordingly, the Court held that Federal Rule 8 controls over the contrary Delaware affidavit-of-merit requirement in diversity suits.[30]

**What does *Berk* mean for the Sixth Circuit?**

The Court's decision in *Berk* does not affect the status quo in the Sixth Circuit. In *Gallivan v United States*, 943 F3d 291, 293-294 (6th Cir. 2019), the Sixth Circuit held that Federal Rules 8, 12, and 9 controlled, not Ohio's affidavit-of-merit pleading requirement, Ohio Civil Rule 10(D)(2). In turn, the Sixth Circuit held that the district court erred when it dismissed the plaintiff's federal medical-malpractice lawsuit for failing to comply with state pleading requirements.[31]

In *Albright v Christiansen*, 24 F4th 1039, 1045-1046 (6th Cir. 2022), the Sixth Circuit looked to *Gallivan* when considering whether Michigan's affidavit-of-merit pleading requirement, MCL 600.2912d, applies in federal courts. Under Michigan law, the plaintiff in a medical-malpractice action, or their attorney, must "file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169."[32] Looking to *Gallivan*, the Sixth Circuit in *Albright* held that Michigan's affidavit-of-merit pleading requirement conflicts with Federal Rules 8, 9, 11, and 12 and that the federal rules apply over Michigan law in diversity suits.[33]

For similar reasons, the Sixth Circuit in *Albright* also held that Michigan's pre-suit medical-malpractice notice requirement, MCL 600.2912b, does not apply in federal diversity actions under Federal Rules 3, 8, 9, 11, and 12.[34]

Although medical-malpractice plaintiffs in federal diversity suits do not need to comply with state-law pleading requirements, plaintiffs in these suits, like any other plaintiff, still have to establish their case. Accordingly, these suits may still be subject to dismissal for failing to state a claim or lack of evidentiary support under Federal Rules 12 and 56.[35]

**What does *Berk* mean for Michigan courts?**

The Court's decision in *Berk* is unlikely to prompt successful analogous challenges to Michigan's affidavit-of-merit requirements in Michigan courts under the Michigan Court Rules.[36] Although the general pleading requirements under the Michigan Court Rules require a plaintiff to establish the factual sufficiency of their claims, the Michigan Court Rules establish special filing requirements for medical-malpractice claims.[37] MCR 2.112(L)(1) specifically incorporates the affidavit-of-merit statutory requirements.[38] And MCR 2.112(L)(2)(a) references the pre-suit notice-of-intent requirement of MCL 600.2912b by providing a timeline and mechanism for challenging a plaintiff's notice of intent. So, the filing requirements of MCR 2.112(L) differ from Federal Rule 8, which does not include specific pleading requirements for medical-malpractice suits.

## Conclusion

The Supreme Court's decision in *Berk* settles the issue of whether state-law affidavit-of-merit pleading requirements in medical-malpractice cases apply in federal diversity actions (they do not).

The Court's decision in *Berk*, however, does not impact the status quo in the Sixth Circuit because the Sixth Circuit previously held that state medical-malpractice filing requirements do not apply in federal diversity actions.

And, finally, the Court's holding in *Berk* is unlikely to impact the application of medical-malpractice filing requirements in Michigan courts. The Michigan Court Rules provide for special medical-malpractice filing requirements. *Berk* speaks only to the application of the Federal Rules of Civil Procedure to cases filed in federal court.

**Endnotes**

1 *Berk*, __ US at __; slip op at 1.
2 *Id.*
3 See *Id.* at __; slip op at 1-2.
4 *Id.*
5 18 Del C § 6853(a)(1).
6 § 6853(2).
7 § 6853(a)(1).
8 § 6853(4).
9 § 6853(d).
10 *Berk*, __ US at __; slip op at 2.
11 *Id.*
12 *Id.*
13 *Id.*
14 *Berk*, __ US at __; slip op at 2-3.
15 *Berk*, __ US at __; slip op at 3.
16 *Id.*
17 See, e.g., *Berk*, __ US at __; slip op at 1, 3.
18 *Berk*, __ US at __; slip op at 3-4.
19 *Berk*, __ US at __; slip op at 4.
20 *Id.* (internal quotations and citations omitted).
21 *Id.*
22 *Berk*, __ US at __; slip op at 5.
23 *Id.*
24 *Id.*
25 *Berk*, __ US at __; slip op at 6.
26 *Berk*, __ US at __; slip op at 8.
27 *Berk*, __ US at __; slip op at 6.
28 *Id.*
29 *Berk*, __ US at __; slip op at 11. (internal quotations and citations omitted).
30 See, e.g., *Berk*, __ US at __; slip op at 1, 11.
31 See *Id.* at 294.
32 MCL 600.2912d.
33 *Albright*, 24 F4th at 1046.
34 *Albright*, 24 F.4th at 1046-1049.
35 See *Berk*, __ US at ___; slip op at 9.
36 See *People v Parker*, 319 Mich App 664, 667; 903 NW2d 405 (2017) ("Under our Constitution, a court rule will trump a statute when the two irreconcilably conflict on a procedural matter. With respect to a substantive matter, however, a statute will trump a court rule.").
37 Compare MCR 2.111(B)(1) with MCR 2.112(L).
38 *Id.*, citing MCL 600.2912d and MCL 600.2912e.

# Welcoming New Quarterly Committee

**Co-Editor**
**Matthew McCann**
Kotz Sangster P.C.

Matthew C. McCann is Senior Counsel at Kotz Sangster Wysocki P.C. Since relocating to Michigan from New York in 2021, Matt has focused his practice on helping clients navigate complex commercial litigation and regulatory challenges. He has a diverse legal and industry background, including experience handling insurance coverage disputes, product liability cases, toxic tort, premises liability, civil rights, and environmental matters. His work also extends to the cannabis industry, encompassing licensing, litigation, and appeals.

In Michigan, Matt has served on the Oakland County Bar Association's Providing Access to Legal Servies Committee and as a board member for non-profits dedicated to helping children with special needs, including MI AECRES and Specialty Aquatics Charity. He has been named first as a Rising Star, and then as a Super Lawyer, in a number of areas of practice, starting in New York and continuing in Michigan, and has maintained a Martindale-Hubble AV Preeminent® Rating, since 2015.

Matt is a graduate of Brooklyn Law School, Cornell University, and Regis High School.

**Associate Editor**
**Kevin Cowan**
Smith Haughey Rice & Roegge

Kevin Cowan is an associate in our Grand Rapids office and litigation practice.

Kevin has five years of experience working in various legal settings involving all aspects of litigation. As a clerk at the 17th Circuit Court for Kent County, he conducted legal research for civil and criminal motion arguments and drafted proposed opinions and orders. During his time with the Michigan Department of Attorney General, he helped represent the state's Department of Corrections and its employees.

**Co-Editor**
**Samantha Orvis**
Secrest Wardle

Executive Partner, Samantha J. Orvis, is located in Secrest Wardle's Troy office. She is a member of the Alternative Dispute Resolution, Insurance Coverage, Motor Vehicle Litigation, and Premises Liability Practice Groups.

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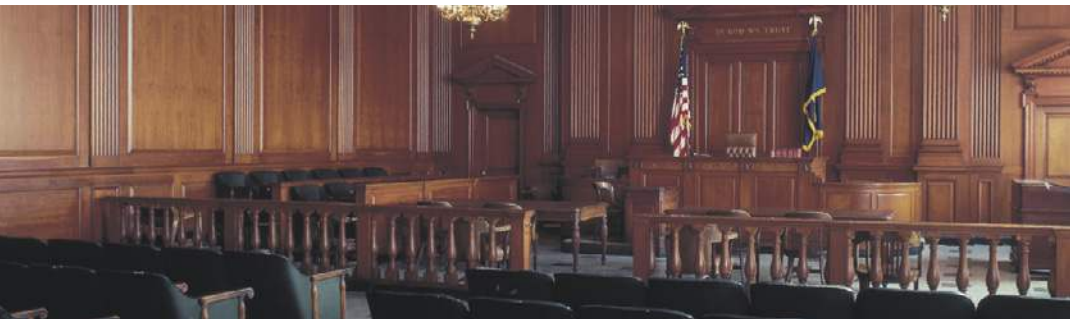
**Associate Editor**
**Samantha Lamrock**
Collins Einhorn Farrell PC

Sam is an associate attorney at Collins Einhorn Farrell, PC, where she focuses primarily on appeals and complex motions. She joined the firm in May, 2025, just after graduating from Wayne State University Law School. In law school, Sam gained a wide breadth of experience ranging from public defense to estate planning to in-house counsel for a multinational corporation. Now she uses her expertise to solve problems for attorneys, insurance agents, accountants, and other professionals.



# Legal Malpractice Update

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

*Doraid Elder, Nozmi Elder, and West Dearborn Partners, LLC v. Lawyers and Law Firm*, unpublished per curiam opinion of the Court of Appeals, issued February 19, 2026 (Docket No. 369709); 2026 WL 478757.

## Facts

Doraid Elder and Nozmi Elder (the "Elders") are members of West Dearborn Partners, LLC. In 2005, West Village Commons, LLC purchased a vacant parcel of land from the City of Dearborn. West Village executed a promissory note secured by a mortgage on the parcel. In August 2010, West Village filed for bankruptcy. In March 2011, West Dearborn Partners purchased the note and mortgage on the parcel under a Note Sale and Assignment Agreement. The Elders and West Dearborn Partners ("plaintiffs") hired defendant lawyers and their law firm to represent them relative to that deal. Plaintiffs subsequently asked that the lawyers record the assignment, but it was not recorded at that time.

In August 2010, West Village filed for bankruptcy, and in October 2011, the bankruptcy court ordered the trustee to abandon the parcel. The trustee executed a quit claim deed conveying the parcel to the City of Dearborn. Over four years later, in December 2015, the lawyers recorded the 2011 assignment on behalf of West Dearborn Partners.

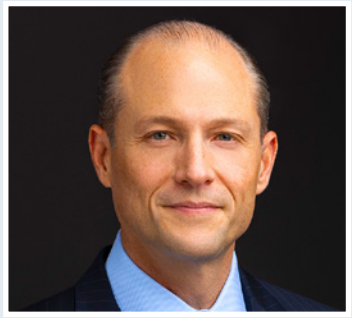
Throughout this time, the lawyers continued to represent the plaintiffs. In December 2017, the plaintiffs entered a tolling agreement to extend the statute of limitations for possible legal-malpractice claims. However, the agreement between the parties included language that specifically provided that the agreement did not "renew, revive, or resurrect, any claim on behalf of West Dearborn Partners, which, on December 1, 2017, was already time barred…."

The plaintiffs filed suit against the lawyers in December 2021 alleging legal malpractice and professional negligence against one individual lawyer, professional liability against the law firm, breach of fiduciary duty against one individual lawyer, and breach of fiduciary duty against the remaining lawyers and the law firm. The trial court dismissed several claims against certain parties on summary disposition. The trial court found that the legal-malpractice claims subsumed the breach-of-fiduciary duty claims and the statute of repose time-barred the legal-malpractice claims.

## 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 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.

The plaintiffs appealed the dismissal of their breach-of-fiduciary-duty claim as to one lawyer.

### Ruling

The Court of Appeals affirmed. It found that the legal-malpractice claim subsumed the breach-of-fiduciary-duty claim. The Court recognized that breach-of-fiduciary duty claims are not automatically duplicative but explained that the complaint must be read as a whole to determine the type of interest harmed. It reasoned that here, the claims for legal malpractice and breach of fiduciary duty included repeated allegations or at least used similar allegations that had been slightly reworded. The Court determined that plaintiffs failed to plead anything more than an inadequate representation and relied on the same lawyer conduct that gave rise to the legal-malpractice claim. Plaintiffs attempted to argue that the lawyers had a duty, at least in part, under the Michigan Rules of Professional Conduct to self-report possible malpractice. The court rejected that argument and found that it further enforces that any duties owed to plaintiffs arose out of the attorney-client relationship, and the breach-of-fiduciary-duty claim is properly subsumed by the legal-malpractice claim.

Because of this finding, the Court found that the trial court properly granted summary disposition to the lawyers, as the statute of repose time-barred the claims. The Court explained the difference between the statute of limitations under MCL 600.5805 and the statute of repose under MCL 600.5838. Even though the representation continued until 2020 and the claim was timely filed in 2021 under the statute of limitations, the statute of repose expired in 2017, and the claim was time-barred.

### Practice Note

It is important to think through the possible implications of your tolling agreements - including whether they may revive already time-barred claims.

Additionally, while it is possible for a legal client to have a breach of fiduciary claim distinct from a malpractice claim, a claim for breach of fiduciary duty requires proof of conduct committed with a more culpable state of mind than the negligence required for malpractice.



## MDTC Schedule of Events

Click for more information

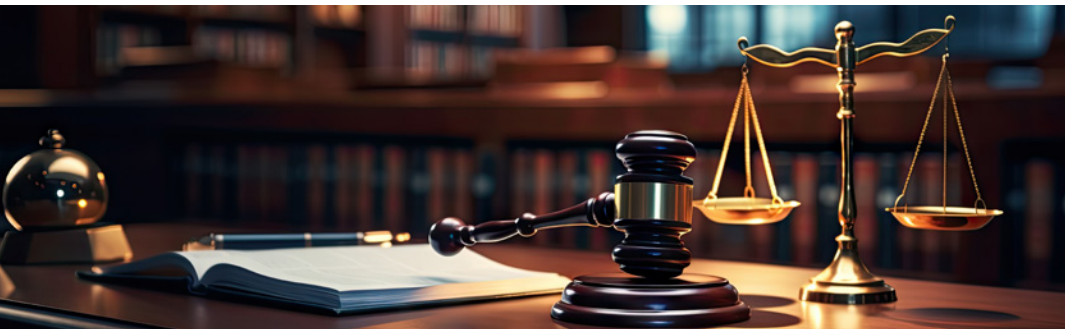
## 2026

**Battle of the Bar**
Tuesday, August 18, 2026 @ Corner Ballpark Detroit

**Golf Outing**
Friday, September 11, 2026 @ Mystic Creek Golf Course Milford

**Meet the Judges**
Thurday, October 8, 2026 @ Detroit Golf Club

**Winter Meeting**
Friday, October 30, 2026
8:00 a.m. – 5:00 p.m. @ Sheraton Detroit Novi Hotel



# Michigan Court Rules Update

**By: Carlos A. Escurel,** *Foley Baron Metzger & Juip, PLLC*
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## Proposed Amendments

Before determining whether a proposal should be adopted, changed before adoption, or rejected, notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. These matters will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

Publication of these proposals does not mean the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

**ADM File No. 2024-04-Proposed Amendment of Rule 3.981 regarding Minor Personal Protection Orders**

| | |
|---|---|
| Rule affected: | MCR 3.981 |
| Issued: | March 4, 2026 |
| Comment period: | Expires July 1, 2026 |

The proposed amendment of MCR 3.981 would require the court to advise minor PPO respondents of their right to appeal following the issuance of an order that is appealable by right and would clarify that appointment of appellate counsel in these cases is controlled by MCR 3.993(D)(5). The language of the proposed amendment can be found here.

**ADM File No. 2024-32-Proposed Amendment of Rule 2.410 regarding Alternative Dispute Resolution**

| | |
|---|---|
| Rule affected: | MCR 2.410 |
| Issued: | March 4, 2026 |
| Comment period: | Expires July 1, 2026 |

The proposed amendment of MCR 2.410 would explicitly allow ADR proceedings to be conducted by videoconferencing technology if such participation is appropriate under MCR 2.407. The language of the proposed amendment can be found here.

**ADM File No. 2025-09-Proposed Amendment of Rule 6.610 regarding Criminal Procedure Generally**

| | |
|---|---|
| Rule affected: | MCR 6.610 |
| Issued: | March 4, 2026 |
| Comment period: | Expires July 1, 2026 |

## Carlos A. Escurel

Carlos is an Associate Principal with the firm. He has defended healthcare professionals and institutions for over 17 years. His primary focus is handling complex medical malpractice claims and premises liability claims. Carlos has experience handling cases involving anesthesiology, emergency medicine, orthopedic surgery, general surgery, cardiology, obstetrics and gynecology, nursing, podiatry, and radiology.

Before joining Foley, Baron, Metzger & Juip, Carlos worked for a Detroit law firm handling medical malpractice claims for nursing homes, physicians and hospitals located in Wayne, Oakland, Macomb, Genesee, and Saginaw counties. Prior to that, he worked for a Livonia law firm defending one of Detroit's largest health systems in medical malpractice and premises liability cases. Carlos also has experience defending physicians in state licensing board matters.

While in law school, Carlos served as Chairperson of the Free Legal Aid Clinic (FLAC) and a Board Member for the Student Trial Advocacy Program (STAP). He also served as a member of the Student Board of Governors for the law school.

Carlos was recognized as a "Rising Star" by Michigan Super Lawyers in 2010, 2011, 2012, 2013, 2014, and 2015.

The proposed amendment of MCR 6.610 would clarify that defense counsel must be allowed a reasonable opportunity to attend, as part of a court-ordered presentence investigation, any presentence interview of their client. The language of the proposed amendment can be found here.

**ADM File No. 2025-23-Proposed Amendment of Rule 7.210 regarding Record on Appeal**

| | |
|---|---|
| Rule affected: | MCR 7.210 |
| Issued: | March 4, 2026 |
| Comment period: | Expires July 1, 2026 |

The proposed amendment of MCR 7.210 would explicitly exempt full transcripts for appeals from certain domestic relations actions. The language of the proposed amendment can be found here.

**ADM File No. 2023-23-Proposed Amendment of Rule 3.972 regarding Trial**

| | |
|---|---|
| Rule affected: | MCR 3.972 |
| Issued: | March 25, 2026 |
| Comment period: | Expires July 1, 2026 |

The proposed amendment of MCR 3.972 would require the court, in child protective proceeding bench trials, to make findings of fact and conclusions of law and allow for the equivalent of an involuntary dismissal. The language of the proposed amendment can be found here.

**ADM File No. 2024-34-Proposed Amendment of Rule 7.316 regarding Miscellaneous Relief**

| | |
|---|---|
| Rule affected: | MCR 7.316 |
| Issued: | April 16, 2026 |
| Comment period: | Expires August 1, 2026 |

The proposed amendment of MCR 7.316 would allow the Court to accept late applications for leave to appeal or cross-appeal in limited circumstances. The language of the proposed amendment can be found here.

**ADM File No. 2024-15-Proposed Addition of Rule 6.426 regarding Appointment of Appellate Counsel Following Remand by Michigan Supreme Court and Proposed Amendments of Rule 7.216 regarding Miscellaneous Relief and Rule 7.315 regarding Opinions, Orders, and Judgments**

| | |
|---|---|
| Rules affected: | MCR 6.426, MCR 7.216, MCR 7.315 |
| Issued: | April 16, 2026 |
| Comment period: | Expires August 1, 2026 |

The proposed addition of MCR 6.426 and proposed amendments of MCR 7.216 and 7.315 would ensure that self-represented criminal defendants are advised of the right to counsel in remand proceedings from the appellate courts and would facilitate appointment of such counsel. The language of the proposed addition and proposed amendments can be found here.

Comments on the above proposals may be submitted by comment period expiration date indicated by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to the correspondence ADM File No. 20xx-xx. Your comments and the comments of others will be posted under the chapter affected by these proposals.

## Proposed Adoptions

On order of the Court, this is to advise that the Court is considering the use of modified court rules for a proposed pilot project, and before cases are handled under the proposed pilot project, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

**ADM File No. 2025-30-Proposed Adoption of Administrative Order No. 2026-X: Pilot Project to Study Informal Domestic Relations Docket**

| | |
|---|---|
| Issued: | April 16, 2026 |
| Comment period: | Expires August 1, 2026 |

The proposed administrative order would approve a pilot project to study the effectiveness of an informal domestic relations docket affecting the 8th Circuit (Montcalm County only), 14th Circuit, 17th Circuit, and 48th Circuit Courts. The proposed language for the Pilot Project can be found here.

## Adopted Amendments

**ADM File No. 2022-31-Amendment of Rule 2.106 regarding Notice by Posting or Publication**

| | |
|---|---|
| Rule affected: | MCR 2.106 |
| Issued: | March 18, 2026 |
| Effective: | May 1, 2026 |

The amendment of MCR 2.106 updates the definition of "newspaper" for notice by publication. The language of the amendment can be found here.

**ADM File No. 2023-09-Amendment of Rule 6.106 regarding Pretrial Release**

| | |
|---|---|
| Rule affected: | MCR 6.106 |
| Issued: | March 18, 2026 |
| Effective: | May 1, 2026 |

The amendment of MCR 6.106 aligns the rule with MCL 780.66(6), which addressed the return of deposited percent bonds. The language of the amendment can be found here.

**ADM File No. 2023-39-Amendment to Rule 7.215 regarding Opinions, Orders, Judgments, and Final Process for Court of Appeals**

| | |
|---|---|
| Rule affected: | MCR 7.215 |
| Issued: | March 18, 2026 |
| Effective: | May 1, 2026 |

The amendment of MCR 7.215 eliminates the requirement that parties provide, with their briefs, copies of all unpublished Court of Appeals opinions; only opinions issued before 1996 need to be provided, and any opinions issued in 1996 or later must include as part of the citation the docket number date of decision. The language of the amendment can be found here.

**ADM File No. 2024-02-Amendment to Rule 7.215 regarding Opinions, Orders, Judgments, and Final Process for Court of Appeals**

| | |
|---|---|
| Rule affected: | MCR 7.215 |
| Issued: | March 18, 2026 |
| Effective: | May 1, 2026 |

The amendment of MCR 7.215 sets out procedures for facilitating cases on remand from the Court of Appeals and clarifies that the parties are afforded the right to supplemental briefing in the Court of Appeals after remand and the opportunity to request oral argument. The language of the amendment can be found here.

**ADM File No. 2024-10-Amendment to Rule 6.429 regarding Correction and Appeal of Sentence**

| | |
|---|---|
| Rule affected: | MCR 6.429 |
| Issued: | March 18, 2026 |
| Effective: | May 1, 2026 |

The amendment of MCR 6.429 reorganizes and updates the rule to clarify that a court must afford parties an opportunity to object to its *sua sponte* correction of an invalid sentence and that the parties must raise any objections when that opportunity is provided. The language of the amendment can be found here.

**ADM File No. 2023-23-Amendment to Rule 3.942 regarding Trial**

| | |
|---|---|
| Rule affected: | MCR 3.942 |
| Issued: | March 25, 2026 |
| Effective: | May 1, 2026 |

The amendment of MCR 3.942 requires the court, in delinquency proceeding bench trials, to make findings of fact and conclusions of law and allow for the equivalent of a directed verdict. The language of the amendment can be found here.

ADM File No. 2026-10-Addition of Rule 2.114 regarding Special Motions Under the Uniform Public Expression Protection Act and Amendment of Rule 7.209 regarding Bond; Stay of Proceedings

| | |
|---|---|
| Rules affected: | MCR 2.114 and MCR 7.209 |
| Issued: | April 16, 2026 |
| Effective: | Immediately |
| Comment period: | Expires August 1, 2026 |

The addition of MCR 2.114 provides a process for special motions under the Uniform Public Expression Protection Act (MCL 691.1853 *et seq.*), and the amendment of MCR 7.209 clarifies the availability and applicability of the stay during an appeal as contemplated by this new Act. The language of the addition and proposed amendment can be found here.

**ADM File No. 2024-07-Amendment of Rule 6 of the Rules Concerning State Bar of Michigan**

| | |
|---|---|
| Rule affected: | Rule 6 Representative Assembly |
| Issued: | April 22, 2026 |
| Effective: | October 1, 2026 |

The amendment of Rule 6 addresses the nomination and election of members of the Representative Assembly, including their eligibility for nomination and their terms and vacancies. The language of the amendment can be found here.

**ADM File No. 2025-14-Amendment of Rule 8.115 regarding Courthouse Decorum; Policy Regarding Use of Cell Phones or Other Portable Electronic Communications Devices; Civil Arrests**

| | |
|---|---|
| Rule affected: | MCR 8.115 |
| Issued: | April 19, 2026 |
| Effective: | May 1, 2026 |

In accordance with MCL 600.1821(4), the amendment of MCR 8.115 states that parties, attorneys, and subpoenaed witnesses are not subject to civil arrest while going to, attending, and returning from the places they are required to attend. The amendment defines several of the terms that appear in the rule. The language of the amendment, concurrence by J. Hood, and dissent by J. Zahra can be found here.

## Adopted Administrative Orders

**ADM File No. 2020-08-Adoption of Administrative Order No. 2026-3**

Issued: April 22, 2026
Effective: Immediately

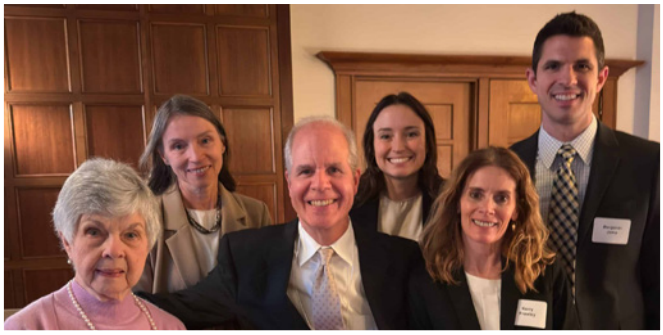
On order of the Court, the following courts are authorized to implement a pilot project to study the expanded use of electronic service using proposed Michigan Court Rule amendments:

- 56-B District Court and Barry County Probate Court (Barry County)
- 7th Circuit Court (Genesee County)
- 98th District Court (Gogebic County)
- 16th Circuit Court and Macomb County Probate Court (Macomb County)
- 19th District Court (Wayne County)

The pilot project will begin at the direction of the State Court Administrative Office, or as soon thereafter as is possible, and will remain in effect for one year after the pilot project begins, or until further order of this Court. The pilot courts will track issues with implementing expanded electronic service and must report to and provide information as requested by the State Court Administrative Office.

For purposes of studying the expanded use of electronic service, the pilot courts will operate under the following revised rules during the pilot project period. These revised rules are only applicable in courts participating in the pilot project. The language of the adopted Administrative Order can be found here.

**Click here to view all Court Rules Update**



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# Res Ipsa Loquitor: Does it Really "Speak for Itself" or are Plaintiffs Using it to Shift Their Burden of Proof?

**By: Sarah Cherry,** *Foley, Baron, Metzger & Juip, PLLC*
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*Res Ipsa Loquitor ("RIL")* for many years felt like an outdated doctrine you learned about in law school and only saw a handful of times in practice. Now it seems to be trending more than Kim Kardashian's law career. Recently, in medical malpractice cases specifically, plaintiff attorneys are pleading *RIL* as a separate count – almost as a backup plan – in an effort to shift the burden entirely to defendants.

So, what really is *RIL*, and can it be a substitute for plaintiffs to use when they cannot establish proximate cause? And, as is paramount, how do you defend against it?

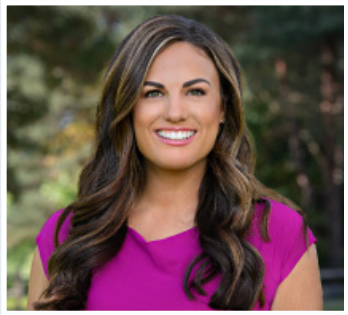
*RIL* is Latin for "the thing speaks for itself." In civil cases, this is a substitute for proving negligence if the event could not have happened but for negligence. The classic case of *RIL* in the medical malpractice context is a sponge left in a patient following surgery – even if no one knows how the sponge got left in the patient, it gets left there only if someone is negligent. However, plaintiff attorneys have been attempting to widen *RIL*'s application to include cases simply when a fact or event is unknown or even as an explanation for a bad medical outcome.

Plaintiff attorneys are pleading *RIL* more frequently of late, which is consistent with the plaintiff bar's push to lower their burden of proof in negligence matters (i.e., relation back doctrine, expert qualifications, vicarious liability)

Of course, being able to argue to a jury that "this only occurs if someone is negligent" makes plaintiffs' job exponentially easier. If successful, essentially relieves plaintiffs of their burden of proof in establishing there was a breach of the standard of care and proximate cause and shifts the burden – almost entirely - to defendants to disprove their claim.

Despite plaintiffs' complaints frequently pleading *RIL* as a separate claim, it is actually not an independent cause of action.[1] Rather, it is an inference of negligence. Under the doctrine of *RIL*, an inference of negligence can arise when the plaintiff's injury: (1) ordina*rily* would not have occurred in the absence of negligence, (2) was caused by an agency or instrumentality within the exclusive control of the defendant, and (3) was not due to any voluntary action or contribution of the plaintiff.[2]

The fact of a bad medical result itself is insufficient to satisfy the first element of *RIL*.[3] The mere possibility that a breach of duty by defendant caused plaintiff to sustain injuries is not sufficient to establish causation or to apply the doctrine of *RIL*.[4]



## Sarah Cherry

*Foley, Baron, Metzger & Juip, PLLC*

Sarah is a Partner with the firm. Her practice is focused on medical malpractice defense and professional liability.

Sarah's medical malpractice defense practice spans a broad range of medical specialties, including but not limited to emergency medicine, anesthesiology, general surgery, gastroenterology, radiology, interventional radiology, family medicine, hospitalists, pathology, cardiology, plastic surgery, hand surgery, neurology, and obstetrics. She represents hospital systems, physician groups, insurance companies, physicians (across all specialties), nurses, and mid-level providers, including physician assistants, nurse practitioners, CRNAs, and CAAs.

Sarah is a litigation attorney with experience in complex medical malpractice trials. In addition to trials, she enjoys handling complicated expert depositions, *Daubert* hearings, and complex damages claims.

Whenever she is assigned a new matter, Sarah immediately strategizes how she can get the case dismissed or minimize damages. This strategy is implemented and reassessed throughout every phase of litigation, with the ultimate goal of client satisfaction.

Before joining Foley, Baron, Metzger & Juip, Sarah was a Partner at a metro-Detroit law firm where she practiced medical malpractice defense. Earlier in her career, Sarah practiced commercial litigation, including the defense of a mortgage company in a wide range of matters, as well as work on mergers and acquisitions.

Sarah is a board member of the Michigan Defense Trial Counsel (MDTC), an association of leading defense attorneys in the State of Michigan and sits on a variety of the organization's committees. She was the recipient of the Anita L. Comorski Volunteer of the Year Award in 2023 in recognition of her generous contributions to the mission and goals of the MDTC.

Despite Michigan medical malpractice laws to the contrary, *RIL* is being used by plaintiffs as a tool to apply strict liability.[5]

This inference of negligence is exactly what makes a claim of *RIL* dangerous to have pending at the time of trial. This inference, and instructions with respect to it, essentially signals to the jury that because the outcome occurred then negligence must have also occurred. The jury instruction for *RIL* would be read after the submission of proofs and right before jury deliberations. This jury instruction may cause a jury to essentially ignore defendant's proofs and find negligence – something akin to strict liability. As an example, the jury instruction pertinent to a medical malpractice case sets forth the following:

> If you find that the defendant had control over the [ body of the plaintiff/ instrumentality which caused the plaintiff's injury], and that the plaintiff's injury is of a kind which does not ordina*rily* occur without someone's negligence, then you may infer that the defendant was negligent.
>
> However, you should weigh all of the evidence in this case in determining whether the defendant was negligent and whether that negligence was a proximate cause of plaintiff's injury.[6]

It is imperative that medical malpractice defense attorneys understand *RIL* before a case begins so that you can successfully implement your defense strategy. Your defense strategy will start with your first responsive pleadings and making sure you address this *RIL* "claim" in your affirmative defenses. During the depositions of the plaintiff and other witnesses, you will want to inquire as to whether (1) the event was caused by an agency or instrumentality within the exclusive control of the defendant and (2) there was any voluntary action or contribution of the plaintiff. These inquiries will develop an important record with respect to the second and third *RIL* factors.

After lay witnesses have been deposed, you will need to prepare for the depositions of plaintiff's experts. You should start with researching the incident rates in which the at-issue event occurs and preserve any relevant case studies and literature regarding the frequency of these incidences. When you depose plaintiff's experts you should obtain testimony about whether they (1) agree that the at-issue event could occur absent any negligence and (2) have any experience of the event occurring absent any negligence. You will want to make sure you have a clear transcript before ending the deposition as you will need to rely on the transcript for the next step.

Next, after you have deposed all of plaintiff's experts, you should file a motion to strike plaintiff's claim for *RIL* or for summary disposition pursuant to MCR 2.116(C)(8) and (10) and cite plaintiff's experts' admissions (if you can secure them) that such event could occur absent any negligence, along with any admissions and record support to rebut the other two elements. Even if the Court does not grant your motion, you may raise it again at the close of plaintiff's proofs at trial as a motion for directed verdict and/or have a preserved appellate issue.

If plaintiffs continue to push the bounds of *RIL* and undermine long standing laws and medical malpractice statutes and customs, what will come of the defense of medical malpractice claims? Will defendants be found liable simply because there was a bad outcome? Will this slippery slope eventually lead us to quasi strict liability in negligence claims? These questions and concerns are exactly why defense attorneys should certainly be on the look out for these claims even if they are not specifically set forth in plaintiff's Complaint.

Although Michigan law does not permit "trial by surprise,"[7] plaintiff attorneys may be able to convince a judge that they have established the elements of *RIL* during the case to date and should be entitled to the inference at trial. To avoid ending up with this *RIL* inference at trial, defense attorneys will want to evaluate each case from the moment it arrives on their desk and strategically work them up along the lines outlined in this article. That way, a dispositive motion or a motion to strike can be filed timely before trial.

Defense attorneys will need to collaborate and aggressively pursue the defense of *RIL* claims in order to protect the integrity of the justice system and be able to defend our clients within the bounds of the long-standing laws which explicitly place the burden of proof on the plaintiff.[8]

**Endnotes**

1 *Jones v Porretta*, 428 Mich 132, 150; 405 NW2d 863 (1987).

2 *Woodard v Custer*, 473 Mich 1, 7; 702 NW2d 522 (2005); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193-94; 540 NW2d 297 (1995).

3 *Locke v Pachtman*, 446 Mich 216, 230-31; 521 NW2d 786 (1994).

4 *Berryman v Kmart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992); Cloverleaf Car Co, 213 Mich App at 194.

5 *Bryant v Oakpointe Villa Nursing Ctr*, Inc, 471 Mich 411, 425-26; 684 NW2d 864 (2004).

6 M Civ JI 30.05

7 *Stepp v Dep't of Natural Resources*, 157 Mich App 774, 779; 404 NW2d 665 (1987).

8 *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995); *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 492; 668 NW2d 402 (2003); *Craig v Oakwood Hosp*, 471 Mich 67, 87-88; 674 NW2d 296 (2004); *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005).

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