MICHIGAN DEFENSE
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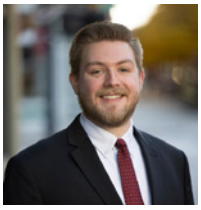

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President's Corner

By: John C. W. Hohmeier, *Scarfone & Geen PC*
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John Hohmeier assists insurance carriers in investigating and defending fraudulent claims, handling multi-claim cases, and advising on the prospect of civil RICO cases against litigious medical providers. He has consistently been recognized for excellence in the practice of law by Super Lawyers®. He has been named to America's Top 100 Civil Defense Litigators® and Best Lawyers in America® (Civil Defense Litigation and Appellate Practice). He has been featured in Top 100 Lawyers Magazine® and DBusiness Magazine Top Lawyers®.

Before I made one of the most important decisions in my life to move to Michigan and pursue law, I had a fool for a master. Sure, I had taken people's advice before, but usually I thought I knew better. Then came law school, which humbled me. In my final year,I received perhaps some of the greatest advice in my life, which was not "try to get a job at the best firm" or "take the job with most money." The advice was "find a good mentor." I've had many mentors, so you will never hear me say anything remotely close to "I'm a self-made man" or "I did it all on my own." I had some great mentors. And I still do.

But "find a good mentor" is also a tall order, isn't it? Kind of esoteric, even. Find a good mentor? How do you know what makes someone a good mentor? Is a good mentor someone who makes you work/intern 60 hours a week? Is a good mentor someone with a heavy red pen, who rips your briefs apart but teaches you things you otherwise wouldn't learn? Is a good mentor someone who lets you take Friday off and takes you to lunch, but rarely, if ever, provides you with any criticism? Maybe a good mentor is all, none, or some of those things. My definition of a good mentor is simple: someone who invests time in you by paying attention. This side of the aisle can feel cold and make you feel like an outsider sometimes; however, rest assured that you can always find a good mentor here at the MDTC.

Carl Jung once said this: "One looks back with appreciation to the brilliant teachers, but with gratitude to those who touched our human feelings. The curriculum is so much necessary raw material, but warmth is the vital element for the growing plant and for the soul of the child." We can all agree that "curriculum" is abstract, not necessarily defined with precision. "Warmth" is likewise incapable of precise definition. But we all know warmth when we feel it.

And we feel it here at the MDTC. Whether it be the golf outing, the summer or winter meeting, the "Meet the Judges" event, or the Legal Excellence Awards, anyone who has attended an MDTC event has experienced the comradery and inherent warmth that membership in the MDTC offers.

The MDTC is, by far, the greatest and warmest organization. The MDTC welcomes all like-minded individuals who want to join, including curious young guns searching for greatness or even just to belong. As an organization built by the hands of seasoned and respected professionals of the defense industry, the MDTC strives to provide the best support and resources for young lawyers trying to navigate the civil defense world. And we do. For most of us, the path to success is permeated with obstacles and devoid of shortcuts. If

you need a mentor or just want to meet awesome people, the MDTC membership is the best place to start.

Thank you for your continued support of this incredible organization.

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2025

Thursday, March 20, 2025
6:00 pm – 9:00 pm
Legal Excellence Awards – *Gem Theatre*

Friday, June 20, 2025
9:00 am – 5:30 pm
Annual Meeting & Summer Conference – *Soaring Eagle Casino*

E-Discovery Report

By: B. Jay Yelton, III, *Warner Norcross + Judd LLP*
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Defendant Sanctioned for Failing to Suspend Cell Phone Auto-Delete Upon Receipt of a Cease-and Desist Letter

Safelite Group, Inc. v. Nathaniel Lockridge, et al., 2024 WL 4343038 (S.D. Ohio Sept. 30, 2024)

Plaintiff, an auto-glass repair and replacement company, brought this action against a competitor and some of its former employees alleging misappropriation of trade secrets and interference with its employment contracts and business relationships. Defendant Nathaniel Lockridge resigned from Plaintiff's employ in August 2021 and immediately began working for a competitor. Documents produced during discovery reflected that Defendant spoke to and texted with other employees of Plaintiff for the purpose of recruiting them to work for the same competitor. On August 27, 2021, Plaintiff sent Defendant a detailed cease-and-desist letter reminding him of his non-solicitation obligations, demanding assurances that he was complying with those obligations, and threatening legal action absent such assurances.

Plaintiff filed this action on September 13, 2021 and served Defendant with the complaint shortly thereafter. Defendant met with counsel on October 7, 2021, and received advice about his obligation to refrain from destroying, deleting, or throwing away any documents, records, or communications that dealt with the allegations in the lawsuit. He received a written litigation hold in November 2021.

In response to Plaintiff's request that Defendant produce certain communications, Defendant admitted that he made no effort to preserve his text messages until February 3, 2022, when he claims to have discovered that his cell phone was set to delete any text messages older than 30 days. As a result, Defendant did not preserve any text messages sent or received before January 4, 2022. Plaintiff filed a motion for an order finding that Defendant spoliated evidence, imposing an adverse-inference sanction, and awarding costs and expenses.

The Court began its analysis by explaining that a party to civil litigation has "a duty to preserve information, including [ESI], when he knows (or should know) that the information may be relevant to future litigation." Quoting from FRCP 37(e), the Court further explained that a party seeking sanctions for spoliation of ESI must show that (1) ESI that "should have been preserved in the anticipation or conduct of litigation" was lost; (2) the party responsible for preserving the information "failed to take reasonable steps to preserve" it; and (3) the information "cannot be restored or replaced through additional discovery."

B. Jay Yelton, III

After 30+ years as a litigator and manager of eDiscovery teams, Jay now focuses on serving as discovery mediator and special master where he assists parties to design proportional discovery plans and to resolve discovery disputes. Jay is an Adjunct Professor at Michigan State University College of Law and at Thomas M. Cooley Law School where he teaches eDiscovery. Jay is recognized by *Best Lawyers in America* for eDiscovery, Litigation, and Data Privacy. He serves as Education Director and Chairman Emeritus for the Detroit Chapter of BarBri's eDiscovery Association (Association of Certified eDiscovery Specialists), as a member of the Global Advisory Council for E.D.R.M. and as a member and editor for The Sedona Conference.

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The Court next explained that once these elements are satisfied, differing sanctions can be granted depending on the "cause and effect of the spoliation." First, under Rule 37(e)(1), a court can impose sanctions that are "no greater than necessary to cure the prejudice" if the loss of information prejudices the movant, regardless of the nonproducing party's intent. Alternatively, under Rule 37(e)(2), a court can impose more severe sanctions if (and only if) the court finds that the nonproducing party intended to deprive the movant of the information's use in the litigation.

The Court found that Plaintiff satisfied each of the elements of a spoliation claim against Defendant. First, the Court found that Defendant was on notice of his duty to preserve after receiving Plaintiff's August 27 cease-and-desist letter. The Court rejected Defendant's argument that no duty could be imposed on him by Plaintiff's August 27 cease-and-desist letter because he was a "lay person." The Court noted that this argument was inconsistent with the applicable objective standard and counter to the relevant authorities' finding that a party's inexperience in litigation is a factor in evaluating whether he took reasonable steps to preserve evidence—not whether he had a duty to preserve evidence.

Second, the Court found that Defendant failed to take reasonable steps to preserve the text messages. The Court explained that Rule 37(e) "does not call for perfection," and courts consider a "party's familiarity with litigation, level of control over the lost evidence, resources, and any evidence of the routine, good faith operation of an information retention system." The Court concluded that Defendant made no effort to preserve his text messages, which were under his exclusive control, despite having the "wherewithal and the resources to discuss his obligations" with counsel. The Court also declined to credit Defendant's assertion that "he did not know his phone automatically deleted text messages after 30 days," finding that "Defendant is an experienced businessman" and "it is not plausible that a modern, professional smartphone user like Defendant could carry on for four years without realizing that his text messages disappeared after 30 days."

The Court faulted Defendant's counsel, who were obligated not only to implement a litigation hold but to monitor Defendant's efforts to retain and produce the relevant documents. While Defendant's counsel orally advised him of the "obligation to retain and not destroy, delete, or throw away any documents, records, or communications that dealt with the allegations in the lawsuit," the Court stated that "an oral litigation hold is insufficient to reasonably protect against the spoliation of evidence."

Third, the Court found that Defendant's text messages could not be restored or replaced through additional discovery. Plaintiff demonstrated that it was unable to obtain the text messages by other means, including from the other parties to those text messages. The Court also concluded that there was no substitute for the messages, because "without the lost text messages, Plaintiff is deprived of the opportunity to know the precise nature and frequency of those private communications, which occurred during a critical time period."

Having concluded that Plaintiff demonstrated spoliation, the Court turned to the appropriate sanction. The Court stated that Plaintiff demonstrated prejudice by proffering evidence that Defendant exchanged extensive text messages with relevant individuals during a critical time period and communicated with his new employer about those individuals during that same critical period. The Court noted that prejudice could be found based on the fact that Plaintiff was "required to piece together information from other sources to try to recover relevant documents."

When presented with discovery motions, courts are more closely evaluating whether counsel conducted a meaningful meet and confer in good faith. A meaningful meet and confer includes: (a) providing opposing counsel with details and support for your position and (b) being willing to explore alternatives.

With respect to the specific sanction, the Court stated that sanctions under Rule 37(e)(1) were appropriate based on Defendant's negligent failure to preserve the text messages. explained that "the severity of the sanction is determined on a case-by-case basis, depending in part on the non-producing party's level of culpability," but must be "no greater than necessary to cure the prejudice." After "considering the record as a whole in assessing the extent to which Plaintiff has been prejudiced by the lost text messages," the Court concluded that Plaintiff should be permitted to introduce evidence at trial of the August 27 letter and of Defendant's failure to preserve his text messages.

Accordingly, the Court granted Plaintiff's motion for spoliation sanctions and ordered that the parties be permitted to present admissible evidence of Defendant's duty to preserve his text messages and negligent failure to do so, along with argument on whatever inference the jury should draw from that evidence. The Court further awarded Plaintiff attorneys' fees and costs.

PRACTICE TIP: Data on cell phones is increasingly relevant evidence for many if not most case. In those cases, it is essential for attorneys: (a) to provide clients with written instructions on how to preserve that data including the suspen-

sion of relevant auto-delete programs and (b) to monitor compliance. Courts are becoming much less tolerant when those steps are not undertaken.

Parties Criticized for Not Effectively Engaging in a Meet and Confer and for Refusing to be Transparent Regarding Search Term Statistics

Humanmade v. SFMade, 2024 WL 3378326 (N.D. Cal. July 10, 2024)

In this action alleging claims for false advertising, unfair business practices, and related torts, Plaintiff claimed that Defendants misused a proprietary training program developed by Plaintiff and cut Plaintiff out of partnerships with cities and aid organizations.

During discovery, the parties agreed on five custodians for Defendants to use and "several" search terms to apply to the ESI of those custodians. However, the parties could not agree on seven additional proposed search terms because Defendants claimed that they yielded too high a hit count, thus making review of documents based on those seven search terms overly burdensome. Plaintiff complained that Defendants refused to disclose hit counts resulting from the seven disputed search terms and refused to negotiate revisions to those terms. There was apparently no dispute as to the relevance of Plaintiffs' document requests or the seven additional search terms.

The Court began its analysis with a lengthy discussion of proportionality under the Federal Rules. In particular, the Court noted that FRCP 26(b)(1) provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." The Court also explained that while the party seeking discovery bears the burden of establishing relevancy, once it does so the resisting party has the burden to "specifically explain the reasons why the request at issue is objectionable and may not rely on boilerplate, conclusory, or speculative arguments."

Turning to the application of these standards, the Court first concluded that it would be proportional to require Defendants to "run additional search terms, if appropriately drafted, and produce responsive ESI documents and materials" because there was no dispute over the relevance of Plaintiffs' document requests. However, the Court ultimately concluded that it could not rule on Plaintiffs' motion to compel. The Court noted that neither party had submitted all seven of the disputed search terms in connection with the motion. The Court also expressed disappointment that the parties failed to engage in "the kind of communication during meet and confers which is expected and necessary for effective resolution of discovery issues." The Court noted that "experienced counsel should be capable of and, indeed, are expected to resolve ESI and search term disputes typically without the need for Court intervention, because eDiscovery issues are common in the modern era and members of the bar are expected to be familiar with and capable of competently working through these kinds of issues."

The Court also took Defendants to task for failing to share "statistics on hit counts for the seven disputed search terms transparently with Plaintiff." The Court explained that "parties are both encouraged and expected to timely share eDiscovery statistics such as hit number results when they have a dispute over eDiscovery issues such as search terms." The Court similarly chided Plaintiff for failing to "propose any alterations to, limitations on, or modifications to any of the seven disputed search terms when informed that they yield an excessive and unreasonably high number of hits."

Based on these failures by counsel, the Court ordered the parties "to undertake the normal type of search term negotiation and resulting ESI production that they should have done without the need for Court intervention." As part of this negotiation, the Court ordered (1) Defendants to provide Plaintiff with the hit count statistics resulting from running each of the seven disputed search terms against Defendants' database of collected ESI; (2) Plaintiff to provide Defendants with a set of up to seven modified search terms to replace the original seven search terms, "where the modifications shall be made for the purpose of reducing the hit count to address overbreadth and undue burden"; and (3) Defendants to run the proposed modified search terms and report the document hit count statistics to Plaintiff. In this regard, the court noted that the party in possession of the documents and ESI database from which discovery is sought is generally expected to "run test searches using the opposing party's proposed search terms to see if they return a reasonable and mutually agreeable hit count (whether too high or too low)."

Finally, the Court restated that "able and experienced counsel, particularly lead trial counsel, are expected to and should know how to resolve disputes of the kind raised herein and how to resolve them efficiently and without undue delay." The Court ordered the parties' counsel to review and comply with the Court's Guidelines for Professional Conduct, the Court's Discovery Standing Order, and the FRCP (particularly Rules 1 and 26).

PRACTICE TIP: When presented with discovery motions, courts are more closely evaluating whether counsel conducted a meaningful meet and confer in good faith. A meaningful meet and confer includes: (a) providing opposing counsel with details and support for your position and (b) being willing to explore alternatives.

Court Analyzes Parties' Obligation When Requesting & Producing Metadata

Bah v. Sampson Bladen Oil Company, Inc., 2024 WL 3678337 (E.D. N.C. Aug. 5, 2024)

Plaintiff sued her former employer for employment discrimination. At the outset, the parties submitted a Joint Rule 26(f) Report in which they agreed that most ESI should be produced in TIFF format but that some types of ESI, such as Excel spreadsheets, PowerPoint files, and audiovisual files, should be produced in native format. The Joint Rule 26(f) Report provided that when a party produced ESI in TIFF format, the production "would also include metadata and searchable, extracted text," but the report did not specify which metadata should be produced.

When discovery commenced, Plaintiff served requests for production that did not specify the metadata that should accompany production, and Defendant eventually produced about 2,100 documents consisting of 13,000 pages in TIFF format and a "handful of documents in native format." Defendant provided a load file with the production containing searchable, extracted text and 13 metadata fields. Plaintiff complained that the production was "completely unusable" because she could not "filter the documents by date and would instead need to search each specific date as text within the TIFF file," which would be "extremely cumbersome and time-consuming" and would increase the chance of overlooking relevant documents. She also complained that the production lacked "Bates numbers" and "parent/child relationship fields." Plaintiff requested that Defendant provide additional metadata, but Defendant refused to do so.

Plaintiff filed a motion to compel additional metadata, arguing that both the FRCP and the parties' Joint Rule 26(f) Report required Defendant to provide all metadata fields available. The Court rejected Plaintiff's argument that Defendant violated the Joint Rule 26(f) Report and Rule 34 by producing only some of the available metadata. The Court noted that the parties agreed in the Joint Rule 26(f) Report that ESI produced in TIFF format would "include metadata and searchable, extracted text." He found that the report was ambiguous as to whether the reference to metadata meant "all available metadata" or something less.

To resolve this ambiguity, the Court looked to Rule 34, under which the requesting party may request that the responding party produce ESI in a particular form and the responding party may object to the requested form. The Court explained that Rule 34 "encourages the parties to be explicit about issues related to the form of production for ESI," whereby the requesting party "should explicitly state its desired form of production and the responding party should explicitly state the form in which it is willing to produce ESI." The Court also noted that these requirements "are designed to avoid the very problems confronting the court and the parties here" by facilitating "the orderly, efficient, and cost effective discovery of ESI."

The Court surveyed prior case law on the issue of metadata requests, summarizing these decisions as requiring "parties to address those issues explicitly and promptly." In particular, "if a party wants metadata, it should ask for it. Up front. Otherwise, if the party asks too late or has already received the document in another form, it may be out of luck." Applying these standards, the Court concluded that the parties' use of the term "metadata" in their Joint Rule 26(f) Report, without more, entitled neither party to "all available metadata." The Court explained that "a party who wants ESI produced in non-native format to be accompanied by all available metadata must say so."

Data on cell phones is increasingly relevant evidence for many if not most case. In those cases, it is essential for attorneys: (a) to provide clients with written instructions on how to preserve that data including the suspension of relevant auto-delete programs and (b) to monitor compliance.

With respect to "how much metadata the parties must produce," the Court again looked to Rule 34, where in the absence for a request for a specific production form, the responding party "must produce ESI in a form or forms in which it is ordinarily maintained" or in a "reasonably usable form." The Court concluded that because the parties' Joint Rule 26(f) Report provided for production of most ESI in non-native format, those documents were required to "be produced in a reasonably usable form." As a result, the Court held that "unless a request for production contains more specific instructions, any ESI produced in non-native format must include enough metadata to be reasonably usable to the requesting party."

The Court then addressed whether Defendant had complied with its obligation to "produce ESI in a reasonably usable form." The Court explained that Rule 34 does not allow a party to produce ESI in "a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation." Rather, "if the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature." The Court stated that Plaintiff, as the requesting party, had the burden to show that ESI has not been produced in a reasonably usable format.

Addressing Plaintiff's arguments in support of her claim that Defendant's production was not "reasonably usable," the Court found that Plaintiff was able to access, review, and text-search the ESI produced. The Court concluded that these facts undermined Plaintiff's request for additional metadata. The court also rejected Plaintiff's argument that the lack of Bates numbers and parent/child metadata rendered the productions unusable. The Court noted that the parties' ESI vendors appeared to agree that Defendant's production included fields for "Production Beg Bates and End Bates along with Production Beg Attach and End Attach," meaning that Defendant's production included Bates numbers. The Court also noted that Plaintiff did not dispute Defendant's argument that "the production bates attach and production bates end metadata allows for the identification of documents that are attachments to others."

The Court next addressed whether the lack of metadata allowing Plaintiff to filter documents by date and to categorize documents by file type rendered Defendant's production unusable. The Court cited to several decisions supporting the proposition that in most cases, courts find that "a production is reasonably usable if it is text searchable." The Court added that Rule 34's Advisory Committee Notes support the position that whether a production is searchable aligns with the commentary: "If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature."

The Court concluded that Defendant's production met the requirement that ESI be produced in a reasonably usable format because it was text searchable, and there was nothing in the record establishing that the production was less searchable for Plaintiff than it would be for Defendant. In this regard, the Court noted that Plaintiff was able to view the documents using her ESI vendor's eDiscovery platform and search them for "specific dates and specific individuals." The Court also noted that Plaintiff had failed to provide specific information about how her review would be impeded by the lack of the additional metadata, how much more onerous reviewing the production would be, or how additional metadata would streamline Plaintiff's review of the documents.

Ultimately, the Court found that while Defendant's production was not reviewable and searchable with the ease and sophistication that Plaintiff preferred, this was not required. Rather, Rule 34 requires only that when ESI is produced in a non-native format, the chosen form must be reasonably usable by the requesting party. Rule 34 does "not require that ESI be produced in the form the requesting party prefers or the one that is the most easily usable by the requesting party." The Court concluded that Defendant complied with its obligations because Plaintiff did not request specific metadata fields in her requests for production and Defendant's production was reasonably usable. Therefore, Plaintiff's motion to compel additional metadata was denied.

PRACTICE TIP: Depending on the types of relevant ESI in your case, the parties may need to request different production formats. Most attorneys lack an adequate understanding of metadata fields and production formats to develop an adequate production protocol. In these situations, you should consult with a well-respected ESI vendor early in the case so that an agreed upon protocol can be included in your joint discovery plan. Failure to do so will result in unnecessary costs and delays.

Insurance Coverage Report

By: Drew W. Broaddus, *Smith Haughey*
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***Hairston v Lku, et al,* __ Mich __; __NW3d __ (2023) (Docket No. 363030), lv pending, 4 NW3d 484 (Mich, 2024**).

The issue presented in *Hairston* is whether a bad faith claim against a liability carrier can be asserted in a garnishment action. Darnell Hairston lost his right hand and forearm in an accident at a soybean processing facility where he was employed. A jury found that Specialty Industries was grossly negligent in its design of the processing machinery, resulting in a $13.5 million judgment in Hairston's favor. Specialty Industries had liability coverage through Burlington Insurance Company and Evanston Insurance Company. Those two insurers paid approximately $9.7 million of the judgment. Hairston sought to collect the remaining balance on the judgment from the insurers after Specialty Industries assigned Hairston its right to pursue a bad faith "failure to settle" claim.[1] After Hairston was denied the ability to litigate that issue in proceedings supplemental to the personal injury judgment, he filed a writ of garnishment against the insurers. The Court of Appeals held, in a published opinion, that Hairston could litigate his bad faith claim in the garnishment action, citing *Rutter v King,* 57 Mich App 152; 226 NW2d 79 (1974). The insurers filed an application for leave to the Supreme Court. The Insurance Alliance of Michigan filed an amicus curiae brief in support of the insurers' position. On December 4, 2024, the Supreme Court heard oral argument on the insurers' leave application.[2] The Supreme Court has not yet issued its decision.

A jury found that Specialty Industries was grossly negligent in its design of the processing machinery, resulting in a $13.5 million judgment in Hairston's favor.

Hairston is notable because bad-faith litigation is rare in Michigan. After almost forty years, the main case remains *Commercial Union Ins Co v Liberty Mut Ins Co*, 426 Mich 127; 393 NW2d 161 (1986).[3] In *Commercial Union*, an excess insurer (Commercial Union) filed suit under an equitable subrogation theory[4] against a primary insurer (Liberty Mutual). Commercial Union alleged that Liberty Mutual's failure to negotiate a settlement in a case against their mutual insured constituted bad faith, thereby causing Commercial Union's excess policy to be exposed. The jury found no cause of action against Liberty Mutual, but the Court of Appeals reversed, ordering a new trial and finding that the trial court's bad faith instructions were, in part, prejudicial and erroneous. The Supreme Court affirmed the Court of Appeals and, instructing the trial court on remand, explained that "bad faith should not be used interchangeably with either 'negligence' or 'fraud.'" The Court defined "bad faith," for

Drew W. Broaddus

Drew Broaddus is a leading appellate advocate with two decades of experience in litigation and insurance matters. He has argued over 150 cases in the Michigan Court of Appeals and has also argued multiple cases in the Michigan Supreme Court, the U.S. Court of Appeals for the Sixth Circuit, and various state and federal trial courts.

Throughout his career, Mr. Broaddus has successfully handled cases involving general negligence, premises liability, motor vehicle accidents, and insurance coverage disputes. His strategic approach has earned him recognition among clients and peers alike as seen through a variety of Super Lawyers and Top Lawyers accolades that he has received in recent years. Additionally, Mr. Broaddus has received an AV Preeminent® Peer Review Rating by Martindale-Hubbell.

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the purposes of instructing the jury on remand, as "arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty." "Good-faith denials, offers of compromise, or other honest errors of judgment are not sufficient to establish bad faith." "Further, claims of bad faith cannot be based upon negligence or bad judgment, so long as the actions were made honestly and without concealment." But because "bad faith is a state of mind," the Court noted that "there can be bad faith without actual dishonesty or fraud." "If the insurer is motivated by selfish purpose or by a desire to protect its own interests at the expense of its insured's interest, bad faith exists, even though the insurer's actions were not actually dishonest or fraudulent."

The *Commercial Union* Court went on to identify the following twelve "supplemental factors which may be considered in determining whether liability exists for bad faith":[5] (1) failure to keep the insured fully informed of all developments in the claim or suit that could reasonably affect the interests of the insured, (2) failure to inform the insured of all settlement offers that do not fall within the policy limits, (3) failure to solicit a settlement offer or initiate settlement negotiations when warranted under the circumstances, (4) failure to accept a reasonable compromise offer of settlement when the facts of the case or claim indicate obvious liability and serious injury, (5) rejection of a reasonable offer of settlement within the policy limits, (6) undue delay in accepting a reasonable offer to settle a potentially dangerous case within the policy limits where the verdict potential is high, (7) an attempt by the insurer to coerce or obtain an involuntary contribution from the insured in order to settle within the policy limits, (8) failure to investigate the claim properly before refusing an offer of settlement within the policy limits, (9) disregarding advice or recommendations of an adjuster or attorney, (10) serious and recurrent negligence by the insurer, (11) refusal to settle a case within the policy limits following a verdict in excess of the policy limits when the chances of reversal on appeal are slight or doubtful, and (12) failure to take an appeal following a verdict in excess of the policy limits where there are reasonable grounds for such an appeal (especially where trial counsel so recommended).[6] The Court noted that these "factors are not exclusive" and "[n]o single factor shall be decisive."[7]

The *Commercial Union* Court was not the first to recognize bad faith in the insurance setting; the concept appears in Michigan jurisprudence at least far back as the *City of Wakefield v Globe Indemnity Co,* 246 Mich 645; 225 NW 643 (1929). But *Commercial Union* was and is the seminal decision defining the concept, at least in the context of liability claims.

Four years later, in *Frankenmuth Mutual Ins Co v Keeley (On Rehearing),* 436 Mich 372; 461 NW2d 666 (1990), the Court clarified that an insurer's liability for bad faith failure to settle is limited by the collectability of its insured. The Court adopted Justice Levin's dissent in *Frankenmuth Mutual Ins Co v Keeley*, 433 Mich 525; 447 NW2d 691 (1989). The approach adopted by the Court on rehearing was described as a compromise between the "prepayment rule" (which required an insured to have made some payment on the judgment[8]) and the "judgment rule" (which required an insurer to pay an excess judgment in instances of bad faith, regardless of the insured's solvency or ability to pay any part of the judgment.[9]) The compromise proposed by Justice Levin, and later adopted by the Court, was to "accept the essence of the judgment rule by eliminating the need to show partial payment, but provide protection for insurers along the lines of the prepayment rule by precluding collection on the judgment from the insurer beyond what is or would actually be collectible from the insured."[10]

We should know sometime in the first half of 2025 whether these types of claims can be asserted via a writ of garnishment, as the Court of Appeals' published *Hairston* decision allows.

***Auto-Owners Ins Co v Forest Ins Center Agency,* unpublished opinion per curiam of the Court of Appeals, issued October 25, 2024 (Docket No. 366123).**

This declaratory judgment action deals with the Auto-Owners' duty to defend and/or indemnify its insureds (who were independent insurance agents) from underlying errors and omissions. In the underlying negligence suit, the plaintiffs alleged that Auto-Owners' insureds failed to procure adequate insurance for a sawmill, which was destroyed in a July 2, 2019 fire and covered under a policy placed several months earlier. Auto-Owners did not provide liability coverage to these agencies until June 2019, but the agencies had been placing insurance for the underlying plaintiffs for several years. Auto Owners' policy contained a "retroactive date" of June 27, 2019, and the policy stated that "[c]overage does not apply to any[ ] incident which takes place before the retroactive date...."[11]

Auto-Owners moved for summary disposition, arguing that it had no duty to defend or indemnify relative to the underlying suit because the relevant coverage was placed by Auto-Owners' insureds in November 2018, months before the policy's "retroactive date."[12] The trial court rejected that argument, holding that Auto-Owners' insureds were under a continuing duty to assess coverage up to the date of the fire, including for about a week after the "retroactive date."[13] In other words, the agencies' failure – during that five-day interval – to discover their alleged oversight nine months earlier was considered an "incident" after the "retroactive date,' triggering Auto-Owners' duty to defend. The Court of Appeals affirmed.[14]

The Court of Appeals summarized the facts as follows: "This

case arises from a July 2, 2019 fire at the Kamps defendants' sawmill in Fountain, Michigan, that allegedly caused over $22 million in property damage and business losses."[15] "From November 2014 through July 2019, [Kamps] contracted with Forest and Mauck … to procure commercial insurance for the Kamps defendants' multiple businesses," including "the sawmill that burned down."[16] But the policy only provided "$1,250,000 for building replacement coverage, $2,133,500 for business personal property coverage, and nothing for business interruption coverage, significantly less than [Kamps] required."[17]

"On August 12, 2020, the Kamps defendants sued the Forest defendants, alleging that they negligently procured inadequate commercial insurance coverage for the sawmill, thereby causing over $19 million in uninsured losses stemming from the fire."[18] "According to the Kamps defendants, in January 2018, the Forest defendants reduced their business personal property coverage despite their request for additional coverage."[19] "And in January 2019, the Forest defendants [allegedly] inaccurately responded to the Kamps defendants' inquiries by advising them that they had blanket business interruption coverage for each of their facility locations when, in fact, the sawmill had no such coverage."[20]

"The Forest defendants maintained primary professional-liability insurance" through multiple carriers, including "a commercial umbrella policy written by Auto-Owners…."[21] The policy "included an endorsement that provided 'claims-made coverage' for any 'incident' that occurred between June 27, 2019, and June 27, 2020."[22] The policy defined "incident", in relevant part, as "any negligent act, error, or omission or breach of duty of the insured or a person whose acts, errors or omissions the insured is legally liable."[23]

After the Forest defendants' primary liability carrier tendered its policy limits, "Auto-Owners filed this action seeking a declaratory judgment that it has no contractual duty to defend the Forest defendants or indemnify the Kamps defendants on their behalf."[24] "…Auto-Owners alleged that it was entitled to declaratory relief because the Forest defendants neither affirmatively erred nor erred by omission during the policy term at issue."[25] "The Kamps defendants countered that the Forest defendants negligently procured inadequate insurance coverage and failed to rectify their error before the sawmill fire took place during the policy term at issue."[26] After both sides moved for summary disposition, the trial court ruled against Auto-Owners because "the Forest defendants allegedly procured inadequate insurance coverage on behalf of the Kamps defendants and continuously failed to rectify their alleged errors before the sawmill fire occurred on July 2, 2019 – five days after Auto-Owners' commercial umbrella policy went into effect."[27]

In affirming, the *Forest Ins Center* panel found *P L Kanter Agency, Inc v Continental Cas Co,* 541 F2d 519 (CA 6, 1976) to be particularly instructive. In *P L Kanter,* a fire damaged a cocktail lounge in Livonia, Michigan.[28] The P. L. Kanter Insurance Agency committed certain errors and omissions in procuring insurance for the cocktail lounge, which resulted in the premises being inadequately and improperly insured.[29] "P. L. Kanter had two potentially applicable professional-liability insurance policies."[30] "The first policy was in effect when the errors and omissions first took place."[31] "The second policy was in effect when "the actual loss itself and claim made thereon occurred…."[32] Applying Michigan law in diversity, the Sixth Court held that P. L. Kanter's errors and omissions "were not traceable to merely a single act or acts … but instead were continuing omissions which existed immediately prior to the fire…."[33] The Sixth Circuit "stated that P. L. Kanter had a duty to provide adequate insurance or, failing that, to promptly notify the cocktail lounge owners so that they could obtain adequate coverage elsewhere."[34] The Sixth Circuit further explained that P. L. Kanter's duty "was as binding on the date of the fire as it was when the obligation was originally undertaken."[35] Therefore, "P. L. Kanter's professional-liability insurance policy in effect on the date of the fire provided primary coverage for the alleged loss."[36]

The *Forest Ins Center* panel found that *P L Kanter* applied because "the Forest defendants were duty-bound to procure the Kamps defendants' requested coverage and accurately advise the Kamps defendants regarding the adequacy of their business interruption coverage."[37] As explained in *P L Kanter*, 541 F2d at 522, "those duties were as binding on the date of the sawmill fire as they were on the dates they initially arose."[38]

Underlying the *Forest Ins Center* opinion is the sometimes confusing nature of an independent agent's duty. The duty has been described as a "fiduciary duty of loyalty…."[39] Yet, courts have generally limited that duty to providing the insurance requested by the customer; "an insurance agent does not have an affirmative duty to advise a client regarding the *adequacy* of a policy's coverage."[40] "Instead, the insured is obligated to read the policy and raise questions concerning coverage within a reasonable time after issuance."[41] But, "an insurance agent owes a duty to procure the insurance coverage requested by an insured."[42] That was the duty Auto-Owners' insureds allegedly breached.

The *Forest Ins Center* opinion also sheds light on the sometimes-confusing contours of the duty to defend. The duty to defend is broader than the duty to indemnify – and can conceivably apply to claims "which are not covered under the policy" – but "the duty to defend is not an unlimited one," and an "insurer is not required to defend against claims for damage

expressly excluded from policy coverage."[43] The duty to defend "arises solely from the language of the insurance contract,"[44] but also "depends upon the allegations in the complaint of the third party.…"[45] And sometimes, the insurer must look beyond the complaint since the "duty to defend … includes the duty to investigate."[46]

***Auto-Owners Ins Co v JROC Inc*, unpublished opinion per curiam of the Court of Appeals, issued September 12, 2024 (Docket No. 369309).**

Like *Forest Ins Center, JROC* also dealt with the duty to defend and culminated in a finding that Auto-Owners owed the duty to defend. The facts that gave rise to this declaratory judgment action were unusual and tragic. The central issue was whether Auto-Owners' insured, the operator of a bar adjacent to a marina, was responsible for a nearby boat launch where two people drowned.

The Court of Appeals summarized the facts as follows: "On August 16, 2019, after 11:00 p.m., Jill Parrinello and Darrin Gabbard arrived at the Sand Bar Grille, which is located on the premises of the Safe Harbor Marina in LaSalle, Michigan."[47] "The two sat at the bar and were served 2-3 beers each," then "left a little after 1:00 a.m."[48] "Thereafter, they both went missing."[49] About a week later, "police discovered Parrinello's vehicle at the bottom of the waterway channel."[50] "Parrinello and Gabbard, both of whom had been trapped in the vehicle after it entered the water, were pronounced dead at the scene."[51]

"Parrinello's estate filed a premises liability claim against JROC Inc., doing business as the Sand Bar Grille, SHM Toledo Beach LLC, and Safe Harbor Marinas LLC."[52] "Thereafter, defendants SHM Toledo Beach LLC and Safe Harbor Marinas (collectively the Marina defendants) filed a cross-claim against JROC, alleging breach of a commercial lease agreement and seeking indemnification for any damages arising from the failure to comply with the terms of the lease agreement."[53] This prompted "Auto-Owners, JROC's insurer, [to file] a complaint for declaratory judgment, seeking a declaration that the Marina defendants were not covered by the insurance policy that it had issued to JROC."[54]

"[T]he Marina defendants moved for summary disposition … alleging that they qualified as additional insureds under JROC's policy because Parrinello's death arose out of the use of the portion of the premises leased to JROC given that Parrinello's sole purpose for being at the marina was to patronize the Sand Bar Grille."[55] "Auto-Owners argued in response that the Marina defendants were not additional insureds because the underlying litigation did not relate to the ownership, maintenance, or use of any part of the premises that had been leased to JROC."[56] "And given the lack of additional insured status, Auto-Owners requested that the trial court grant it summary disposition against the Marina defendants."[57] The trial court rejected Auto-Owners' position and granted summary disposition to JROC. The Court of Appeals affirmed.

Resolution of the appeal "require[d] consideration of the interplay between JROC's insurance policy that was issued by Auto-Owners and the commercial lease agreement that JROC entered into with the Marina defendants."[58] "[T]he Marina defendants entered into a written lease agreement with JROC and, under the terms of that agreement, JROC was required to name the Marina defendants as additional insureds."[59] "Therefore, the first requirement … of [the Auto-Owners' policy's] commercial general liability plus coverage endorsement" was satisfied.[60] Coverage therefore turned on whether there was "liability arising out of the ... use of that part of the premises leased to" JROC.[61]

The panel answered in the affirmative. The panel explained that the phrase "arising out of," in the context of insurance contracts, has "a broad, comprehensive, and general meaning" synonymous with the phrases "grows out of," "originating from," "having its origin in," or "flowing from."[62] "These phrases are frequently given a broader and more comprehensive meaning than that encompassed by proximate cause" and are generally considered to mean, in the insurance context, "flowing from" or "having its origin in."[63] So, the phrase "arising out of" does not require "a direct proximate causal connection but instead merely requires some causal relation or connection."[64] Applied here, this meant that Auto-Owners had a duty to defend JROC if there was a "causal connection between Parrinello's death and the use of the Sand Bar Grille that [was] more than incidental, fortuitous," or "but for."[65]

The panel found such a connection where "Parrinello … drank beer and sat at the bar" during a time when "[t]he Marina was not open to the public," and "Parrinello was not one of the Marina's tenants."[66] Also, "the general manager for SHM Toledo testified that, at the time that Parrinello's phone was 'pinging' in the area of the Marina, the only purpose for her being on the premises would be to patronize the Sand Bar Grille."[67] In addition, there was "likely" a "gate attendant, who would have required Parrinello to state that she was going to the Sand Bar Grille before she was admitted into the parking area."[68] Therefore, "the Marina defendants presented more than mere speculation in support of their contention that Parrinello's sole purpose for being at the Marina was to patronize the Sand Bar Grille."[69]

The panel rejected Auto-Owners' argument that the phrase "arising out of ... the use of that portion of the premises leased to" JROC meant that liability was limited "to incidents that occur in the interior portion of the building that was leased

to JROC."[70] Although the lease provided support to Auto-Owners' position, the panel noted that the lease also provided JROC "and its guests, visitors, and business invitees" with a "non-exclusive, revocable license" to use the common areas, described as "the shared access, parking areas, and driveways serving the Marina."[71] The panel interpreted this language to mean that the phrase "leased portion of the premises" included permission for "both JROC's employees and patrons to *use* the Marina's parking lot."[72] "Moreover, the lease also provided that the leased premises could be *used* for both the specified purpose of the operation of a bar and restaurant" and for "any uses incidental" to that use.[73] So, under "the plain terms of the commercial lease," JROC's "use of the leased portion of the premises" *was* "not limited solely to the use of the interior portion of the premises."[74] Put another way, "the commercial general liability plus coverage endorsement [did] not preclude coverage simply because Parrinello's death occurred outside of the leased building."[75]

Endnotes

1 See *Frankenmuth Mut Ins Co v Keeley,* 433 Mich 525, 534; 447 NW2d 691 (1989).
2 The Supreme Court's "MOAA" Order directed the parties to "file supplemental briefs ... addressing whether a claim of bad-faith refusal to settle by an insurer can be litigated in a writ of garnishment." *Hairston v Lku,* 4 NW3d 484 (Mich, 2024).
3 See, for example, *Great Am Ins Co v E.L. Bailey & Co, Inc,* 841 F3d 439, 446 (CA 6, 2016).
4 For an explanation of equitable subrogation, see *Esurance Prop & Cas Ins Co v Michigan Assigned Claims Plan*, 507 Mich 498; 968 NW2d 482 (2021).
5 *Commercial Union*, 426 Mich at 138-139. These factors have not been significantly modified by Michigan Courts in the thirty years since. See *Great Am Ins Co*, 841 F3d at 446.
6 *Commercial Union*, 426 Mich at 138-139.
7 *Id.* at 137.
8 "The underlying rationale" of the prepayment rule "is that where an insured does not pay any money in satisfaction of an excess judgment, the insured is not harmed and thus may not collect damages." *Econ Fire & Cas Co v Collins,* 643 NE2d 382, 385 (Ind App, 1994).
9 *Keeley,* 433 Mich at 553-565 (Levin, J., dissenting). The "judgment rule" was and remains the majority rule. See *Miller v Kenny,* 180 Wash App 772, 799; 325 P3d 278 (2014).
10 *Keeley,* 433 Mich at 565 (Levin, J., dissenting).
11 See *Forest Ins Center,* unpub op at 2-3. The undersigned represented Auto-Owners in this case in the Court of Appeals.
12 See *Forest Ins Center,* unpub op at 3-5.
13 See *Id*.
14 See *Id.*
15 *Forest Ins Center,* unpub op at 1.
16 *Id.,* unpub op at 1-2.
17 *Id.,* unpub op at 2.
18 *Id.*
19 *Id.*
20 *Id.*
21 *Forest Ins Center,* unpub op at 2.
22 *Forest Ins Center,* unpub op at 2.
23 *Id.,* unpub op at 5.
24 *Id.,* unpub op at 3.
25 *Id*.
26 *Id*.
27 *Id*.
28 *Forest Ins Center,* unpub op at 5, citing *P L Kanter*, 541 F2d at 520.
29 *Forest Ins Center,* unpub op at 5, citing *P L Kanter*, 541 F2d at 520.
30 *Forest Ins Center,* unpub op at 5, citing *P L Kanter*, 541 F2d at 520.
31 *Forest Ins Center,* unpub op at 5, citing *P L Kanter*, 541 F2d at 520.
32 *Forest Ins Center,* unpub op at 5, citing *P L Kanter*, 541 F2d at 520.
33 *Forest Ins Center,* unpub op at 5, citing *P L Kanter*, 541 F2d at 522.
34 *Forest Ins Center,* unpub op at 5, citing *P L Kanter*, 541 F2d at 522.
35 *Forest Ins Center,* unpub op at 5, citing *P L Kanter*, 541 F2d at 522.
36 *Forest Ins Center,* unpub op at 5, citing *P L Kanter*, 541 F2d at 523.
37 *Forest Ins Center,* unpub op at 5.
38 *Id.*
39 *Genesee Food Servs, Inc v Meadowbrook, Inc,* 279 Mich App 649, 656; 760 NW2d 259 (2008).
40 *Mate v Wolverine Mut Ins Co,* 233 Mich App 14, 22; 592 NW2d 379 (1998) (emphasis added).
41 *Id.*
42 *Zaremba Equip, Inc v Harco Nat'l Ins Co,* 280 Mich App 16, 37; 761 NW2d 151 (2008).
43 *Meridian Mut Ins Co v Hunt*, 168 Mich App 672, 677; 425 NW2d 111 (1988).
44 *Stockdale v Jamison*, 416 Mich 217, 224; 330 NW2d 389 (1982).
45 *Dochod v Cent Mut Ins Co*, 81 Mich App 63, 66; 264 NW2d 122 (1978).
46 *Koski v Allstate Ins Co*, 456 Mich 439, 445 n 5; 572 NW2d 636 (1998).
47 *JROC,* unpub op at 1. The undersigned represented Auto-Owners in this case through part of the Court of Appeals.
48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.*
52 *Id.,* unpub op at 2.
53 *Id.*
54 *JROC,* unpub op at 2.
55 *Id.*
56 *Id.*
57 *Id.*
58 *JROC,* unpub op at 2.
59 *Id.,* unpub op at 3.
60 *Id.*
61 *Id.*
62 *Id.,* citing *People v Warren,* 462 Mich 415, 428 n 23; 615 NW2d 691 (2000) (citations omitted).
63 *JROC,* unpub op at 3 (citations omitted).
64 *Id.* (citations omitted).
65 *Id.,* unpub op at 4.
66 *JROC,* unpub op at 4.
67 *Id.*
68 *Id.*
69 *Id.*
70 *JROC,* unpub op at 5.
71 *Id.*
72 *Id.* (emphasis in original).
73 *Id.* (emphasis in original).
74 *Id.*
75 *Id.*

Ingham County Court Press Release

The Michigan Supreme Court has announced the appointment of Judge James S. Jamo as the new Business Court Judge for the 30th Judicial Circuit Court. This prestigious appointment recognizes Judge Jamo's exceptional dedication, expertise, and commitment to upholding justice in complex civil and commercial litigation.

With 40 years of legal experience, Judge Jamo brings a wealth of knowledge and a proven track record of excellence in handling complicated legal matters. He has served in multiple capacities throughout his legal career and was elected to the bench in 2012. Judge Jamo is a graduate of the University of Michigan and received his Law Degree from Thomas M. Cooley Law School.

Upon receiving the appointment, Judge Jamo expressed his gratitude and commitment to the new role, stating, "I appreciate the Supreme Court's trust in me. I commit to bring to this important litigation the high level of dedication and integrity Judge Joyce Draganchuk provided in her 11 years of service as Ingham Circuit's Business Court Judge."

Business courts are intended to provide a case management structure that facilitates more timely, effective, and predictable resolution of complex business cases. Specialized dockets improve the efficiency of the courts, which benefits all litigants.

For more information about the Business Court and its functions, please visit www.courts.michigan.gov or contact the Michigan Supreme Court at (517) 373-0120.

Judge James S. Jamo

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Amicus Report

By: J. Scot Garrison, *Vandeveer Garzia*
and **David Porter,** *Kienbaum Hardy Viviano Pelton & Forrest*
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MDTC also recently filed amicus briefs in three cases before the Michigan Supreme Court.

In *Stefanski v Saginaw County 911 Communications Center Authority* (No. 166663), the Michigan Supreme Court has asked whether an employee reports "a violation or a suspected violation of a law" and thus engages in protected activity under the Whistleblowers' Protection Act if the employee merely reports a violation of the common law.

MDTC's amicus brief, authored by Phil DeRosier and Daniel Ziegler of Dickinson Wright PLLC, answers that question "no." The critical phrase, "a violation . . . of a law," they point out, is part of a larger phrase, "law or regulation or rule promulgated pursuant to law of this state." Using the associated words canon, MDTC advocates reading "law" in a way that is informed by its neighbors, "regulation" and "rule." "[T]he most important commonality that the[se] words . . . share, is that each is enacted by a body acting in a legislative or quasi-legislative manner to respond to a general need." This interpretation finds support in the statute's reference to "*a* law" in the singular, as distinguished from "*the* law." The language suggests that the Legislature meant a particular "law," as opposed to the collective common law. MDTC concludes that this clear and concrete definition of "law," which focuses on discrete legislative or quasi-legislative enactments, will best serve the WPA's purpose by providing both employers and employees with a clear understanding of their rights and obligations.

The Supreme Court heard arguments in the case on January 22, 2025, but has yet to issue a decision.

In *Mann v City of Detroit* (No. 166619), the Michigan Supreme Court is considering the case of a plaintiff who tripped over a metal pole protruding from a sidewalk in the City of Detroit and later sued the City for negligence. The Court has asked whether the City, typically immune from tort claims, is nonetheless subject to suit under the "sidewalk exception" to governmental immunity, MCL 691.1402a.

> This is precisely the result the Legislature sought to avoid with its functional definition of "owner.

J. Scot Garrison

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

David Porter

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

In a brief filed by Briana Combs of Plunkett Cooney, MDTC argues in support of the City and the inapplicability of the sidewalk exception. The exception applies only when the plaintiff's injury is proximately caused by "[a] vertical discontinuity defect of 2 inches or more in the sidewalk" or "[a] dangerous condition in the sidewalk itself." MCL 691.1402a(3)(a)-(b). In arguing that the protruding pole is not a "[a] dangerous condition in the sidewalk itself," MDTC relies on the plain language of MCL 691.1401(f), which defines "sidewalk" as "a paved public sidewalk intended for pedestrian use situated outside of and adjacent to the improved portion of a highway designed for vehicular travel." Notably absent from that definition are objects protruding from the sidewalk, such as the metal pole in the plaintiff's case. Any other reading, MDTC says, would expand the sidewalk exception to include everyday objects like signposts. That would sow confusion and increase litigation, contrary to the Legislature's intent in enacting a limited exception to governmental immunity tied specifically to the paved portions of public sidewalks.

The Supreme Court heard arguments in the case on January 22, 2025, but has yet to issue a decision.

Finally, in *Abdulla v Auto Club Group* (No. 167532), the Auto Club Group Insurance Company has asked the Michigan Supreme Court to correct the Court of Appeals' misinterpretation of a key provision in the No-Fault Act that disqualifies "owners," i.e., those who "hav[e] use of" a vehicle for a period of 30 days or more, from receiving PIP benefits if they are injured while operating their vehicle without the required coverage. In a published decision, the Court of Appeals held that the plaintiff, a commercial truck driver who had exclusive use of and dominion over his semi-truck tractor, was not an "owner" because the tractor was titled in the name of a limited liability company. The Court of Appeals therefore determined that the driver was not disqualified from receiving PIP benefits under the Act.

Notably absent from that definition are objects protruding from the sidewalk, such as the metal pole in the plaintiff's case

In a brief authored by David Porter and Sean Dutton of Kienbaum Hardy Viviano Pelton & Forrest, PLC, MDTC urges the Supreme Court to grant the Auto Club Group's application. MDTC's brief argues that the Court of Appeals effectively eliminated the Act's key deterrent against free riders. The plaintiff—the only one who could be incentivized to obtain coverage through the Act's disqualification provision—will receive the benefits of a no-fault system he did not pay into. Meanwhile, there are no consequences for his company in failing to get coverage because, as a legal fiction, his company will never be behind the wheel. This is precisely the result the Legislature sought to avoid with its functional definition of "owner."

MDTC's brief emphasizes the prevalence of this factual scenario and, consequently, the profound impact the Court of Appeals' decision will have on the insurance industry in Michigan. When uninsured commercial vehicles are involved in an accident, the resulting costs—which, for semi-trucks, on average, run magnitudes higher than accidents involving passenger vehicles—will be passed on to law-abiding motorists in the form of higher premiums. Roughly 36,000 commercial freight companies in Michigan are single-driver, single-truck operations like the plaintiff—half of Michigan's entire commercial freight industry. The Court of Appeals' decision, if left in place, would serve as a roadmap for these and countless other owner-operators (from electricians to plumbers to florists) to sidestep the Act's coverage requirement without repercussion. In other words, it effectively "opens a hole in Michigan's No-Fault Act big enough to drive an uninsured truck through it."

The Michigan Supreme Court has yet to act on the Auto Club Group's application.

The Seven Habits of Civil Lawyers

Originally Published in the State Bar Journal

By: Trent Collier, *Collins Einhorn Farrell PC*
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In the late eighties and early nineties, Steven Covey's *The 7 Habits of Highly Effective People* was everywhere. It was on every bestseller list and in every bookstore. *7-Habit*s-themed stores were popping up in shopping malls. Even President Bill Clinton consulted with Covey on management.

I was a teenager when the *7 Habits* phenomenon arose and, at first, I thought it was cheap, self-help nonsense. But when a copy of the book landed on my dad's bedside table, that was endorsement enough to warrant at least a skim. To my surprise, the book made points that remain with me to this day.

One anecdote stands out. Covey tells the story of a time when his son was really flaking out. (Being an extremely flaky teenager myself, I may have paid extra attention to this anecdote.) So Covey had to talk to his son, right the ship. He realized that he could have immediately delivered a blistering lecture, and demanded better performance in school and better behavior at home. But he knew what would happen: his son would get defensive and the whole encounter would be useless.

So he decided to put aside his more immediate goal and focus on his son. He chose to get a better sense of what was going on in his son's life—to really listen. Only then—only with this foundation laid—could he have a real talk with his son about where his life was heading. And that's essentially what happened. Covey put in extra time listening and just being present for his son. Then, with this foundation, he was able to have a genuine conversation about his son's choices.

This anecdote reflects the whole thrust of Covey's book. We want things quickly and we act reflexively. But it's far more effective to put in time building relationships, working on understanding, and acting with intention. Then we can be more effective in relationships and at work.

The same ideas apply to civility in the legal profession. It's not something you can just turn on with a flip of a switch. The lawyers who are truly civil—and who make civility work for their clients—put in time building relationships and working on understanding others. So, in the spirit of the late Mr. Covey, here are the seven habits of highly civil lawyers.

1. **A civil lawyer builds relationships with lawyers on the other side of the "v."** Back when I was interviewing with firms as a summer associate, I met with a somewhat frightening senior partner from a firm in Cleveland. When he asked me if I had any questions, I decided to go bold. I asked him what, in his view, were the biggest ethical pitfalls of his practice. He paused for so long that I thought he was going to call security. Instead, he finally said, "You know, I sometimes take the v. too

Trent Collier

Trent B. Collier's practice focuses on the defense of legal and other professional malpractice claims at the appellate level and at summary judgment. In addition, he represents clients in defending insurance, commercial, and general liability claims at both the appellate and trial level. He is a member of the State Bar of Michigan Appellate Practice Section, the Oakland County Bar Association, the Federal Bar Association for the Eastern District of Michigan, and the American Society of Writers on Legal Subjects.

personally." I know now what he meant. We all take the v. too seriously sometimes, acting as if lawyers on our side always have access to the truth and justice while lawyers on the other side are barbarians groping in the dark. But of course that's not true. Civil lawyers remember that. Better yet, they join bar organizations where they work and develop relationships with lawyers from the other side of the v. Nothing combats incivility as effectively as knowing the names of your opponent's children or hacking through a round of golf together. One of the best ways to develop civility, in other words, is to do what Covey did with his son: invest time.

2. **A civil lawyer manages their time to avoid last minute, stress-inducing time crunches.** Last-minute crises lead to stress and stress leads to incivility. (Okay, I'm paraphrasing Yoda's "fear leads to anger" talk a little.). Civil lawyers leave themselves time to sit on drafts before filing. They have time to reflect. They have time to consult with colleagues and, when they have to, time to cool down. They avoid putting themselves into the pressure-cooker of last-minute filings, an emotional stew that makes it easy to act thoughtlessly. They're better able to use the soul-nourishing parts of their lives (time with family, reading, meditation, fishing, whatever) to maintain an equilibrium. It's hard to get ahead of your workload. But staying ahead sets you up for civility.

3. **A civil lawyer knows the strengths of their opponent's side and the weaknesses of their own.** A quick path to incivility is drinking your own Kool-Aid, believing that you have exclusive access to truth and justice. It's hard for the righteous crusader to be a civil crusader. Civil lawyers tend to understand the weaknesses in their own cases and the strengths in their opponents' cases. That's not just civil; it's good lawyering. Sure, it can feel good to believe that your opponents personify evil and ignorance. But that doesn't lead to better outcomes for your clients. In reality, it limits your ability to understand your opponent's position—and that limits your ability to counter that position.

4. **A civil lawyer distinguishes case-altering decisions from case-neutral decisions.** Just about every decision a lawyer makes fits into one of two boxes: (1) decisions that can affect the outcome of a case or (2) decisions that are unlikely to affect the outcome of a case. When an opponent wants to expand the record, that could affect the outcome. Saying "no" is reasonable. But when an opponent wants a couple extra weeks to file a brief? Not so much. A civil lawyer distinguishes requests in the first category from requests in the second. In doing so, a civil lawyer regularly improves relations between the parties without sacrificing their client's position. Quite the contrary: everybody needs an extension sometimes. Saying yes to an opponent lays the groundwork for similar accommodations later.

5. **A civil lawyer remembers that they are challenging ideas, not individuals—usually.** It is hard not to take our practices personally, especially given how hard we all work. But in most cases, we're not really battling each other; we're debating ideas. So we often have a choice to make about how to phrase our arguments: do we attack ideas or do we attack people? Do we write that the plaintiff tried to mislead the court in citing Smith v Jones or do we write that the plaintiff's argument mistakenly relies on Smith v Jones? It's a simple shift in phrasing but it transforms a personal argument into one that really focuses on the business before the court. This kind of shift—speaking to the core issues and avoiding personal attacks— upholds a lawyer's fundamental duty of professionalism and can only benefit their clients.

6. **A civil lawyer assumes that people are acting in good faith (until they have real evidence of misconduct).** Many of us start to get a little cynical after we've practiced for a while. But if we reflect on our careers honestly, we'll likely realize that most people we've encountered have not been deceitful or malicious. Of course there are some bad actors. But, by and large, the bar is full of people doing their honest, level best. Civil lawyers keep that in mind, engaging with other lawyers as if they're honorable people with good intentions. They certainly keep their radar attuned to any misbehavior that might harm their clients' causes. But civil lawyers start with the presumption that people have good intentions. That creates more civil communication and less wasteful litigation.

7. **A civil lawyer keeps wins and losses in perspective.** Civil lawyers tend to take both wins and losses in stride, not putting too much stock in either. First, that's just reasonable lawyering. A win or loss is rarely the final word. (I'm an appellate lawyer, so that fact is my bread and butter.) Second, that kind of perspective helps lawyers conduct themselves with civility throughout a proceeding. Rarely is litigation a life-or-death matter. You can be a zealous advocate while still resisting our tendency as human beings to blow things out of proportion.

The common thread here is one that Steven Covey identified back in the days of VCRs and trips to Blockbuster. Effective action—in this case, civil action—means planting seeds long before we're called to act. If we shrug off the idea of civility when we're untroubled by ethical dilemmas, we won't be very effective in facing those dilemmas once they arise. A civil lawyer builds relationships and manages their perspective before there's a challenge to their ethics and civility.

Civility, in other words, is a habit. And cultivating that habit makes for highly effective lawyers.

MDTC/MAJ Respected Advocacy Award Recipients 2025

MDTC selected
Kevin A. McNeely

MAJ selected
John Whitman

Every year, the MDTC and MAJ each present a "Respected Advocate Award." The MDTC annually gives the award to a member of the plaintiff's bar to recognize and honor the individual's history of successful representation of clients and adherence to the highest standards of ethics. The MAJ does the same annually for a defense practitioner. In so doing, we promote mutual respect and civility.

The Respected Advocate Award will be presented at the State Bar of Michigan Negligence Law Section Annual Awards and Summer Conference on Thursday, August 21, 2025, at the Detroit Golf Club.

Link to MAJ history

Legal Malpractice Update

By: James J. Hunter and David C. Anderson, *Collins Einhorn Farrell PC*
james.hunter@ceflawyers.com
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Thank you to **Katherine Smith** for your contributions to this article.

Whitton, et al v Whitton, et al, unpublished per curiam opinion of the Court of Appeals, issued September 30, 2024 (Docket No. 364842); 2024 WL 4351148.

In a fiduciary setting, the attorney-client relationship runs between the attorney and the fiduciary, not the estate or trust.

Facts

Two co-trustees and co-personal representatives (the Whitton brothers) hired defendant attorneys to handle trust and estate-related matters. In addition to serving as co-trustees and co-personal representatives, the Whitton brothers, along with their sister, inherited their brother's company when their fourth sibling passed away.

At the same time that they were administering the estate and the trust, the Whitton brothers continued to operate the company. At some point, they started their own similar company excluding their sister. Defendant attorneys advised that failing to share proceeds from the new company with their sister may be a breach of their fiduciary duties and could expose them to liability. A dispute arose between the Whitton brothers and their sister. The sister sought to have them removed as trustees. The probate court determined that the Whitton brothers breached their fiduciary duty to their sister as a beneficiary and removed them as trustees. The parties settled their claims, and the Whitton brothers were eventually reinstated as trustees.

The Whitton brothers, both individually and as co-trustees and co-personal representatives, later sued the defendant attorneys for malpractice. The trial court granted summary disposition, at least in part because the trust and estate did not have standing—they lacked an attorney-client relationship with the lawyers. The Whitton brothers appealed.

Ruling

In *Whitton*, the court relied heavily on *Estate of Maki v Coen*, an earlier decision that shed light on attorney-client relationships where the client is a fiduciary. *Id.*, citing *Estate of Maki v Coen*, 318 Mich App 532 (2017).

In *Maki*, a child was born with a congenital birth defect. His family settled a medical malpractice suit. As the settlement was finalized, his mother was appointed as his first conservator. However, her attorney did not include the settlement income in paperwork he prepared for the conservatorship. After the mother-conservator failed

James J. Hunter

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

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

David Anderson

David C. Anderson is a share- holder of Collins Einhorn Far- rell PC, and has over 20 years of litigation experience. He has successfully defended a wide variety of professional liability claims, ranging from legal malpractice to claims against accountants, insurance agents, architects and engineers, real estate/title agents and even fine art ap- praisers. He has also successfully defended numerous corporations against product liability claims, including death cases. Over those years, David has gained considerable jury trial and arbitration experience.

"to account for the settlement funds, she was removed as conservator." Another conservator was appointed, who filed suit against the mother-conservator's attorneys (and others) arguing that the attorneys owed the child a duty of care as their client.

The attorneys argued that they owed no duty to the child, as the mother conservator was their client. The court agreed, explaining "that concluding that the attorney represented both the conservator and the estate would lead to a conflict of interest. . . ." To reach this conclusion, the court relied on both the relevant statute and court rule. Citing MCR 5.117(A), the court explained, "[t]he plain language of this court rule is clear that an attorney appearing in the probate court on behalf of a conservator represents the conservator rather than the estate." Ultimately, the court determined that the attorney for the mother-conservator only had an attorney-client relationship with her as the conservator, and no other party was a real party in interest able to bring a legal-malpractice claim.

The *Whitton* court explained that while *Whitton* doesn't involve conservators like *Maki*, the *Maki* logic extends to *Whitton* "because the language in MCL 700.5423(2)(z) is nearly identical with the language in. . . MCL 700.7817(1)(w), which concerns trustees." In analyzing this language, the court reasoned that when the Estates and Protected Individuals Code was adopted, the Legislature intentionally removed language indicating that legal services were performed *on behalf of the estate*. . . ." Instead, the court noted that the Legislature "replaced it with language indicating an attorney provides legal services and assistance to the. . . trustee." The court further explains that those statutory provisions now "clarify an attorney performs legal services for . . . the trustee and that the attorney advises or assists the . . . trustee in the performance of his or her duties." And because the attorney specifically performs work for the trustee, the legal services are not for the trust.

Practice Note

Without an express agreement that says otherwise, in a fiduciary setting, the attorney-client relationship runs between the attorney and the fiduciary, not the estate or the trust. An attorney's obligation to the fiduciary is to advise or assist the fiduciary in the performance of their duties. If the engagement agreement expands the scope of this representation, be sure to review possible conflicts of interest and tailor the representation accordingly.

Reflections on My Year as a Facilitator

By: Mary T. Doll, *Secrest Wardle*
mdoll@secrestwardle.com

As I reflect on the past year of facilitating cases in Michigan, I am filled with a deep sense of fulfillment and growth. The journey has been both challenging and rewarding, offering numerous opportunities to develop my skills and make a meaningful impact on the individuals and groups I have worked with. Here are some key lessons I have learned over the past year as a facilitator.

The Power of Active Listening:

One of the most crucial skills I have honed is active listening. This goes beyond simply hearing the words spoken by participants; it involves fully engaging with their emotions, body language, and underlying concerns. By practicing active listening, I have been able to build trust and rapport with participants, making them feel valued and understood. This has been instrumental in creating a safe and open environment where meaningful dialogue can take place.

Maintaining Neutrality:

Maintaining neutrality has been another essential lesson. As a facilitator, it is imperative to remain impartial and refrain from taking sides. Raised as a defense attorney and with the reputation for same, I have had to assert my neutrality to allow participants to feel confident that their perspectives are being considered fairly. It also helps to keep the focus on the issues at hand rather than personal biases. Learning to balance empathy with neutrality has been a delicate yet vital aspect of my role.

Effective Communication:

Clear and concise communication is at the heart of effective facilitation. Over the past year, I have learned the importance of articulating instructions, summarizing discussions, and clarifying misunderstandings. Keeping good notes on the negotiations that took place during the hearing has been imperative to me. Many times, I have had participants come back after a few months to see if I could continue with assisting them in reaching the goal of settlement. Effective communication helps to ensure that all participants are on the same page and that the process moves forward smoothly. It also involves being adaptable and finding the right balance between assertiveness and flexibility.

Conflict Resolution Techniques:

Conflict is an inevitable part of facilitation, and I have had ample opportunities to practice and refine my conflict resolution skills. Whether mediating heated disputes or addressing underlying tensions, I have learned the value of patience, empathy, and problem-solving. Techniques such as active listening, reframing statements, and

Mary T. Doll

Mary Doll is an executive partner at Secrest Wardle in Troy, MI. A graduate of the University of Michigan and the Detroit College of Law, she has practiced for over 30 years in insurance defense. Since 2023, she has added facilitations and alternative dispute resolution to her resume and finds it very fulfilling.

MDTC Photo Gallery

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encouraging collaborative solutions have proven invaluable in resolving conflicts and fostering a cooperative atmosphere.

Encouraging Participation:

One of the key goals of facilitation is to ensure that all voices are heard. Over the past year, I have developed various strategies to encourage participation, particularly from quieter or less assertive individuals. Encouraging diverse perspectives has enriched the discussions and led to more innovative and well-rounded solutions.

Building Consensus:

Facilitation is not just about managing discussions; it is also about guiding participants toward consensus. I have learned that building consensus requires patience, persistence, and a focus on common goals. By identifying areas of agreement, addressing concerns, and finding mutually acceptable solutions, I have been able to help groups reach decisions that satisfy everyone's interests. This collaborative approach has often led to more sustainable and effective outcomes. Nowhere is this more important than when determining whether a "mediator's recommendation" would be helpful to reaching a resolution. By understanding the concerns of the parties involved and their limits on settlement, a good mediator's recommendation can be very beneficial to achieving a positive end result.

Adaptability and Flexibility:

The past year has underscored the importance of adaptability and flexibility in facilitation. Each case is unique, with its own dynamics and challenges – the adjuster does not have authority, the parties need to reschedule, there is a motion to be heard, etc. Being able to adapt my approach based on the needs of the group and the evolving situation has been crucial. This flexibility has allowed me to respond effectively to unexpected developments and ensure that the facilitation process remains productive.

Virtual Facilitations:

The COVID-19 pandemic has brought about significant changes in the way facilitation is conducted. I have had relatively few in-person facilitation hearings with most being remote or over the phone. This presents a unique challenge in attempting settlement. I have learned to navigate the technical aspects of virtual platforms (with a few minor glitches), and feel confident in my ability to assign everyone to their own room! There is a certain challenge in trying to ensure engagement in a virtual setting, and address the unique dynamics of remote interactions. While the lack of in-person interaction has been a challenge, it has also opened up new possibilities for accessibility and flexibility. I have to say, though, that it can be a challenge to get everyone to stay on track and refrain from multi-tasking during a hearing.

Reflecting on my experiences as a facilitator in Michigan over the past year, I am struck by the profound impact that facilitation can have on individuals and groups. The lessons I have learned—active listening, maintaining neutrality, effective communication, conflict resolution, encouraging participation, building consensus, adaptability, and continuous learning—have not only enhanced my skills but also enriched my personal growth. As I look forward to the coming year, I am excited to continue this journey, applying these lessons and making a positive difference in the legal community. With the potential for bad faith legislation becoming a reality in Michigan, this change will present unique challenges to a facilitator. I anticipate more facilitations in the future as both the defense bar and plaintiff bar navigate this new frontier.

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Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright*
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Expediting Civil Appeals in the Michigan Court of Appeals

Pursuing or defending an appeal in the Michigan Court of Appeals can be a lengthy process. Briefing does not begin until after all transcripts have been ordered, and that process alone can take up to 91 days in civil cases. MCR 7.210(B)(3)(b)(iv). The appellant's brief is typically due 56 days from the date all transcripts are received by the Court of Appeals, and the appellee's brief is due 35 days later. MCR 7.212. Both deadlines, however, are subject to extensions of up to 56 days. Once briefing is completed, the parties must wait for oral argument to be scheduled. As a result, parties can typically expect the appeal process to take 12-18 months (in 2023, it was approximately 14 months on average for all appeals).[1]

With this timeline, it may be necessary in some cases to attempt to expedite the appellate process. The court rules provide three basic procedures for expediting appeals in the Michigan Court of Appeals.

First, an appellee may file a motion to affirm. See MCR 7.211. See also IOP 7.211(C)(3). This motion, which can be filed only after the appellant's brief has been filed, requests that the Court affirm an order or judgment below because "(a) it is manifest that the questions sought to be reviewed are so unsubstantial as to need no argument or formal submission; or (b) the questions sought to be reviewed were not timely or properly raised." See MCR 7.211(C)(3). These motions can be granted only with a unanimous order.

In short, a party wishing to expedite consideration of an appeal has various options for doing so.

Second, an appellant may file a motion for peremptory reversal. MCR 7.211(C)(4). This motion argues that error "is so manifest that an immediate reversal of the judgment or order appealed from should be granted without formal argument or submission." *Id.* Like a motion to affirm, a motion for peremptory reversal may be granted only by a unanimous order.

Third, a party may file either a motion for immediate consideration (in the case of applications for leave to appeal) or a motion to expedite (in the case of appeals as of right). MCR 7.211(C)(6); IOP 7.211(C)(6). Although the court rules suggest that motions for immediate consideration can be filed only to expedite consideration of another "motion" (such as a motion to affirm or a motion for peremptory reversal), the Court's Internal Operating Procedures (IOPs) explain that a party may file a

Phillip J. DeRosier

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

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

motion for immediate consideration of an application for leave to appeal as well. See IOP 7.211(C)(6)-1 ("A motion for immediate consideration . . . is designed to expedite consideration of another accompanying or pending motion, application for leave, or original proceeding."). Finally, while the court rules do not explicitly mention motions to expedite an appeal as of right, the Court's IOPs clearly provide for such relief and explain the process for doing so. See IOP 7.211(C)(6)-2. A successful motion to expedite can result in a considerable shortening of the overall appeal timeframe (in 2023, the average expedited appeal lasted 9 months).[2]

In short, a party wishing to expedite consideration of an appeal has various options for doing so.

Endnotes

1 See *Michigan Court of Appeals*, Annual Report (2023), p 5, available at: https://www.courts.michigan.gov/4963ef/siteassets/reports/coa/annualreports/annualreport2023.pdf

2 *Id*. at 6.

MICHIGAN DEFENSE QUARTERLY

Best Article Award Recipient

Ernest Chiodo

Vol. 40 No. 3
By: Ernest Chiodo
Article: *To a Reasonable Degree of Medical Certainty*

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2025 Legal Excellence Awards Recipients

Young Lawyer Golden Gavel Award

Laura A. Alton
Collins Einhorn Farrell PC

Laura A. Alton is a dedicated attorney within the firm's General Liability Defense Practice Group, specializing in defending third-party automotive, condominium law, and premises liability cases. Her passion for assisting clients during difficult times drives her legal practice, which is enriched by her experience in no-fault law, immigration law, and litigation. Laura's journey through law school included reaching the finals of the Wayne State University Transactional Law Competition and was a finalist in the Moot Court Competition.

Her practical legal experience spans law clerk roles at personal injury firms, a judicial internship at the U.S. District Court for the Eastern District of Michigan, and service in the Wayne County Prosecutor's Office Conviction Integrity Unit. Laura also served as a student attorney with the Wayne State University Legal Advocacy for People with Cancer Clinic where she handled various legal matters.

A notable career highlight includes Laura's first trial as lead counsel, where she secured a favorable settlement before she had even completed her cross- examination of the plaintiffs. Laura has also second-chaired two jury trials that resulted in no-cause verdicts along with successfully arguing numerous dispositive motions. She thrives on uncovering the truth through discovery and crafting robust defenses for her clients, believing in the constant evolution of the legal field to achieve justice.

As one of five children in her family, Laura attributes her sense of fairness – and aggressive advocacy skills – to her upbringing. She balances her professional drive with moments of leisure, exploring new restaurants, binge-watching her favorite shows, and spending time with family and friends. Laura combines sharp legal acumen with a warm, approachable demeanor, making her a trusted advocate for her clients.

Judicial Award

Justice Brian K. Zahra
Michigan Supreme Court since 2011

Justice Brian K. Zahra was appointed by Governor Rick Snyder to the Michigan Supreme Court on January 14, 2011. The people of Michigan subsequently elected him in 2012 to a partial term and then re-elected to full term in 2014 and 2022.

Justice Zahra received his undergraduate degree from Wayne State University and graduated with honors from the University of Detroit School of Law, where he served as a member of the Law Review and as Articles Editor of the State Bar of Michigan's Corporation and Finance Business Law Journal. Upon graduation he served as law clerk to Judge Lawrence P. Zatkoff of the U.S. District Court for the Eastern District of Michigan before joining and eventually becoming a partner in the law firm of Dickinson, Wright, Moon, Van Dusen & Freeman.

continued on next page

Judicial Award continued...

In 1994, Governor John Engler appointed him to the Wayne County Circuit Court where in 1996 he was elected to a six-year term. In December of 1998, he was appointed to the Michigan Court of Appeals by Governor Engler. He was elected to six-year terms in 2000 and 2006.

Justice Zahra has served on many professional and legislative committees, including the Michigan Civil Jury Instructions Committee, the Circuit Court Appellate Rules Committee, the Domestic Violence Legislation Implementation Task Force, and the Michigan Board of Law Examiners, which reviews Bar applicants for character and fitness, and drafts and grades the Bar examination.

In 2021, Justice Zahra was appointed chair of the Justice for All Commission, which is a coalition of state leaders and access to justice advocates. This commission is working to substantially open access to the civil justice system. He also serves as the Supreme Court's liaison to the Board of Law Examiners, the State Bar Board of Commissioners, and the Michigan Business Courts, which currently operate within 17 circuit courts.

Justice Zahra taught as a Senior Fellow of Law and Public Policy at the University of Michigan-Dearborn campus, and is a Distinguished Fellow at Hillsdale College, Hillsdale, MI. He previously served on the adjunct faculty at the University of Detroit-Mercy Law School and the Michigan State School of Law.

Justice Zahra is a member and former officer of the Catholic Lawyers Society, and past officer of the Federalist Society, where he currently serves as a member of the Advisory Board to the Michigan chapter. He also serves as the judicial advisor to the Hillsdale College Federalist Society Chapter.

Excellence in Defense Award

Marcy R. Matson
Hall Matson PLC

Marcy R. Matson is a Managing Partner of Hall Matson, PLLC, which she established in 2006 with Parter Thomas R. Hall.

With 30 years of experience in the health care and insurance industry, Ms. Matson provides advice and counsel to hospitals, physicians, and other healthcare professionals. As a medical malpractice attorney, Ms. Matson has assisted health professionals and healthcare entities navigate through complex malpractice claims, government entity investigations, and contract negotiations.

Client engagement is central to a successful defense in a medical malpractice case. Ms. Matson is committed to maintaining a high level of communication with her clients, being sure to pay close attention to their goals and concerns, as well as keeping her clients well-advised during every step of the litigation process.

Excellence in Defense Award

Richard A. Kitch
Kitch Attorneys & Counselors, PC

Richard A. Kitch is a founding Principal and President of Kitch Attorneys & Counselors, PC, a law firm of approximately 113 attorneys with offices in Michigan, Ohio, and Illinois. His practice for over 50 years has, to a great extent, involved the representation of healthcare providers. He has served on several hospital board of trustees and quality committees, and has authored numerous articles relating to healthcare legal issues. He has been a member of numerous legal and healthcare organizations and is a member of the Michigan Hospital Association Task Force for Medical Liability Reform. He was a key factor in the drafting and securing legislative approval for Michigan's very successful 1993 Medical Malpractice Tort Reform legislation. He is a former member of the Board of Directors of FinCor Insurance Company and the Michigan Hospital Association Insurance Company.

He received his LLB, with distinction, from Wayne State University Law School and has been a fellow of the American College of Trial Lawyers since 1978. He is a member of the State Bar of Michigan, the Federal Bar Association, and is admitted to practice before all courts in the State of Michigan including the United States District Courts and the U.S. Court of Appeals, 6th Circuit.

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