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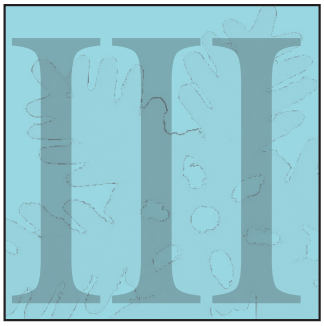

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Editor's Notes

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

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President's Corner

By: Mark A. Gilchrist, *Smith Haughey Rice & Roegge*

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In late 2013 a chorus arose culminating in the introduction of a bill in the Michigan Senate to eliminate the mandatory requirements of the Michigan State Bar. In other words, the Bar would become a voluntary organization rather than one in which all lawyers must join to have a license to practice law in the State of Michigan. Many people believe the legislation was the direct result of the State Bar asking the Secretary of State to eliminate issue ads in judicial campaigns.

In response to this legislation, the State Bar asked the Michigan Supreme Court to assess how the State Bar should operate under *Keller v State Bar of California*, 496 U.S. 1 (1990), an opinion that restricts but does not eliminate certain issue advocacy by mandatory bar organizations. Pursuant to this request, the Michigan Supreme Court established the Task Force on the Role of the State Bar of Michigan (the "Task Force") by way of Supreme Court Administrative Order 2014-5 on February 13, 2014 "to address whether the State Bar's current programs and activities support its status as a mandatory State Bar." Specifically, the Court charged the Task Force with determining whether the State Bar could perform its duties "by means less intrusive upon the First Amendment rights of objecting individual attorneys." The Task Force submitted its report to the Michigan Supreme Court on June 3, 2014. Although a number of different issues were addressed by the Task Force, I will address two: (i) whether the State Bar should remain mandatory, and; (ii) if the Task Force adequately addressed whether the State Bar's ideological activities will not affect the First Amendment rights of its members.

The State Bar Should Remain Mandatory

Importantly, the Task Force recommended that the State Bar of Michigan remain a mandatory State Bar. The Task Force noted that "a clear majority" of lawyers providing written or public feedback supported the idea of a mandatory State Bar. Every State Bar section and local bar association that provided the Task Force feedback also came out in favor of a mandatory bar. After the Task Force submitted its report, the Supreme Court invited the State Bar Board of Commissioners to comment on the Task Force report. Regarding the continuation of a mandatory state bar, the Board of Commissioners agreed with the Task Force recommendation that the State Bar remain mandatory. There being no significant dissent from the State Bar or the Task Force concerning the continuation of a mandatory bar, it is my hope that the Michigan Supreme Court follows the recommendation of both and maintains the mandatory nature of the Michigan State Bar.

State Bar Issue Advocacy

There is significant disagreement between the Task Force and the Board of Commissioners with respect to issue advocacy and public policy concerns. Specifically, the Task Force asked the Michigan Supreme Court to adopt a "strict interpretation" of *Keller* regarding State Bar advocacy. The Task Force requested that before the State Bar could consider an issue, that issue must be vetted by an independent *Keller* panel, requiring a super majority of the panelists for an issue to be considered. Also, the Task Force suggested a proposed *Keller* administrative order which "specifically identif[ies] the following as impermissible areas for State Bar advocacy: (i) Ballot issues; (ii) Election law; (iii) Judicial selection; (iv) Issues that are perceived to be associated with one party or candidate, and endorsement of candidates; (v) Matters that are primarily intended to personally benefit lawyers, law firms, or judges; and (vi) Issues that are perceived to be divisive within the Bar membership.

Any fair reading of these impermissible areas would render the State Bar effectively useless in advocating on potential issues that could directly impact both the judiciary and practice of law in Michigan. It is not difficult to conceive of potential ballot issues or proposed election laws which could significantly and negatively impact both the practice of law and the judiciary in this state. One would hope that should such public policies be proposed, the State Bar could and would take an active role in identifying the issues and offering thoughts on whether the proposed reforms were welcome, or not.

Further, the language prohibiting advocacy on issues that are "perceived" to be associated with one party or candidate, or "perceived" to be divisive within the Bar membership is too broad and ambiguous. Is it simply a general perception that matters and, if so, how is that quantified? Is it the perception of the public, a legislator or even the perception of a single State Bar member which could trigger restricting the State Bar from advocating? The proposed language is too imprecise and could be interpreted too broadly to allow the State Bar to basically ever engage in issue advocacy, a result which would be detrimental to the profession.

In reality, the State Bar has been very cautious and deliberate in terms of injecting itself into public policy debates or issue advocacy. If anything, I wish the State Bar would interject itself more often into the public policy arena when issues arise which significantly impact a large number of practitioners. Typically, however, the State Bar restricts itself to offering opinions only on those issues which would drastically and detrimentally impact the practice of law in Michigan. Many of the reforms offered by the Task Force are too extreme and would, in my view, effectively prohibit the State Bar from ever participating in issue advocacy. The reforms proposed by the State Bar Board of Commissioners are better suited to allowing the State Bar to take appropriate stances when necessary to protect Michigan's practitioners and judiciary. I, for one, hope that the Michigan Supreme Court adopts the Board of Commissioners' proposed reforms.

MEMBER NEWS

Work, Life, and All that Matters

MDTC member **Carson J. Tucker** has started his own specialized appellate law and liability practice in Ann Arbor. He is an appellate and insurance coverage lawyer providing highly specialized and unique services to his clients in Michigan and abroad. Mr. Tucker handles all types of appellate matters and assists other lawyers with complex litigation and insurance coverage issues. Mr. Tucker also represents local and state governmental entities, national and international businesses and insurance companies, and global corporations. After law school, Mr. Tucker was a research lawyer for the Michigan Court of Appeals and then a law clerk for the Honorable Stephen J. Markman, Justice of the Michigan Supreme Court. He is a Major in the Judge Advocate General (JAG) Corps of the Michigan Army National Guard and Command Judge Advocate for the 272nd Regional Support Group (RSG), a brigade-sized military unit providing logistics, transportation, supply, medical and combat support to the National Guard and the United States Army. Mr. Tucker can be reached at cjtucker@comcast.net and 734-218-3605.

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 Lee Khachaturian (dkhachaturian@dickinsonwright.com) or Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).*

Michigan Supreme Court Weighs in on Definition of "Employee" under Workers' Disability Compensation Act

By: Michael D. Wiese, *Smith Haughey Rice & Roegge PC*

Executive Summary

The Michigan Supreme Court's recent ruling reversing the Court of Appeals conflict panel's decision in Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc, makes clear that a person seeking to avoid employee status and, thus, the exclusive remedy under the Worker's Disability Compensation Act, need only satisfy one of the three criteria set forth in MCL 418.161(1)(n), rather than all three criteria as the court of appeals had held.

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The Michigan Supreme Court recently issued an opinion in *Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc*, overturning the decision of a Court of Appeals conflict panel regarding the interpretation of the definition of "employee" set forth in the Workers' Disability Compensation Act ("WDCA").[1] In doing so, the court resurrected the prior interpretation articulated in *Amerisure Ins Cos v Time Auto Transp, Inc.*[2] The conflict panel's interpretation of the subject portions of the WDCA drastically reduced the ability of a plaintiff to divest himself or herself of "employee" status and thereby avoid the exclusive remedy of the WDCA, thus increasing the umbrella of coverage provided to workers under the WDCA. The Michigan Supreme Court's resurrection of the holding promulgated in *Amerisure* requires a plaintiff to satisfy only one of the conditions set forth in MCL 418.161(1)(n), as opposed to all three, in order to be divested of "employee" status.

The WDCA was enacted in order to provide benefits to the victims of work-related injuries in an efficient, dignified, and certain form.[3] The WDCA defines "employee" as "every person in the service of another, under any contract of hire, express or implied.[4] The extent of this definition is restricted in MCL 418.161(1)(n), which limits the application of "employee" status by providing criteria that, if met, divest a plaintiff of such status. The definition of "employee" further includes:

> Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act.[5]

These two subsections of MCL 418.161(1) "must be read together as separate and necessary qualifications in establishing employee status."[6] Thus, once an express or implied contractual relationship of hire is established, a plaintiff is an "employee" *unless* the plaintiff is divested of this designation based on the criteria in MCL 418.161(1)(n).

The first published Court of Appeals decision to interpret MCL 418.161(1)(n) was *Amerisure Ins Cos v Time Auto Transp, Inc.*[7] The *Amerisure* court held that once one of the criteria set forth in the statute was met (a plaintiff maintains a separate business, holds himself or herself out to and renders service to the public, or is an employer subject to the WDCA), a plaintiff was divested of employee status.

The facts underlying the recent *Auto-Owners* case are as follows: while working on a fall clean-up job for All Star Specialists Plus, Inc., Joseph Derry was injured as he loaded leaves into a truck when a leaf vacuum machine tipped over onto him. All Star

carried three insurance policies: a commercial general liability policy, a no-fault policy, and a workers' compensation policy. When Derry brought causes of action to recover under the general liability and no-fault policies, Auto-Owners filed a declaratory judgment action, seeking a determination that Derry was an employee and thus his only means of recovery was under the workers' compensation policy. The trial court concluded, based on the *Amerisure* interpretation, that because Derry satisfied one of the criteria of MCL 418.161(1)(n), he was not an employee and could therefore recover under the general liability and no-fault policies.

The Court of Appeals recognized that it was bound by *Amerisure*, but disagreed with the *Amerisure* Court's interpretation of MCL 418.161(1)(n), stating that "instead of focusing on the word 'not,' the panel should have focused on the word 'and.'"[8] Given this discrepancy, the Court of Appeals convened a special conflict panel to determine whether MCL 418.161(1)(n) requires one of the three criteria be met, pursuant to *Amerisure*, or requires all three be met, pursuant to the court's assertions in *Auto-Owners*, for a plaintiff to be divested of "employee" status.

The conflict panel concluded that *Amerisure* was wrongly decided. In analyzing the statute, the court reviewed the use of the word "and" linking the three criteria. In support of its holding that all three criteria must be met to declassify a person as an employee, the court gave the following example: "if only one of the three criteria has to be met to yield an independent contractor, then that status would apply to a full-time secretary who advertised to the public, and in fact performed, freelance typing outside that full-time employment."[9] Thus, the conflict panel concluded that all three of the statutory criteria in MCL 418.161(1)(n) must be met before an individual is divested of "employee" status.

The Michigan Supreme Court reversed the holding of the conflict panel, stating that the provision at issue had been correctly interpreted in *Amerisure*. Specifically, the court held that "by requiring that all three statutory criteria be met for an employee to be divested of employee status, the special panel majority's interpretation ignored the word 'not' contained in each criterion."[10] The court stated that "each criterion of MCL 418.161(1)(n) must be satisfied for an individual to be considered an employee; conversely, failure to satisfy any one of the three criteria will *exclude* an individual from employee status."[11] Further, to the extent the conflict panel found authority for its holding in the supreme court decision *Reed v Yackell*, the *Auto-Owners* court clarified that *Reed* was considered and decided in a manner fully consistent with the *Amerisure* interpretation.[12]

While the conflict panel's decision greatly increased the extent of coverage for workers' compensation benefits, the Michigan Supreme Court's recent ruling reigned in that increased scope. Pursuant to this clarification, in order to be divested of "employee" status and pursue a cause of action in tort against the entity that would otherwise be considered a plaintiff's employer, a plaintiff is only required to satisfy one of the criteria set forth in MCL 418.161(1)(n).

Endnotes

1 *Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc*, 497 Mich 13; __ NW2d __ (2014) (Docket No. 149036).
2 *Amerisure Ins Cos v Time Auto Transp, Inc*, 196 Mich App 569; 493 NW2d 482 (1992).
3 *Thomas v Certified Refrigeration, Inc*, 392 Mich 623, 636; 221 NW2d 378 (1974).
4 MCL 418.161(1)(l).
5 MCL 418.161(1)(n).
6 *Hoste v Shanty Creek Mgmt, Inc*, 459 Mich 561; 573 NW2d 360 (1999).
7 Note that at the time this statute was reviewed by the court in *Amerisure* it was designated MCL 418.161(1)(d), although the relevant language is identical to that found in 418.161(1)(l).
8 *Auto-Owners Ins Co v All Star Lawn Specialists Plus Inc*, 301 Mich App 515, 527; 838 NW2d 166 (2013).
9 *Auto-Owners Ins Co v All Star Lawn Specialists Plus Inc*, 303 Mich App 288, 299; 845 NW2d 744 (2013).
10 *Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc*, 497 Mich 13; __ NW2d __ (2014) (Docket No. 149036).
11 *Id.*
12 *Id.*

MDTC Schedule of Events

2015

March 24	Webinar - The Distracted Driver: Science, Application, Investigation
March 26	Board Meeting – Okemos
May 7	Webinar - Testing and Analysis: Tools for IP Litigation
May 14-15	Annual Meeting – The H Hotel, Midland
September 11	Golf Outing – Mystic Creek
September 23	Webinar - Statistics in the Courtroom: A Seminar for Litigators
October 7	Respected Advocate Award Presentation – Novi
October 7-11	DRI Annual Meeting – Washington, D.C.
October 7-9	SBM Annual Meeting – Novi Expo Center
November 12	Past Presidents Dinner – Sheraton, Novi
November 13	Winter Meeting – Sheraton, Novi

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May 12-14	Annual Meeting – The Atheneum, Greektown
September 21	Respected Advocate Award Presentation – Grand Rapids
September 21-23	SBM Annual Meeting – Grand Rapids
October 19-23	DRI Annual Meeting – Boston
November 10	Past Presidents Dinner – Sheraton, Novi
November 11	Winter Meeting – Sheraton, Novi

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❑ **May 7, 2015 -** Testing and Analysis: Tools for IP Litigation

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Can Data Analytics Make a Zero Claim Goal a Reality?

How the Failure to Use it Might Cost You Some Day

By: Timothy S. Groustra, *Kitch Drutchas Wagner Valitutti & Sherbrook, P.C.*

Executive Summary

Research has revealed that there are certain personality traits that are determinative of crash risk in the transportation industry. Monitoring personality traits through the use of internet search tools and the review of drivers' social media may assist companies in avoiding or mitigating risk and in reducing financial exposure. Employers must be aware, however, of the possible legal ramifications of using social media in pre-employment screening.

Timothy S. Groustra is a principal attorney in the Mount Clemens office of Kitch Drutchas Wagner Valitutti & Sherbrook. He manages the trucking and no-fault litigation practice groups for the Kitch firm. He also manages other complex litigation matters, including breach of contract, fraud/misrepresentation, and insurance matters. His email address is t.groustra@kitch.com.

The U.S. Department of Transportation stated recently a goal of zero highway fatalities. While many in the industry decried the goal as unrealistic and misguided, others have embarked on programs to eliminate claims altogether. That is, some trucking companies have called into question the assumption that claim expenses arising from liability losses should be an expected cost of business. Are such goals obtainable?

Truck drivers face both a disproportionately higher risk of vehicular fatalities and far more serious health disorders than those driving other vehicles.[1] For that and other reasons, driver retention is a significant ongoing problem for trucking companies. Additionally, statistics show that roughly 10 percent of drivers are responsible for 50 percent or more of a fleet's crash risk.[2] Clearly there is a need to ensure that people driving the trucks are those with the right fit for the job. With cycles of driver shortages, financial drawbacks (i.e., not having the funds to hire the best drivers and/or not being able to afford the methods to make more discerning hiring selections), as well as other issues, both risky and transitory drivers continue to find jobs with trucking companies.

A 2011 study by the Federal Motor Carrier Safety Administration ("FMCSA") found a direct causal link between driver retention and crash risk.[3] The survey asked safety managers and transportation experts to identify and rank personality traits believed to be most determinative of crash risk:[4]

- sensation-seeking[5]
- anger/hostility/aggression
- impulsivity/risk-taking
- intensity (i.e., "Type A")[6]
- agreeableness
- conscientiousness[7]
- stress level (neuroticism)[8]

The following have been found to be the "Big Five" retention-related personality traits:[9]

- extraversion
- openness to experience
- conscientiousness
- agreeableness
- emotional stability

"A *trait* is a personal characteristic that *differs among people* and tends to be *persistent over time*."[10] "Psychologists distinguish *traits* from *states*."[11] "Traits are enduring, often lifetime, characteristics, whereas states are temporary conditions."[12] Both traits and states may impact a person's suitability for long-haul driving.

Importantly, respondents in the FMCSA study believed driver assessment activities, including driver selection and post-selection evaluation, had a greater effect on safety than other non-assessment management activities.[13] In other words, the personality traits that a driver walks in the door with will be a better indicator of safety and employment duration than training or safety meetings.

Personality tests have a long history in the hiring process.[14] What is new, however, is the scale. With social media and internet search tools, it is possible to evaluate more candidates, amass more data, and peer more deeply into drivers' personal lives.[15]

Merely being compliant with the federal regulations, however, does nothing to root out those problem drivers. That is, section 391.41 of the FMCSA regulations, addressing physical qualifications for drivers, does not address a) personality traits, b) driver behaviors, or c) how those qualities may translate into on-road performance. The FMCSA's Pre-Employment Screening Program (PSP) only scratches the surface.

The guess, however, is that, at best, companies are searching driver's social media only post-accident, in instances of significant litigation and, even then, are doing so only superficially. The apparent logic employed is that (a) truck drivers are generally older and, thereby, less apt to use social media;[16] (b) truck drivers are too busy driving to use social media; and (c) few trucking companies or insurance carriers have the time or resources necessary to effectively monitor any particular driver's social media activity.

Those stereotypes are changing, however, because: (a) the driver pool must be replenished with younger, more tech-savvy, drivers; (b) new hours of service (HOS) regulations and electronic driver logs (EDL) rules are causing drivers to spend significantly more down-time away from home;[17] (c) social media, in general, continues to grow in popularity as new platforms emerge and technology improves;[18] (d) with those advancements, trucking companies are increasingly more likely to require drivers to have smart technology devices; and (e) emerging new data-mining technologies are unearthing a wealth of information and, in so doing, irrefutably tying certain data to particular behaviors.[19]

You can expect that drivers will be posting on social media far more frequently in the future. Monitoring those postings in some form or fashion may thwart, or at least help mitigate, substantial exposure. Culling information through data mining may ultimately result in increased driver retention rates while correspondingly preventing serious loss long before it happens.

Many studies have advocated an attempt to assess the "whole person" by using multiple data sources in an effort to capture a variety of safety relevant characteristics.[20] Social media is simply too powerful a tool to ignore as a source for driver personality traits and states – millions of dollars are at issue.

As a stark example of the potential costs of the failure to monitor personality traits and states, and thereby miss opportunities to avoid or mitigate the risk, recall the story of Lisa Novak, a combat pilot, decorated electronics warfare specialist, and astronaut.[21] The government spent millions of dollars training her. She was the mother of 2 kids and was on the verge of divorcing her husband one month before her biggest assignment: mission control specialist for a shuttle mission.[22] She drove virtually nonstop from Orlando to Houston with the intent to kidnap a woman she thought was a threat to another astronaut in whom she was interested.[23] She had weapons, a disguise, and a bunch of adult diapers so she would not have to stop to use the bathroom.[24] She faced attempted kidnapping and burglary charges and will likely never return to NASA. How was a highly accomplished astronaut, one in which so much was invested, capable of such an act? Seemingly, the stress of the mission, coupled with personal issues, caused her to snap.

Financial exposure from personality traits and states is very high in the trucking industry as well. An LTL (less than truckload) carrier in Michigan, for example, had a former driver post a bomb threat against the company via Facebook the day after the Boston marathon bombing of 2013, causing evacuations of several company facilities.

The questions then become (1) whether (and how) a trucking company or insurance carrier can maximize the use of data analytics, including social media, in a manner 100% in line with employer/employee legal requirements, to achieve a zero tolerance goal; and (2) what risks might you assume if you do not data mine?

Predictive Modeling

Many may be thinking that predictive modeling already provides a solution. It does, in part, but predictive modeling, by design, generally does not take advantage of the burgeoning information available on social media.

Predictive modeling is the process by which a model is created or chosen to try to best predict the probability of an

outcome.[25] In many cases, the model is chosen on the basis of detection theory to try to guess the probability of an outcome given a set amount of input data.[26] Most predictive modeling formulas, such as Avatar Fleet, Vigillo/IQ_Lab, or Exemplar Research Group, presently use structured data only – they do not use unstructured data such as social media.[27] Predictive modeling has proven to be very successful in reducing claims and increasing employee retention rates.

The present predictive modeling options do not employ social media in their queries. There are, however, significant lessons to be learned from predictive modeling as to what to look for when searching social media.

There are a handful of companies with their own predictive modeling techniques, but there appears to be a general consensus on what to look for. How each model teases out the respective qualities varies from company to company, but the key metrics appear universal and closely resemble those personality traits and states listed in the FMCSA study above. Thus, by way of example, Avatar Fleet bases its predictive modeling questions on 6 core competencies of a truck driver:

1) conscientiousness
2) customer focus
3) compliance
4) independence
5) integrity,
6) safety focus

Predictive modeling companies, however, base their processes on the mining of structured data, of which social media does not qualify. Yet the personality traits defined by predictive modeling formulas would seemingly also be readily identifiable in social media postings, even long after a driver is hired. The key, though, is that predictive modeling works, and the personality traits predictive modeling has defined can also be gleaned from a person's social media posts.

Mining Social Media Content

There is a seemingly endless array of social media to which your driver may post. Some of the more obvious, more well-known social media options are:

- Twitter
- Facebook
- Pinterest
- Snapchat
- MySpace
- Flickr
- Foursquare
- YouTube
- Google+
- LinkedIn
- Quora

Several others, including several geared specifically to long-haul truck drivers, include:

- www.fastertruck.com
- www.jobgripe.com
- www.thetruckersreport.com
- www.complaintnow.com
- www.ripoffreport.com
- www.truckersforum.net
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Many social media postings, whether posted directly by a driver or by a friend or family member, however, may not appear in a simple Google search. Thus, the issue arises of how one reasonably gathers the data and compiles it in a usable, workable, format.

The issue may simply be addressed by retaining a qualified private investigative service to run the queries for you. Such companies are generally skilled at finding hidden information. Other trucking companies use employment screening firms or retain ad agencies to perform social media checks from outside the company.

For a much deeper investigation, there are a growing number of companies in the emerging market of data mining. These companies not only assume the daunting task of searching all social media avenues, some companies claim to be capable of distilling trace data from numerous sources and aligning the data to demonstrate concrete patterns.

Predictive analytics and data mining activities generally include:[28]

- Sample the data by creating a target data set large enough to contain the significant information, yet small enough to process.
- Explore the data by searching for anticipated relationships, unanticipated trends, and anomalies in order to gain understanding and ideas.
- Modify the data by creating, selecting and transforming the variables to focus the model selection process.
- Model the data by using analytical tools to search for a combination of data that reliably predicts a desired outcome.
- Assess the data and models by evaluating the usefulness and reliability of the findings from the data mining process.

There are several companies in the space, including Vigillo (with its Athena product targeting trucking, specifically), SAS, Data Miners, Inc., and many others.[29] Data mining companies not only provide far more in-depth analysis and note demonstrative patterns, but they also provide the independent third-party separation from the employer that may sometimes be legally required (discussed below).

Retaining a data mining firm may not fit every company's budget; more rudimentary, yet thorough, social media searches may be done in-house. Nevertheless, an important element of legal protection is gained when the

responsibility is placed in the hands of an independent vendor.

Hiring Issues – What the Law Is

While social media can be a great tool to screen and monitor truck drivers, it can also cause legal issues, even for those with the best of intentions. Employers can be liable even if the tests or processes they use to screen social media inadvertently exclude protected groups from the hiring process.[30]

The biggest issue for hiring and using social media is that you can learn things about people that may disclose race, age, religion, national origin, pregnancy status, genetic information, or information on other protected groups. Additionally, employers who utilize social media may potentially waive any future argument that they were not aware of the person's protected status.[31]

Some employers have begun requiring applicants to provide social media login and password information during the application process. Eleven states have enacted social media or internet privacy laws affecting employers, including: Arkansas, California, Colorado, Illinois, Maryland, Michigan, Nevada, New Mexico, Oregon, Utah and Washington.[32] All but one of these states protect access to information for both current and prospective employees, with New Mexico only protecting the log-in information of applicants.[33] Michigan's law prohibits employers and prospective employers from requiring employees and applicants to grant access to, allow observation of, or disclose information used to access private internet and email accounts, including social media networks.

A summary of the laws of the various states is as follows:[34]

Legal Provision	States Recognizing Provision
Prohibits employers from requesting that employee add employer representative or another employee to his or her list of contacts (e.g., "friend")	Arkansas, Colorado, Oregon and Washington
Prohibits employers from requesting employee to access his or her personal social media account in the presence of the employer ("shoulder surfing")	California, Michigan, Oregon and Washington
Prohibits employers from requesting employee change the privacy settings on his or her personal social media accounts	Arkansas, Colorado and Washington
Specifically permits employers to view and access social media accounts that are publicly available	Arkansas, Illinois, Michigan, New Mexico, Oregon and Utah
Exception when access required to comply with laws or regulations of self-regulatory organizations	Arkansas, Nevada, Oregon and Washington
Exception for investigations of employee violation of law or employee misconduct	Arkansas, California, Michigan, Oregon, Utah and Washington (Colorado and Maryland limit this exception to investigation of securities or financial law compliance)

Endnotes

1 Mark G. Gardner, *Driver Selection is Everything*, Avatar Fleet White Paper, First Quarter (2011).

2 R. Knipling, S. Burks, K. Starner, C. Thorne, M. Barnes, and G. Bergoffen, *Driver Selection Tests and Measurement, A Synthesis of Safety Practice*, CTBSSP Synthesis 21, sponsored by the FMCSA (2011), at 3.

3 CTBSSP Synthesis 21, at 19.

4 CTBSSP Synthesis 21, at 9.

5 Sensation-seekers have been found in studies to be strongly associated with violations of the rules (e.g., speed limits) and are generally more susceptible than other drivers to fatigue and drowsiness, as they seek more stimulation to keep them awake. CTBSSP Synthesis 21, at 10.

6 "Type A individuals often exhibit life stress both at home and at work, are quickly irritated by other drivers, tend to dehumanize other drivers, and express anger outwardly rather than inwardly. For them, the shell of a car or truck cab can be an insulated and 'safe' environment from which to project anger and hostility." CTBSSP Synthesis 21, at 11.

7 "Conscientious people have a strong sense of right and wrong and believe in an obligation to act accordingly. Thus, they tend to be careful, scrupulous, responsible, and reliable." CTBSSP Synthesis 21, at 11.

8 "Neuroticism is a personality trait characterized primarily by anxiety and stress. Other characteristics include irritability, discontent, self-consciousness, and moodiness." "Chronic stress levels can also be a true personality trait . . . ." Thus, "applicant stress level might be seen as an enduring personality characteristic." CTBSSP Synthesis 21, at 12.

9 CTBSSP Synthesis 21, at 19.

10 *Id.* at 8.

11 *Id*.

12 *Id*.

13 *Id.* at 2.

14 Joseph Walker, "Meet the New Boss: Big Data; Companies Trade in Hunch-Based Hiring For Computer Modeling," *The Wall Street Journal* (Sept. 20, 2012).

15 *Id*.

16 Jane Clark, "Commentary: The Ever-Pressing Need for Young Drivers and Technicians," www.TruckingInfo.com (December 2013).

17 *See, e.g.*, Betsy Morris, "Meet the Truck Driver of 2013," *The Wall Street Journal* (Nov. 14, 2013).

18 It has been reported that if Facebook were a country, it would be the world's third largest.

19 Data analytics are becoming so prevalent that some lending companies are mining social media to help determine a borrower's creditworthiness by looking at things such as whether the applicant posted about being terminated from a prior job. Stephanie Armour, "Borrowers Hit Social-Media Hurdles," *The Wall Street Journal* (Jan. 10, 2014).

20 CTBSSP Synthesis 21, at 62.

21 John Medina, *Brain Rules: 12 Principles for Surviving and Thriving at Work, Home, and School* (Pear Press, 2008), at 296.

22 *Id*. at 297.

23 *Id*.

24 *Id*.

25 Wikipedia for "predictive modeling."

26 *Id*.

27 *See* CTBSSP Synthesis 21, at 32+ for several other predictive modeling programs available.

28 T. Patel, W. Thompson, C. Stephens, *Data Mining 101: How to Reveal New Insights in Existing Data to Improve Performance*, SAS webcast summary.

29 See http://www.kdnuggets.com/companies/consulting.html for a more comprehensive list of data mining companies.

30 *Walker*, *supra*.

31 Adam Forman & David King, "#Winning with Social Media" (ICLE, 2012), at 12-5.

32 Elizabeth Dunning, *Myriad of Social Media Privacy Laws Create Havoc for Multi-State Employers* (Holland & Hart, July 22, 2013).

33 *Id*.

34 *Id*.

Attorney-Client Privilege Protections and Employer-Provided Technology:

When Does the Employee's "Expectation of Privacy" End and When Do You, as Counsel, Have an Obligation to Warn the Client?

By: Salina M. Hamilton, Scott A. Petz, Michelle L. Alamo and Ariana F. Deskins, *Dickinson Wright, P.L.L.C.

Executive Summary

Employees' communications with their personal counsel could lose their privileged status if the communications were generated with employer-provided technology. Factors to consider are whether (a) the employer has a policy banning personal use; (b) the employer monitors computer usage or emails; (c) third parties have access rights to computers or emails; and, (d) the employee had notice of computer usage and monitoring policies. The American Bar Association has issued a formal opinion advising attorneys to warn their clients that attorney-client privilege regarding communications may be waived if employer-generated technology is used.

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Introduction

Given changing workplace dynamics and the growing prevalence of work performed off-site, the distinction between "work" and "personal" time is often blurred. These blurred lines create unique problems for courts when lawsuits arise between employers and employees. One growing issue is the impact on the attorney-client privilege when employees use company technology to communicate with their personal attorneys, especially regarding workplace complaints. Are such communications between the employees and their personal attorneys privileged? Or have the employees waived the attorney-client privilege simply by using employer-provided technology? The answer often comes down to whether the employees had an "expectation of privacy" when the communications were sent. Counsel representing an employee may have an obligation to warn the client about the risks of using employer-provided technology to communicate.

The Client's "Expectation of Privacy": *Asia Global* Factors

To determine whether employees have an expectation of privacy in their personal communications, many courts look at the factors and reasoning employed in *Asia Global Crossing, Ltd.*,[2] in which the Bankruptcy Court for the Southern District of New York considered whether a bankruptcy trustee could compel the production of e-mails sent by company employees to their personal attorneys on the company's e-mail system. In analyzing the potential waiver of the attorney-client privilege, the court looked at four factors to "measure the employee's expectation of privacy in his computer files and e-mail":

(1) Does the corporation maintain a policy banning personal or other objectionable use?
(2) Does the company monitor the use of the employee's computer or e-mail?
(3) Do third parties have a right of access to the computer or e-mails?
(4) Did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?[3]

These factors provide a useful structure in assessing the methodology courts may employ to determine whether privilege protections exist or have been waived.[4]

Factor 1: Bans on Personal or Objectionable Use

As a general matter, courts often find that the attorney-client privilege has been waived if the emails were sent in contravention of a policy banning personal or extraneous use of company software or devices and a monitoring policy exists giving the employer the right to monitor communications. As one court noted, "[a]n outright ban on personal use would likely end the privilege inquiry at the start."[5] Policies must be clear and unambiguous; vague language or unclear policies may be ineffective to create waiver of the attorney-client privilege.[6] When policies are in effect, employees will likely be deemed to have no expectation of privacy when using company technology; and information and documents created, received, saved, or sent on employer-issued computers or communication systems will be the property of the employer.[7] Without such a policy, courts are more inclined to find that an employee's communications retain privilege protections even if sent using employer-issued technology.

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Factor 2: Monitoring Policies

As to the second factor, many courts have concluded that an employer's reservation of the right to review or monitor destroys any reasonable expectation of privacy regardless whether the employer actually does, in fact, monitor such communications.[8] However, some courts choose to examine the degree of actual enforcement of the monitoring policies before determining whether there was a reasonable expectation of privacy.[9] Ultimately, however, as the law has developed, courts have increasingly found that this factor is satisfied when an employer merely reserves the right to monitor an employee's electronic communication.[10]

Factor 3: Third-Party Rights of Access

When third-parties, such as the employer, have a right to access the communications, courts are less likely to find that employees have a reasonable expectation of privacy. For example, in instances where employee communications are stored on company servers, such as by using company email accounts, courts are more inclined to find waiver of the privilege because employers clearly have access to such communications.[11] In contrast, in circumstances where employees use personal, web-based email accounts that are password-protected (e.g., Gmail or Yahoo!)—to which employers generally do not have ready access—courts are divided about whether the use of a personal email account via employer-issued technology results in a waiver of the privilege.[12] As such, whether courts find a waiver may depend on the manner in which the employer obtains the employee's communications and the extent to which an employee should have been aware of that methodology, such as "whether the employer used forensic recovery techniques, deployed special monitoring software, or hacked the employee's accounts or files."[13]

Factor 4: Notification or Awareness of Policies

A fourth consideration is whether the employee received notification or had knowledge that the communications on employer-issued technology were being monitored or accessed. If an employee had actual knowledge of such policies and chose to send privileged communications anyway, the employee will likely be deemed to have waived the privilege. Though waiver is most likely to be found when an employee has actual knowledge, such as by signing an acknowledgement of the policy,[14] some courts have indicated that even constructive knowledge may be sufficient to demonstrate waiver.[15] In contrast, other courts have refused to find waiver simply because an employee "arguably *should* have known about a specific company email policy," requiring a greater showing of awareness before finding waiver.[16]

That being said, with the growing familiarity of technology in the modern workplace, courts are becoming more inclined to impute all employees with some level of constructive knowledge that their communications are, or can be, monitored by employers when using employer-issued technology.[17] As explained by the federal district court in Idaho: "It is unreasonable for any employee in this technological age . . . to believe that her e-mails, sent directly from her company's e-mail address over its computers, would not be stored by the company and made available for retrieval."[18]

Additional Factors and Considerations – Location of Use and Public Policy

In addition to the four *Asia Global*

factors, courts also consider a variety of other factors on a case-by-case basis to assess whether employees' communications with their personal counsel are privileged, including the employees' location at the time of use and potential public policy considerations. To that end, when employees use employer-issued technology outside the office and without accessing the company's servers, employees are less likely to be deemed to have waived the privilege because there is a greater expectation of privacy.[19] Additionally, in at least one case out of the Western District of Washington, the court refused to find waiver as a matter of public policy—without consideration of other factors—holding that "[n]otwithstanding . . . [a] policy in its employee manual, public policy dictates that such communications [made through personal web-based email accounts] shall be protected to preserve the sanctity of communications made in confidence."[20]

The Attorney's Duty to Warn: ABA Formal Opinion 11-459

In recognition of this growing issue, the American Bar Association (ABA) issued Formal Opinion 11-459 on August 4, 2011 to address an attorney's obligations to protect the confidentiality of an employee's communications if the employee uses a business e-mail address, a workplace computer, or other employer-owned telecommunications devices to communicate with the attorney:

> A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access. *In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party.*[21]

This ABA opinion advises attorneys to warn employee-clients about the potential for waiver if the employee uses employer-issued technology to communicate.

Conclusion

As reliance on technology continues to grow, and as the lines between "work" and "personal" time continue to blur, the effect of employer-issued technology on the attorney-client privilege will undoubtedly become an even hotter issue. As counsel, one should be prepared to discuss this issue, and the associated risk, with one's client from the onset of the representation and continue to remind the client of it as necessary throughout the representation.

Endnotes

* The authors would like to thank Hannah Reisdorff for her significant contributions to this article as a 2014 Dickinson Wright Summer Associate.

2 *In re Asia Global Crossing, Ltd*, 322 BR 247, 257 (Bankr, SDNY, 2005).

3 *Id.* at 257.

4 *United States v Finazzo*, unpublished decision of the United States District Court for the Eastern District of New York, issued February 19, 2013 (Docket No. 10-CR-457) ("Although the test is only advisory, because it is 'widely adopted' by many courts, it is a good framework with which to conduct this highly fact-dependent analysis.").

5 *Id.*

6 *Asia Global*, 322 BR at 259-261 (holding that, because the evidence was "equivocal" about the existence of a corporate policy banning personal use of e-mail and allowing monitoring, the court could not conclude that the employees' use of the company e-mail system eliminated any applicable attorney-client privilege).

7 See, e.g., *Goldstein v Colborne Acquisition Co*, 873 F Supp 2d 932, 937 (ND Ill, 2012) (recognizing that, where a "third party can dictate the means of communication, an employee is less reasonable in believing it secure"); *Aventa Learning, Inc v K12, Inc*, 830 F Supp 2d 1083, 1109 (WD Wash, 2011) (finding no reasonable expectation of privacy where company "discouraged" personal use through a policy stating its systems "should generally be used only for . . . [company] business"); *Hanson v First Nat'l Bank*, unpublished decision of the United States District Court for the Southern District of West Virginia, issued October 31, 2011 (Docket No. 5:10-0906) (finding no reasonable expectation of privacy despite policy allowing "[i]ncidental and occasional personal use" of its systems); *Scott v Beth Israel Med Ctr, Inc*, 17 Misc 3d 934, 936-937 (NY Sup Ct, 2007) (finding this first factor met when the defendant's email policy policy specifically provided that that company technology "should be used for business purposes only").

8 See discussion of cases in *Finazzo*, at 26-28.

9 See, e.g., *Alamar Ranch, LLC*, unpublished decision of the United States District Court of Idaho, issued 2009 (Docket No. CV-09-004-S-BLW) (determining that the employee's knowledge that the company had actually monitored another employee's email on one occasion could contribute to a finding that attorney-client privilege did not attach to emails the employee sent to her attorney from an employer-issued computer using her company email address). Also, in *Curto v Medical World Communs*, Inc, unpublished decision of the United States District Court for the Easter District of New York, issued May 15, 2006 (Docket No. 03CV6327), the Eastern District of New York found that the inconsistent enforcement of the employer's email monitoring policy led to a "false sense of security" which "lulled employees into believing that the policy would not be enforced." Though the employer had only monitored employees' email on four occasions—including one time when an employee was suspected of playing online poker from an employer-issued computer and another employee who was suspected of downloading pornographic material—the court found that there was no error by the lower court in considering the actual rate of enforcement of the email monitoring policy when determining whether the employee had waived the attorney-client privilege. *Id.* at 25-26.

10 See, e.g., *In re Info Mgmt Servs, Inc Derivative Litigation*, 81 A 3d 278, 289 (Del Ch, 2013) (holding that if the employer has clearly and explicitly reserved the right to monitor work email, then the absence of past monitoring or a practice of intermittent or as-needed monitoring comports with the policy and does not undermine it); *Finazzo*, at 26-27 (noting

that reservation of the right to review an employee's electronic communication destroys any reasonable expectation of privacy, whether or not the employer routinely reviews the e-mails).

11 See, e.g., *Alamar Ranch, LLC*, at 11 ("It is unreasonable for any employee in this technological age . . . to believe that her emails, sent directly from her company's email address over its computers, would not be stored by the company and made available for retrieval.").

12 See, e.g., *Curto*, at 8-9 (holding that an employee who emailed her attorney from her personal email account on her employer-issued laptop, even when she signed an acknowledgement of the employer's monitoring policy that provided that employees expressly waived any right of privacy in anything they created, stored, sent, or retrieved on the computer or through the Internet or any other computer network, did not in fact waive the privilege); see also *Nat'l Econ Research Assocs*, unpublished decision of the Massachusetts Superior Court, issued August 3, 2006 (Docket No. 04-2618 BLS2), at 3-4 (holding that the employee did not waive attorney-client privilege because, among other things, the monitoring policy did not even implicitly suggest that employers would access personal email accounts); *Stengart v Loving Care Agency*, 201 NJ 300, 314; 990 A 2d 650 (2010) (holding that the employee did not waive attorney-client privilege because she had a reasonable expectation of privacy in the absence of a policy that expressly addressed the monitoring of personal email accounts). But see *Long v Marubeni Am Corp*, unpublished decision of the United States District Court for the Southern District of New York, issued October 19, 2006 (Docket No. 05 Civ. 639) (holding that there is no attorney-client privilege for personal email sent from a work computer when the policy regarding email monitoring is made clear to employees).

13 See *In re Info Mgmt Servs, Inc*, 81 A 3d at 291.

14 See *Finazzo*, at 11-12; *Scott*, 17 Misc 3d at 937.

15 *In re Info Mgmt Servs, Inc*, 81 A 3d at 291-92 ("If the employee had actual or constructive knowledge of the policy, then this factor favors production."); see also *Scott*, 17 Misc 3d 934 at 942 (rejecting employee's effort to maintain that he was unaware of this employer's email policy barring personal use because, as an administrator, the employee was deemed to have constructive knowledge of the policy).

16 See *Mason v ILS Techs*, LLC, unpublished decision of the United States District Court for the Western District of North Carolina, issued February 29, 2008 (Docket No. 3:04-CV-139-RJC-DCK) ("A more convincing showing of an effective notification of the . . . email policy to Plaintiff, or some affirmative evidence of Plaintiff's waiver of privilege, should be required before this Court allows private attorney-client communications to be subject to discovery.").

17 *Alamar Ranch, LLC,* at 11.

18 *Id.*

19 See *Curto*, at 16-17; *Nat'l Econ Research Assocs v Evans*, at 12-13 (explaining that employees who are frequently required to travel for their jobs would be burdened by an "impractical" and "extremely difficult" policy that allowed employers to monitor personal email accounts accessed on employer-issued computers while they were on the road).

20 See *Sims v Lakeside School,* unpublished decision of the United States District Court for the Western District of Washington, issued September 20, 2007 (Docket No. C06-1412RSM).

21 ABA Formal Opinion 11-459, (August 4, 2011), available at http://www.americanbar.org/content/ dam/aba/administrative/professional_responsibility/11_459_nm_formal_opinion.authcheckdam.pdf (emphasis added).

LJAP Offers Assistance on a Broad Range of Concerns

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LJAP Program Administrator

Proactive, expansive, confidential, and free are all words that describe a very important State Bar member service. The Lawyers and Judges Assistance Program (LJAP), one of the oldest lawyers' assistance programs in the country, employs a total wellness approach in assisting individuals who are faced with issues related to depression, gambling, substance use disorders, stress, marriage and family issues, career transition, life stage adjustment, and other general wellness issues. Since 1979, the program has been a confidential source of guidance and support to attorneys, judges, and law students throughout the State of Michigan.

Through LJAP's confidential toll-free phone line, lawyers, or those concerned about them, can receive information about ways to address substance abuse and other mental health issues impacting a lawyer's ability to ethically practice law – including referral information and the opportunity to schedule an in-person conversation that may lead to assessment and treatment recommendations.

In recent years LJAP has shifted its focus from merely reactive to preventative. By providing education and support for individuals, families, law schools, and employers, LJAP can assist in circumventing trouble, and/or begin to assist program participants toward health through difficult times, minimizing harm to individuals, families, and the community.

Highly skilled professionals, experienced in dealing with substance use and mental health disorders as well as general wellness issues, are working to ensure that bar members and students are supported, and the public is protected. The LJAP staff of Program Administrator Tish Vincent, Clinical/Administrative Assistant Jen Clark, and Case Monitors Molly Dean and Molly Ranns, are devoted to helping individuals get back on track before they begin to experience formal consequences related to difficulties that they face. Where formal consequences have come to fruition, LJAP is ready to provide assistance via its Attorney Monitoring Program.

MCR 9.114(B) allows a lawyer who has been investigated for professional misconduct relative to a mental health and/or substance use disorder to enter into "contractual probation," which is an agreement with the attorney in question that is implemented by the Attorney Grievance Commission and facilitated in cooperation with LJAP. Under MCR 9.114(B) a lawyer may consent to a period of probation not to exceed three years. Every attorney referred by the Attorney Grievance Commission to LJAP has an opportunity to address what may be the underlying cause of misconduct. For many, the probationary/monitoring experience results in lasting and positive transformation.

Similarly, law students sometimes incur legal infractions that may be related to substance use and/or mental health disorders. Some students get referred to LJAP as

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a result of reporting these infractions to their law schools. Others may be referred once they have begun the bar application process and learned that those offenses will impact their character and fitness evaluation. Because law students are the future of the legal profession, LJAP has sought to extend its preventative education to this population. By continuing to develop and deliver preventative educational programming for students, LJAP seeks to support the students' strengths and help them to eliminate any budding difficulties before they can impact their abilities as lawyers representing clients.

LJAP is a service for State Bar members that is supported by member dues. The LJAP staff recognizes that the issues that bring lawyers, judges, and students to the program are deeply personal and must be handled with the utmost discretion. All inquiries and services are handled in accordance with applicable federal and state privacy guidelines. For more information about the LJAP program and its services, view our website at http://www.michbar.org/generalinfo/ljap or call our confidential help line: 1-(800) 996-5522.

Avoiding the Uncertainty of a Medical Malpractice Trial[1]

By: Richard A. Bone, Esq., *Bone, Bourbeau, Lizza & Spagnuolo PLLC*

Alternative dispute resolution ("ADR") provides viable and attractive alternatives to jury trials as a means of resolving medical legal disputes arising out of allegations of professional negligence. The two primary alternatives to a jury trial for medical malpractice cases are mediation and binding arbitration.

When your client goes into court for the resolution of alleged professional negligence, they are putting their fate into the hands of six people who usually have no medical background. If they do, they are often removed by a peremptory challenge. That leaves the parties with a jury made up of individuals who have no medical knowledge, other than their own personal experiences, and would rather be doing something else.

In some locations as many as one half of those summoned for jury duty refuse to show up. Studies have shown that those who do appear are often angry at the inconvenience and the amount of time involved, especially in a medical malpractice case. Their anger is often manifested in the verdict, producing widely variable and unpredictable results. Many jurors are simply not capable of fully understanding the medical issues involved in these cases.

As a result, cases are decided on peripheral issues that have nothing to do with the facts, the medicine, or the law. Also, with the internet available on smart phones, notwithstanding the admonition by the court that no research can be done by the jury, the temptation is too great for some and the internet is searched. I have personal experience of this happening as reported by another juror on the panel. This usually calls for a mistrial or appeal only to prolong the litigation and incur more expense. Despite strict instructions from the court, more jurors are choosing to become "experts" on the issues and are bringing into the courtroom information never presented within the rules of evidence.

The role of geography in determining the outcome of medical liability cases is another reason to choose ADR. Counties within the state have vastly different patterns in jury verdicts. I have tried a case in a county in Michigan where a jury verdict in a medical malpractice case has never been rendered for a plaintiff. We also know that in some counties very large verdicts are rendered for plaintiffs. ADR alleviates this uncertainty. Virtually identical fact patterns can produce extremely disparate results depending upon where the case is tried.

The cost of taking a medical malpractice case to trial is very expensive. Expert witness fees, depositions, securing and organizing voluminous medical records and medical illustrations, and other costs can result in out-of-pocket expenses that would be prohibitive for many plaintiffs and a significant factor for malpractice insurance carriers. Plus potential sanctions from case evaluation can also be a significant factor.

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Time is equally important. In some jurisdictions, cases can be prepared and tried relatively quickly. In others, it can take years to conclude with the potential for an appeal to delay the process even longer.

As a result medical liability cases have become a gauntlet and an endurance contest that, when combined with the unpredictable results, makes ADR an increasingly more palatable option for resolution.

The ADR options remove many of the above mentioned concerns. The parties participate in mediation and have a voice in the proceedings and a say in the ultimate outcome. Mediation is also voluntary, meaning that although mediators may often be asked to express their opinion, neither party can be forced to settle a case at mediation.

Often, by agreement if the case is not settled, the mediator will place a "mediator's number" on the case which would have the same effect as though the dispute was case evaluated. I think this can be beneficial in that the mediator, often with subject matter expertise, who should have a good understanding of the case, usually can put a more meaningful number on the case for both parties to seriously consider. This can be an important number for both. Mediation is not perfect in the sense that usually one party leaves with less than expected and the other pays more than expected. It is, however, quick, cost-effective, informal, voluntary and final.

Arbitration also has desirable characteristics, however it is typically binding and final, with a few exceptions. It is cost effective, less formal than a trial and vastly more predictable than a jury. Both mediation and arbitration eliminate the previously mentioned vagaries and pitfalls of jury trials. They eliminate the exorbitant costs to the parties and the years it often takes to get to trial. Arbitrations also tend to weed out extreme results and those based on peripheral issues that have nothing to do with the medicine.

There is also a relatively new twist on mediation and arbitration and it is called MED/ARB. This is a process wherein the case proceeds to mediation in the normal fashion, and if the case does not settle the mediator then becomes the arbitrator and hears the case as the arbitrator with binding authority. I will not go into detail on MED/ARB in this article but only mention it so that you are aware of this increasingly popular procedure. This type of ADR has been conducted with a great deal of success. Going into mediation the parties know the case is going to be resolved either by settlement or an arbitration award, and it brings finality to the process with all of the advantages listed above.

Predicting the role of ADR in medical liability cases is difficult but the prevailing opinions are that it is becoming more and more prevalent in medical malpractice litigation. If all parties come to the mediation in good faith to settle the case, in my experience, ADR is very effective.

The difficulties of resolving medical liability cases by jury trials are becoming more and more pronounced. Choosing ADR to resolve this type of litigation has proven to be beneficial, and I am sure will continue to be into the future.

Endnotes

1 Previously published in the *Detroit Legal News*.

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Technology Corner: Uber, Michigan Courts, and Serial

As a new author for the *Michigan Defense Quarterly* I would like to say I'm honored to be writing this. I currently work on the emails you receive and also the MDTC website updates. I am going to be writing about the exponentially expanding industry of digital technology. Computers now surround us nearly 24 hours of each day; with mobile ones in our pockets and even quite advanced ones in our cars, there are many functions for the machine. What I hope to convey to you through these articles is the new and noteworthy uses or information that this technology is allowing us to access. As a young college student, tech savvy people communicating constantly surround me and I hope to apply some of this information that I hear to you lawyers. In this article I will be discussing two mobile applications: Uber and Michigan Courts. Also, I will be delving into the podcast Serial.

Uber

When is the last time there was a huge change in the taxi industry? There is a relatively new taxi service that is making a big name for itself. This taxi service is Uber. Uber is set up quite different than most taxis. An average taxi ride consists of many variables like calling or seeing a taxicab, having cash, and leaving a tip. With Uber you do none of these. The steps to an Uber ride are the following:

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Step 1: Download Uber via The Apple App Store or Google Play
Step 2: Create an account tied to your credit or debit card
Step 3: A GPS map will appear where you can tap to set your pickup location
Step 4: Request your ride and a driver will accept
Step 5: Enter the address or name of your destination
Step 6: After pickup the driver will be shown where you are going and your app will show the route with your ETA

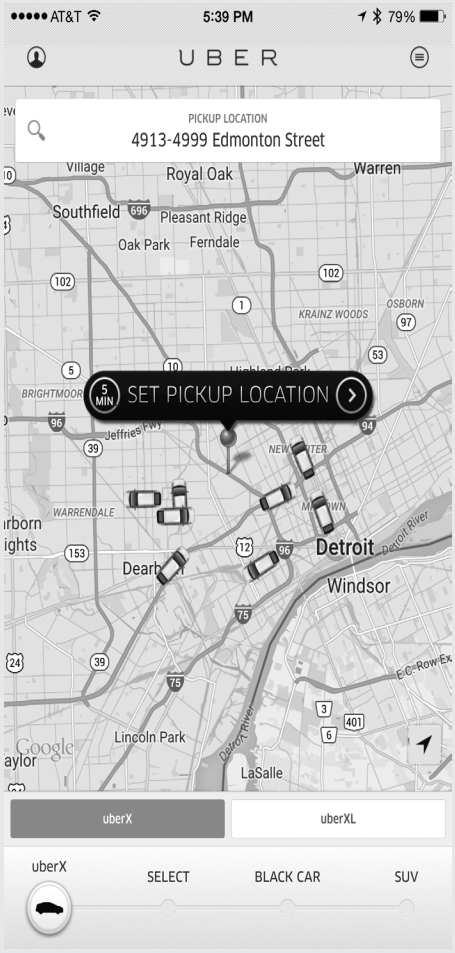
The app will charge the card that is tied to your account and send you a receipt after pickup. Uber also supports split fares. If you add people to your route, the cost will be equally dispersed among the riders.

The original concept of a taxi gets twisted even more when it comes to drivers. Uber does not search for drivers and hire them. Instead, anyone can sign up as a driver on their website. They ask you a few questions, get the documents needed, and give you a setup smartphone to use. As a driver you can decide when you want to work, and use your own vehicle if it meets the requirements.

Overall the app connects riders and drivers, transfers funds without cash or tips, and is quite an open system for transportation. This technology based taxi service is booming right now. Uber is now doing business in over 50 countries across the globe.

Controversy does surround the company though. It is banned in Spain and two cities in India. Also, taxi drivers, taxi companies, governments, and even some Uber drivers continuously protest. They believe it is an illegal taxicab operation that lacks passenger safety and participates in unfair business practices. I will let you decide if it is ethical or not, but as of now, Uber does not break any United States law.

For those of you who live or work in one of the larger Michigan cities Uber is quite developed in those areas. The photo of the app is a screenshot from my phone of a randomly selected pickup location I tapped in Detroit. As you can see there are eight drivers within my pickup location: the closest one being 5 minutes away. I did this in all the major cities around the state and found at least a couple drivers in each one.



When it comes to smaller towns you seem to be out of luck at the moment. The app does not let you pinpoint a location if there are not any drivers available to pick you up. Who knows though, with drivers signing up on their own there could be a driver in your town. So if you are in need of a taxicab and carry a smartphone, consider giving Uber a shot.

Michigan Courts

The Michigan courts now have an app! If you have an iPhone or Android smart phone this could be a great resource for you. The app includes the Michigan bar's attorney directory, PACER, Michigan rules of procedure, federal rules of procedure, local rules for Michigan's state and federal courts, Michigan's Citation Manual, and driving directions to all of Michigan's federal courthouses. Access to information like this on a mobile device can save you time and help you out when you're on the move.

"Michigan Courts [is a] Perfect app for any lawyer who wants or needs to have important court rules, rules of evidence and other procedural requirements available at a moments notice. Outstanding resource for bench books other judicial resources. Easy to use and relevant," said Robert German in the review section on Google Play. It is titled "Mich Courts" on the Apple App Store and "Michigan Courts" on Google Play. Both versions are priced at $2.99. If these tools are useful to you it could be worth the couple bucks!

Serial Podcast

Serial is a podcast from the creators of This American Life. If you do not know what This American Life is it is a weekly public radio show and podcast that is listened to by millions. According to Apple, Serial has the record for the fastest podcast to hit 5 million downloads and streams. As of February 13, 2015, it is still number 2 on the overall top charts and season one has been completed for almost two months.

Serial is about a 1999 crime that took place in the city of Baltimore, Maryland. A teenage girl name Hae Min Lee went missing one day after school. Her ex-boyfriend, Adnan Syed, and Classmate, Jay, were arrested six weeks later for her murder. Jay claims that Adnan murdered Hae and came to him after it was done. He then proceeded to help Adnan bury Hae because Adnan threatened him.

Jay's story is completely different than what Adnan says though, and the facts in Jay's testimony do not exactly add up. Adnan to this day sits in federal prison, claiming innocence for the murder of his ex-girlfriend. This is all I will describe because I do not want to ruin the story. The podcast is told by Sarah Koenig, who explores the truths and lies of this case to determine what really happened back in 1999.

You can listen to the podcast via Apple's podcast app or on serialpodact.org. I recommend going to the website. It is very easy to use; also, it has documents and photos from the case that you can view. Personally, I have listened to all of season one and it was very intriguing. There are a lot of questionable parts of the case that keep you hooked the whole time. Season one is complete and the next season will be on a different case. The podcast is free to listen to and if you are looking for a good story, I would definitely recommend it.

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MDTC Legislative Report

As I complete this report on January 13th, the 97th Legislature has passed into history and the members of the 98th are poised for swearing in. Election Day was cold and wet, and great numbers of voters who might have altered the outcome stayed at home, as they often do when the sun doesn't shine. Those who did show up decreed a Republican bonanza, and thus, the balance of power will remain the same for the next two years. Governor Snyder has now been sworn in for his second term amid speculation that he might be one to keep in mind as a candidate for the Presidency in 2016. The Republicans have increased their already comfortable majorities in both houses of the State Legislature – 27 to 11 in the Senate, and 63 to 47 in the House. The term limits adopted in 1992 have required a change of leadership in the Legislature. For the next two years, Representative Kevin Cotter, a third-term Representative from Mt. Pleasant, will serve as House Speaker. Arlan Meekhof, a veteran Senator from Ottawa County, will be the new Senate Majority Leader.

2014 Public Acts

With the balance of power unchanged, there was little that had to be accomplished in the lame duck session. A great number of bills were passed and sent to the Governor in the last two weeks of the session, but few of these were of any great significance. A number of controversial issues were discussed, but most were ultimately left for another day. The most significant issue to be addressed was the troublesome question of how to raise the funding needed to fix Michigan's crumbling roads and bridges. In the last two days of the session, the leadership reached a compromise on that issue which will require the voters to decide whether to approve an increase in the state sales tax. If they do not, the new Legislature will be back to square one.

As of this writing, there are 477 public acts of 2014, with a great many bills still awaiting the Governor's review. The new acts which may be of interest include:

2014 PA 345 – Senate Bill 991 (Pappageorge – R) has created a new "right to try act." This new act will **allow an opportunity for eligible patients suffering from an "advanced illness" to have access to medical treatments which have not yet received final FDA approval.** The act would allow, but not require, manufacturers to make these experimental treatments available outside of an FDA approved clinical trial, and would allow, but not require, health care providers and health insurers to make those treatments available and cover their cost in accordance with the act's requirements. The experimental treatments would be made available by manufacturers without compensation, but patients could be required to pay costs of manufacturing the experimental drug, product or device. The new act would also specify that, in the absence of gross negligence, willful misconduct or other sufficient cause, the recommendation or administration of experimental treatments in accordance with these new provisions could not be considered cause for investigation of, or disciplinary action against, a health care provider. 2014 PA 346 – House Bill 5649 (Jenkins – R) has amended provisions of the Public Health Code to provide the **same protection against disciplinary action for health care providers and licensed health facilities**.

2014 PA 314 – Senate Bill 857 (Schuitmaker – R) has amended the "Good Samaritan Act" to add a new section MCL 691.1503, **providing limited immunity from civil liability for an individual, other than a licensed health care provider, who administers an "opioid antagonist" to treat another person whom the individual believes, in good faith, is suffering the immediate effects of an opioid overdose.** This initiative also includes 2014 PA 312 - House Bill 5404 (Crawford – R); 2014 PA 313 - House Bill 5405 (Forlini – R); and 2014 PA 311 - House Bill 5407 (Forlini –R), which have amended several sections of the Public Health Code to facilitate the availability of opioid antagonists and their use in emergencies for **treatment of opioid overdoses by first responders and others**, and to provide immunity from civil and criminal liability for those who do so. 2014 PA 462 - Senate Bill 1049 (Schuitmaker – R) has created a new act which will **facilitate the use of opioid antagonists for emergency treatment of opioid overdoses by law enforcement**

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officers and provide immunity from civil and criminal liability for those who do so in good faith.

2014 PA 360 – House Bill 5217 (Walsh – R) has amended the Revised Judicature Act to add a new Section MCL 600.2956a, which will provide a **limitation of civil liability for employers who hire a parolee who has been issued a "certificate of employability"** by the Department of Corrections pursuant to MCL 791.34d, added by 2014 PA 359 – House Bill 5216 (Kesto – R)**.**

2014 PA 394 – House Bill 4118 (Farrington– R) and 2014 PA 395 – Senate Bill 275 (Hune – R) have amended the Social Welfare Act to **require the Department of Human Services to establish and administer a pilot program for suspicion-based substance abuse screening and testing of welfare recipients** which may disqualify recipients from eligibility for benefits in certain circumstances.

HJR UU – (Haveman – R). This house joint resolution, approved by the requisite two-thirds vote of both houses on the last day of the session, proposes amendments to the Michigan Constitution (Article 9, §§ 8, 10 and 11) to **raise additional sales and use tax revenue for fixing the roads.** The proposed amendments, which will be presented to the voters for approval in a special election to be held on May 5, 2015, would increase the maximum sales tax and use tax from their current level of 6% to 7%; exempt sales of gasoline and diesel motor fuel from the general sales tax after October 1, 2015; and dedicate a portion of the increased taxes to the school aid fund and revenue sharing with townships, cities and villages. Several companion acts required for implementation of the funding compromise are contingent upon voter approval of the proposed constitutional amendments.

As I mentioned at the outset, there are still a considerable number of bills which have been presented to the Governor but have not yet been approved or disapproved as of this writing. Approval cannot be assumed with respect to all of them; Governor Snyder vetoed eight bills in the last week of 2014. The bills of interest that become the last public acts of 2014 will be addressed in my next report.

New Initiatives

All of the bills that did not receive final approval before the last adjournment of 2014 have now died. Many of these will be reintroduced as bills for the new session in the weeks to come, but there have been no sessions of the new Legislature, and thus, there has not yet been any introduction of new bills, as of this writing. The agendas are still being planned, and little has been said publicly so far about what is in store. All that can be assumed for now is that the program will have its interesting moments, as always.

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Medical Malpractice Report

Expert Testimony

Elher v Misra, ___ Mich App ___ (2014).[1] Application for leave to appeal to the Supreme Court is pending.

The Facts: The defendant general surgeon was sued for malpractice after injuring the common bile duct during a laparoscopic gall bladder removal. The plaintiff's expert witness opined that it is virtually always a breach of the standard of care to injure the common bile duct unless there is extensive scarring or inflammation. The expert testified that there was no medical literature he could cite to support the assertion.

The defendants' expert disputed the blanket assertion that it was essentially always malpractice to have an injury to the common bile duct during an otherwise uncomplicated surgery, and testified that sometimes such an injury might be the result of malpractice, and sometimes it might not be.

Defendants filed a motion for summary disposition arguing, in relevant part, that plaintiff's expert's opinion was not reliable under MRE 702 because plaintiff (and the expert) did not provide any scientific literature or data to support it. Defendants, on the other hand, provided a number of articles supporting the proposition that a common bile duct injury was an inherent risk of the laparoscopic gall bladder procedure, and that the majority of injuries occurred without any negligence. The trial court granted defendants' motion, agreeing that the plaintiff's expert's testimony lacked reliability under MRE 702.

The Ruling: The Court of Appeals, in a 2-1 decision (authored by Judge Gleicher and joined by Judge Beckering), reversed. The court held that because the facts were not in dispute, nor were the plaintiff's expert's qualifications, and the issue was whether the defendant surgeon's acts breached the standard of care, the issue was "outside the realm of scientific methodology," meaning that MRE 702 didn't "stand[] in the way of" the expert's testimony. The court also rejected the argument that plaintiff's expert's lack of any peer-reviewed scientific literature to rely upon barred his testimony under MRE 702, noting that "well-qualified surgeons" were engaged in "vigorous debate" about the standard of care issue:

> No evidence supports that the standard-of-care issue debated by the parties' experts has been tested, analyzed, investigated or studied in peer-reviewed articles. To the contrary, the supplied articles attest that well-qualified surgeons are enmeshed in vigorous debate about this question, and respect each others' views. The experts disagree about the conclusions to be drawn from their collective experience, skill and training, rather than about science or methodology of laparoscopic gallbladder surgery. [*Elher* at ___.]

Judge Hoekstra, however, dissented, opining that the trial court had not abused its discretion. Judge Hoekstra's dissent stressed the fact that the expert's testimony was not founded upon the "standard of care demanded by the medical community," but rather was "rooted entirely in his own 'belief system,' for which he fails to provide any supporting authority."

Statute of Limitations and the Discovery Rule

Milostan v Troy Internal Medicine, unpublished opinion per curiam of the Court of Appeals, issued January 15, 2015 (Docket No. 317704).

The Facts: The plaintiff was a longtime patient of the medical practice. After surgery to repair a brain aneurysm, she resumed taking the drug Coumadin, and was required to have her blood Coumadin levels checked every two to three days. One physician at the practice continued her dosage at the same level despite the fact that the plaintiff had a significant rise in her Coumadin levels. Plaintiff eventually experienced bleeding in her brain from the elevated Coumadin levels.

The plaintiff sued for malpractice, naming the medical practice and two of its physicians, but not the one who ordered the continuation of Coumadin at the same dosage despite the elevated levels. Plaintiff did not learn the name of that physician until the defendants provided answers to interrogatories, after the statute of limitations expired. Plaintiff then tried to amend her complaint to add the physician as a defendant, but the trial court granted the physician summary disposition because

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the statute of limitations had expired.

The Ruling: The Court of Appeals affirmed. The court stressed that the operative inquiry for the purposes of the discovery rule is whether the plaintiff knows or should know of the *claim* against a defendant. The court emphasized that "the discovery rule is not triggered by the discovery of a wrongdoer's identity." The court, in so concluding, acknowledged that it "appear[ed] rather harsh given that it [wa]s uncontested that plaintiff remained ignorant of [the defendant's] involvement in her treatment until [after the statute of limitations expired]. . . . Be that as it may, plaintiff ignore[d] the fact that she had two years from the time of [the defendant's] wrongdoing, or six months from the discovery of her injury and its possible cause, whichever was later, in which to ascertain [his] identity and his role in her misfortune."

Endnotes

1 Issued December 2, 2014. By order of the Court of Appeals, this opinion replaced an earlier version issued November 25, 2014, which the court vacated.

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Appellate Practice Report

Appealability of Orders Compelling Arbitration

Recently on the SBM Appellate Practice Section listserv, an issue arose concerning the immediate appealability of orders compelling arbitration. The answer appears to turn on whether the underlying litigation has been dismissed, and whether it remains subject to reopening.

The Sixth Circuit has held that orders sending cases to arbitration can only be appealed under the Federal Arbitration Act, 9 USC § 1 *et seq.*, "when they are issued in tandem with dismissals of the underlying litigation." *Bates v 84 Lumber Co, LP*, 205 Fed Appx 317, 325 (CA 6, 2006). In *ATAC Corp v Arthur Treacher's Inc*, 280 F3d 1091 (CA 6, 2002), the Sixth Circuit explained that orders of dismissal in deference to arbitration under FR Civ P 12(b)(6) and orders granting summary judgment and compelling arbitration under FR Civ P 56 are immediately appealable because "[b]oth orders indicate a final decision on the arbitrability issue and leave nothing more for the court to do." *Id*. at 1098. Federal courts have found such dismissals to be final, appealable decisions even if they are entered "without prejudice." *See Howell v Rivergate Toyota, Inc*, 144 Fed Appx 475, 477 (CA 6, 2005) ("The district court's order dismissed Mr. Howell's action, albeit without prejudice, and the order thus constitutes a final decision."); *McCaskill v SCI Mgmt Corp*, 298 F3d 677 (CA 7, 2002) ("A dismissal without prejudice compelling arbitration is an appealable final decision."). On the other hand, orders staying the litigation, "even coupled with closing the case," are interlocutory and thus may not be appealed until after the arbitration proceeding has ended and the case returns to the district court. *ATAC Corp*, 280 F3d at 1098.

The Michigan Court of Appeals has applied a similar analysis. In *Rooyaker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146 (2007), the court held that an order granting summary disposition and referring claims to arbitration was "final" because "there was nothing left for the trial court to decide and it did not state that it was retaining jurisdiction." *Id*. at 148 n 1. And this appears to hold true even if the summary disposition order dismisses the case "without prejudice." *See Turner v AutoAlliance Int'l, Inc,* unpublished opinion per curiam of the Court of Appeals, issued November 19, 2002 (Docket No. 233185) (holding that although dismissals "without prejudice" are ordinarily not final, the trial court's order granting summary disposition and compelling arbitration of the plaintiff's worker's compensation retaliation claim pursuant to his collective bargaining agreement was a "final judgment" because under MCR 7.202, it was "'the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties.'").

But just as in federal court, if the trial court retains jurisdiction over the case, then the order is likely not final. In *Green v Ziegelman*, 282 Mich App 292 (2009), the Court of Appeals concluded that an order granting summary disposition and compelling arbitration was not final because "[t]he summary disposition order merely sent the case to arbitration, where it would be arbitrated and then returned to the circuit court for entry of a judgment on the arbitration award." *Id*. at 301 n 6.

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The court thus held that the summary disposition order could not have been immediately appealed. *Id*.

In short, a party faced with an order compelling arbitration should carefully evaluate the order and determine its effect. If the order dismisses the case and leaves nothing else for the lower court to do, then it is likely appealable. But if the order merely stays or closes the case, or if the lower court otherwise indicates that it is retaining jurisdiction, then the order is most likely interlocutory and thus not immediately appealable – at least not as a matter of right. While the jurisdiction of federal appellate courts is narrowly circumscribed by statute, a party can always ask the Michigan Court of Appeals to exercise its discretion under MCR 7.203(B)(1) to grant leave to appeal from an order that is "not a final judgment appealable as of right."

Michigan Supreme Court Rescinds Michigan Uniform System of Citation

For many years, parties filing briefs in Michigan state courts have been required to follow the Michigan Uniform System of Citation, which the Michigan Supreme Court adopted in Administrative Order 2006-3. That recently changed with the Supreme Court's issuance of Administrative Order 2014-22. In that order, the Supreme Court rescinded Administrative Order 2006-3, and now encourages parties to use the Michigan Appellate Opinion Manual, "which sets forth the Court's standards for citation of authority, quotation, and style in opinions of the Supreme Court and the Court of Appeals."

As a practical matter, nothing has really changed. Michigan will still continue to follow the familiar "no periods" citation style that Michigan practitioners have long been accustomed to. For the most part, the Michigan Appellate Opinion Manual adds style suggestions (e.g., "these cases" as opposed to "the above-cited cases"), formatting tips, and the like. The manual can be found at www.courts.mi.gov.

Proposed Amendments to Subchapter 7.300 of the Michigan Court Rules

On October 22, 2014, the Michigan Supreme Court issued an order announcing that it is "considering amendments of the series of rules found in Subchapter 7.300 of the Michigan Court Rules, which contains the procedural rules applicable to the Michigan Supreme Court." The Court's order, which can be found at www.courts.mi.gov along with the proposed amendments, explains that the changes "would clarify procedure and would reflect current practice and provide uniformity in a numbering system that is consistent with the procedural rules found in Subchapter 7.200 (the rules governing procedure in the Court of Appeals)." The staff comment adds that the "proposed amendments would update the rules regarding practice in the Michigan Supreme Court, and would renumber and reorganize the rules to be consistent with those in the Court of Appeals for the ease of the appellate practitioner and greater judicial efficiency."

A few of the more significant changes are worth noting:

The proposed amendments would clarify when cross-appeals are required;

There would be a new rule on issuance of advisory opinions;

The traditional "hearing" date for when applications for leave to appeal are eligible for submission to the Court, which is currently set by the appellant and which governs when opposing briefs are due, would be replaced by a fixed 28-day deadline for the filing of opposing briefs;

The number of copies required to be filed for applications for leave to appeal, opposing briefs, and routine motions would be reduced from 8 to 4, and from 24 to 14 for merits briefs and motions for rehearing;

There would be a new provision addressing the submission of supplemental authority (like in the Court of Appeals); and

There would be a new provision allowing amici to answer motions for rehearing (assuming they are already participating in the appeal).

E-filing Comes to the Michigan Supreme Court

Although appellate practitioners have been able to file documents electronically in the Michigan Court of Appeals and the United States Court of Appeals for the Sixth Circuit for some time, the Michigan Supreme Court remained a holdout—until now. With Administrative Order 2014-23, the Michigan Supreme Court announced that it will allow electronic filing through ImageSoft, Inc.'s TrueFiling system. The Michigan Court of Appeals will gradually adopt TrueFiling as well, creating a unified system of e-filing in

Michigan's appellate courts.

TrueFiling began in the Michigan Supreme Court on January 5, 2015 and in the Michigan Court of Appeals on January 20, 2015. E-filing will not be mandatory in either court, at least for now. In addition, the Court of Appeals will temporarily allow filers to continue using its current Odyssey system even after it makes TrueFiling available.

As with federal courts' PACER system, TrueFiling is available 24 hours a day, seven days a week. Documents filed after 11:59 p.m., on Saturday or Sunday, or on a holiday will be deemed filed on the following business day.

Filers are not limited to .PDF files. TrueFiling also accepts Microsoft Word files, text files, and "images such as a TIFF, PNG or JPG." "Original pleadings" (which include appellate briefs) should be filed in a searchable format.

Even with the widespread adoption of e-filing, it may be too early to go completely paperless. The Michigan Supreme Court's order stresses that attorneys must maintain hard copies of all electronically-filed documents "until final disposition of the case and the expiration of all appeal opportunities."

Changes on the Horizon for the Federal Rules of Appellate Procedure

In September 2014, the Committee on Rules of Practice and Procedure proposed changes to the Federal Rules of Appellate Procedure, along with the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence. The period for comment expires on February 17, 2015.

A number of the proposed amendments to the Federal Rules of Appellate Procedure warrant attention. One of these changes addresses a circuit split regarding the application of Federal Rule of Appellate Procedure 4(a)(4). This rule states that "'[i]f a party *timely* files in the district court' certain postjudgment motions, 'the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion.'" *Summary of the Report of the Judicial Conference* at 3 (quoting Fed R App P 4(a)(4)). In other words, filing certain post-judgment motions extends the deadline for filing a claim of appeal, provided that the motion is filed on time.

Courts are split on what happens when a court extends the deadline for filing post-judgment motions beyond that allowed by the Federal Rules of Civil Procedure. Most circuits have held that Rule 4(a)'s timeliness requirement is jurisdictional, such that a motion can extend the deadline for an appeal only if it is filed pursuant to the Civil Rules' deadlines. The Sixth Circuit has held that a motion is timely even if it is filed by a court-approved deadline later than the limits contemplated by the Civil Rules.

The proposed amendment to Rule 4 adopts the majority view by tying "timeliness" under Rule 4 to the Civil Rules' deadlines. The amendment strikes "timely" and adds the italicized language:

If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure,—*and does so within the time allowed by those rules*—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion.

Another noteworthy proposal would reduce the word-count limit in appellate briefs. Federal Rule of Appellate Procedure 32 allows parties to file briefs that do not exceed 30 pages or, in the alternative, that contain fewer than 14,000 words. The committee proposes reducing this word limit to 12,500 words, explaining that the assumptions underlying the 14,000 limit (adopted in 1998) were erroneous.

The proposed amendment would also exclude electronic service from the "3-day rule" of Federal Rule of Appellate Procedure 26. This rule, like its analog in Federal Rule Civil Procedure 6, allows parties to add three days to a deadline when a document is served by mail or electronically. The committee's proposal would eliminate application of the 3-day rule to documents served electronically.

The committee also addresses the lack of rules governing amicus briefs in support of or opposition to rehearing. Proposed changes to Federal Rule Appellate Procedure 29 would create default rules for amicus briefs concerning rehearing. These rules largely mirror those governing amicus briefs during the merits stage.

The full text of the proposed amendments and accompanying commentary is available at: http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf (last visited February 8, 2015).

The Sixth Circuit Court of Appeals Issues a Key Decision on Preserving Dispositive Legal Arguments in a Jury Trial

In *Ayers v City of Cleveland,* ___ F3d ___ (CA 6, Dec. 2, 2014), the Sixth Circuit Court of Appeals held that trial counsel failed to preserve arguments raised in an unsuccessful summary judgment motion. As such, this opinion is one that warrants careful attention from both trial and appellate counsel.

The plaintiff in *Ayers* "spent 12 years in prison based on a state-court murder conviction that was later overturned." *Slip op* at 1. The plaintiff sued various parties—including two detectives—who allegedly procured this conviction by violating the plaintiff's Sixth Amendment rights. The defendants filed a motion for summary judgment based on qualified immunity, but the district court denied it. The defendants did not seek interlocutory review.

After the close of evidence at trial, the defendants requested a directed verdict without raising their qualified-immunity argument. The court denied that motion as well. The jury returned a $13 million verdict in the plaintiff's favor. The defendants did not file a post-verdict motion but pursued a timely appeal.

The Sixth Circuit Court of Appeals declined to address the defendants' qualified-immunity argument. Following *Ortiz v Jordan,* 562 US 180 (2011), it held that "a party cannot appeal an order denying summary judgment after a full trial on the merits." *Slip op* at 7. Rather, "the full record developed in court supersedes the record existing at the time of the summary judgment motion." *Slip op.* at 7 (citations and quotations omitted). Because the defendants did not raise their qualified-immunity argument "in either a Rule 50(a) [directed verdict] or Rule 50(b) motion [post-verdict motion for new trial or judgment as a matter of law]," the Sixth Circuit held that the qualified-immunity argument was not preserved for appellate review.

Notably, the Sixth Circuit held that a pre-verdict motion under Rule 50(a) is a *minimal* requirement. *Slip op* at 9. It cited *Sykes v Anderson,* 625 F3d 295, 304 (CA 6, 2010), where a post-verdict motion under Rule 50(b) was not enough to preserve a qualified-immunity defense. Thus, *Ayers* holds that parties must raise potentially dispositive arguments both before *and* after verdict.

The same rule applies to arguments regarding judgment as a matter of law and the insufficiency of evidence. The defendants moved for summary judgment at the close of evidence but did not renew this motion under Rule 50(b) after the jury returned its verdict. *Slip op* at 9. This record was insufficient to preserve the defendants' arguments for judgment as a matter of law or judgment based on insufficiency of the evidence. Again, the defendants were required to raise their potentially dispositive arguments both before and after the verdict.

This holding is premised on the principle that "a district court *may* enter judgment as a matter of law preverdict when it concludes that the evidence is legally insufficient, [but] it is not *required* to do so." *Slip op* at 10.

Ayers is a warning for attorneys who wish to preserve arguments raised in an unsuccessful summary judgment motion: Once trial begins, you can preserve those arguments only by raising them in a motion both before *and* after the jury's verdict.

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Legal Malpractice Update

The gravamen of an action is determined by reading a claim as a whole, and a plaintiff's failure to identify specific acts of negligence in a complaint may preclude an action for legal malpractice.

In re Estate of Leo G Charron v Attorney Defendant, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2014 (Docket No. 316186)

The Facts: Plaintiffs, representatives of an estate, brought an action for legal malpractice against attorney defendant, identifying six discrete issues in their complaint—all of which generally related to the handling of estate, tax, and loan negotiation transactions. Plaintiffs' complaint also made reference to related bankruptcy proceedings but "did so in a conclusory manner devoid of any detail or allegations."

Attorney defendant filed a motion for summary disposition on the basis that the two-year statute of limitations barred plaintiffs' claims, and the trial court agreed. After denying plaintiffs' motion for reconsideration, plaintiffs appealed as a matter of right, contending "the trial court should have considered the continued representation in the bankruptcy matter when analyzing the statute of limitations."

The Ruling: The Court of Appeals affirmed the trial court's decision, finding the bankruptcy proceedings were not within the scope of the malpractice claims alleged, and therefore, because the remaining allegations occurred more than two years before plaintiffs filed suit, the action was barred by the statute of limitations.

The court first held that plaintiffs failed to properly plead a malpractice action with respect to the bankruptcy proceedings, and thus any representation in relation to such proceedings would not save the statute of limitations. A claim for malpractice "accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose." Thus the primary inquiry was whether "the matters out of which the claim for malpractice arose" extended to the federal bankruptcy proceedings. Plaintiffs "only provided a cursory reference to the bankruptcy proceedings" within their complaint, failing to identify any "specific action [defendant attorney] undertook that was negligent"—dedicating nearly all eighteen pages to other allegations. Reading the complaint as a whole, the gravamen of the action was a "legal malpractice claim arising out of the estate, tax, and loan negotiations transaction," not the bankruptcy proceedings. And because these remaining allegations all occurred more than two years prior to when plaintiffs filed suit, the entire action was barred.

Practice Note: It is important to read a plaintiff's claim as a whole. By tailoring the gravamen of the action, it may be possible to utilize a statute of limitations defense that is otherwise unavailable.

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Federal preemption of an underlying action can destroy the causation element necessary to maintain a claim for legal malpractice.

Bush v Attorney Defendant, unpublished opinion per curiam of the Court of Appeals, issued August 21, 2014 (Docket No. 315807)

The Facts: Plaintiffs, husband and wife, contacted attorney defendant about a possible medical malpractice claim arising out of a cardiac surgery on August 24, 2004, wherein the wife agreed to participate in a research study "to evaluate the safety and efficacy of a new, unapproved, vascular closure device." The wife later learned she should not have been permitted to participate in the study because she was a nursing mother, which she alleged caused her to suffer serious medical complications, significant pain and suffering, occupational disability, mental anguish and emotional distress and incur significant medical expenses. Plaintiffs and attorney defendant subsequently entered into a contingency fee agreement which referenced a medical malpractice claim and a possible product liability case.

On June 5, 2006, attorney defendant advised plaintiffs in writing that several experts indicated they could not support a medical malpractice claim, and accordingly, attorney defendant would not proceed with plaintiffs' case. In that same correspondence, attorney defendant advised that the applicable statute of limitations may expire as soon as August 12, 2006, and that plaintiffs should not delay in contacting new counsel if they wished to pursue the claim. There was no mention, however, as to the viability of a product liability claim or the corresponding statute of limitations. Plaintiffs later sought new counsel, but alleged these attorneys declined representation on the basis that only two months remained within which to proceed on the medical malpractice action.

Plaintiffs filed their complaint against attorney defendant on April 10, 2009, primarily alleging that attorney defendant committed legal malpractice by failing to advise of the statutory limitations period for product liability actions and abandoning the claim altogether without discussing such a decision with plaintiffs. Attorney defendant's first responsive pleading was a motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). Attorney defendant argued plaintiffs' claims were not only barred by the two-year statutory limitations period for legal malpractice actions (because plaintiffs had not pled facts in support of an extension of the limitations period under the discovery rule), but also based upon application of the attorney judgment rule. Regarding the latter, attorney defendant asserted that he acted in good faith and with an honest belief that advising plaintiff of the earliest statute of limitations, in combination with the recommendation that new counsel be sought immediately, was the best course of action.

The trial court agreed, finding that plaintiffs were "essentially [seeking] to hold Defendants liable for the new attorney's inability to recognize the potential and timeliness of the products liability claim," and that attorney defendant did not breach any duty. The Court of Appeals later reversed this ruling, finding there was a question of fact regarding the application of the attorney judgment rule, as well as whether plaintiffs should have discovered the possible legal malpractice prior to meeting with their current counsel on October 13, 2008.

On remand, attorney defendant filed two more motions for summary disposition, under MCR 2.116(C)(10). Attorney defendant first argued that the underlying product liability would not have been successful "because the learned-intermediary and the sophisticated-user doctrines eliminated any duty the device manufacturer owed to plaintiffs, and because plaintiffs' claim was properly classified as a medical-malpractice case." Attorney defendant additionally argued that plaintiffs "never had a viable product liability claim because such an action would have been preempted by federal law, specifically the Medical Device Amendments ("MDA") to the Federal Food, Drug and Cosmetic Act ("FDCA")."

Plaintiffs neither filed a response to either motion nor appeared for the hearing, and the trial court granted both of attorney defendant's motions. The trial court thereafter denied plaintiffs' motion for reconsideration, finding they offered no reasonable explanation for the foregoing failures. Plaintiffs appealed as a matter of right.

The Ruling: The Court of Appeals affirmed the trial court's decision on the basis that plaintiffs' product liability

claim against the individuals and entities that manufactured and sold the vascular closure device was preempted by federal law, and therefore, plaintiffs' legal malpractice claim failed due to lack of causation.

The court concluded after a lengthy discussion that plaintiffs' state law claim was preempted by 21 USC 360k of the MDA, and as a result, the proximate cause element of a legal malpractice claim could not be satisfied. "[I]t has long been settled that state laws that conflict with federal laws are without effect," though there is a presumption against preemption.

Application of the analysis set forth in *Medtronic, Inc v Lohr*, 518 US 470, 485 (1996), which addresses when a state law claim is preempted by the MDA, led to the following determinations: (1) investigational device exemption applications, such as those that were necessary for the vascular closure device, were federally regulated by device-specific requirements; (2) MCL 600.2948(3), the governing statute for product liability actions, sufficiently encompassed the safety or effectiveness of medical devices; and (3) Michigan's product liability statutes were state requirements "different from, or in addition to," federal requirements. The elements of *Lohr* being satisfied, 21 USC 360k of the MDA thus preempted plaintiffs' state law claim.

Because plaintiffs' underlying product liability claim would have necessarily failed due to this preemption, they could not establish that the alleged malpractice proximately caused any injury. In order to establish proximate cause in a legal malpractice action, "a plaintiff must show that but for an attorney's alleged malpractice, the plaintiff would have been successful in the underlying suit." Without a viable claim, there was no genuine issue of material fact that plaintiffs would not have been successful in the underlying suit, and summary disposition in favor of attorney defendant was appropriate.

Practice Note: Attacking the viability of a plaintiff's underlying claim may allow for the early disposition of a legal malpractice action. It is therefore important to legally and factually explore the underlying claim, which may reveal the claim is meritless or otherwise barred in a way that is not obvious upon initial review—such as federal preemption.

The authors acknowledge the valuable assistance provided by Jason Renner, an associate of the firm.

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Supreme Court Update

The State is Permitted to Establish Workers' Compensation Districts and Relocate Hearing Site Locations to Other Countries

On November 18, 2014, the Michigan Supreme Court held that, while MCL 418.851 provides that a workers' compensation hearing must be held in the locality where the injury occurred, an order by the administrators of the hearing system that relocates hearing sites to different counties was not unreasonable and should not have been overruled. *Younkin v Zimmer*, ___ Mich ___ (2014).

Facts: The plaintiff Lawrence Younkin was injured while working in Genesee County, and filed a workers' compensation claim. While the plaintiff's claim was pending, he received notice from the defendants, administrators of the workers' compensation hearing system, that the Genesee County hearing site his case was previously assigned to would be closing and that hearings in his case would be held approximately 70 miles away in Eaton County. This change was part of a reorganization of the Michigan Administrative Hearing System. The plaintiff then brought a mandamus action against the defendants to compel them to maintain the Genesee County hearing site. Based on MCL 418.851, which provides that "[t]he [workers' compensation] hearing shall be held at the locality where the injury occurred," the trial court issued a writ of mandamus compelling the defendants to hold hearings on the plaintiff's workers compensation claim in Genesee County.

The Court of Appeals affirmed, finding that the defendants lacked the authority to order the hearings be held in a locality other than the locality where the injury occurred. The Court of Appeals reasoned that by use of the word "shall" in the statute, the legislature plainly and unequivocally required workers compensation magistrates to hold hearings at the locality where the injury occurred. The Court of Appeals further reasoned that "the term 'locality' generally refers to the surroundings of a particular place or district where a person or thing happens to be situated." Thus, the Court of Appeals held that "a plain reading of this geographic limitation simply does not support the notion that the Legislature intended the phrase 'locality where the injury occurred' to mean any district or region delineated by the executive for the purpose of administrative convenience." The court, therefore, held that the interpretation employed by the administrators of the workers' compensation hearing system was contrary to the plain language of the statute and the trial court did not abuse its discretion in issuing the writ of mandamus.

Holding: The Supreme Court reversed and held that the trial court abused its discretion by issuing the writ of mandamus compelling defendants to hold the hearing in Genesee County. The Court explained that to obtain a writ of mandamus, the plaintiff must show that he or she has a clear legal right to the performance of the specific duty sought to be compelled and that the defendant has a clear legal duty to perform it. The Court reasoned that although MCL 418.851 provides that a workers' compensation hearing must be held at the locality where the injury occurred, defendants, in their official capacities as administrators of the workers' compensation hearing system, are entitled to have their interpretation of the term "locality" given respectful consideration and, if persuasive, not be overruled without cogent reasons.

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The Court agreed with the Court of Appeals' definition of "locality," but held that it did not conflict with the Legislature's intent.

The Court also explained that, as the Court of Appeals recognizes, the term "locality" is defined as "a place or district." In accordance with their interpretation of the term, the defendants divided the state into 11 reasonably located hearing districts, and workers' compensation claims were assigned from definite regions of the state to one of those hearing district offices depending on where the injury occurred. The Court explained that "[n]othing in the Worker's Disability Compensation Act [citation omitted] requires that there be a hearing site in every county." The Court, therefore, held that the defendants' interpretation did not conflict with the Legislature's intent.

The Court further noted that, while the hearing should be held at a place convenient for parties and their witnesses, it was not unreasonable to conclude that the locality where the injury occurred in this case was Dimondale given the injury occurred in Genesee County and that county falls within the Dimondale district. Although having the hearing in Eaton County rather than Genesee County would be less convenient for the plaintiff, this would not constitute an unreasonable inconvenience. Accordingly, the Court held that the plaintiff did not have a clear legal right to a hearing in Genesee County, and the defendants did not have a clear legal obligation to hold the hearing there. Thus, the issuance of the writ of mandamus was an abuse of discretion.

Significance: The Court expanded the interpretation of the WDCA's requirement that hearings be held in a particular locality, and expanded the powers of the administrators of the workers' compensation hearing system to establish hearing districts.

Judicial Review of Insurance Appraisal Awards is Highly Limited Only if the Award can be Read as a Conclusive Judgment

On November 18, 2014, the Michigan Supreme Court held that if an insurance appraisal award involves a matter of coverage under the insurance contract, the award is not afforded conclusive effect and the policy language is not beyond the scope of judicial review. *Dupree v Auto-Owners Ins Co*, ___ Mich ___ (2014).

Facts: After her home and much of its contents were damaged by fire, the plaintiff filed a claim under the terms of a homeowners insurance policy issued by the defendant. The parties were unable to agree on the extent of the loss of the plaintiff's personal property. Consequently, the parties invoked the policy's fire loss appraisal provision, which provided for an appraisal process that would result in a written award from the appraisal that would determine the actual cash value or amount of loss. After the parties' respective appraisers submitted their reports, the selected umpire issued an appraisal award that established a full replacement value of $167,923.60, applicable depreciation of $39,673.48, and an actual cash value loss of $128,250.12.

The defendant, thereafter, paid to the plaintiff $128,250.12 for the actual cash value of her damaged personal property. The defendant, however, refused to pay the full replacement cost on the basis that the plaintiff had failed to comply with the policy's replacement cost provision, which provided that, as a prerequisite to payment, the plaintiff was required to submit proof that she actually replaced her damaged personal property. The plaintiff then sued to recover the additional depreciation amount, and the trial court granted summary disposition in her favor.

The Court of Appeals affirmed and concluded that the appraisal award regarding the amount of loss was conclusive and superseded the insurance policy's replacement cost provisions. Therefore, the plaintiff was not required to submit proof of loss, and the defendant was required to pay the full amount of the judgment described in the award. The Court of Appeals, citing *Auto-Owners Ins Co v Kwaiser*, 190 Mich App 482, 486; 476 NW2d 467 (1991), reasoned that judicial review of an appraisal award is limited to instances of bad faith, fraud, misconduct, or manifest mistake and that the amount of loss attributable to personal property damage, as determined by the appraisers, is conclusive.

Holding: The Supreme Court reversed, holding that the plaintiff was not entitled to the full replacement cost of her property. The Court explained that, although judicial review of appraisal awards under MCL 500.2833(1)(m) is generally limited to instances of bad faith, fraud, misconduct, or manifest mistake, that limitation did not apply here because the appraisal award was not a conclusive judgment requiring the payment of replacement costs.

Consequently, the replacement cost provision in the plaintiff's homeowners policy applied and, because the plaintiff did not properly comply with that provision, the defendant was liable for only the actual cash value of plaintiff's damaged personal property.

The Court explained that, to determine the extent of defendant's liability, it is necessary to ascertain the scope of the appraisal award. The Court noted that, while "matters of *coverage* under an insurance agreement are generally determined by the courts, the *method* of determining the loss is a matter reserved for the appraisers." Additionally, because the statutorily mandated appraisal process set forth in MCL 500.2833(1)(m) is regarded as a "substitute for judicial determination of a dispute concerning the amount of a loss," "the amount of loss attributable to personal property damage, as determined by the appraisers, is conclusive." As a result of this "conclusiveness," judicial review of an appraisal award is limited to instances of bad faith, fraud, misconduct, or manifest mistake.

Thus, under the circumstances presented, "if the appraisal award is read as awarding plaintiff the replacement cost of her damaged property, then the award is conclusive in that respect and, absent bad faith, fraud, misconduct, or manifest mistake, it will supersede the insurance policy's replacement cost provision." The Court explained, however, that if the appraisal award "is viewed as involving a matter of coverage under the insurance contract, then the award is not afforded conclusive effect, the policy language is not beyond the scope of judicial review, and the limiting terms of the insurance policy's replacement cost provision will remain determinative."

The Court found that a plain reading of the appraisal award did not support a finding that it required the defendant to pay to the plaintiff the full replacement cost of the lost personal property. The Court focused on language from the award that stated it was awarding "actual cash value" to the plaintiff. Furthermore, the Court noted that, although review of appraisal awards is "especially limited," the appraisal award simply could not be read as a "conclusive" judgment for replacement costs that superseded the insurance policy's replacement cost provisions. The plaintiff's failure to submit proof of actual loss in accordance with that provision precluded her from recovering replacement costs and entitled her to only the actual cash value of her damaged personal property.

Significance: The Court recognized the limited judicial review permitted with respect to appraisal awards, but looked both to the wording of award itself and the circumstances surrounding the award – including the requirements of the insurance policy at issue – to determine the scope of the plaintiff's recovery.

An Individual who Fails to Satisfy Any One of the Three Criteria set Forth within MCL 418.161(1)(n) is not an Employee for Purposes of the Worker's Disability Compensation Act

On November 25, 2014, the Michigan Supreme Court held that an individual is not an "employee" for purposes of the Worker's Disability Compensation Act ("WDCA") unless he or she satisfies each of the three criteria of MCL 418.161(1)(n).The failure to satisfy any of those criteria will divest the individual from the status of an employee. *Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc*, ___ Mich ___ (2014).

Facts: Joseph Derry was injured while working on a lawn maintenance crew for All Star Lawn Specialists Plus, Inc. ("All Star") when a leaf vacuum machine tipped over and struck him. Mr. Derry brought a negligence suit against All Star and one of its owners for his injuries, and sued Auto-Owners Insurance Company ("Auto Owners") for no-fault benefits as the provider of a commercial automobile no-fault insurance policy to All Star. All Star also had general liability insurance and worker's compensation insurance in effect at the time of the injury. Auto-Owners filed a declaratory judgment action, seeking a determination that Mr. Derry was an employee of All Star and, thus, that the only insurance coverage available was under All Star's worker's compensation policy. Mr. Derry, however, contended that he was an independent contractor and, therefore, that the general liability policy and no-fault policy applied.

Prior to its amendment in 2011, MCL 418.161(1)(n) provided that an employee is "[e]very person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an

employer subject to this act."

Granting summary disposition in favor of Mr. Derry, the trial court concluded that, because Mr. Derry held himself out to the public to perform the same services as the work he performed for All Star, Mr. Derry was an independent contractor, not an employee, at the time of his injury and was, therefore, entitled to coverage under Auto-Owners' general liability and no-fault policies.

The Court of Appeals initially affirmed the trial court's conclusion in light of its duty to follow the Court of Appeals' prior decision in *Amerisure Ins Cos v Time Auto Transp, Inc*, 196 Mich App 569; 493 NW2d 482 (1992) (interpreting MCL 418.161(1)(n) as meaning a person does not qualify as an employee if they qualify as any one of the three classes of people excluded by the statute). The Court of Appeals, however, disagreed with the *Amerisure* decision. To resolve the conflict, the Court of Appeals convened a special panel, which reversed the trial court's decision that Mr. Derry was an independent contractor. The special panel majority also overruled *Amerisure* and held that "all three of the statutory criteria in MCL 418.161(1)(n) must be met before an individual is divested of 'employee' status."

Holding: The Supreme Court reversed the decision of the Court of Appeals special panel and held that the Court of Appeals correctly interpreted MCL 418.161(1)(n) in its decision in *Amerisure* when it stated that by "employing the word 'not,' the Legislature intended that once one of these three provisions occurs, the individual is not an employee. Thus, each provision must be satisfied for an individual to be an employee."

The Court explained that the three criteria that must be met for a person "performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury" to be considered an employee are that a person, in relation to this service: (1) does *not* maintain a separate business, (2) does *not* hold himself or herself out to and render service to the public, and (3) is *not* an employer subject to this act. According to the Court, because each of these criterions must be satisfied for an individual to be considered an "employee," the "failure to satisfy any one of the three criteria will *exclude* an individual from employee status." Thus, the Court of Appeals special panel erred by requiring that all three of these statutory criteria be met for an employee to be excluded from employee status. The Court reasoned that the Court of Appeals' interpretation ignored the word "not" in the statutory criterion of MCL 418.161(1)(n) and, consequently, contravenes the principle of statutory interpretation that courts "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute."

The Court further explained that the Court of Appeals special panel's reliance on a paraphrase of MCL 418.161(1)(n) in *Reed v Yackell*, 473 Mich 520; 703 NW2d 1 (2005) was misplaced. The Court explained that *Reed* sought only to replace the confusing negative definition of an employee created by MCL 418.161(1)(n) with a positive definition of people who are excluded from the statutory class of employees by operation of the statute. The Court found, however, that *Reed's* statement may not be interpreted as an indication that the Court believed all three criteria of MCL 418.161(1)(n) must be met for a person to be excluded from employee status. Furthermore, the Court found the statement in *Reed* to be nonbinding dictum because *Reed* was a plurality opinion and the statement had no impact on the decision in *Reed*.

Significance: The Court affirmed that *Amerisure* is still good law and clarified what has been a less than clear history of the requirements for employee status under MCL 418.161(1)(n).

The Michigan Supreme Court has Rescinded its Order Requiring use of the Michigan Uniform System of Citation and, Instead, Encourages the use of the Appellate Opinion Manual

On November 5, 2014, the Michigan Supreme Court rescinded, effective immediately, Administrative Order No. 2006-3, which required practitioners to use the Michigan Uniform System of Citation. The Court stated that it currently uses, and encourages others to use, the Michigan Appellate Opinion Manual, which sets forth the Court's standards for citation of authority, quotation, and style in opinions of the Supreme Court and the Court of Appeals. The Michigan Appellate Opinion Manual provides a more comprehensive citation manual than its predecessor, and is available in .pdf format on the Court's webpage at:

http://courts.mi.gov/Courts/MichiganSupremeCourt/Documents/MiAppOpManual.pdf

Court Rules Update

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Michigan Court Rules

For additional information on these and other amendments, visit the Court's official site at:

http://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Pages/default.aspx

ADOPTED

2005-19 - View of premises

Court Rule: MCR 2.507
Issued: November 26, 2014
Effective: January 1, 2015

This amendment restores an (apparently unintentionally) deleted subrule permitting a "view of premises" by a judge sitting without a jury.

2012-02 - Discovery-only depositions

Court Rule: 2.302
Issued: October 1, 2014
Effective: January 1, 2015

New language was added to MCR 2.302-4-a-ii to provide that a party may notice a deposition of an expert witness for discovery only and impeachment, without the need for a motion and order under MCR 2.302-C-7.

2013-18 - Testimony by videoconference

Court Rules: 2.407 (added)
2.310 and 2.315 (amended)
Issued: November 26, 2014
Effective: January 1, 2015

New Rule 2.407 permits but does not require a trial court to allow the use of videoconferencing technology for the presentation of a witness's testimony. A number of factors that the court is to consider are listed, including this important one:

> "Whether the procedure would allow for full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits."

This additional requirement will also be important:

> "A participant who requests the use of videoconferencing technology shall ensure that the equipment available at the remote location meets the technical and operational standards established by the State Court Administrative Office."

The other two rules were amended solely to cross-reference the new rule.

(Note that this administrative number was previously used for a different proposed rule involving electronically filed documents. That one is still under consideration.)

2013-27 - New parties to counterclaims and cross-claims

Court Rule: 2.203
Issued: October 1, 2014
Effective: January 1, 2015

This permits the addition of new parties to counterclaims and cross-claims, and authorizes the issuance of a summons in that case.

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.

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DRI Report

Tim Diemer is a partner with the appellate team at Jacobs and Diemer, P.C. He is a Past President of MDTC and currently serves as the DRI State Representative for Michigan.

I am writing as MDTC's state representative to the Defense Research Institute (DRI), MDTC's sister national defense counsel organization. DRI puts on quite a few seminars and annual meetings each year in exciting and fun venues that offer its members an opportunity to meet other practitioners in their field on a face-to-face basis.

If you are not yet a DRI member, please contact me to discuss your membership options. You may be eligible for a free year of membership to DRI.

Upcoming DRI events include:

March 12, 2015 – San Francisco: *Medical Liability and Health Care Law*

DRI's Medical Liability and Health Care Law Seminar offers two days of targeted instruction on emerging and evolving medical and legal topics aimed at defense attorneys, in-house counsel, claims professionals, and risk management personnel. This seminar is focused on cutting-edge topics presented by an accomplished faculty of attorneys, physicians, and claims professionals, while also providing excellent networking opportunities.

March 18, 2015 – Las Vegas: *Trial Tactics*

Join colleagues from around the country for DRI's 2015 Trial Tactics Seminar and master the skills necessary to take your practice to the next level. Speakers will utilize a combination of lecture, participation, and skills presentations to impart expert guidance and tips on topics ranging from business development to managing complex litigation. Participants will also have the opportunity to learn from seasoned colleagues as they present a mock voir dire workshop and *Daubert* hearing.

March 25, 2015 – Chicago: *Insurance Coverage and Claims Institute*

The Insurance Coverage and Claims Institute is DRI's flagship seminar for insurance executives, claims professionals, and outside counsel. Each spring in Chicago, DRI brings together outstanding speakers to provide insight and guidance into complex and cutting-edge issues we face in our insurance defense practices. On Wednesday, we will focus on settlement by presenting a hands-on, live mediation demonstration and a session for coverage attorneys to hone their negotiation skills. On Thursday, we will provide litigation guidance for cases involving multiple occurrences, supplementary payments, cyber liability, consent judgments, and bad faith. We will explore the interplay between underwriting and claims and the enforcement of arbitration agreements. Finally, on Friday, we will present a dual track focusing on issues unique to personal lines and commercial and construction litigation.

April 15, 2015 – Washington DC: *Life, Health, Disability and ERISA*

DRI'S Life, Health, Disability and ERISA Seminar, the preeminent program in benefits litigation, is returning to Washington, D.C., in 2015. The seminar offers unparalleled learning opportunities directly related to your area of practice, as well as extensive networking forums for in-house and outside counsel over three days. The experienced faculty features leading practitioners who will provide insights into trends and developments in the law, as well as practice tips you will not want to miss. This year's program includes breakout sessions on ERISA, health, and non-ERISA tracks on Wednesday afternoon. The program will also include ethics programming.

There will be no shortage of networking opportunities, including panel counsel meetings, networking receptions, dine-arounds, a young lawyers' event, corporate counsel and new member breakfasts, and a diversity luncheon.

For more details on these and other seminars and other upcoming DRI events, please go to http://www.dri.org/Events. As always, feel free to contact me if you have any questions about DRI or if I can be of any assistance. tad@jacobsdiemer.com; 313-965-1900.

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Michigan Supreme Court and Court of Appeals Adopt TrueFiling Electronic Filing and Service from ImageSoft

About ImageSoft

ImageSoft, Inc. provides document and process management solutions to automate, streamline and improve court and government processes. Since 1996, ImageSoft's technology and workflow solutions have increased productivity, reduced operating costs and saved time and money for our customers in government and commercial industries.

An award-winning company, ImageSoft has been named one of the nation's Fastest-Growing Privately Held Companies by Inc. magazine and selected as a Best Fit Integrator by the Center for Digital Government. The company is also annually named one of the Best and Brightest Companies to Work For in Detroit and nationally and has repeatedly been selected as a Michigan Economic Bright Spot. From its headquarters in Southfield, Mich., and satellite offices in Raleigh, N.C., and Portland, Ore., ImageSoft serves customers in the U.S., Canada and Mexico. Learn more at www.imagesoftinc.com.

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The Michigan Supreme Court and Court of Appeals took another major step toward improving court efficiency with the implementation of electronic filing and electronic service. The courts implemented TrueFiling, an eFiling and eService solution from Southfield, Michigan-based ImageSoft.

Initially, the use of TrueFiling was limited to a test group of filers at both courts, but following a successful test run, it currently is available to all filers. Electronic filing in the Supreme Court and the Court of Appeals is currently voluntary, but the courts may decide to make it mandatory at some point in the future. Other than paying the statutory filing fees when applicable, there is no additional cost to the filer to use TrueFiling. (There are no transaction charges or credit card processing fees charged to filers.)

TrueFiling, which will eventually replace the Court of Appeals' current eFiling system, is a Web-based eFiling product that allows attorneys to electronically file documents to the courts from anywhere an Internet connection is available – 24 hours a day, seven days a week. It also enables real-time communication with the courts via the TrueFiling web portal and greatly streamlines and accelerates the courts' internal processes with automated workflow. Since TrueFiling drastically reduces paper handling, it improves overall efficiency for both the courts and the filers.

For the courts, eFiling means even more efficient use of resources. For attorneys, it may mean less time spent travelling to and from the courts to file paper documents, as well as cost savings by eliminating the need to copy, process and deliver thousands of paper documents each year. TrueFiling also offers a bundling feature that enables filers to combine several filings for a single case into one transaction and creates a system-generated proof of service.

"With electronic filing at the Michigan Supreme Court and Court of Appeals, the public will benefit from even better customer service and the added convenience of 24/7 access to file important documents," said ImageSoft President Scott Bade.

"TrueFiling has consistently received high marks from end users," added Bade. "It is a true multi-jurisdictional solution that is built for the complex law firm, but is also simple enough for the self-represented filer. TrueFiling has been in production for several years in both Michigan and other states, and we have gotten great feedback and feature suggestions from the legal community, which we have incorporated into the product."

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