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Articles: All articles published in the *Michigan Defense Quarterly* reflect the views of the individual authors. The *Quarterly* always welcome articles and opinions on any topic that will be of interest to our members in their practices. Although MDTC is an association of lawyers who primarily practice on the defense side, the *Quarterly* always emphasizes analysis over advocacy, and favors the expression of a broad range of views, so articles from a plaintiff's perspective are always welcome. Author's Guidelines are available from the editor (hcarroll@VGpcLAW.com) or the assistant editor, Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).

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President's Corner

By: Phillip C. Korovesis
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From the President

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"Whatever you are, be a good one."
Abraham Lincoln, 16th U.S. President

I am only a steward of this tremendous organization. One of my goals is to look back at my year as its president to see that I was a good one. My involvement with Michigan Defense Trial Counsel goes back some years, of course. And during that time I have made many friends, shared good times with many of its members and learned many lessons about being part of a thriving and energetic group of professionals. I have never once questioned why I cherish MDTC.

Now, it is my role to serve as its president. In my turn at the helm, I invite those of you who are members to take an active role in the coming year, and beyond, to get more involved in an organization that indeed makes a difference. I also invite you to invite others to join the MDTC. We are only as strong and diverse as our ranks and the MDTC board and executive committee want to hear what you have to say.

While I hope you don't have to ask "What can the MDTC do for me?", if you do, then I say this. First, the MDTC is the premier organization of civil defense counsel in this state. It has been for some time. All you need to do to confirm that is to take a look at the list of the civil defense lawyers that have been part of the organization throughout its history. In fact, you can look back to our just-completed annual meeting program at the roster of speakers and presenters to gain an appreciation of who belongs to the MDTC – the very best on this side of the "v" belong to the MDTC. Be part of that.

Next, the MDTC speaks for the civil defense bar like no other organization in Michigan. The MDTC has been invited to present its view as an amicus curiae in numerous cases that have been considered by the Michigan Supreme Court, and MDTC has spoken. Another amicus request hit my desk this morning as I write this column. I expect that to change not one bit in the coming year. Also, MDTC's publication, the *Michigan Defense Quarterly* is a well-respected publication shared with many in Michigan's state and federal judicial ranks, as well as the members of Michigan's legislature who are attorneys. The voice of the defense bar is well represented in that publication. Lastly, we will be exploring in the coming year other forums for the civil defense bar to have its voice heard. We have something to say and many will listen. Be involved in the MDTC because our voice will be heard.

The MDTC will also offer cutting-edge programs on substantive legal issues that touch upon the practices of many of its members. From the teleconference on the *Kreiner/McCormick* standard presented last year to the upcoming (by the time of publication of this piece, the program will have been concluded) teleconference program on Medicare liens, MDTC members benefit from hearing from those that are leaders within an organization of leaders. Don't miss out on opportunities to expand your knowledge in areas of the law that are evolving in our state.

Lastly, the MDTC is, quite frankly, a down-to-earth group of some very fine folks. I have not met a member who didn't care about this profession, this organiza-

The MDTC will also offer cutting-edge programs on substantive legal issues that touch upon the practices of many of its members.

tion or what our roles are in the fair administration of justice in the civil law system in Michigan. In fact, every single person that is a part of this organization has expressed an interest in what matters in our legal system by just being a member. Be part of the MDTC because you care and it does matter.

So, I hope you will join me in the coming year of my stewardship of this outstanding group of legal professionals. I look forward to seeing you all out there and I hope that when I do look back at the end of my being the MDTC's steward, I will have been a good one.

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Where To Draw The Lines?

MCR 2.302(B)(5) And The Duty To Preserve Electronically Stored Information

By: Patrick B. Ellis, *Kitch Drutchas Wagner Valitutti & Sherbrook*

Executive Summary

Michigan's court rules have been modified to address discovery requirements of electronically stored information ("ESI"), but the rules have not yet been discussed or elaborated upon by the appellate courts. The requirements for preservation and production of ESI are therefore not entirely clear, but it is clear that litigants at least have a duty and must take early steps to preserve and protect ESI that may later become part of active litigation. One fundamental step is the litigation hold on routine document destruction and purging.

Especially difficult issues are presented by the fact that much information is held by third parties. Increasingly, information is stored in "the cloud," which means it is under the control of third parties, which may or may not be willing to cooperate in preservation of information for litigation. The same problem arises in connection with social medial such as Facebook, Twitter and Linked In, each of which has its own rules.

Because of these uncertainties, potential litigants should begin the process of developing and installing data retention policies now, rather than waiting for litigation.

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This article seeks to highlight some of the current and future considerations for potential litigants with regard to the scope of their duty to preserve electronically stored information under Michigan Court Rules. While there is no shortage of physical documents, images and records in the home and workplace, more and more information is being stored electronically on hard drives or dedicated servers. As we have had to adapt to the Information and Technology Age in our personal and professional lives, so too have Michigan courts been forced to address how technology and the information stored therein can be harnessed for purposes of litigation. The fruits of their labors can be seen in the recent amendments to the Michigan Court Rules with regard to electronic discovery (e-discovery). The most significant of these rules spells out that parties have the obligation to preserve electronically stored information (ESI).

Although the court rules are a good first step, there are a number of unresolved issues surrounding the duty to preserve that parties must consider. The most pertinent of these questions is what is the appropriate timing and scope of ESI retention. The duty to preserve ESI on a state level only came into effect in 2009. Even then, the rules did not define the scope of the duty, and the appellate courts have had little opportunity to address the particulars of rules. In fact, it would appear there have been no opinions from the higher courts regarding e-discovery issues. As such, potential litigants have not been provided specific direction as to when and what information is to be preserved.

Parties are thus left to look to federal e-discovery precedents. As Michigan's rules are preceded by those on the federal level, Michigan trial courts will likely have to look to the federal courts for precedent when addressing these issues. The federal courts have had extensive experience with e-discovery questions and controversies, even before the implementation of formal rules.[1] Their opinions should provide an initial groundwork from which Michigan courts can shape e-discovery processes and parties can begin to understand the parameters of their duty to preserve potentially discoverable electronic data.

It is only a matter of time, however, before new technology and means of communication redefine the scope of one's duty to preserve ESI. Today, the bulk of ESI sought and produced during litigation is email communications stored on company servers. This format is relatively easy for a party to develop a retention policy around. However, we can already see that more and more information is being stored in "the cloud," phrase that refers to online data storage space available to consumers and operated by third-party vendors. In addition, people are relying more on text messages and Facebook to communicate. These are technologies where the person responsible

Although the court rules are a good first step, there are a number of unresolved issues surrounding the duty to preserve that parties must consider.

for the ESI may not have the means to preserve and produce it when called on to do so in discovery. As the technology and our means of communication change, so too must our understanding of the obligation to preserved data under the court rules.

The Scope of the Duty to Preserve ESI under Michigan's Current Rules

The process of preserving and exchanging physical discovery materials is well known to litigation attorneys. However, with the recent amendments to the Michigan Court Rules, the discovery process dramatically expanded to digital arena. In 2008, the Michigan Supreme Court adopted rules specifically providing for the preservation and discovery of information stored on digital mediums (*i.e.*, hard drives, servers, and flash drives, among many others). These rules are based in part on similar rules set forth in the Federal Rules of Civil Procedures. The rules' most fundamental requirement is that parties have the obligation to preserve potentially relevant ESI, like they would any other physical discovery materials.[2] [3] However, the rules do not specify when the obligations arises or how much ESI must be preserved. Thus, even after two years under the current e-discovery rules, potential state court litigants are still unclear as to the exact scope of their duty under the rules.

What is clear is that litigants at least have a duty to preserve ESI and should take early steps to preserve and protect ESI that may later become part of active litigation. Likewise, they must be able to explain that the loss or destruction of any potentially relevant ESI was the result of a "routine, good-faith operation of an electronic information system."[4] If they fail to do so, the sanctions can be quite severe, up to outright dismissal of the case.[5] Therefore, it is important for litigants to develop comprehensive data retention and destruction policies to preserve potentially relevant ESI. They then need to strictly adhere to the policies. If federal precedent is any guide, Michigan courts will not be concerned with the particulars of a party's data preservation program.[6] However, they will strongly consider the existence of policies and procedures for routine ESI retention and whether they were executed in good faith when addressing any spoliation issues.

Litigation Holds

Parties will also be expected to have the ability to place a "litigation hold" when the need arises. That is, parties will have to develop the means to sequester certain ESI from the normal data destruction program. Failing to do so may have drastic consequences. As a US District Court has held, the "utter failure to establish any form of litigation hold at the outset of litigation is grossly negligent."[7] Such a showing, according the Court, is "plainly enough to justify sanctions at least as serious as an adverse inference."[8] As to when the litigation hold must be placed is still uncertain. The current rules do not specify when the duty to

These are technologies where the person responsible for the ESI may not have the means to preserve and produce it when called on to do so in discovery.

What is clear is that litigants at least have a duty to preserve ESI and should take early steps to preserve and protect ESI that may later become part of active litigation

preserve ESI arises. Michigan courts will have to address this issue. The courts will certainly expect that the parties will sequester discoverable ESI after the suit is filed. However, there may also be occasions where Michigan courts will expect ESI to be protected from routine data destruction policies before suit is filed. For example, the courts will most likely require a party to place a litigation hold after a formal presuit request to preserve ESI is served by the opposing party.

In addition, one can foresee that Michigan courts may find the duty to place a litigation hold attaches in the notice period of medical malpractice cases. Federal courts have largely taken the position that the duty to preserve ESI arises when a case has been filed or when litigation is reasonably foreseeable.[9] Michigan courts will likely adopt the same stance and examine each issue on a fact specific case-by-case basis. Therefore, for the time being, potential litigants and their counsel must be prepared to quickly suspend any routine data purging system and notify key personnel of the potential demands of discovery when litigation is filed or reasonably foreseeable. They must also be prepared to monitor any ongoing litigation hold As one court put it:

> [I]t is not sufficient to notify all employees of a litigation hold and expect that the party then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all

sources of discoverable information are identified and searched.[10]

Parties will not likely be expected to preserve every piece of ESI on a system to comply with the new rules and avoid spoliation issues. A complete litigation hold would effectively cripple both large and small businesses that are frequent litigants. Either due to limited storage or the shear quantity of data produced, it is not reasonable to expect parties to completely discontinue their routine data destruction policies. Moreover, given the fact potentially relevant ESI may be located on any number of hard drives, servers, cell phones and flash drives, it would not be feasible to see to it that all storage devices are effectively sequestered. The cost of compliance, if this were the case, would oftentimes be too great. The current e-discovery rules do not require the production of ESI that is not reasonably accessible, due to undue burden or cost. However, a court may compel the production of specific ESI if the requesting party shows "good cause."[11] The rules do not spell out what is unduly burdensome and what is good cause. The Michigan courts will thus likely have to employ a balancing test, considering the costs and burden of preserving the ESI versus the benefit of a wider scope would have on full and fair resolution of the litigation. The Conference of Chief Justices suggested a 13 part balancing test in deciding a motion to compel further preservation and production of ESI:

A. The ease of accessing the requested information;

B. The total cost of production compared to the amount in controversy;

C. The materiality of the information to the requesting party;

D. The availability of the information from other sources;

Parties will also be expected to have the ability to place a "litigation hold" when the need arises.

E. The complexity of the case and the importance of the issues addressed;

F. The need to protect privileged, proprietary, or confidential information, including trade secrets;

G. Whether the information or software needed to access the requested information is proprietary or constitutes confidential business information;

H. The breadth of the request, including whether a subset (e.g., by date, author, recipient, or through use of a key-term search or other selection criteria) or representative sample of the contested electronically stored information can be provided initially to determine whether the production of additional such information is warranted;

I. The relative ability of each party to control costs and its incentive to do so;

J. The resources of each party compared to the total costs of production;

Although it is not clear at this time what exactly the courts will take into consideration when defining the scope of the duty to preserve ESI, parties will have to be prepared to explain the reasoning behind their actions and defend their production or request for such information.

K. Whether the electronically-stored information is stored in a way that makes it more costly or burdensome to access than is reasonably warranted by legitimate personal, business, or other non-litigation-related reasons; and

M. Whether the responding party has deleted, discarded, or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable.[12]

Although it is not clear at this time what exactly the courts will take into consideration when defining the scope of the duty to preserve ESI, parties will have to be prepared to explain the reasoning behind their actions and defend their production or request for such information.

As one can see, the timing and scope of the duty to protect and preserve ESI is not yet well defined in Michigan. With time, the courts will provide a better understanding of the onset and scope of the duty to preserve potentially relevant ESI. For the time being, however, it is clear that potential litigants must at least make preparations to comply with the rules. This includes developing data retention policies and 'litigation hold' capabilities. Failing to do so will likely only lead to greater costs and burden during discovery. However, by making a good faith effort to comply with the rules before litigation arises, a party will be better prepared to withstand potential spoliation arguments.

Future Issues Regarding the Scope of E-Discovery

As alluded to above, the majority of electronic data sought in litigation today are emails, word processing documents, and images stored on computer hard drives and network servers owned by the various parties. This arrangement gener-

ally makes it straightforward for IT managers to identify what ESI needs to be protected from data purging policies and where it can be found. It also provides the parties the means to personally control data destruction. Yet, companies and individuals are increasingly moving away from on-site data storage. More and more, they are relying on the "cloud" for their data solutions. In addition, people are communicating more via web based providers, such as Facebook or LinkedIn. These trends appear as if they will greatly complicate a party's e-discovery obligations under the current rules.

The Cloud

The "cloud" is quickly becoming a more enticing option for corporate and individual data storage needs. It allows the consumer to pay for only the storage they use. Moreover, it frees up the space and resources that would generally be taken up by on-site servers and IT personnel. On the other hand, this model of data storage may interfere with a party's ability to comply with its e-discovery obligations under Michigan Court Rules. It is not always clear whether data placed in the cloud is under the control and custody of the provider, as opposed to a potential party. In addition, the party may not have the capability to control data retention policies or order a litigation hold. A storage provider may simply be unable or unwilling to release the data during the course of discovery. The data that is sought may be located in a single out of state data center or multiple foreign centers that are not subject to the state court's subpoena power. A worst case scenario would be if ESI were accidentally destroyed or lost by the provider. Therefore, no matter how proactive a party may be in arranging cloud data storage, it ultimately can not insure compliance with the e-discovery obligations.

Social Media

The same holds true for social media web pages and communications. Facebook, Twitter and LinkedIn have become ubiquitous communications and marketing portals for business and individuals alike. However, they create a number of difficulties in complying with one's duties under the e-discovery rules. The party who posts to these websites generally does not own or control the data they produce. Accounts are frequently hacked and taken over by third parties.

Social Media pages may also rightfully refuse to release private postings under the Stored Communications Act of 1986.[13] At the moment, it would appear that the only recourse to discovering or producing what is on these pages is through time-stamped screenshots. Facebook does have a "Download Your Information" feature. Yet, it is not at all clear whether this feature allows the download of archival data to see when specific communications are posted or deleted. There are various services emerging to monitor social media sites. Nonetheless, potential litigants must be careful when jumping into social media, in light of their duty to preserve ESI. It is too early to predict how the Michigan courts will handle e-discovery from social media providers.

Conclusion

Michigan's current e-discovery rules provide that parties have the duty to preserve ESI. However, we must wait for the courts to interpret the rules further before we can have a clear idea of where the lines will be drawn as to the onset and scope of a party's duty to preserve ESI. What is clear, however, is that potential litigants should begin the process of developing and installing data retention policies now. In addition, they should have in place the capability to preserve data that is potentially relevant. Any action now that can potentially forestall any spoliation issues during the course of litigation, will certainly save in cost and time later. Yet, a company or individual's tasks are not over once it has the framework in place to comply with the rule. As a company's network architecture changes and people are relying more heavily on the cloud and social media, potential parties will have to consistently reevaluate their plans to ensure compliance with Michigan's new ESI preservation obligations.

Endnotes

1. *See Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 WL 649934 (SDNY 1995)
2. MCR 2.302(B)(5): A party has the same obligation to preserve *electronically stored information* as it does for all other types of information…[Emphasis added]
3. Although not defined by the Court rules, this ESI may include, emails, web pages, document files, images, and many other digital files.
4. MCR 2.302(B)(5): …Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information as a result of the routine, good-faith operation of an electronic information system.
5. See *Gillett v Michigan Farm Bureau*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2009 (Docket No. 286076), where Court of Appeals affirmed dismissal of case based on plaintiff's spoliation of evidence when destroying emails. Although the Court held MCR 2.313 ESI retention provisions did not apply, it agreed the dismissal of the case was appropriate under the lower court's inherent powers.
6. The particulars of a retention program it will depend largely on a companies' internal records and information management system and thus may vary for party to party.
7. *Chan v. Triple 8 Palace, Inc.*, 2005 WL 1925579, at * 7 (S.D.N.Y. Aug.11, 2005).
8. *Id.*
9. *See Zubulake v UBS Warburg LLC*, 220 FRD 212, 216-17 (SDNY 2003) ("Zubulake IV"); see *also Silvesteri v General Motors Corp.*, 271 F3d 583, 591)(4th Cir. 2001).
10. *Zubulake v UBS Warburg LLC*, 229 FRD 422, 432 (SDNY 2004) ("Zubulake V")
11. MCR 2.302(B)(6).
12. The Conference of Chief Justices, *Guidelines for State Courts Regarding Discovery of Electronically Stored Information* (Aug. 2006), *available at* http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf
13. Crispin v Christian Audigier, Inc., 717 F.Supp.2d 965 (CD Cal. 2010) (holding that some of the Stored Communication Act's protections reached content on social media webpages, including private messages).

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Internet Jurisdiction[1]

By: Kevin L. Moffatt, *Martin, Bacon & Martin P.C.*

1. Editor's Note: this article originally appeared in the Spring issue of the Negligence Law Section newsletter and is reprinted with permission

Executive Summary

Although no Michigan court has yet issued a published opinion discussing whether and under what circumstances a defendant's use of the internet can subject it to limited or general personal jurisdiction, an opinion in an unpublished case contains a thoughtful analysis that is a useful guide. The opinion holds that a passive internet site, which merely contains information about a product, cannot create jurisdiction in a Michigan court. But an interactive site, which permits communication between the defendant and the internet user, can create limited personal jurisdiction if the site generates sufficient economic activity in Michigan to satisfy the minimum contacts requirement.

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Introduction

If you never explored a website or shopped online, then I doubt you own or have access to a computer. If so, it is time to replace your rotary dial telephone with a desktop, laptop, tablet, smartphone or other programmable device that will allow you to search the internet. ComScore, Inc., a global leader in measuring the digital world, recently reported that online retailers sold $142.491 billion worth of merchandise in 2010, up from $129.797 billion in 2009.[1] With the advent of the internet, e-retail has become a significant business market while e-commerce continues to grow. Companies can sell their products and services worldwide with a click of a mouse. What does e-commerce have to do with your practice and how may it affect your clients? Two words: Internet jurisdiction.

Personal Jurisdiction

The internet is an interstate and international network connecting millions of computers. E-tailers and retailers alike, through their websites, have a presence on the World Wide Web. However, does a website alone subject its proprietor to personal jurisdiction in courts where the site is accessible? More specifically, can internet activity constitute sufficient contacts for personal jurisdiction in Michigan?

Personal jurisdiction in Michigan is governed by both state statutes and the United States Constitution. A court's exercise of personal jurisdiction must satisfy two requirements: (1) it must be authorized by one of Michigan's long-arm jurisdictional statutes; and (2) it must be consistent with the requirements of the Due Process Clause of the Fourteenth Amendment.[2]

Michigan's long-arm statutes require the existence of certain relationships between either individuals or corporations and this state to enable courts to exercise personal jurisdiction. "General" and "limited" personal jurisdiction over individuals are contained in MCL 600.701 and MCL 600.705, respectively. For corporations, the requirements for general and limited personal jurisdiction can be found at MCL 600.711 and MCL 600.715.

Although Michigan's long-arm statutes for individuals and corporations are distinct, they do have similarities. The transaction of any business within the state does enable Michigan courts to exercise limited personal jurisdiction over both individuals and corporations.[3] Michigan courts can also exert general personal jurisdiction over corporations which carry on a continuous and systematic part of their general business within the state.[4]

This article does not discuss the Due Process Clause of the Fourteenth Amendment but is limited to whether an individual or corporation may have a sufficient "Internet" connection with Michigan to require a constitutional inquiry.

Can internet activity constitute sufficient contacts for personal jurisdiction in Michigan?

Applicable Law

In the unpublished case, *Clapper v Freeman Marine Equipment, Inc*,[5] the majority cautiously provided a perfunctory analysis of internet jurisdiction for fear that any ruling on this issue based only on hypothetical fact situations would constitute pure dicta unlikely to be of any benefit to the bench and bar.[6] To the contrary, Judge Saad wrote separately, and in his concurring opinion, provided a thorough analysis of this significant and novel issue in Michigan jurisprudence. Although no Michigan court since *Clapper* has addressed the internet issue in the form of a published opinion, Judge Saad's analysis, referred to by his colleagues as a "scholarly dissertation," is instructive and provides guidance for trial courts and litigants.[7]

In *Clapper*, plaintiffs brought suit in Michigan against defendant Freeman, an Oregon corporation doing business in Oregon, alleging that it provided defective doors, hatches, and other components for use in the construction of their yacht. Freeman moved for summary disposition and asserted that it did not conduct sufficient business in Michigan to give the state's courts general or limited personal jurisdiction over it. In response, plaintiffs argued that Freeman could have foreseen that its products would be used in Michigan. For example, plaintiffs stressed that Freeman advertised in national magazines that are circulated in Michigan and maintained an Internet website that Michigan residents could access. The court ultimately found that Freeman did not carry on a continuous and systematic part of its business in Michigan. However, the majority didn't address the effect of internet activity other than broadly stating that simply maintaining a website does not constitute a minimum contact with Michigan:

> In sum, defendant's contacts with Michigan consist of national advertising not specifically targeted in Michigan, *maintenance of an Internet Web site providing product information and the means to obtain catalogs,* sales of the component parts to companies that sold their finished products in Michigan, and a modest volume of sales directly to Michigan. In their totality, these do not establish the continuous and systematic business activity necessary to establish jurisdiction under Michigan's long-arm statute for general jurisdiction.[8]

Judge Saad felt compelled to thoroughly analyze plaintiffs' argument that defendant's website created a constant presence in the state of Michigan, sufficient to establish general personal jurisdiction. He adjured the court to carefully review the large body of internet case law from other states and deduce the essential principles for deciding when a defendant's web activity constitutes the requisite minimum contacts for the assertion of personal jurisdiction: an issue of first impression in Michigan.[9] Judge Saad's analysis focused on whether Michigan could properly assert general jurisdiction because defendant directed its business activity at Michigan by making its website accessible to Michigan residents; using that website to offer Michigan residents a sales catalog; and providing Michigan residents with the company's telephone and fax numbers.

Passive-Interactive Website Distinction

Cases which have considered the internet issue in other jurisdictions have primarily relied upon the analysis provided in *Zippo Mfg Co v Zippo Dot Com, Inc.*[10] The *Zippo* "sliding scale" analysis distinguishes websites as either "passive" or "interactive." A passive website simply makes information available to interested viewers. An interactive website permits communication between the proprietor and user for the purpose of soliciting business.

Applying the *Zippo* analysis, courts have refused to exercise general personal jurisdiction where the website is purely passive by only providing advertising or making information available for browsing.

At the other end of the spectrum, *Zippo* would find interactive websites, which facilitate business over the Internet, to be sufficient for a court to exercise personal jurisdiction. Judge Saad agreed that an interactive website could support the exercise of personal jurisdiction, but indicated that an interactive website would only warrant personal jurisdiction if it garners sufficient business in the foreign state. In other words, a website that invites users to e-mail a purchase order will not warrant jurisdiction if the site fails to attract customers. Although a website may have the ability to generate business, it can become interactive only when computer users take advantage of its features. Indeed, if sufficient business is generated, an interactive website can serve as the basis for limited, and in some cases, general jurisdiction.

Judge Saad wrote separately, and in his concurring opinion, provided a thorough analysis of this significant and novel issue in Michigan jurisprudence.

The refined *Zippo* analysis adopted by Judge Saad presents the most practical method in determining whether internet

The Zippo "sliding scale" analysis distinguishes websites as either "passive" or "interactive."

activity provides a sufficient basis for exercising personal jurisdiction. Certainly, purely passive websites that do not permit communication between the proprietor and user cannot form the basis for general jurisdiction. If, however, an interactive website is designed to permit a user to exchange information with the host computer, further analysis is necessary. The court would need to consider whether sufficient business was generated by the interactive website to satisfy the requisite minimum contacts for the assertion of personal jurisdiction. This approach is consistent with the line of cases following the *Zippo* sliding scale analysis and passive/interactive/middle classification of websites.

In *Clapper*, the defendant's website was not passive because it permitted communication between the company and viewers. However, the only interactive feature of the website was an electronic form that allowed visitors to use e-mail to request a copy of defendant's mail order catalog. The website did not enable visitors to place direct orders and generate revenue for defendant. After applying his analysis, Judge Saad concluded that defendant's website was at the passive end of the *Zippo* sliding scale. Without the ability to place direct orders online, defendant did not generate revenue from internet sales. Thus, Judge Saad found that plaintiff could not predicate personal jurisdiction on the basis of defendant's internet presence.

Conclusion

At present, no Michigan court has addressed internet jurisdiction in a published opinion. If it is necessary to address this issue, the analysis provided by Judge Saad in C*lapper* should be considered. Passive websites, which only make information available to viewers, will not be sufficient to establish personal jurisdiction. Interactive websites, on the other hand, may allow Michigan courts to exercise personal jurisdiction. If the website generates sufficient business in the form of internet revenue through direct online sales, it can serve as the basis for limited, and in some cases, general jurisdiction. Although no bright-line test exists for determining when a website is sufficient for Michigan courts to exercise personal jurisdiction, the analysis should begin with the passive-interactive distinction.

Endnotes

1. Press Release, comScore, Inc. (February 4, 2011).
2. *Aaronson v Lindsay & Hauer Int'l LTD*, 235 Mich App 259, 262 (1999).
3. MCL 600.705(1); MCL 600.715(1).
4. MCL 600.711(3).
5. *Clapper v Freeman Marine Equipment, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 16, 2000 (Docket No. 211139), lv den 463 Mich 981 (2001).
6. *Id.*, p 5.
7. *Id.*, p 5.
8. *Id.*, p 6 (Emphasis added).
9. *Id.*, p 6.
10. *Zippo Manufacturing Company v Zippo Dot Com, Inc*, 952 F Supp 1119 (WD Pa, 1997).

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Key Considerations In Collecting Email In Discovery

By: Jonathan E. Moore, *Warner Norcross & Judd LLP*

Executive Summary

Email is the most common type of electronically stored information that is exchanged in discovery, so it is important to establish and follow clear and comprehensive procedures is gathering it for production. The first step, after the litigation hold has preserved the information, is to determine what will be collected and who will do the collecting; collection by the client's own personnel is usually the least expensive by may not be wise if the litigation is complex and the stakes are high.

It is important that the email be collected in its native electronic format, i.e., the software program in which the file was originally created and viewed. The collection plan should address the medium to be used for collection and the method of transferring the data; this may vary according to the size and complexity of the information being provided, and should be compatible with your client's systems. It is also important to have a "chain of custody" record, showing the date the collection was made, the data sources and locations collected, the form of the data, the media used for the collection, and the means of transferring the data once collected.

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The purpose of this article is to highlight some key practical guidelines for handling the collection of your client's email in discovery. Although email is certainly not the only form of electronically stored information (ESI) that may be relevant in your case, it is the dominant form of electronic communication in business today,[1] and usually constitutes a significant portion of the documentary evidence that must be reviewed and produced in most litigation matters. Additionally, because email is typically sent, received, and retained within most organizations on one or more network servers dedicated to that purpose, it is reasonable to treat email as a separate category of ESI.

At the stage in the e-discovery process addressed in this article, it is assumed that you have already put in place a litigation hold, have issued written litigation hold notices to all individuals within the organization who are likely to possess or have access to potentially relevant documents and data, and are reasonably confident that all potentially relevant ESI and other documents are being properly preserved. It is also assumed that you have conducted interviews of both key custodians and appropriate information-technology (IT) personnel within the organization, enabling you to identify the locations, categories, time periods, and custodians from which collection will be made.

Another question you will need to consider is whether and to what extent you should collect email contained on backup media. Backup tapes are generally considered to be not reasonably accessible due to undue burden or cost,[2] as they typically contain massive volumes of data and require considerable time and expense to be restored and searched. One exception to this general rule of thumb is if the organization uses backup media for archival purposes rather than simply for disaster recovery. If the organization has a regular practice of accessing backup data in its ordinary business, a court may likely conclude that the backup media is reasonably accessible. Moreover, in recent years, e-discovery vendors have introduced software that is specifically designed to search and retrieve data contained on backup tapes, thus greatly increasing the accessibility of backup data. Indeed, in certain situations, collection from backup media may be a preferable alternative to collection from active sources, as it can prevent disruption to the organization's ongoing processes.

Now you can begin the process of collecting ESI — either in response to a discovery request or as part of completing your initial disclosures under Rule 26(a)(1) of the Federal Rules of Civil Procedure. Ideally, by this point you will also have reached an agreement with opposing counsel on the scope of ESI to be collected, including to what extent backup media will be searched, the relevant time period(s), custodians, and, if applicable, the keywords or other search terms or parameters to be applied.

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Scope of Collection and Identity of Collector

The first step in formulating your collection plan should be to decide on the scope of the data to be collected and identify who is going to perform the collection. The decision concerning these features of your plan turns largely on practical considerations such as the number of custodians, the total volume of data associated with each custodian, the amount at stake in the litigation, and the likelihood of a challenge to your collection methodology by opposing counsel.

At one end of the spectrum, you may determine that a full forensic copy of relevant servers or other data locations is necessary, and proceed with a forensic collection by a third-party professional, despite the additional costs entailed by this approach. If the data being collected is in Michigan, you should consider whether the forensic collection will need to be performed by a firm licensed to perform computer forensics services, to comply with MCL 338.822 and MCL 338.823.

A forensic copy provides a complete mirror-image capture of all data at the location collected — not only active files and data that are visible and available to users — but also hidden, deleted or fragmented files and data that users generally cannot see or access. Although such a forensic capture is usually not necessary for most cases, it may be warranted in certain cases involving allegations of fraud or other wrongdoing, or in other situations where users may have deleted relevant ESI.

At the other end of the spectrum, you might reasonably conclude in certain circumstances that self-collection by client personnel is the best option. Having client personnel identify and collect relevant and responsive emails is certainly the cheapest approach for your client — not only because it avoids additional professional fees and costs from the collection itself, but also because self-collection typically results in a much lower volume of data that needs to be reviewed prior to production.

Client self-collection is riskier, however, with respect to ensuring that all responsive ESI has been captured, and is not recommended for high-dollar-value, high-profile litigation, or circumstances in which you have reason to question the reliability of the personnel performing the collection — either due to lack of technical competence or sophistication, lack of understanding of the relevance or responsiveness criteria, or because they may have an incentive to intentionally omit certain documents from collection. For example, litigation involving allegations of fraud, corruption, or other wrongdoing — or even simply the commonplace desire to avoid embarrassment or blame — may present temptations too great for individual collectors to withstand, making self-collection an unreasonable approach under the circumstances.

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Another factor to consider is the technical capabilities of your client's systems to perform keyword and other searches. Some organizations have invested millions of dollars in document-management systems that permit application of sophisticated search techniques, such as the capability to apply complex Boolean search strings, run simultaneous searches, modify search parameters, perform sampling and other auditing functions, and apply various filtering criteria such as date, sender, recipient, domain name, or other terms. Indeed, your client's in-house capabilities may actually equal or exceed those of your firm's litigation support department or even those of some e-discovery vendors, which, if properly utilized, can be relied upon to produce a highly defensible collection of ESI. With systems this sophisticated, it would probably be a disservice to your client not to make use of them. Note, however, that you might be unaware of your client's in-house capabilities until you interview the organization's IT personnel — another reason for doing so as early as possible in the litigation.

Of course, most organizations do not have technical capabilities this robust; most will have only the built-in search capabilities provided by the email software that is used. Note, too, that those capabilities vary widely from program to program; the search options within Microsoft Outlook, for example, are

more extensive than those of Lotus Notes. Lotus Notes also presents additional challenges for collection, review and production — most notably, with respect to maintaining certain embedded metadata present in the native messages.

No matter where your client lies on the sophistication continuum, however, it is important that you understand the relevant systems and their strengths and weaknesses, and make a determination concerning the extent to which those systems should be relied upon in collection of ESI. It may be advisable at this point in the decision-making process for you to engage an e-discovery consultant with technical expertise to help you to make this determination and to help guide the collection process.

If you do decide to proceed with some form of client self-collection, it is important that as outside counsel you actively supervise and oversee the collection efforts, including providing clear instructions, following up with additional guidance as needed to ensure proper implementation of agreed-upon procedures, and documentation of the procedures used, the individuals involved, and the safeguards that were implemented.

Additionally, a recommended best practice is to conduct and document one or more audits of the collection process, such as by reviewing an unfiltered sample of emails and then verifying that all relevant emails from the sample were included in the self-collected set. The selection of the pertinent sample may be done randomly, according to statistical sampling methodology, or on a judgmental basis, such as by identifying a custodian or time period known to contain a high incidence of relevant messages. These auditing procedures, if properly implemented and documented, can go a long way toward increasing the defensibility of a client self-collection approach. Such auditing should be performed, whether the self-collection is made by manual selection

If you do decide to proceed with some form of client self-collection, it is important that as outside counsel you actively supervise and oversee the collection efforts.

or as a result of running keyword or other search terms.

Preservation of Native Format

Whether collection is going to be performed by a third-party consultant or by client personnel, it is important that the email be collected in its native electronic format. Native format is the "default format" of an electronic document or file as it was originally created and viewed in the software program in which it was generated.[3] Native format is also the format in which electronic documents and files are typically stored and retained — either on a network server, the user's local hard drive, or some other storage media.[4]

In addition to preserving the complete functionality of the original document in the native software application, native format also preserves all original metadata, which is automatically generated data concerning the circumstances of the creation, modification, and use of the document.[5] Metadata may identify, among other things, the author, date of creation, and recipients.[6] Metadata embedded in email also automatically identifies any attachments originally sent with any given email message.[7]

Whether collection is going to be performed by a third-party consultant or by client personnel, it is important that the email be collected in its native electronic format.

There are two principal reasons why you should always collect email (and other ESI) in native format. First, it is by far the easiest, most efficient, and most cost-effective format to use for processing, review, and production. Numerous software tools are now available to deduplicate and cull out irrelevant junk, spam, and nonbusiness emails, thus greatly reducing the cost of attorney review, by far the single largest cost component of most litigation matters; these tools are applied to email (or other ESI) in native electronic format.

Additionally, the metadata (automatically generated electronic data embedded in emails and other electronic documents) can be used to autopopulate — or automatically fill in — the fields in document-review database programs such as Concordance or Summation. Native-format email can also be searched in its full text (including metadata such as sender, recipient, date, etc.). It also ensures that attachments remain associated with their parent emails; conversion of emails to paper or other electronic formats may result in those attachments being separated from the messages to which they were originally attached.

Second, it is likely that you will need to produce the documents in native format. The federal rules permit the requesting party in requests for production to "specify the form or forms in which electronically stored information is to be produced."[8] The plain language of MCR 2.310 actually requires the requesting party to specify the format of production of ESI.[9] In part due to the enhanced features of native format (*e.g.*, full-text searchability, metadata, etc.), parties are increasingly requesting email and other ESI in native format, and the courts are generally enforcing those requests.[10]

Even if your opponent's discovery requests do not specify native format, you still run the risk that the court will

require you to produce in native format. If the requests do not specify a particular format, then the responding party must produce the ESI in a form "in which it is ordinarily maintained or in a form or forms that are reasonably usable."[11] As the committee notes to Rule 34 emphasize, "the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation."[12] For example, if the responding party ordinary keeps the ESI in a format that makes it searchable, it should not be produced in a format that "removes or significantly degrades this feature."[13] Conversion of native emails from native format to paper printouts — or even to PDF or TIFF images — may thus be deemed not reasonably useful.[14]

Moreover, if you intend to rely on the option to produce requested emails "as they are kept in the usual course of business" rather than labeled to correspond to individual request,[15] you should be aware that federal courts have held that such production requires that ESI be produced in native format.[16] Thus, for example, courts have rejected productions of paper printouts of emails, as well as PDF and TIFF image files.[17] Given that the e-discovery amendments to the Michigan rules were pattered on the federal rules, it is likely that Michigan state courts will look to these federal decisions as persuasive authority.[18]

As a practical matter, then, in the absence of agreement with opposing counsel, at a minimum you should make sure that emails are not collected by printing them out and processing hard copies, by forwarding emails to a new recipient, or by converting emails to PDF or TIFF format for processing and review.

Logistics of Collection and Transfer

Next, your collection plan should address the medium to be used for collection and the method of transferring the data. Make sure to use a medium and transfer method that are compatible with your client's systems. At a minimum you will need to confer with your client's IT department representative to identify the most convenient means of data extraction and transfer. Other than system compatibility, the key factor with respect to medium of collection is generally the volume of data being collected. Small data sets may be collected by flash drive or on DVD, while larger sets may require one or more external hard drives. Geographical and cost considerations may make remote collection, such as through a secure file transfer protocol (FTP) site, a good option. These logistical items largely depend on technical considerations beyond the knowledge base of most lawyers and should be discussed with specialists in the area, such as IT personnel at the client, members of your firm's litigation support department, or your e-discovery consultant, if you have retained one.

Chain of Custody

Whether collection is performed by a third-party consultant, a paralegal or member of your firm's litigation support department, or client personnel, you will want to document certain basic facts concerning how the data were collected and came into your possession for processing and review. Prepare and complete a collection and chain-of-custody form documenting, at a minimum, the date the collection was made, the data sources/locations collected, the form of the data, the media used for the collection, and the means of transferring the data once collected. At this point, collection has been completed, and you can move on to the next stage for processing the emails (and other ESI) for review and production.

Conclusion

Given the predominant role of email in the e-discovery aspect of most litigation matters, it is important to formulate and implement an appropriate email collection plan that is reasonably tailored to the circumstances of the case. Whether using a third-party consultant or supervising the work of client personnel, the key considerations discussed above will guide you in ensuring that collection of email proceeds in a defensible manner.

Endnotes

1. Email's dominance in business communication may now be on the wane, as certain other forms of communication — such as text messages and messaging and posting features of social-network sites and other third-party providers — continue to gain popularity.
2. Fed. R. Civ. P. 26(b)(2)(B); MCR 2.302(B)(6).
3. *Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350, 353 n.4 (S.D.N.Y. 2008).
4. *Autotech Techs. Ltd P'ship v. Automationdirect.com, Inc.*, 248 F.R.D. 556, 557 (N.D. Ill. 2008).
5. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 547 (D. Md. 2007).
6. *In re Netbank, Inc. Secs. Litig.*, 259 F.R.D. 656, 681 (N.D. Ga. 2009).
7. *Hagenbuch v. 3B6 Sistemi Elettronici Industriali SRL*, 2006 WL 665005, at *3 (N.D. Ill. Mar. 8, 2006).
8. Fed. R. Civ. P. 34(b)(1)(C).
9. MCR 2.310(C)(1) ("The request ***must*** specify . . . the form or forms in which electronically stored information is to be produced, subject to objection.") (emphasis added).
10. *E.g. Cenveo Corp. v. S. Graphic Sys.*, 2009 WL 4042898, at *2 (D. Minn. Nov. 18, 2009); *see also* Cohen & Lender, *Electronic Discovery Law and Practice* § 2.06[B][3] (2009 Supp.) ("[R]equesting parties are often insisting on production of electronically stored information in native format and their wishes are being granted by courts."); cf. MCR 2.310, Staff Comment (MCR 2.310(C)(1) "allows parties to determine the format in which [ESI] should be produced").
11. Fed R. Civ. P. 34(b)(ii); *accord* MCR 2.310(C)(2) ("If the request does not specify the form or forms in which electronically stored information is to be produced, the party responding to the request must produce the information in a form or forms in which the party ordinarily maintains it, or in a form or forms that is or are reasonably usable.").
12. Committee Note to Rule 34.
13. *Id.*
14. *See Goodbys Creek, LLC v. Arch Ins. Co.*, 2008 WL 4279693, at *3 (M.D. Fla. Sept. 15, 2008) (conversion of emails from native format to TIFF files was not acceptable because the TIFF files were no longer searchable).

15. *See* Fed. R. Civ. P. 34(b)(2)(E)(1); MCR 2.310(C)(5).
16. *See, e.g., Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc.*, 248 F.R.D. 556, 557 (N.D. Ill. 2008) (identifying "native format" as "the way [the document] is stored and used in the normal course of business"); *Covad Communications Co. v. Revonet, Inc.*, 254 F.R.D. 147, 150 (D.D.C. 2008) (holding that "no reasonable person can honestly believe that hard copy" printouts of emails is an acceptable format of production of documents as they are kept in the usual course of business; "[f]or hard copy to be an acceptable format, one would have to believe that [the producing party], in its day to day operations, keeps all of its electronic communications on paper"); *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, 2008 WL 5479701 (M.D. Fla. Nov. 25, 2008) (special master recommendation), 2008 WL 5120696 (M.D. Fla. Dec. 4, 2008) (adopting special master recommendation) (documents printed out and then scanned into electronic format and produced on CD were not produced as they were kept in the ordinary course of business as required by Rule 34); *Cenveo Corp v S Graphic Sys*, 2009 WL 4042898, at *2 (D Minn, Nov 18, 2009) (granting motion to compel production of ESI in native format where producing party failed to object to the specified format); *White v. Graceland Coll. Ctr. for Prof'l Dev. & Lifelong Learning, Inc.*, 586 F. Supp. 2d 1250, 1264 (D. Kan. 2008) (granting motion to compel production of emails and attachments in native format rather than PDF scans); *cf.* 23 Am. Jur. 2d, *Depositions and Discovery* § 156 (2009) ("When a party is ordered to disclose electronic documents as they are maintained in ordinary course of business, i.e. as 'active file' or in 'native format,' producing party should produce electronic documents with their metadata intact."); 8A Wright, Miller & Marcus, *Federal Practice and Procedure* § 2219 (3d ed. 2009) ("The 'ordinarily maintained' form may often be 'native format.'"); *see also Consol. Rail Corp. v. Grand Trunk W. R.R.*, 2009 WL 5151745 (E.D. Mich. Dec. 18, 2009) (documents produced in order they were found on each hard drive, with attachments immediately after the each corresponding email was sufficient under Rule 34 to comply with the "normal course of business" option where the document custodians were identified, along with the corresponding bates range for each custodian).
17. *E.g., Covad*, 254 F.R.D. at 150; *Bray & Gillespie*, 2008 WL 5479701; *White*, 586 F. Supp. 2d at 1264; *Goodbys Creek, LLC v. Arch Ins. Co.*, 2008 WL 4279693, at *3 (M.D. Fla. Sept. 15, 2008) (production of emails as TIFF image files not acceptable).
18. *See, e.g., Brenner v. Marathon Oil Co.*, 222 Mich. App. 128, 133; 565 N.W.2d 1 (1997) ("[I]n the absence of available Michigan precedents, we turn to federal cases construing the similar federal rule for guidance."); *White v. Taylor Distrib. Co.*, 275 Mich. App. 615, 628 n.7; 739 N.W.2d 132 (2007) (Michigan courts "do[] not lightly adopt a position at odds with the federal rules, after which our rules are patterned").

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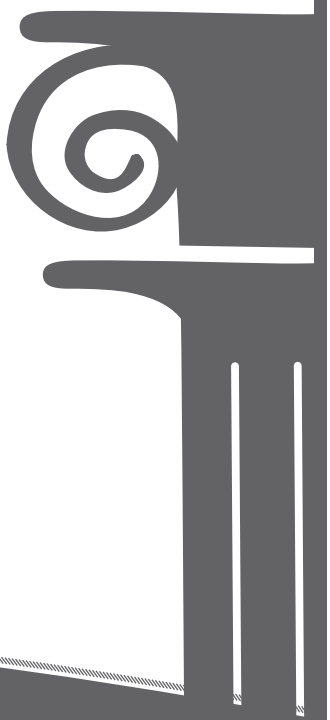

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Secure Passwords: The Rules Have Changed

By: Sharon D. Nelson, Esq. and John W. Simek
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Passwords might seem a tired subject to some, but the rules of the security game have changed — and it is high time to say goodbye to those wimpy, eight-character passwords. If you are using less than eight letters, shame on you!

So why the major change?

According to a report recently published by the Georgia Institute of Technology, it is time to move to 12 character passwords. In essence, Institute researchers were able to use clusters of graphic cards to crack eight-character passwords in less than two hours. And trust us, if researchers are doing this, so are the cybercriminals of the world.

The researchers discovered that, when they applied the same processing power to 12-character passwords, it would take 17,134 years to crack them. Cybercriminals, even when highly motivated, are going to bypass 12-character passwords – there are just too many folks with out there asking for their security to be violated with less secure passwords.

Richard Boyd, a senior research scientist who worked on the project, says that 12-character passwords should be the de facto standard we all use. It is simply too clear that the degree of your vulnerability is dictated in large part by the length of your password. Sad, but true.

The recommendation really strikes a balance between convenience and security – and assumes that password-cracking capabilities will continue to increase, as has certainly been true since computers became an integral part of our lives.

Here's how they came to their recommendation: They assumed a sophisticated hacker might be able to try 1 trillion password combinations per second. If that were the case, it would take180 years to crack an 11-character password. If you add just one more character, it would now take17,134 years to break the password. Given that the computing power of those with evil intent continues to accelerate, that added character gives (for the foreseeable future) a pretty good level of security.

For many years, we have lectured about passwords to audiences of lawyers. In the beginning, it was very frustrating, as lawyers wanted "instant on" information and were unwilling to take passwords very seriously. This is still true in the case of smartphones. Consistently, when we poll lawyer audiences, more than half do not have a PIN (personal identification number) on their smartphone. They simply want that "instant on" access. That's fine until you lose your phone, which is a tremendously common experience. Now the person that finds your smartphone also has "instant on" access to all your data. Not a terribly effective way to safeguard your confidential data.

Make no mistake about it, without a PIN, someone with evil intent will have access not only to data that you yourself could see on your phone, but to whatever deleted data may reside within its memory. This is precisely what we do in computer

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Institute researchers were able to use clusters of graphic cards to crack eight-character passwords in less than two hours

forensics lab when phones come in as part of the discovery process, albeit without the evil intent!

Apart from smartphones, lawyers have generally gotten smarter about passwords over time and tend not to use the names of children, sports teams, etc. as their passwords. We still find passwords on sticky notes on monitors or in desk drawers. That is an unending source of despair to all security experts, but apparently most of us cannot remember our passwords – and indeed, we have a lot of sympathy for the fact that lawyers have so many passwords that it hard to remember them all.

In response, over the last few years, we have joined others who lecture on security and recommended the use of full sentences or passphrases as passwords. They are so much easier for all of us to recall.

"I'msickofLindsayLohan!" is simple enough to remember and complex enough to confound a would-be password cracker. Using characters that are non-letters helps add to the complexity and therefore to your security. The English alphabet contains just 26 letters but there are 95 letters and symbols on a standard keyboard. "Mixing it up" makes it even more difficulty for computers to break your password.

Some, including Microsoft, will argue that users should not use real words or logical combinations of letters because they may be guessed by a "dictionary attack" using a database of words and common character sequences. Maybe, but we think that is overkill unless you're dealing with national security data or the formula for Coca-Cola.

The research used at Georgia Tech was a "brute force" attack, meaning that they simply tried all possible combinations of characters. The computer graphics cards they deployed are very cheap and easily programmed to perform these sorts of computations. The processors in the cards all run simultaneously, working to crack the passwords. Amazingly, these processors, running together, now have the processing power of what we used to call "supercomputers."

So let's say you accept the need for 12-character passwords. Several issues arise. One is that your bank, your stock brokerage, etc. may not allow for 12 character passwords. There are a lot of websites out there that still do not permit long passwords, though with each passing day, that is changing.

More problematic is that many sites do not **enforce** the long passwords. They may accept a six letter password or they may not insist that you use non-letter characters. This remains a significant problem, as many sites containing sensitive data have not yet caught up with security requirements for the coming decade.

Perhaps the greatest problem is remembering all these passwords. One solution is to use an encrypted flash drive such as the IronKey, which includes a password "vault" application that remembers all the characters for you. This has been our solution, which is great – until we forget the IronKey. We can only sigh remembering how many times **that** has happened — fortunately we've always been in the same city as the IronKey. We haven't managed to lose our IronKeys yet, but as small as they are, that would also be easy. There is an insurance policy — you can store your passwords (encrypted) on the IronKey site. But you can sense that there is a nuisance factor here.

Perhaps the greatest problem is remembering all these passwords. One solution is to use an encrypted flash drive such as the IronKey, which includes a password "vault" application that remembers all the characters for you.

There are websites which will store your passwords for you, but then you must trust the security levels (and employees) of that website.

Particularly dangerous are social media passwords, which are often used to log in all over the Web. Adding to the danger is that fact that third party applications regularly require you to turn over your social media ID and password so that they can have interaction between say, Facebook, and the popular applications Mafia Wars and Farmville are good examples. This makes things easy for the user, but now a cybercriminal with a single set of credentials may be able to access multiple sources of information.

For $19.95, you can turn to a product like eWallet (http://www.iliumsoft.com/site/ew/ewallet.php) which will store your passwords in encrypted format and allow you to sync access to it from multiple devices, including smartphones (be sure to check that yours is supported).

Now the person that finds your smartphone also has "instant on" access to all your data. Not a terribly effective way to safeguard your confidential data.

Particularly dangerous are social media passwords, which are often used to log in all over the Web.

This may be the best solution currently available for busy lawyers. John uses eWallet as a backup (synced to the BlackBerry) to his IronKey. With a 30-day free trial, it's hard to go wrong. There are similar products out there, but research them carefully before selecting one. Most have been tested by independent sources – your best way of screening software since all vendors will trumpet their products as "the" solution to your problems.

Whatever you do, make sure you do take passwords seriously. We know from experience that most lawyers are not going to buy a product like the IronKey or use a product like eWallet. This may change as the years go by, but for now, the majority will simply come up with passwords on the fly as required. If that sounds like you, at least take heed of the message conveyed by the Georgia Institute of Technology and make your passwords strong 12-character passwords. At least then you will have demonstrated that you took "reasonable measures" to protect client confidentiality.

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Why Your Facebook Status Matters:

Defamation In The Age Of Social Networking Websites

By: Trevor J. Weston,[1] *Fedor, Camargo & Weston, PLC*

1. The author would also like to thank his partners Matthew Fedor and Nicolas Camargo as well as Steve Johnston for their contributions to this article.

Executive Summary

As our clients' interconnectivity increases via social networking websites, so does their ability to incur civil liability for their actions and statements which they may innocently think is merely their opinion. Attorneys must develop a clear understanding of the internet as well as social networking websites in order to better counsel their clients on how to deal with the new and diverse legal issues that social interaction via the internet will inevitably create.

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Remember the old childhood idiom: sticks and stones may break your bones, but words will never hurt you? Turns out our parents were either lying or simply unfamiliar with the law of defamation. Read further to insure your complete loss of innocence.

With millions of Americans constantly updating their Facebook status, or twittering a constant running synopsis of their lives, internet users are taking certain risks without even being aware of them. Many if not all of us have seen someone make a statement on the internet regarding something they do not like, perhaps about bad service at a local restaurant, or an ex-husband whose conduct has been less than acceptable. The people making these statements may be subjecting themselves to liability by way of a claim for defamation. This article will attempt to describe how the recent eruption of social networking groups has created a need for attorneys to better understand the law of defamation as it relates to the internet.

There is no question as to the recent explosion in popularity of social networking websites. Social networking now accounts for twenty two (22%) percent of all time spent online in the United States.[1] Twitter processed more than one billion tweets in December, 2009 and averages over fifty (50) million tweets per day.[2] Over twenty five (25%) percent of domestic internet page views occurred at one of the top social networking sites in December 2009, up from 13.8% a year before.[3] The number of social media users age 65 and older grew 100 percent throughout 2010, so that one in four people in that age group are now part of a social networking site.[4] Two of the more popular social networking sites online with a combined more than three quarters of a billion users are Facebook and Twitter.

As some of the readers may have never indulged in these websites, the following section will attempt to familiarize some of the nomenclature. Twitter is a website that offers a social networking and "microblogging" service, enabling its users to send and read messages called *tweets*. Tweets are text based posts of up to one hundred and forty (140) characters displayed on the user's profile page. Tweets are publicly visible by default; however, senders can restrict message delivery to just their followers. Users may subscribe to other users' tweets; this is known as *following* and subscribers are known as *followers* or *tweeps*. All users can send and receive tweets via the Twitter website or compatible external applications, such as for smartphones.[5] Since its creation, in March 2006, and its launch in July 2006, Twitter has gained popularity worldwide and is estimated to have 190 million users.[6]

Facebook is a social networking website launched in February, 2004. As of January 2011, Facebook had more than 600 million active users.[7] Users may create a personal

profile, add other users as "friends" and exchange messages privately or publicly, via a "wall posting," which serves as a user's pseudo message board. Additionally, users may join common interest user groups, organized by workplace, school, or college, or other characteristics. It is these features that differentiate Facebook from Twitter. Even the story surrounding the creation of this website by founder Mark Zuckerberg has captivated the attention of Americans, in the film "*The Social Network*" which was nominated for eight Academy Awards in 2011.[8]

Networking websites like Facebook and Twitter allow users to generally comment upon the world around them with a much louder and broader voice than ever before. Of course, this new phenomenon has both positive and negative effects. There is no question that social networking allows for an enhanced ability to share information and keep up with friends and family in a way which is far more convenient and instantaneous than ever before. However, it is this potential liability that flows from this ultra connectivity that requires a greater understanding of the nature of these media by attorneys in order to better protect their client's interests should legal issues arise. With this increased access to everyone created by Facebok and Twitter, users are opening themselves up to civil liability based upon the statements they make on these sites.

Not long ago, a colleague shared that while admittedly wasting a bit of time on the internet, he made what he considered a benign post to his Facebook wall. In his post, he brashly questioned the intelligence of a famous political commentator in relation to some comments he had made about the City of Detroit; a subject about which he tends to be a bit defensive. Later in the day, he noticed that there were approximately fifteen posts on the wall. These posts were rife with venom and hatred, first towards him, and then violently back and forth between riled up participants who had commented thereafter. It was a relatively amazing sequence; and one that he did not expect, and it made me consider if such an episode could create a real possibility of civil liability for the venom filled posters, as well as for my colleague.

Social networking now accounts for twenty two (22%) percent of all time spent online in the United States.

Recently my firm has handled several cases that have involved individuals and businesses who have been defamed or been accused of defamation via the internet. Cases such as these raise numerous emergent legal issues in the areas of jurisdiction, free speech, defamation vs. opinion, etc.

Anyone who has read comments posted online via Facebook, Twitter or any internet message board would notice that some feel that the internet provides a veil of pseudo-anonymity or protection which allows them to take more liberties with their statements than they would ever do in person. Social commentator and writer Matt Zoller Seitz describes this phenomenon as follows: "The protective force field of anonymity — or pseudonymity — brings out the worst in some people. They say things they would never say in the presence of flesh-and-blood human beings."[9] Now, certainly harmless commentary as to local restaurants, the performance of favorite sports teams, and/or other general observances, is not anything to worry about. But what if your client storms into your office and slams a screen copy of one of the following statements ripped from the internet onto your desk:

As of January 2011, Facebook had more than 600 million active users.

John Q. Merchant is a crook! His business ripped me off; he and his partners are criminal and I will never do business with them again! (You represent the merchant)

or

> My ex-husband is an awful parent, he's a jerk and late to pick up the kids AGAIN! I just want everyone to know how badly he treats his kids! (Your client is the ex-husband)

or

> "You should just come and stay at my apartment anyway. Who said sleeping in a moldy apartment was bad for you? My landlord thinks it's ok." (the landlord is your biggest client)

Given these statements, an understanding of the law and the medium of social networking would be a valuable commodity indeed.

Common Law Defamation

Under the common law, slander refers to a malicious, false, and defamatory spoken statement or report, while libel refers to any other form of communication such as written words or images.[10] Defamation has generally been understood as a legal term encompassing both slander and libel. Most jurisdictions allow legal actions, civil and/or criminal, to deter various kinds of defamation and retaliate against groundless criticism. Related to defamation is the "invasion of privacy" tort of public disclosure of private facts, which arises where one person reveals information that is not of public concern and the release of which would offend a reasonable person. Unlike libel,

truth is not a defense for invasion of privacy. It is important to note, that absent some sort of statute, the common law is the law of the internet, just as it is the law of any other forum.

When much of the law of defamation was written and developed, the alleged defamatory statement must have been "published" by way of a statement made to another person, or in some sort of form of writing such as newspaper or letter.[11] This leads to the question, if someone makes a defamatory statement on your facebook wall, and this statement is published to your friends, certainly the original publisher may be open to some liability, but could you be held liable for these statements? Courts have yet to answer these questions; however, it is more than likely that litigation over the next decade will involve these questions as the common law further evolves into the age of the internet and attorneys need to grasp the nature of these forums upon which their clients spend so much time.

Recent Cases Involving Internet Defamation

Musician and actress Courtney Love agreed to begin paying $430,000, as part of a legal settlement, to a fashion designer who claimed that Ms. Love had posted multiple defamatory remarks about her on Twitter and other websites, ruining her reputation and her business during a dispute over a $4,000 payment for a dress.[12] Ms. Love argued that she was expressing her opinions online and that the designer's business did not suffer as the result of the dispute and had in fact, benefited from the publicity of doing business with her. The case was closely watched not only because was one of the first high-profile cases addressing the question of what amounts to defamation on social sites.[13]

Horizon Group v Bonnen was a libel suit brought a Chicago real estate management company against one of its former tenants. This case has received extensive publicity with its involvement of issues such as consumer protection and limits of libel and free speech. The management company contended that he tenant defamed it by posting a "tweet" on May 12, 2009, to her friends which read, "You should just come anyway. Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it's ok."[14] The company filed a claim seeking damages of at least $50,000 for the alleged libel, which prompted widespread comment from journalists, bloggers, and legal experts. On January 21, 2010, Horizon's suit was dismissed; the judge felt that the original tweet was too vague to meet the strict definition of libel per se. Nevertheless, while this case was dismissed, the tenant likely incurred significant legal fees to defend the suit, so her conduct, while vindicated in the end, still likely involved negative monetary consequences.

With this increased access to everyone created by Facebok and Twitter, users are opening themselves up to civil liability based upon the statements they make on these sites.

If someone makes a defamatory statement on your facebook wall, and this statement is published to your friends, certainly the original publisher may be open to some liability, but could you be held liable for these statements?

Tips and Applications for Attorneys

As an attorney it is important to advise your clients that this area of law is somewhat unclear and still developing. It's quite possible that legal issues that arise within the case could be appealed, and while such a prospect may be academically thrilling for an attorney, it can be very expensive for the client. This is rarely considered positive aspect of a civil litigation experience, at least from the client's perspective. It should also be explained to the client that defamation claims can be very hard to prove, especially if there are legitimate questions as to the foundational evidence, *i.e.* someone else had access to my account or it was hacked, etc. Remember the claim is not that the facebook account defamed someone, but that the owner of the account did.

Alternatively, defense counsel should zealously question the foundation of the allegations pled by the plaintiff. Defamation complaints require specificity in their pleadings and a poorly pled claim for defamation risks a motion for summary disposition for not pleading with adequate specificity. In other words, to coin a gambler's guide to life, make the plaintiff pick his or her horse, *e.g.*, "Defendant told my friend Jim on May 10th that I was a liar and a thief and I stole from my employer." This way the defendant knows the exact allegations and you can properly prepare your defense. If you don't know the allegations, how can you defend your client? Attorneys do this all the time by way of depositions, but in defamation claims, Plaintiffs have to show their factual hand right within the complaint.[15]

Defense counsel should bring an immediate motion for a more definite statement under MCR 2.115(A) or a motion for summary disposition under MCR 2.16(C)(8) if there is any question as to the adequacy of the initial pleadings.

While attorneys certainly cannot undertake a duty to police all of their

client's facebook pages, they are well advised to have a clear and concise understanding of this forum where many of their clients spend more time then they'd like to admit. Furthermore, while this article focuses primarily on civil liability for defamatory statements made on these sites, there are all sorts of other ways that clients can, and will, get in trouble using the internet. Traditional breach of contract claims may arise out of cyber meetings of the minds. There may be issues relating to employment, (especially public employment), for conduct deemed unbecoming within postings concerning vacation, personal, partying, pictures, etc. Such issues have recently made headlines nationwide in several public school teacher firings. Of course, statements made or posted may be used to impeach a client at trial or disprove elements of a claim, just as any other statement could, except for online statements come with a ribbon on top, written out and easily admitted if available to the opposing counsel.

It is important that attorneys explain to clients the problems that public information available on social networking websites could present to their case. There are ways to increase security on these websites to allow less access to information, but clearly anything that could in any way relate to their case should be taken down. If there is any question, offer to review the page with them. Alternatively, if an opposing party has a public social networking page, it may be useful to collect as much information as possible for later review by copying their Facebook postings, especially on the date of and since the incident in question. These may be useful as admissions against interest.

Some clients may try to invoke their constitutional rights as a basis for their ability to share their thoughts on online, but it is important to note that the first amendment does not extend to defamatory speech.[16] Moreover, even if the speech is protected, it does not act as a complete bar to having to spend the money to respond to a complaint and defend against a lawsuit where these sacred constitutional rights serve only as a measly affirmative defense.

Conclusion

As our interconnectivity increases, so does our ability to incur civil liability for what we may think is our own opinion. The constant and ongoing commentary can be risky business if the subject of the comments decides to take legal action. It is in an attorney's best interest to have a clear understanding of the internet as well as social networking websites in order to deal with their client's problems, caused by that "gol darned Google machine."[17]

Endnotes

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10. A thorough understanding of what is and is not libel and slander is a complicated and involved discussion and thus not addressed within this article.
11. *Rouch v Enquirer & News*, 440 Mich 238, 251, 487 NW2d 205 (1992) (citing *Locricchio v Evening News Ass'n*, 438 Mich 84, 476 NW2d 112 (1991), *cert denied,* 503 US 907 (1992); *see also Ireland v Edwards*,230 Mich App 607, 614, 584 NW2d 632 (1998).
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13. *Id*.
14. *Horizon Group Management, LLC v Amanda Bonnen,* Cook County No. 2009 L 8675
15. It should be noted that specificity in pleadings is more stringent in libel cases than slander because the alleged defamatory statements are actually written.
16. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).
17. My grandfather's affectionate name for the internet.

Editors' Notes – Policy and Practice on Submitting Articles

Articles: All articles published in the *Quarterly* reflect the views of the individual authors. We always welcome articles and opinions on any topic that will be of interest to our members in their practices. Although we are an association of lawyers who primarily practice on the defense side, the *Quarterly* always emphasizes analysis over advocacy, and favors the expression of a broad range of views, so articles from a plaintiff's perspective are always welcome. Author's Guidelines are available from the editor (hcarroll@VGpcLAW.com) or the assistant editor, Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).

By: Geoffrey M. Brown
Collins, Einhorn, Farrell & Ulanoff

Medical Malpractice Report

Geoffrey M. Brown is an associate in the appellate department at Collins, Einhorn, Farrell & Ulanoff, PC, in Southfield. His focus is primarily on the appellate defense of medical-malpractice claims, and he has substantial experience in defending appeals in legal-malpractice and other professional-liability claims. His email address is Geoffrey.Brown@ceflawyers.com.

Expert Witness Qualifications

Johnson v Bhimani, unpublished opinion per curiam of the Court of Appeals, issued February 10, 2011 (Docket No. 292327).

The facts: Plaintiffs sued the defendants, a radiologist and his professional corporation, for malpractice arising out of the allegedly negligent missed diagnosis of a pelvic fracture. The defendant radiologist was board certified in general diagnostic radiology and had a certificate of added qualifications in neuroradiology. The plaintiffs retained an expert witness whose certifications matched. The parties agreed, however, that the one most relevant medical specialty for the purposes of MCL 600.2169 and *Woodard v Custer*, 476 Mich 545 (2006), was general diagnostic radiology. Defendants moved to strike the plaintiffs' expert on the ground that he testified he spent the majority of his professional time on neuroradiology, which is a different specialty under *Woodard*. The trial court agreed, struck the witness, and granted summary disposition.

The ruling: In a 2-1 decision, the Court of Appeals affirmed the trial court's order striking the witness and granting summary disposition. The court rejected plaintiffs' argument that since neuroradiology is a subspecialty of general diagnostic radiology and there is overlap between the two fields, their expert should have been found to be qualified. The court instead held that the two disciplines are distinct specialties and that "practicing neuroradiology is not the same as practicing general diagnostic radiology." In so holding, the court relied on *Woodard*'s holding that a discipline in which one can earn a board certificate or certificate of added qualifications is considered a distinct specialty even if it is a subspecialty of some other specialty. Under MCL 600.2169(1)(b), plaintiffs' expert was required to spend most of his professional time practicing general diagnostic radiology to be qualified. But because he clearly testified that he spent the majority of his time in a different specialty, neuroradiology, he was not qualified to testify, and the trial court properly struck him as a witness and granted summary disposition.

Bondie v Rubert, unpublished opinion per curiam of the Court of Appeals, issued May 3, 2011 (Docket No. 295832).

The facts: The plaintiff was in a car accident that caused a closed-head injury, nerve injury, fractures, an ankle sprain, a shoulder contusion, and hand injuries. The plaintiff was treated by defendant for a many of his injuries, including performing surgery and treating his hand injuries. She ultimately referred him to a hand specialist for evaluation of his hand injuries, and later had an index finger amputated. The plaintiff sued, claiming that the defendant committed malpractice that aggravated and exacerbated the hand injuries, which led to the amputation.

The plaintiff's expert was board certified in orthopedic surgery and also in the orthopedic subspecialty of hand surgery. The defendant was also a board-certified orthopedic surgeon, but did not hold the additional certification in hand surgery. The plaintiff's expert testified that he spent approximately seventy percent of his professional time on sports injuries and hand surgery, and the remaining thirty percent on general orthopedic surgery. The defendant successfully moved to strike the expert and for summary disposition, arguing that she was practicing general orthopedic surgery, a specialty distinct from hand surgery, and that the plaintiff's expert was not qualified under MCL 600.2169(1)(b) because he spent more than half of his professional time in a different specialty than the one defendant was practicing.

The ruling: The Court of Appeals affirmed. There was no dispute that hand surgery, as a subspecialty in which one could be board certified, constituted a specialty distinct from general orthopedic surgery under *Woodard*. What was in dispute was whether the defendant was practicing general orthopedic surgery, or whether she was practicing as a specialist in hand surgery. The Court held that the defendant was practicing general orthopedic surgery despite her treatment of the plaintiff's hand injuries because general orthopedic surgery "is a broad specialty that includes the treatment of hands." Since she was practicing general orthopedic surgery at the time she treated the plaintiff, the rele-

The court rejected plaintiffs' argument that since neuroradiology is a subspecialty of general diagnostic radiology and there is overlap between the two fields, their expert should have been found to be qualified.

vant standard of care was that of general orthopedic surgeons. Since the plaintiff's expert did not devote the majority of his professional time to general orthopedic surgery, he was not qualified to give testimony under MCL 600.2169(1)(b).

Practice tip: *Johnson* and *Bondie* show the importance of remembering the "practice/instruction" requirement of MCL 600.2169 in terms of both selecting an expert and in challenging a plaintiff's expert. It is not enough for a standard-of-care expert to "match" the specialty and board certification of the defendant, but the expert must also "match" the relevant specialty by devoting the majority of his or her professional time to practicing or teaching that specialty. When deposing a plaintiff's standard-of-care experts, care should be taken to nail the expert down as specifically as possible as to how he or she spends his or her professional time.

Traditional Malpractice Claim Versus Loss Of Opportunity

Ames v Strauther, unpublished opinion per curiam of the Court of Appeals, issued April 21, 2011 (Docket No. 295010).

The facts: Plaintiff, the personal representative of the decedent's estate, sued a number of doctors and medical facilities arising out of the surgical removal of the decedent's gallbladder and the subsequent treatment of the decedent for complications from that surgery. Plaintiff's general-surgery expert testified that he was not critical of the care provided by three of the defendant surgeons who treated the decedent at the University of Michigan and that in his opinion the decedent only had a thirty percent chance of survival at the time the subsequent treaters took on her care. The trial court granted summary disposition under *Fulton v William Beaumont Hosp*, 253 Mich App 70, 83 (2005), on the basis that the plaintiff could not prove a sufficient loss of opportunity for survival.

The ruling: Citing *Stone v Williamson*, 482 Mich 144, 154 (2008), and *Velez v Tuma*, 283 Mich App 396 (2009), the Court of Appeals held that the trial court was wrong to grant summary disposition under *Fulton* because the plaintiff had pleaded a traditional malpractice claim and did not plead a loss-of-opportunity claim. But the Court of Appeals nevertheless affirmed summary disposition. The court held that there was no expert testimony that it was more likely than not that the decedent would not have died but for the defendants-appellees' actions, and as such, the trial court had properly granted summary disposition, albeit for the wrong reason.

Practice tip: It remains unclear to what extent and under what circumstances *Fulton* continues to apply. Practitioners considering a motion for summary disposition under *Fulton* in a case where the plaintiff has not explicitly pleaded a loss-of-opportunity claim should consider, where possible, raising additional grounds for summary disposition.

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MDTC Legislative Report

The New Budget

When I last reported in March, I expressed hearty skepticism that the FY 2011-2012 Budget could be completed by Memorial Day, as proposed by Governor Snyder in his first State-of-the-State Address. I was skeptical, as many others were, because the task assigned was something that has not been accomplished in the memory of most observers, and the objective seemed impossibly ambitious in light of the desperate state of our economy and the inevitable opposition to Mr. Snyder's proposals which has been so vigorously and loudly voiced in the last three months. And so, I was simply astounded to see the budget completed, as requested, the week before Memorial Day. Although it was not the two-year budget requested and there are still a few loose ends to tie up, it must be conceded, by Mr. Snyder's supporters and detractors alike, that this has been a monumental accomplishment.

Fiscal Reinvention

This leaves little room for doubt that the Reinvention Express is running on time, and yet, there are still some dangers ahead. Mr. Snyder has shown great leadership, but the progress toward accomplishment of his agenda has been made without any significant input or support from the minority party, and over its strongly-worded objections on several points. Many elements of his plan have been very unpopular – the authority of appointed emergency managers to suspend collective bargaining agreements, the taxation of pensions, the elimination of popular tax credits, and further reductions of funding for education, to name a few. But the Governor has promised favorable results, and if they materialize as predicted, Mr. Snyder and his fellow Republicans will bask in lustrous glory; if not, we may expect that the voters will show them the door.

2011 Public Acts

As of this writing (June 7, 2011), there are 47 Public Acts of 2011. The most noteworthy of these have been enacted as part of Governor Snyder's plan to turn Michigan's economy around. They include:

2011 PA 4 – HB 4214 (Pscholka – R), which has created a new **Local Government and School District Financial Accountability Act.** This new act provides for the appointment of emergency financial managers having broadly-defined authority to direct the affairs of distressed local governments and school districts – authority which includes, most notably, the power to modify or suspend application of collective bargaining agreements. 2011 PA 9 – SB 158 (Pavlov – R), a part of the same package, has amended the **Public Employment Relations Act** to allow rejection, modification or termination of collective bargaining agreements by an emergency financial manager in accordance with the new Local Government and School District Financial Accountability Act.

2011 PA 15 – HB 4158 (Lyons – R), has created a new **Shopping Reform and Modernization Act** to replace the former item-pricing law. It has been hoped that this new act will benefit retailers by its elimination of the prior law's requirements for

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This new act provides for the appointment of emergency financial managers having broadly-defined authority to direct the affairs of distressed local governments and school districts

price-marking of individual items offered for sale. It seems reasonable to expect that this benefit will flow from the reduction of person-power formerly required for that job. How this might further the administration's objective of creating new jobs remains to be seen.

2011 PA 21 – SB 53 (Marleau – R), sometimes called the **"I'm Sorry Act,"** has amended the Revised Judicature Act to add a new section MCL 600.2155, providing that: "A statement, writing, or action that expresses sympathy, compassion, commiseration, or a general sense of benevolence relating to the pain, suffering, or death of an individual and that is made to that individual or to the individual's family is inadmissible as evidence of an admission of liability in an action for medical malpractice."

New Initiatives

Although Governor Snyder and the new Republican Legislature have made short work of this year's budget, they are by no means finished with their efforts to make our Government leaner, and the state's economy more attractive to business interests. Word around town is that the Legislature is planning to keep very busy with those efforts until its summer adjournment near the end of June, although the precise agenda has not yet been revealed.

What might the agenda for the summer and the rest of the session include? The Supreme Court has proposed the elimination of several trial court judgeships, and a reduction of the Court of Appeals from 28 judges to 24, by attrition. SB 319 (Jones – R), proposing implementation of those changes, awaits consideration by the Senate Judiciary Committee.

Governor Snyder has called for educational reforms, and continues to press for legislation to create the legal mechanisms required for construction of a new international bridge at Detroit. And of course, the redistricting process for the new decade will have to be completed soon. Organized labor remains uneasy over the prospects for movement of a number of proposals, including some calling for elimination or reform of the "Act 312" compulsory arbitration process for police and firefighters, and others proposing creation of new "Right to Work Zones." HB 4522 (Farrington – R), which proposes a streamlining of the Act 312 arbitration process and modifications designed to safeguard the fiscal integrity of municipal employers, is on the agenda for the next hearing of the House Government Operations Committee.

And every conservative organization has its "wish list" of items to be addressed once the economy has been stabilized. It should come as no surprise that the wish lists for organizations interested in civil litigation include a lot of what has been proposed before. SB 191 (Caswell – R), for example, proposes adoption of a **sliding scale limiting the amounts that may be recovered under contingent fee agreements** – a proposal very similar to the one that was being discussed when I came to Lansing 20 years ago. As usual, there is a cornucopia of Bills proposing limited grants of immunity or limitation of liability for various circumstances. These include, but are not limited to:

HB 4231 (Walsh – R), which would amend the Estates and Protected Individuals Code to add a new section MCL 700.5109, **allowing parents or guardians of minors to release sponsors and organizers of recreational activities** sponsored by nongovernmental, nonprofit organizations, and employees or volunteers coaching or assisting such activities, from liability for injuries resulting from inherent risks of such activities. This Bill, evidently introduced in response to the Supreme Court's decision in *Woodman v Khera, LLC*, 486 Mich 228 (2010), has been passed by both houses, and has now been enrolled for presentation to the Governor.

HB 4601 (Haveman – R), which would amend the Revised Judicature Act to add a new Chapter 30, imposing **limitations on the liability of successor corporations for asbestos claims.**

HB 4589 (Somerville – R), which would amend the Governmental Immunity Act to **clarify the responsibility of municipal corporations for maintenance of sidewalks** adjacent to highways within their jurisdiction. As amended, MCL 691.1402a would require municipal corporations to maintain sidewalks adjacent to municipal, county, or state highways, without regard to prior knowledge of the defect causing injury now required by § 2a(1)(a), but a municipal corporation would be presumed to have maintained the sidewalk in reasonable repair in the absence of specific facts proving that the injury at issue was proximately caused by a vertical discontinuity defect of two inches or more, or another "dangerous condition in the sidewalk itself." The question of whether this presumption has been rebutted would be a question of law for the court, allowing for disposition of many claims by summary disposition. HB 4589 has been put on the agenda for

It has been hoped that this new act will benefit retailers by its elimination of the prior law's requirements for price-marking of individual items offered for sale.

the next meeting of the House Judiciary Committee.

HB 4350 (Haines – R), which would amend the Public Health Code, MCL 333.16277, to **extend the existing immunity from liability for injuries arising from uncompensated nonemergency health care to nonprofit entities**, other than health facilities, that are organized and operated for the sole purpose of coordinating and providing referrals for uncompensated nonemergency health care to uninsured and underinsured individuals. This Bill was passed by the House on April 26, 2011, and now awaits consideration by the Senate Committee on Health Policy.

HB 4389 (Stamas – R), which would amend the Public Health Code, MCL 333.16185, to **extend, to dentists, the immunity from liability** currently provided under that section to physicians providing uncompensated medical care to medically indigent persons under a special volunteer license. HB 4389 has been passed by both houses, and was presented to the Governor for his approval on May 26, 2011.

Democrats' Bills

The Democrats have introduced Bills of their own, but few of these have received much attention so far, in this Year of the Republican. HB 4440 (Brown – D), again proposes the repeal of the "drug immunity" provided under MCL 600.2946, but the other "reverse tort reform" measures discussed in my reports for the last session have not yet been reintroduced. As a practical matter, there is little reason to reintroduce those Bills in this session, when they will not be taken up by the Republican leadership, but they may be brought forth again, as the next election approaches, for purposes of political expression.

What Do You Think?

As I've said before, the MDTC Board regularly discusses pending legislation and positions to be taken on Bills and Resolutions of interest. Your comments and suggestions are appreciated, and may be submitted to the Board through any Officer, Board Member, Regional Chairperson or Committee Chair.

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No Fault Report

The Danger Of Post-Settlement Provider Claims

Although this column generally reports on appellate court decisions, I was recently on the losing end of a ruling in Wayne County Circuit Court which was sufficiently disturbing to warrant inclusion in this column as a warning to other No Fault defense counsel. The case is a suit brought by a single provider which alleged that it was not paid from proceeds of a settlement entered into between my client, a PIP carrier, and the provider's patient on the eve of trial.

The provider admitted that it was aware of the litigation before the settlement and elected not to intervene in it. During settlement conferences, this particular provider's bills were a source of intense discussion and, at one point, counsel for the original plaintiff indicated that the provider was intending to intervene to prevent the settlement.

But the provider did not intervene, and the settlement was finalized with the representation by plaintiff's counsel that the provider had been satisfied. The plaintiff's suit was then dismissed with prejudice.

Several months after we settled with the plaintiff, the provider sued my insurance company client along with the original plaintiff and his attorney. I filed a motion for summary disposition based on the release of all PIP claims, past, present and even some future as well as res judicata and collateral estoppel.

Authority Barring Late Provider Claims

Lacking a published case with identical facts, I relied on *Farmers Insurance Exchange v Young, et al*, unpublished opinion per curiam of the Court of Appeals, issued August 3, 2010 (Docket No. 275584) in which a provider suit was barred by collateral estoppel after entry of a declaratory judgment in an early suit between Farmers and the provider's patient to the effect that no fault benefits were not owed to the patient. I further relied on *Accident Victims Home Health Care v Allstate Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued June 6, 2006 (Docket No. 257786) which barred a later provider suit when the patient and Allstate had entered into a settlement of all claims.

The judge, however, elected not to apply either of those unpublished cases. Instead, he relied on a third unpublished case that conflicts with those I cited, *Anree Healthcare Inc. v Farm Bureau Insurance Company*, unpublished per curiam opinion of the Court of Appeals dated November 9, 2010 (Docket No. 294081). The judge found that the provider in my suit, like the provider in *Anree,* was not in privity with the plaintiff because there was no "functional working relationship" between them in which the interests of the provider were protected by the plaintiff.

No Res Judicata or Collateral Estoppel

The judge found that the plaintiff/patient was working only for his own interests in settling the suit even though he actively litigated seeking payment for the bills of the provider. Accordingly, the judge refused to apply res judicata to bar the provider's suit. Further, the judge ruled that where a provider is paid directly by the insurance company, rather than payment going to the patient who, presumably, would use the money to pay the provider, a contract is established between the provider and the

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Several months after we settled with the plaintiff, the provider sued my insurance company client along with the original plaintiff and his attorney.

insurer which does not include the patient and is independent of the insurance policy. The judge also ruled that where, as was alleged in my suit, the provider claims to have spoken to the adjuster and the adjuster indicated that payment would be made without objection to the amounts charged, the insurer has established a direct contractual relationship with the provider separate and apart from the patient's contract of insurance.

The judge also ruled that the release did not bar the provider's suit because the provider was not a party to the release.

Post-Judgment Motion?

Finally, the court indicated that the provider suit could have been avoided had I filed a motion under MCL 500.3112 after settlement but before payment of the settlement. In pertinent part, that statute provides:

> Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant or any other interested person may apply to the circuit court for an appropriate order. The court may designate the payees and make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate.

In my view, a settlement of a disputed and litigated claim is not a payment of PIP benefits to someone or some entity who the insurer "believes is entitled to the benefits" as anticipated by that section of the No Fault Act. Typically, the fact that a lawsuit is being defended signals the insurer's belief that no one is entitled to the benefits demanded.

Moreover, there is no clear protocol on how exactly that sort of motion would work. **First**, a settlement is a contract the terms of which can only be changed at one's own peril. In other words, the settlement promises that the consideration for the release will be paid to specific parties. A refusal to make payment on the terms of the release would, at least in theory, constitute a breach of the settlement agreement.

Second, would the court then allow all those who could potentially have a claim to the money to come in and object to a settlement that was already finalized and the suit dismissed? If so, why would any defendant settle?

Third, given the judge's other rulings, how would such an order have constituted a binding order on the providers when res judicata does not apply? Finally, even if the court had apportioned the settlement proceeds, the settlement amount was substantially less than the amount demanded by the provider and the statute only discharges the insurer up to the amount of the payment, theoretically leaving open all amounts demanded by providers in excess of the settlement amount. Accordingly, the insurer received no real release in return for its payment.

To his credit, the judge in this case began his ruling by indicating that he recognized the undesirable ramifications of his ruling, including the invitation to all providers to sue at will regardless of whether others have already sued and won, lost or settled, on the same precise claim.

The Danger of Settlements

The ruling renders it unsafe for any insurer to settle any PIP case without either paying 100% of the amounts demanded by any and all potential claimants and providers or having added all providers that have not been paid 100% of their bills as Plaintiffs. Insurers would have to wake potentially sleeping giants who would not otherwise have pursued payment, the equivalent of an invitation to a masochistic event, or demand signed waivers from all providers before entering into a settlement with any claimant. Of course, if one waits to the brink of settlement before demanding waivers, which would be necessary given that there would be nothing to offer the providers absent a tentative settlement agreement, and one provider refuses to sign off, most judges, would likely refuse to allow a late amendment of pleadings to add the recalcitrant provider as a party.

The ruling also calls into question the finality of any suits settled in the past year and opens the door to providers who have unpaid balances less than a year old to file their own suits on claims insurers have settled with patients recently.

Conclusion

The ruling in this case highlights only one of many serious flaws in the current system with regard to provider suits. I could go on and on but, fortunately for you readers, my space here is limited. I can't promise that a future column won't address other pitfalls on the topic though.

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Appellate Practice Report

Waiver of an Issue by Failing to Include it in the Statement of Questions Presented

The Michigan Court of Appeals' briefing requirements can sometimes serve as a trap for the unwary. One recent topic of discussion on the State Bar of Michigan Appellate Practice Section's listserv was the potential for waiving an issue by not including it in the statement of questions presented.

MCR 7.212(C)(5) provides that the appellant's brief must contain a "statement of questions involved":

> (C) Appellant's Brief; Contents. The appellant's brief must contain, in the following order:
>
> * * *
>
> (5) A statement of questions involved, stating concisely and without repetition the questions involved in the appeal. Each question must be expressed and numbered separately and be followed by the trial court's answer to it or the statement that the trial court failed to answer it and the appellant's answer to it. When possible, each answer must be given as "Yes" or "No."

This is not just a perfunctory requirement. Instead, it is a strictly enforced prerequisite to an issue being "properly presented" on appeal. See, e.g., *Michigan Farm Bureau v Dep't of Environmental Quality*: ("[T]his issue is not properly before us because it is not contained in plaintiffs' statement of the questions presented."), citing MCR 7.212(C)(5)[1]; *Michigan's Adventure, Inc v Dalton Twp*: ("Respondent failed to include this argument in its statement of questions presented and, therefore, this argument is not properly presented for appellate consideration.").[2]

The Court of Appeals has even said that it considers issues not listed in the statement of questions involved to have been "abandoned." *Zwerk v Zehnder*: ("Plaintiff did not include this issue in the statement of questions presented; we therefore deem this issue abandoned.")[3]; *Mettler Walloon, LLC v Melrose Twp*: ("Plaintiff first argues that the trial court erred in dismissing its inverse condemnation claim. This issue is not contained in the statement of questions presented; it is therefore deemed abandoned.").[4]

The Court of Appeals has on occasion made exceptions to this waiver policy, but those cases have been relatively few in number compared to the number of instances where the court has found an issue to have been waived or abandoned on appeal. See, e.g., *Chase v Raymond and Rosa Parks Institute for Self-Development*, ("Ordinarily, an issue not contained in the statement of questions presented is deemed waived or abandoned on appeal. However, because sufficient facts are available and the assertion involves a question of law, we will consider the issue.") (citation omitted).[5] In fact, one recent opinion suggests that such an exception may be limited to an issue of "paramount importance." See *In re Estate of Skaff*, ("At the outset, this particular issue was only referenced in the argument section in the Treasurer's brief on appeal. This issue is outside the scope of the statement of the question presented. . . . However, despite the noncompliance with MCR 7.212(C)(5), we can consider the merits of the

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So how best to avoid waiver? A commonly stated rule of thumb is that the statement of questions presented should correspond with the principal arguments contained in the brief

issue if the issue is a question of law and all of the facts are available. In fact, because the issue is one of law and is of paramount importance we will review the issue.") (citation omitted).[6]

So how best to avoid waiver? A commonly stated rule of thumb is that the statement of questions presented should correspond with the principal arguments contained in the brief. The more difficult task is deciding how broadly the questions should be written. A question that is written too broadly may lose its effectiveness, but if a question is too narrow, then there is a risk that sub-issues may be found to fall outside of its scope. The best practice is probably to ensure that if a particular argument serves as an independent ground for challenging the trial court's judgment or order, then it should be specifically identified in the statement of questions presented.

Effect of Requests for Attorney Fees on Timing to Appeal

Usually, the timing for filing an appeal as of right to the Michigan Court of Appeals is straightforward. As a general matter, unless some other provision of law establishes a different time, a claim of appeal must be filed within "21 days after entry of the judgment or order appealed from." MCR 7.204(A)(1)(a). If a "motion for new trial, a motion rehearing or reconsideration, or a motion for other relief from the order or appealed" is timely filed, then the claim of appeal must be filed within 21 days after entry of an order deciding such a motion. But what if there is an attorney fee issue (e.g., case evaluation sanctions) outstanding at the time the underlying judgment or order is entered? Does that affect the time for filing an appeal from an otherwise final judgment or order?

The short answer is no. Under MCR 7.202(6)(a)(iv), orders "awarding or denying attorney fees or costs under MCR 2.403, 2.405, 2.625 or other law or court rule" are considered "final orders" that are separately appealable. See *Mossing v Demlow Products, Inc*[7] and *King v American Axle & Manufacturing*[8] (holding that an order awarding attorney fees and costs entered after an appeal has been filed must be separately appealed). Indeed, under MCR 2.403, which governs case evaluation sanctions, a request for attorney fees and costs does not even need to be made until "28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment."[9]

Accordingly, a party should not wait to appeal the judgment or order deciding the merits of the case until after the attorney fee issue is resolved. For example, in *Jenkins v James F Altman & Nativity Ctr, Inc*, the Court of Appeals found that the plaintiffs could not challenge the trial court's summary disposition decision because they did not timely appeal.[10] Although they did timely appeal from the trial court's postjudgment order awarding attorney fees and costs, the Court of Appeals held that its jurisdiction was limited to the postjudgment order.

There are two additional matters worth noting. First, a *separate* claim of appeal must be filed in order to properly challenge a postjudgment attorney fee award; it is not enough to raise the issue in the party's brief on appeal from the underlying judgment or order. See *Bell v Michigan Council 25 of the AFSCME, AFL-CIO, Local 1023*: ("Although defendant's jurisdictional statement in its appellate brief states that it is also appealing the trial court's order allowing costs and fees, defendant did not file a separate claim of appeal from this order as required by the court rules. Defendant's only claim of appeal was filed on February 12, 2003, from the court's order denying its motion for JNOV, and defendant did not file an application for leave to appeal from the order awarding costs and fees. Therefore, this Court lacks jurisdiction over any issues stemming from the court's award of costs and fees to plaintiffs.").[11]

Second, a judgment or order awarding attorney fees is not final for purposes of appeal unless it also determines the amount of fees and costs awarded. *John J Fannon Co v Fannon Products, LLC*: ("[A]n order that merely grants the imposition of sanctions is not a 'final order' if the amount of fees and costs remains to be determined.").[12]

Attaching Exhibits to Appellate Briefs: Requirements and Best Practices

Is it better to rely solely on references to the record or appendix in an appellate brief or should one also attach copies of key exhibits to the brief? This may seem like a small matter but it is the kind of practical dilemma that appellate lawyers puzzle over on a regular basis. The right or wrong decision can often mean the difference between effective and ineffective advocacy. Although the Michigan Court Rules do not provide a bright line rule on this issue, a review of the rules governing appendices and the submission of the appellate record suggests a few

Whether briefing a case before the Court of Appeals or the Supreme Court, therefore, parties have an obligation to provide the court with copies of key texts.

points for consideration when deciding what to attach to one's brief on appeal or whether to attach exhibits at all.

In the Michigan Court of Appeals, the record generally consists of all of the pleadings, exhibits, and transcripts from the proceedings below.[13] The record is transmitted to the Court of Appeals and parties are required to include specific page citations to the record in their statements of facts.[14] As for appendices in civil cases, the rules provide: "If determination of the issues presented requires the study of a constitution, statute, ordinance, administrative rule, court rule, rule of evidence, judgment, order, written instrument, or document, or relevant part thereof, this material must be reproduced in the brief or in an addendum to the brief."[15] Thus, the Michigan Court Rules specifically impose on parties the obligation to make key textual materials readily available to the court.

For appeals before the Michigan Supreme Court, the Michigan Court Rules require the compilation and submission of an appendix.[16] This appendix must include, in chronological order, "(1) a table of contents, (2) the relevant docket entries both in the lower court and in the Court of Appeals arranged chronologically in a single column; (3) the trial court judgment, order, or decision in question and the Court of Appeals opinion or order; (4) any relevant finding or opinion of the trial court; (5) any relevant portions of the pleadings or other parts of the record; and (6) any relevant portions of the transcript, including the complete jury instructions if an issue is raised regarding a jury instruction."[17]

Instead of citing to the record as in briefs before the Court of Appeals, parties to an appeal before the Supreme Court must cite to the appendix.[18] The rules applicable to appeals before the Supreme Court also incorporate MCR 7.212 and therefore require that parties include copies of any constitutional, contractual, statutory or other texts critical to the issues on appeal.[19]

Whether briefing a case before the Court of Appeals or the Supreme Court, therefore, parties have an obligation to provide the court with copies of key texts. The rules leave to attorneys' discretion whether to do so by quoting the relevant material in the brief or by appending the text at issue to the brief. As a practical matter, this decision should turn on convenience and the length of the text at issue. If the text is a single section of Michigan's constitution or a portion of a statute, it is clear enough that one can satisfy the obligation imposed by MCR 7.212 by quoting the text in the brief. If the text at issue is an entire contract, on the other hand, common sense suggests that the best approach may be to attach the agreement as an appendix to the brief, provided it is not unwieldy.

As to attaching *non*-textual exhibits, however, the Michigan Court Rules appear to be silent. Therefore, it appears that attorneys must simply consider what works best as a matter of advocacy. If a non-textual exhibit is critical to the issues on appeal and can be attached to a brief, there is no prohibition against attaching it to the brief, even if the exhibit is also available in the record or the appendix. The Court, its staff, and opposing counsel may even appreciate the convenience.

Practice in the Michigan Court of Appeals: Supreme Court Shortens Time Limit for Filing Late Appeals

In an order entered on June 2, 2011, the Supreme Court has amended MCR 7.205(F) to shorten the time for filing a late appeal from 12 months to 6 months. See ADM File No. 2009-19.

The text of the amended rule, which takes effect on September 1, 2011, is available on the Supreme Court's website: http://courts.michigan.gov/supreme-court/Resources/Administrative/2009-19_06-02-11_formatted%20order.pdf

Endnotes

1. ___ Mich App ___; ___ NW2d ___; 2011 Mich App LEXIS 589, *60 (Docket No. 290323, Mar 29, 2011)
2. ___ Mich App ___; ___ NW2d ___; 2010 Mich App LEXIS 1971, *12, n 4 (Docket No. 292148, Oct 21, 2010)
3. Unpublished opinion per curiam of the Court of Appeals, issued May 12, 2011; 2011 Mich App LEXIS 873, *28 (Docket No. 294006)
4. 281 Mich App 184, 221; 761 NW2d 293 (2008)
5. Unpublished opinion per curiam of the Court of Appeals, issued April 19, 2011; 2011 Mich App LEXIS 702, *7 (Docket No. 293897)
6. Unpublished opinion per curiam of the Court of Appeals, issued January 4, 2011; 2011 Mich App LEXIS 10, *7 (Docket No. 291306)
7. 287 Mich App 87, 93-94; 782 NW2d 780 (2010)
8. Unpublished opinion per curiam of the Court of Appeals, issued June 4, 2009; 2009 Mich App LEXIS 1262, *7-8 (Docket No. 281928)
9. MCR 2.403(O)(8).
10. Unpublished opinion per curiam of the Court of Appeals, issued May 31, 2005; 2005 Mich App LEXIS 1368, *8-9 (Docket No. 256144).
11. Unpublished opinion per curiam of the Court of Appeals, issued February 15, 2005; 2005 Mich App LEXIS 353, * (Docket No. 246684).
12. 269 Mich App 162, 166; 712 NW2d 731 (2005).
13. *See* MCR 7.210.
14. *See* MCR 7.212(C)(7).
15. *Id.*
16. *See* MCR 7.307.
17. *Id.*
18. *See* MCR 7.306.
19. *See* MCR 7.306(A).

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Legal Malpractice Update

Expert Witnesses And Affidavits: *Jacobson v Lawyer Defendant*, No. 294929, 2011 WL 1376312 (April 12, 2011) (Unpublished)

The Facts: Plaintiff entered a purchase agreement with Norfolk Development Corp. ("Norfolk") to build a house. When Plaintiff could not produce adequate proof of his credit standing, Norfolk rescinded the agreement. Plaintiff hired the Lawyer Defendant to represent him after his first attorney withdrew from the case. Thereafter, Norfolk was granted summary disposition in the underlying case.

Plaintiff brought this suit against the Lawyer Defendant and law firm alleging negligence for defendant's failure to submit an affidavit that proved his claim in the underlying case. Defendant moved for summary disposition on the basis that plaintiff failed to make out a *prima facie* case for legal malpractice because he did not have an expert witness to testify as to the appropriate standard of care. The motion was granted and plaintiff appealed claiming the motion was premature because discovery was ongoing and because he submitted an affidavit pursuant to MCR 2.116(H).

The Ruling: The court held that the summary disposition motion was not premature as discovery had been open for ten months at the time the motion was filed. It was not unreasonable for the defendant to believe that further discovery would not produce factual support for plaintiff's claims. The court also held that the defendant's motion properly supported shifting the burden to the plaintiff to produce evidence that showed a genuine issue of material fact. The plaintiff produced an affidavit that the court held to be "general and conclusory" wherein it did not indicate that plaintiff retained an expert witness who could testify that defendant breached the standard of care or that the expert had made any findings that would support the plaintiff's claims. Thus the court held that the affidavit did not comply with the court rules.

Finally, the appellate court noted that "the affidavit constituted nothing more than a mere possibility that plaintiff's claim might be supported by expert testimony." The plaintiff's affidavit only established that the expert **might** provide testimony in support of plaintiff's claims. Thus, all the trial court had was a possibility that the expert testimony **could** support Plaintiff's claims **after** he looked at the evidence. The court concluded that a "mere possibility that the claim might be supported by evidence is insufficient to survive summary disposition." Therefore the decision of the trial court dismissing the plaintiff's claim against the Lawyer Defendant was affirmed.

Possible Implications: A plaintiff who asserts a legal malpractice claim but does not have a qualified expert to testify in support of that claim will likely not be able to overcome a motion for summary disposition.

Default Judgments And Proximate Cause: *Poplar v Lawyer Defendant*, No. 296503, 2011 WL 1565471 (April 26, 2011) (unpublished)

The Facts: The plaintiff was injured in a slip and fall accident in an apartment complex owned by Boyzie L. Mathis. Plaintiff retained the Lawyer Defendant to

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The court also held that the defendant's motion properly supported shifting the burden to the plaintiff to produce evidence that showed a genuine issue of material fact.

represent her in a premises liability lawsuit against Mathis. The Lawyer Defendant was unable to serve Mathis by regular service and eventually obtained an order for substituted service. When Mathis did not answer the complaint, the Lawyer Defendant filed a notice of default with the court clerk and moved for entry of default judgment. The court held a hearing on the default judgment motion which was attended by another attorney standing in for the Lawyer Defendant. The court granted the default judgment in the amount of $300,000.00 in January of 2006. On January 24, 2006, after no default judgment had been filed with the clerk, the Lawyer Defendant received a notice to appear advising him that he needed to file the default by February 6, 2006 or the plaintiff's case would be dismissed. The Lawyer Defendant failed to file the default judgment and on February 8, 2006 the plaintiff's case was dismissed.

Plaintiff retained a new attorney to re-open the case and have the judgment entered against Mathis. This time Mathis filed an answer claiming that he had never been served with the summons in the first case. The court declined to re-open the case or to enter judgment against Mathis. Plaintiff filed suit against the Lawyer Defendant alleging legal malpractice for his failure to file the default judgment in the underlying case. The Lawyer Defendant responded to the malpractice complaint with a summary disposition motion arguing that he was not a proximate cause of plaintiff's damages because "there was no causal link between any alleged malpractice and Poplar's damages." The Lawyer Defendant contended that the judgment was worthless because it could have been set aside on the basis of deficient service to Mathis. The Lawyer Defendant also argued that the lost opportunity for plaintiff to argue her slip and fall claim was immaterial because the claim was worthless.

The plaintiff responded that the substituted service was valid and that the Lawyer Defendant was judicially estopped from claiming otherwise. The trial court granted the motion for summary disposition holding that there was no proper service and that the underlying Complaint would have been dismissed in any event pursuant to the open and obvious doctrine.

The Ruling: The court of appeals held that whether the default judgment would have been vulnerable to an attack was properly an issue for the court to decide in the malpractice action. The court stated that an essential element in a legal malpractice claim is cause in fact and that the trial court examined the default judgment to determine whether the plaintiff's injuries were in fact the result of the Lawyer Defendant's failure to file the default judgment. On this issue, the court held that the trial court's finding that the default would have been set aside was supported by evidence in the record. Mathis produced evidence that he never resided at the address where the Lawyer Defendant attempted to serve him and that he never received notice of the proceedings in the underlying case. The court held that the trial court properly found that under those circumstances it had not obtained jurisdiction over Mathis and would have been obligated to set aside the default.

Plaintiff also argued that the Lawyer Defendant was estopped from arguing that the service was insufficient because he represented under oath that it was sufficient. While the plaintiff made a blanket estoppel argument, the appellate court held that she failed to support the argument with facts or applicable law so the court declined to consider the argument. The court concluded that the plaintiff could not meet her burden of showing that if the Lawyer Defendant had filed the default judgment, she would have been able to collect from Mathis.

Practical Implications: A legal malpractice plaintiff who cannot show that he/she would be better off if the alleged professional negligence had not occurred will likely not be able to overcome a motion for summary disposition.

Michigan Defense Quarterly
Publication Schedule

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

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Supreme Court Update

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Michigan Supreme Court Clarifies "Separate And Distinct" Analysis Under *Fultz V Union-Commerce* As Allowing Claims By Third-Party Plaintiffs Where The Defendant's Conduct Is Otherwise Contractually Contemplated

On June 6, 2011, the Michigan Supreme Court clarified the "separate and distinct rule" mode of analysis established under *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004), and noted that subsequent interpretations of *Fultz* improperly broadened the analysis to effectively disallow proper claims by third-party plaintiffs simply because those plaintiffs alleged hazards that were the subject of the defendants' contractual obligations with another. *Loweke v Ann Arbor Ceiling & Partition Co*, ___ Mich ___; ___ NW2d ___ (2011).

Facts: The plaintiff, Richard Loweke, worked as an electrician for a subcontractor on a construction project at Detroit Metro Airport. The defendant, Ann Arbor Ceiling & Partition Co., was hired as a subcontractor to provide carpentry and drywall services at the construction site. While working, the plaintiff was struck and injured by several cement boards that the defendant's employees had leaned against a wall. The plaintiff sued and alleged that the defendant's negligence – namely, stacking the cement boards in an unstable position –caused his injuries. The defendant filed a motion for summary disposition, arguing that the plaintiff's tort claim was barred because the defendant had not breached any duty separate and distinct from the duties imposed under the defendant's contract with the general contractor. The contract at issue imposed duties on the defendant for the "unloading, moving, lifting, protection, securing and dispensing of its materials and equipment at the Project Site." The trial court agreed with the defendant and granted summary disposition in its favor.

On appeal, the Court of Appeals affirmed the trial court's decision and held that, under the "separate and distinct" analysis of *Fultz*, because the defendant's contract with the general contractor required it to secure the cement boards at the construction site and the hazard "had not presented any unique risk that was not contemplated by the contract," the plaintiff's claim related to the defendant's alleged negligence in performing that obligation and were barred.

Holding: The Michigan Supreme Court reversed and remanded the case to the trial court for further proceedings, holding that both the trial court and the Court of Appeals wrongly applied "an improper understanding of *Fultz*" in determining that the defendant owed no duty to the plaintiff because the defendant's performance and the hazards associated with that performance were contemplated under the defendant's contract with the general contractor.

The court explained that *Fultz* simply requires courts to determine whether a defendant owes a noncontracting, third-party a legal duty apart from the defendant's contractual obligations to another. "Although *Fultz* clearly stated that a defendant's legal duty to act must arise separately and distinctly from a defendant's contractual obligations, *Fultz*'s 'separate and distinct mode of analysis' has been misconstrued to, in essence, establish a form of tort immunity that bars negligence claims raised by a noncontracting third party." Simply entering into a contract with another "does not alter the fact that there exists a preexisting obligation or duty to avoid harm when one acts."

In properly applying the *Fultz* analysis to the case at hand, the court concluded that the "defendant - by performing an act under the contract - was not relieved of its preexisting common-law duty to use ordinary care in order to avoid physical harm to foreseeable persons and property in the execution of its undertakings." Accordingly, since the trial court and Court of Appeals held that summary disposition for the defendant was proper by improperly applying *Fultz*, the court reversed the judgment of the Court of Appeals and remanded to the trial court for further proceedings.

Significance: By clarifying its decision in *Fultz*, the Supreme Court significantly limited the generally accepted "separate and distinct" analysis adopted by courts when analyzing contractor liability to third parties. As a result, third party plaintiffs injured as a result of a contractor's negligence may find it easier to get to a jury.

Failure Of Pre-Suit Notice To Provide The "Exact" Location Of The Alleged Defect Is Fatal To

The court explained that *Fultz* simply requires courts to determine whether a defendant owes a noncontracting, third-party a legal duty apart from the defendant's contractual obligations to another.

Claims Brought Under The Highway Exception To Governmental Immunity

In lieu of granting leave to appeal, the Michigan Supreme Court, on June 1, 2011, reversed the judgment of the Court of Appeals and remanded the case to the trial court for entry of an order granting summary disposition to the City of Hamtramck based on the failure of the plaintiff's pre-suit notice to provide the exact location of the alleged defect. *Jackupovic v City of Hamtramck*, ___ Mich ___; ___ NW2d ___ (2011).

Facts: The plaintiff, Kimeta Jakupovic, was walking home from the bank in the City of Hamtramck ("City") when she tripped and fell on a sidewalk, causing her to sustain multiple fractures to her left arm. Three days after the incident, the plaintiff's son and husband took photographs of the sidewalk where the plaintiff allegedly fell. The photographs depicted a 3-inch deep crack in the sidewalk. The cracked sidewalk is located in front of 9465 Mitchell Street, which is directly next to 9477 Mitchell Street. Given the crack's proximity to both properties, the plaintiff claimed that she could not precisely determine whether it was located in front of 9465 Mitchell Street or 9477 Mitchell Street. Nonetheless, ten days after the incident, the plaintiff's attorney served a written, pre-suit notice on the City, indicating that the defective sidewalk was located at 9477 Mitchell Street. The plaintiff filed a formal complaint against the City under the highway exception to governmental immunity approximately three months after the incident and, again, stated that the defect was located at 9477 Mitchell Street.

The defendant filed a motion for summary disposition, arguing that the plaintiff's claim was barred because she failed to provide proper notice of the alleged defect as required under MCL 691.1404(1). The trial court denied the defendant's motion and stated that, in its view, the plaintiff provided proper notice of the incident.

On appeal, the Court of Appeals affirmed the trial court's decision, but noted that the pre-suit notice failed to meet the standards of MCL 691.1404(1). The Court of Appeals explained that the plaintiff's notice "failed to specify the nature of her injuries or the exact nature of the defect." The Court of Appeals concluded, however, that any defect in the pre-suit notice was remedied by the plaintiff's complaint, which was filed less than 120 days after the incident occurred, and because the complaint "sufficiently stated the exact nature of her injuries, as well as the nature of the defect." According to the Court of Appeals, "although MCL 691.1404 is casually referred to as a pre-suit notice statute, there is nothing in its language requiring that adequate notice be a condition precedent to filing a lawsuit." The City appealed to the Michigan Supreme Court.

Holding: The Michigan Supreme Court reversed the Court of Appeals decision and remanded the case to the trial court for entry of an order granting summary disposition to the defendant. The court noted that the Court of Appeals erred in failing to properly enforce the notice requirements of MCL 691.1404(1), as written. Specifically, despite being aware that the plaintiff had "stated the wrong address in giving notice to the defendant of the alleged defect in a sidewalk," the Court of Appeals improperly determined that the notice complied with MCL 691.1404(1). Because MCL 691.1404(1) requires "notice of the exact location of the defect," the failure to provide such detail rendered the plaintiff's notice defective.

Significance: This ruling demonstrates the Supreme Court's reluctance to accept as valid even slightly incomplete notices under MCL 691.1404(1). Because the statute requires that notices "specify the exact location and nature of the defect," any ambiguity in the notice relating to the location of the defect may render the notice insufficient.

Michigan Supreme Court Dismisses Attorney General's *Quo Warranto* Complaint To Oust District Court Judge Appointed By Former Governor Granholm

On May 17, 2011, in *Attorney General v Hugh Clarke*, ___ Mich ___; ___ NW2d ___ (2011), the Michigan Supreme Court dismissed the Michigan Attorney General's *quo warranto* complaint to "oust" District Court Judge Hugh Clarke, who was appointed to the 54-A District Court by former Governor Jennifer Granholm, and determined that Article 6, § 23, of the Michigan Constitution is a "holdover" provision that allows Judge Clarke to hold office until January 1, 2013.

Facts: In 2004, Judge Amy Krause was elected to a 6-year term as a judge in the 54-A District Court. Her term was set to expire on January 1, 2011. In November 2010, Judge Krause was reelected to another six-year term that was set to begin on January 1, 2011. However, on November 23, 2010, before

The Supreme Court significantly limited the generally accepted "separate and distinct" analysis adopted by courts when analyzing contractor liability to third parties.

starting her new term of office, Judge Krause was appointed to the Court of Appeals by former Governor Jennifer Granholm. As a result of this appointment, Judge Krause resigned from the 54-A District Court effective December 13, 2010. Governor Granholm appointed Hugh Clarke to fill the vacancy left on the 54-A District Court as a result of Judge Krause's resignation. Judge Clarke's appointment was effective December 22, 2010, prior to the start of Judge Krause's new term.

The Michigan Attorney General then filed a complaint for *quo warranto* in the Court of Appeals, arguing that Judge Clarke was not entitled to remain in office beyond January 1, 2011, the date on which the term for which he was appointed - the remaining portion of Judge Krause's first term — was set to end. The Attorney General also argued that Judge Clarke's appointment did not extend to Judge Krause's second six-year term because the Governor "is not entitled to fill a judicial vacancy for a term that does not begin until after the Governor leaves office." Because Governor Granholm's term of office as Governor ended on January 1, 2011, she was not entitled to appoint Judge Clark to fill Judge Krause's second term of office, which itself was to begin on January 1, 2011.

Judge Clarke responded, in part, by arguing that article 6, § 4 of the Michigan Constitution expressly prohibits the Michigan Supreme Court from removing a judge from office.

Before the Court of Appeals ruled, the Michigan Supreme Court granted Judge Clarke's motion to bypass the Court of Appeals, and assumed jurisdiction over the action.

Holding: The Michigan Supreme Court dismissed the Attorney General's *quo warranto* action and held that article 6, § 23 of the Michigan Constitution is a "holdover" provision that allows appointed judges to hold office "for two separate terms when the second term begins before "12 noon of the first day of January next succeeding the first general election held after the vacancy occurs." Because the vacancy on the 54-A District Court, to which Clarke was appointed, occurred on December 13, 2010, upon the resignation of Judge Krause, the "first general election held after the vacancy" would not occur until November 2012. Accordingly, the court determined that Judge Clarke's appointment runs until "12 noon of the first day of January next succeeding the first general election held after the vacancy occurs," thus allowing Judge Clarke to remain in office until January 1, 2013.

Despite ruling in his favor, the court rejected Judge Clarke's argument that the Michigan Supreme Court lacks authority to remove a judge from office. Specifically, the court noted that Judge Clarke's argument is not the law of the state and "confuses judicial removal for reasons of misconduct with a determination that a person is not lawfully entitled to hold judicial office."

Significance: In reaching its decision, the court "repudiated" its previous holding in *Attorney General v Riley*, 417 Mich 119; 332 NW2d 353 (1983) and clarified the length of judicial appointments made under article 6, § 23 of the Michigan Constitution. The court further clarified that plurality opinions, such as *Riley*, are not binding on the court under the doctrine of stare decisis. Ultimately, the court's holding resolved what had become a rather heated and politically-charged debate.

The Guaranteed-Renewal Provision Under The Small Employer Group Health Coverage Act Does Not Prohibit Health Insurers From Imposing Minimum Contribution Requirements On Employers

On May 17, 2011, the Michigan Supreme Court held that MCL 500.3711(2), of the Small Employer Group Health Coverage Act, does not prohibit health insurance carriers from imposing minimum employer contribution requirements on small employers for the payment of a minimum percentage of their employees' health insurance premiums. *Priority Health v Comm of the Office of Financial and Ins Services*, ___ Mich ___; ___ NW2d ___ (2011).

Facts: The plaintiff, Priority Health, operates as a health maintenance organization ("HMO"), offering health insurance benefits to small-employer groups under the Small Employer Group Health Coverage Act ("Act"). Priority Health's policies impose minimum contribution requirements on small employers, requiring the employers to pay a minimum percentage of their employees' health insurance premiums as a condition of obtaining insurance. The minimum contribution provisions of the policies effectively impose a ceiling on the amount of health insurance expenses the employers may pass onto their employees. Priority Health requested a declaratory ruling from the Michigan Office of Financial and Insurance Regulation ("OFIR," formerly OFIS) as to whether

The Court of Appeals concluded, however, that any defect in the pre-suit notice was remedied by the plaintiff's complaint, which was filed less than 120 days after the incident occurred, and because the complaint "sufficiently stated the exact nature of her injuries, as well as the nature of the defect."

it could impose the minimum employer contribution requirements in its policies. Priority Health argued that the minimum contribution requirements reduce the financial burden on employees and combats against "adverse selection," or the tendency of healthy people declining health insurance because of its cost.

The commissioner of OFIR ruled, however, that "the mandated employer contribution in Priority Health's policies is unreasonable and inconsistent with the [Act]." Particularly, the commissioner determined that an employer's failure to pay the minimum contribution of his employees' insurance premiums cannot be grounds for nonrenewal under MCL 500.3711(2). Priority Health appealed to the Circuit Court, which affirmed, and to the Court of Appeals, which affirmed the commissioner's decision and held that the Act "does not permit carriers to impose a minimum employer contribution requirement on small employers as a condition for issuing a health insurance plan." Priority Health appealed to the Michigan Supreme Court.

Holding: The Supreme Court reversed the Court of Appeals decision and rejected the finding of the OFIR commissioner, stating that "[b]oth the commissioner and the Court of Appeals improperly relied on the guaranteed-renewal provisions of MCL 500.3711 to conclude that minimum employer contribution requirements are impermissible in small-employer policies." Rather, according to the court, MCL 500.3711(2) does not prohibit health insurers providing coverage to small employers from imposing minimum contributions on those small employers. Although the Act requires health insurance carriers to make all small-employer benefit plans available to all small employers and MCL 500.3711 expressly limits the grounds on which health insurance carriers may decline to renew a small employer policy, MCL 500.3707(1) permits health insurance carriers under the Act to include within their policies provisions that are "reasonable" and "not inconsistent" with the Act. Moreover, the guaranteed-renewal provision does not limit the initial coverage terms that can be included in a policy, but simply guarantees renewal of those terms once they are in effect. Thus, so long as a minimum contribution requirement is "reasonable" and "not inconsistent" with the Act, it may be properly included within small-employer health insurance policies.

Because the Supreme Court refused to determine whether the particular minimum contribution requirements in Priority Health's policies are "reasonable" and "not inconsistent" with the Act, it remanded the case to OFIR for reconsideration of Priority Health's request for declaratory ruling on those issues.

Significance: The Supreme Court squarely rejected OFIR commissioner's position that health insurers are precluded under MCL 500.3711(2) from requiring as a condition of insurance small employers to pay a minimum percentage of their employees' health insurance premiums. The court refused, however, to determine whether the minimum contribution requirements at issue were unreasonable or inconsistent with the Act for other reasons. Consequently, while this decision may be seen as a victory for small-employer health insurers, the court left open the possibility that policy provisions requiring small employers to pay a minimum percentage of their employees' health insurance premiums may later be deemed invalid on other grounds.

Member News

Work, Life, and All that Matters

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

Send your member news item to the editor, Hal Carroll (hcarroll@VGpcLAW.com) or the Assistant Editor, Jenny Zavadil (Jenny.Zavadil@det.bowmanandbrooke.com).

Julie I. Fershtman has been elected President of the State Bar of Michigan. Ms. Fershtman concentrates her practice in the areas of insurance coverage defense, insurance coverage, premises liability, business litigation (plaintiff and defense), agribusiness, sporting and recreational liability, fraud litigation, intentional torts, and equine law. Ms. Fershtman has lectured at seminars, conventions and conferences in 27 states on issues involving liability, risk management and insurance. She has authored over 190 published articles and three books.

Byron P. Gallagher, Jr., with the Gallagher Law Firm, which has offices in Lansing, Detroit, Grand Rapids and Mt. Pleasant, was re-appointed Ingham County Public Administrator by Michigan Attorney General Bill Schuette and Michigan State Public Administrator Rebecca Mason Visconti. As Ingham County Public Administrator, Mr. Gallagher serves as personal representative to administer decedent's estates for various reasons such as when an estate is not opened by a family member, when the beneficiaries of the estate do not reside in the United States, or when decedents leave no known heirs.

By: Hilary A. Ballentine
Plunkett Cooney

MDTC Amicus Activity in the Michigan Supreme Court

An asterisk (*) after the case name denotes a case in which the Michigan Supreme Court expressly invited MDTC to file an amicus curiae brief.

Recent Opinions

Pollard v Suburban Mobility Authority for Regional Transportation (MSC No. 140322)*

- Issue: validity of a statutory notice requirement in cases involving governmental agencies
- Author: **Carson J. Tucker**, *Zausmer, Kaufman, August, Caldwell & Tayler, P.C.*
- Stage: MSC requested oral argument on application for leave to appeal via order 6/11/10 (over Chief Justice Young's dissent)
- Status: MDTC amicus brief filed 1/11/11; oral argument held 1/20/11
- Court issued order 3/18/11 denying application for leave to appeal on basis that court was not persuaded that issue presented should be reviewed (Justices Marilyn Kelly and Hathaway dissented).

Pending Decisions In Cases MDTC Has Briefed

Hamed v Wayne County (MSC No. 139505)*

- Issues: (1) whether defendants Wayne County and Wayne County Sheriff's Department may be held liable to the plaintiff for quid pro quo sexual harassment under MCL37.2103(i); (2) whether the plaintiff's incarceration in the Wayne County Jail is a public service within the meaning of MCL 37.2301(b); and (3) whether the trial court erred in permitting the plaintiff to amend her complaint to allege violations of the Michigan Civil Rights Act.
- Author: **Marcelyn Stepanski**, *Johnson Rosati LaBarge Aseltyne & Field*
- Stage: leave granted 6/23/10
- Status: MDTC amicus brief filed 11/22/10; oral argument held 1/19/11; decision pending.

Loweke v Ann Arbor Ceiling and Partition Co (MSC No. 141168)

- Issue: whether a contracting party has a separate and distinct legal duty to an injured third person when the hazard causing the injury is the subject of the contract between the defendant and a third party
- Author: **Anthony F. Caffrey, III**, *Cardelli, Lanfear & Buikema, P.C.*
- Stage: leave granted 9/29/10
- Status: MDTC amicus brief filed 2/16/11; oral argument held 3/8/11
- Decision issued June 6, 2011
- *Editor's Note: See the Supreme Court Report in this issue for a summary of the opinion.*

Hilary A. Ballentine is a member of the firm's Detroit office who specializes in appellate law. Her practice includes general liability and municipal appeals focusing on claims involving the Michigan Consumer Protection Act, the Open Meetings Act, Section 1983 Civil Rights litigation, among others. She can be reached at hballentine@plunkettcooney.com or 313-983-4419.

Krohn v Home-Owners Insurance Co (MSC No. 140945)*

- Issues: proper interpretation of the phrases "lawfully rendering" in MCL 500.3157, and "reasonably necessary" under MCL 500.3107
- Author: **James E. Brenner,** *Clark Hill*
- Stage: leave granted 9/29/10
- Status: MDTC Amicus brief filed 2/3/11; oral argument held 4/5/11; decision pending

Upcoming Oral Arguments In Cases MDTC Has Briefed

Avram v McMAster-Carr Supply Co (MCOA No. 296605)

- Issue: asbestos appeal involving trial court's management of asbestos docket and Daubert issues
- Author: **Matthew T. Nelson**, *Warner, Norcross & Judd*
- Stage: pending on appeal in Michigan Court of Appeals
- Status: MDTC amicus brief filed 2/18/11; oral argument TBD

Jilek v Stockson (MSC No. 141727)*

- Issue: medical malpractice appeal involving standard of care issues
- Author: **Beth A. Wittmann,** *Kitch Drutchas Wagner Valitutti & Sherbrook*
- Stage: oral argument on application for leave to appeal in MSC
- Status: MDTC Amicus Brief filed 4/20/11; oral argument TBD

Forthcoming MDTC Amicus Briefs

Jones v DMC (MSC No. 141624)*

- Issue: medical malpractice appeal involving legal cause aspect of proximate cause, including whether a rare and unpredictable reaction to a medication is foreseeable
- Authors: **Philip DeRosier** and **Toby White,** *Dickinson Wright*
- Stage: Pending on appeal in Michigan Supreme Court
- Status: MDTC amicus brief forthcoming

LaMeau v City of Royal Oak (MSC No 141559-60)*

- Issue: governmental immunity appeal involving whether guy wire and anchor ae part of sidewalk thus necessitating a duty by the City to keep it in "reasonable repair"
- Author: *Kitch Drutchas Wagner Valitutti & Sherbrook*
- Stage: oral argument on application for leave to appeal in Michigan Supreme Court
- Status: MDTC amicus brief forthcoming

Joseph v A.C.I.A. (MSC No. 142615)*

- Issue: whether the minority/insanity tolling provision of MCL 600.5851(1) applies to toll the "one-year back rule" in MCL 500.3145(1) of the No-Fault Act; and (2) whether *Regents of the Univ of Michigan v Titan Ins Co*, 487 Mich 289 (2010), was correctly decided.
- Author: **Mary Massaron Ross** and **Josephine DeLorenzo,** *Plunkett Cooney*
- Stage: leave granted 5/20/11
- Status: MDTC amicus brief forthcoming

Michigan Defense Trial Counsel Proposed Revised Application For Amicus Brief May 16, 2011

Please submit this Application to the Amicus Section Chair within a reasonable time, i.e., not less than 35 days before the amicus brief is due.

A.CAPTION OF THE CASE (if multiple parties are involved, please list all and be sure to include the names and contact information of the attorneys representing the parties to the litigation):

B. NAME AND CONTACT INFORMATION OF INDIVIDUAL REQUESTING SUPPORT (please include the requestor's relationship to the case):

C. FULL STATEMENT OF THE ISSUE OR ISSUES PRESENTED (if there are multiple issues, but MDTC's support is sought on only one, please identify all the issues but point out the specific issue on which MDTC's support is sought):

D. FULL STATEMENT DETAILING WHY THIS ISSUE WARRANTS MDTC'S AMICUS INVOLVEMENT:

E. DATE BY WHICH THE PROPOSED AMICUS BRIEF MUST BE FILED:

F. COPY OF THE DECISION OR ORDER APPEALED FROM, ACCOMPANYING OPINION AND OTHER RELEVANT DOCUMENTS, INCLUDING BRIEFS OF THE PARTIES, AND OTHER MATERIALS

Adopted at the May 19, 20111 MDTC Board Meeting

By: Todd W. Millar, DRI State of Michigan Representative
Smith Haughey Rice & Roegge

DRI Report: July 2011

DRI's Annual Meeting

DRI's 2011 annual meeting will take place October 26 - 30 in Washington, D.C. Some very high profile speakers have been signed up for this meeting and I am sure you will not be disappointed if you attended.

President Bill Clinton is the featured speaker. "Embracing Our Common Humanity," is the title of President Clinton's discussion. President Clinton is a powerful voice for progress around the world and he will share his unique insights and observations about globalization, our growing interdependence, and finding our way toward a common future based on shared goals and values.

Supreme Court Justice Antonin Scalia and author Bryan A. Garner will present, "Making Your Case - The Art of Persuading Judges." Mr. Garner joined forces with Justice Scalia to write a book by the same title. The book has been described as a "compendium of advice like no other, leavened with the authors' trenchant wit and lucid prose style." They will share their insights together on the principles of persuasion, legal reasoning, brief writing and oral argument.

John Pistole, Administrator of the Transportation Security Administration, will discuss "Transportation Security - Its Evolution and Future." Mr. Pistole became administrator of TSA in July, 2010. He oversees management and security operation of more than 450 federalized airports throughout the U.S., the Federal Air Marshal Service, and the security for highways, railroads, ports, mass transit systems and pipelines. The TSA is a risk-based, intelligence-driven counterterrorism agency dedicated to protecting our transportation systems.

Dominic Gianna is the founding partner of Middleberg Riddle & Gianna. He and Thomas A. Mauet, a professor of law and director of trial advocacy at the University of Arizona James E. Rogers College of Law, will speak on "Advocacy for the Generations - Days of Future . . . Past." This dynamic duo of two internationally recognized masters of persuasion will lead a one-of-a-kind program. Thousands of defense attorneys have claimed that the information gleaned from this seminar has led them to victory in courtrooms around the world. The two trial lawyers are masters of advocacy and have changed the face of trial lawyering.

If you have ever attended an annual meeting, you know its value. If you have not, I would encourage you to find out.

Visit DRI.ORG today to read more about the meeting and to register. If you register before September 28, you will save $200 off the registration price.

Todd W. Millar is a shareholder in the Traverse City office of Smith, Haughey, Rice & Roegge. Mr. Millar graduated from Purdue University with a Bachelors of Science in agricultural education in 1988 and an Masters of Science in agricultural economics in 1990. He earned his Doctor of Jurisprudence from Indiana State University in 1993, earning the Order of the Barrister. His areas of practice include insurance defense, commercial and general civil litigation. He can be reached at tmillar@shrr.com, or 231-929-4878.

By: M. Sean Fosmire
Garan Lucow Miller, P.C., Marquette, Michigan

Michigan Court Rules Amendments and Proposed Amendments

For additional information on these and other amendments, visit http://www.michlaw.net/courtrules.html

PROPOSED

2010-11 - Selection of jurors

Rule affected: MCR 2.511
Issued: 5-3-11
Comments open to: 9-1-11

The proposal would add the following language to Rule 2.511(C):

When the court finds that a person in attendance at court as a juror is not qualified to serve as a juror, the court shall discharge him or her from further attendance and service as a juror. Exemption from jury service is the privilege of the person exempt, not a ground for challenge.

Concurrently, the proposal would remove qualification of the juror from the list of challenges for cause permitted under subsection (D).

The staff comment says that this proposal is based on the fact that MCL 600.1337 requires that the court discharge an unqualified juror whether or not he is challenged by a party.

Section 1337 reads:

600.1337 Jurors; unqualified or exempt; discharge.

Sec. 1337. When the court finds that a person in attendance at court as a juror is not qualified to serve as a juror, or is exempt and claims an exemption, the court shall discharge him or her from further attendance and service as a juror.

A person who is exempt cannot be challenged on the basis of the exemption, under this proposed amendment. The only exemption provided under the Revised Judicature Act is the exemption for those over age 70, found at MCL 600.1307a(2).

2010-07 - Referral contingent fees

Rule affected: MRPC 1.5
Issued: 5-3-11
Comments open to: 9-1-11

Would limit referral fees paid to 25% of the total contingent fee (which is capped under another rule at 33%) unless the referring attorney played a substantial role in the prosecution of the case and unless approved by the trial court. Clients would have to be informed about the division of fees and would have to consent.

Note: This proposal would do nothing to reduce fees paid by clients. Plaintiffs will pay a 33% fee, if the lawsuit is successful, regardless. The referral fee is a division of that fee between the primary attorney and the referring attorney. It is not clear what this proposed amendment hopes to accomplish.

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

ADOPTED

2007-17: Attorney fees in no-fault cases

Court rule affected: 8.121
Adopted: 4-5-11
Effective: 9-1-11

Adds claims for no-fault benefits to the rule governing contingent fees. The contingent fee rule prohibits a contingent fee exceeding 1/3 of the amount recovered.

Several groups posted comments in opposition on the grounds that the amendment might prohibit the award of attorneys fees based on an hourly rate. They argue that the court should have the discretion to award an attorney fee that exceeds 1/3 of the amount recovered, as a penalty for unreasonable denial or delay in payment.

As adopted, the rule exempts court-awarded fees in no-fault and in other cases.

2010-30: Mediation - confidentiality

Court rules affected:2.412 (new), 2.403, 2.411, 3.216
Adopted: 4-5-11
Effective: 9-1-11

Provisions previously found in other rules regarding confidentiality are now combined in a new Rule 2.412. Disclosures made in mediation proceedings are confidential and not admissible in court, except disclosures

- necessary to resolve disputes regarding the mediator's fee
- necessary to resolve issues regarding a party's failure to attend
- made in open or public proceedings
- to court personnel to evaluate and administer the program
- of a threat to inflict bodily harm or commit another crime
- used to commit or attempt to commit a crime, or conceal a crime
- involving a claim of abuse of a child, a protected person, or a vulnerable adult, if included in a report to a government or law enforcement agency, including later court proceedings
- relating to claims of professional misconduct or negligence on the part of a participant
- relating to efforts to enforce or vacate a settlement agreement, if the court finds the disclosure necessary

When a disclosure is made, the scope of the disclosure must be limited to the minimum necessary.

Most of the changes to the other rules are made to conform or to correct cross-references.

2006-38 - Attorneys Grievance Commission proceedings

Rules: 8.110, 8.120, 9.110 et seq.
Adopted: 4-19-11
Effective: 9-1-11

Extensive amendment to the rules relating to professional disciplinary proceedings.

2008-11 Settlement agreements

Court rule affected: 2.507
Issued: 4-5-11
Effective: 9-1-11

Deletes the reference to later denials of an oral settlement agreement, thus tightening the requirement that settlement agreements be in writing.

2004-08 Pro hac vice admission

Rule: 8.121
Adopted: 4-5-11
Effective: 9-1-11

Adds arbitrations to the proceedings governed by the rule.

Adds requirement that the out-of-state attorney submit a certificate of good standing from his current jurisdiction.

Recall that a recent amendment of Rule 8.121 added a number of significant new restrictions on pro hac vice admissions.

2002-24 Lawyer advertising

Rule: MRPC 7.3
Adopted: May 19, 2011
Effective:September 1, 2011

Adds a new subparagraph (c):

Every written communication from a lawyer described in subsections (1) and (2) shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any written communication, unless the lawyer has a family or prior professional relationship with the recipient. If a written communication is in the form of a self-mailing brochure, pamphlet, or postcard, the words "Advertising Material" shall appear on the address panel of the brochure, pamphlet, or postcard. The requirement to include the words "Advertising Material" shall apply regardless whether the written communication is transmitted by regular United States mail, private carrier, electronically, or in any other manner

Also provides that a lawyer may not send a written solicitation to a potential client until 30 days after an accident or injury.

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and Banquet Center
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(248) 684-3333
or 1-888-467-9535

- **Shotgun Start at 11 a.m.**
- **Modified Scramble format**
- **$165 per person on or before 08/26/11**
  $175 per person after 08/27/11
- **Dinner only $45 at approximately 5 p.m. at Mystic Creek Golf Club, Milford, MI**

Fee Includes: Practice Range Balls, Greens Fees, Cart, Deli Sandwich Lunch at registration and a Tenderloin/Chicken Breast Combo Plate Dinner at 5 p.m. Trophies given for Tournament Champs, Longest Drive (men/women), Closest to Pin (men/women) and Best All-Left-handed Team.

Cabin Rentals are available at Camp Dearborn for all those interested in Staying overnight following the outing – Please call 313-943-2350 to make a reservation.

Additional Benefit this year!

Analyze your Golf Swing
With
High Speed Video
by
Gerald Jackson, P.E.
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Scientific and engineering services providers, one of the proud sponsors of the 2011 MDTC Golf Outing.

High speed video analysis is just one of the tools Exponent uses to provide services to our industry. Gerry, and colleagues from his office, will be on hand at the outing to help you better your golf swing. Using high speed video techniques, Exponent will record and immediately playback your swing in slow motion allowing you to view every detail and correct any deficiencies you might perceive. You will also receive a copy of the video as a memento of the 2011 MDTC Golf Outing.

❑ Yes! We are interested in sponsoring the 2011 MDTC Open Golf Tournament

All sponsors will receive recognition during the event and in the association newsletter.

❑ Hole Sponsor $320

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❑ Visa ❑ Mastercard **we do not accept American Express*

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Credit Card Number Exp. Date

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ALL GOLF FEES MUST BE PAID IN ADVANCE OF OUTING

____

Credit Card Number **Exp. Date**

The number of participants is ____________ ($165 per person, $175 after 08/27/11)

❑ Dinner only $45 at Mystic Creek Golf Club, Milford, MI

❑ Please add the price of _____ Barneys (used for putting) – $10

❑ Please add the price of _____ Mulligans – $5

(Each player is limited two mulligans and one barney).

____

Signature Total $

Name on Reservation ______________________________

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City ____________________ State __________ Zip __________

Email ____________________ Website ____________________

Phone ____________________ Fax ____________________

Foursome participants:

Full name: ______________________________

Firm or company name: ______________________________

E-mail: ______________________________

Guest or member of your firm *(circle one)* Judge ❑ yes ❑ no Lefthand ❑ yes ❑ no

I am paying for this golfer ❑ yes ❑ no

Full name: ______________________________

Firm or company name: ______________________________

E-mail: ______________________________

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I am paying for this golfer ❑ yes ❑ no

Full name: ______________________________

Firm or company name: ______________________________

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I am paying for this golfer ❑ yes ❑ no

Full name: ______________________________

Firm or company name: ______________________________

E-mail: ______________________________

Guest or member of your firm *(circle one)* Judge ❑ yes ❑ no Lefthand ❑ yes ❑ no

I am paying for this golfer ❑ yes ❑ no

15th Annual

MDTC Open Golf Tournament

Friday, September 9, 2011

at the Mystic Creek Golf Club and Banquet Center

Bring a Client, a Judge, or a Guest!

*You may create your own twosome or foursome, or choose to be paired randomly by MDTC. If you already have your pair or foursome please list all players' names on the registration form and return it, either individually or collectively to MDTC.

No guarantees you will golf with a judge, unless you bring the judge. Singles/pairings are first come basis. Encourage vendors to bring lawyers as their guests!

Payment MUST be received on or before date of event. For a refund, cancellations must be received in writing at least 72 hours in advance of the event less $20.00 administration fee.

Any questions?…call MDTC at 517-627-3745.

All golf fees must be paid on or before day of golf.

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The cost is $75 for one entry or $200 for four entries. **To advertise, call (517) 627-3745 or email hcarroll@VGpcLAW.com.**

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- Negligence
- Professional Liability
- Commercial
- Contract Disputes

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May 19 -20, 2011 • Soaring Eagle Casino & Resort, Mt. Pleasant, MI

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Tim Belanger & Marti Belanger

Terry Miglio & John Jacobs

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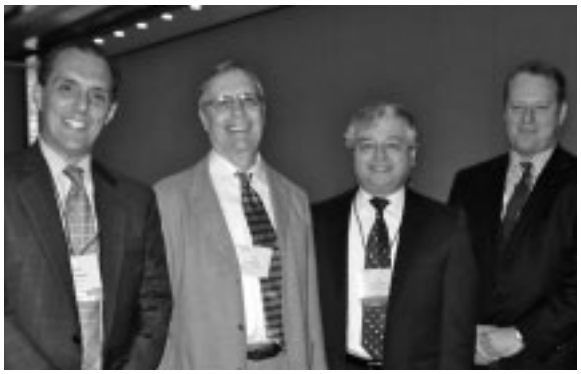

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Jim Lozier and Dan Scully

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MDTC Schedule of Events 2011–2012

2011

September 9	Open Golf Outing, Mystic Creek
September 14	State Bar Annual Meeting – Respected Advocate Award Hyatt Regency Dearborn
September 15 & 16	DRI Automotive Seminar – Dearborn Inn, Dearborn MI
September 22	Board Meeting, Okemos Holiday Inn Express
October 26–30	DRI Annual Meeting – Washington DC
November 3	Board Meeting, Hotel, Baronette
November 3	Past Presidents' Dinner, Hotel Baronette
November 4	Winter Meeting, Hotel Baronette

2012

January 13	Excellence in Defense Nomination Deadline
January 13	Young Lawyers Golden Gavel Award Nomination Deadline
January 27	Future Planning Meeting, The Westin Book Cadillac Detroit
January 28	Board Meeting, The Westin Book Cadillac Detroit
March 15	Board Meeting, Okemos Holiday Inn Express
April 27 & 28	DRI Central Regional Meeting – Greenbrier, West Virginia
May 10	Board Meeting, The Westin Book Cadillac Detroit
May 10–11	Annual Meeting, The Westin Book Cadillac Detroit

Other events: TBA – Section Teleconferences

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