

# *The* General Practitioner

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## EDITOR'S NOTES

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# Class Action Practice

by William A. Roy

Class actions have been a part of American jurisprudence for many years. In recent years class actions have been employed on a more frequent basis. The class action provides a device where a number of claims which would have required separate proceedings can be litigated in one lawsuit. Where applicable, class actions provide a vehicle to bring justice to a number of citizens in a judicially efficient manner.

## Certifying a class action

Most states, including Michigan, base their class action rules on rule 23 of the Federal Rules of Civil Procedure. See MCR 3.501. Under Rule 23 and most state rules the following must be shown as a prerequisite to class certification:

- (A) The class is so numerous that joinder of all members is impracticable;
- (B) There are questions of law and fact common to the members of the class that predominate over questions affecting only individual members;
- (C) The claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (D) The representative parties will fairly and adequately assert and protect the interests of the class; and
- (E) The maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

Certain disputes lend themselves well to class certification. Consumer complaints against a product or business practice often form the basis for class treatment. For example, a poorly designed or fabricated product which is sold to numerous consumers may cause damage to each consumer who purchases the product. The consumer has purchased a product which is essentially worthless, and the product may cause personal injury or damage to other property. A business practice which violates a statute or rule may cause damage as defined in the statute or rule. Each of these situations may present a case where one class action may be superior to numerous individual suits.

Rule 23 provides guidance for determining if class treatment is superior. The court will review the following in making this determination:

- (A) Will prosecution of separate actions create

the risk of conflicting adjudications, or would separate actions be dispositive of or impair the interests of members not parties to the individual suits;

- (B) Whether final declaratory or injunctive relief might be appropriate to the class;
- (C) Whether the action will be manageable as a class action;
- (D) Whether the amount of individual claims is insufficient to support separate actions in light of the complexity or expense of litigation;
- (E) Whether it is probable that the amount which may be recovered by the individual class members is large enough to warrant the expense and effort of maintaining a class action.
- (F) Whether prospective class members have a significant interest in controlling the prosecution or defense of separate actions.

When investigating a prospective class action, the first inquiry should be whether there is a "common question". For example, if Corporation X produces generally standard goods, there would be no common question with respect to all the customers. Corporation X's Product A would have a different defect than Product B and so forth. There may be a common question as to Product A. If one could prove the existence of a design or manufacturing defect in Product A, damages would flow to the members of the class of persons who purchased Product A. This question would predominate, and each class member could file a proof of claim as to the damages. Damages do not have to be identical.

Assuming a common question is identified and the question is common to numerous claimants, a proper class representative or representatives must be identified. The class representatives must have "typical" claims. "Atypicality" may occur if the other party has a unique defense against the class representative, or the class representative has a conflict with the class. The claim representative must also be ready, willing and able to fairly and adequately assert and protect the interests of the class. This will require a showing that the class representative has chosen competent counsel and that the representative party has adequate finances to prosecute the action.<sup>1</sup>

Rule 23 requires the plaintiff move for certification within 90 days of filing the complaint. While the rule permits the court to hold the ruling in abeyance pending

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discovery or other preliminary matters, the short time period requires that case must be investigated and researched prior to filing. Before the case is filed, the plaintiff must be able to make a showing on each of the elements required for class certification. The showing should include at least the following:

- (A) A definition of the class.
- (B) The approximate number of class members.
- (C) The common wrong done to the class.
- (D) Identification of the class representative(s) and evidence why the class representatives' claims are typical.
- (E) Evidence that the plaintiff's "team" is ready, willing and able to prosecute the action.
- (F) An explanation of how the plaintiff team intends to manage the class action, which must include a proposal for notice to the class.

If plaintiff can make a proper showing on these points, there is a strong case for certification.

### **Managing a class action**

Class actions present ethical and information processing problems not present in cases prosecuted for a single client. This section will discuss these issues.

### **Ethical Considerations**

A class action is a representative action. The judgment or settlement in the action will bind all members of the class. Human nature is such that if you have a group of people numerous enough to constitute a class, there will be differences of opinion as to what constitutes "justice" in the case. This presents a lawyer with an interesting ethical dilemma. Ordinarily, a lawyer may not represent clients with competing interests. MRPC 1.7. Rule 23 is designed to allow counsel to perform their duties ethically.

After certification, notice must be sent to all persons included in the class. The notice must contain certain information, including a general description of the action, the rights, if any of the person to "opt in" or "opt out" of the class, a statement of possible financial consequences for the class, a description of any counterclaims, a statement that a judgment in the action will bind the members of the class, a statement that any member can intervene in the action, address of counsel, and any other information the court deems appropriate. The Court may order other notices be sent. The notices, required by the court rule and approved by the court, fulfill counsel's duty to keep the class member clients reasonably informed. MRPC 1.4. The "opt in" a or "opt out" provisions provide a measure of protection against persons being forced into participation in a suit of which

they do not approve, or prejudices their interests in some way.

Rule 23 provides that a class action may not be dismissed or compromised without approval of the court, and that notice of a proposed dismissal be sent to the class members. After notice, the court will conduct a fairness hearing, at which time class members are entitled to be heard, and file any objections to the proposed action. This procedure insures compliance with the rules of ethics. Counsel is forced to view the proposal "from all sides", and weigh the pros and cons of the proposed action in light of the fact that opposing views will probably surface at the hearing. All competing views have a chance to be heard, through counsel if desired. The court rules on the fairness issues after hearing all objectors. Given the safeguards built into Rule 23, counsel complying with the rule should have no problem with demonstrating compliance with MRPC 1.7.

### **Information processing considerations**

By definition, a class action involves numerous claimants, who are often spread over a wide area. Most of the claimants will never come into the office and meet the attorney face to face. Counsel will have to identify the claimants, communicate with them, send the required notices, and if successful, obtain releases and remit the final disbursement to each class member. In a class action with thousands of potential claimants, these tasks must be performed with great skill and care.

Identification of class members requires sophisticated techniques. This is commonly handled by strategic advertising in the markets where the class members are likely to reside or do business. The ads will describe the action and ask potential claimants to respond and provide information. Respondents can be qualified after the information provided in the response. Organizations exist which will provide this service on a contract basis<sup>2</sup>. Use of an organization of this nature, which has a "track record" of successful participation in prior class actions, allows counsel to make a persuasive argument that appropriate measures will be taken to identify class members.

Once the class is identified, several notices must be sent. With an adequate staff and an adequate class member list, any number of mailing companies can handle the task of mailing out the notice that counsel has prepared and the court has approved. Again there are organizations which will handle communications with the class<sup>3</sup>. An organization with class action experience can answer questions or provide service on a number of other peripheral issues which would otherwise consume counsel's time.

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During the pendency of a class action, there are bound to be telephone queries from class members regarding a host of problems that arise. Counsel must make provision for these calls, which must be handled like any other client inquiries. The organization retained to provide services to counsel can answer many of the questions which will arise. Some will require answer by counsel. Counsel must be prepared for an increase in the number of calls requiring attention at certain points in the litigation. A dedicated line or lines with a voice mail or answering service may be necessary to process the inquiries.

When the final settlement is in hand, disbursement presents another host of problems. Each members share must be calculated, pursuant to the plan of allocation approved by the court at the fairness hearing. Each member must be notified, sign a release, and receive a disbursement check. If the settlement is taxable, such as in an employment case, taxes must be withheld. This is a point of the litigation where even a large staff might not be enough to complete this intricate task. Use of an organization to assist counsel at this point is strongly recommended.

### **Fees in a class action**

Counsel will generally not be in close contact with each class member. Generally, counsel will have fee arrangements with the named class representatives. The courts have articulated the “common fund” doctrine, which insures counsel will obtain compensation. Under the doctrine, fees and costs expended by the attorney will be a charge to the common fund created by the efforts of the attorney.

There are two ways courts have determined fees. First is the “lodestar method”. Under this method, counsel documents the time expended. The court determines an hourly rate based on a number of factors (the lodestar), and multiplies the number of hours by the lodestar, and adds approved costs. Second is the percentage of recovery method. Under this method, the court determines an appropriate percentage of the recovery, and orders reimbursement of approved costs.

Under either method, counsel is advised to keep accurate records of time and expenses. The court may wish to look at the actual time expended even in a percentage of recovery award, to insure that the fee is reasonable.

### **Conclusion**

The class action is not normally a weapon in the arsenal of the general practitioner. However, the case that ultimately becomes a class action may very well present itself in the general practitioner’s office in the

form of a consumer complaint or employment dispute. While taking on a class action may not be advisable for a sole practitioner or small firm, MRPC 1.1(a) both permits and requires a lawyer to handle a matter if the lawyer associates with a lawyer competent to handle the matter. There is no reason why a sole practitioner or small firm cannot bring in co-counsel and reap the benefits of a class action.

William A. Roy is a member of the firm of Roy, Shecter & Vocht, P.C. in Bloomfield Hills and a member of General Practice Section Council. He is one of Class Counsel in the case of Gilford et. a. v Detroit Edison Company, an employment discrimination class action with over 1400 class members which is in the process of final resolution.

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- 1 Counsel is permitted under the rules of ethics to advance the costs of litigation. Michigan differs from the ABA model rules in that the Rules of Professional Responsibility require that the client be ultimately responsible for the costs. MRPC 1.8(e)(1).
  - 2 For example
  - 3 Rust Consulting, Inc. of Minneapolis, Minnesota is such an organization. It has a complete information processing plant established for the sole purpose of processing class actions, and has provided service to counsel in some of the largest class actions in the country.

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# People v Travis Boswell

## Opinion and Order

### STATE OF MICHIGAN

### IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,  
PLAINTIFF,

-VS-

CASE NO. 73-07042-43

TRAVIS BOSWELL,  
DEFENDANT.

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#### OPINION AND ORDER

PRESENT: HONORABLE Carole F. Youngblood  
Circuit Court Judge

This matter is before the court on the defendant's Motion for Relief From Judgment requesting that he be granted a new trial.

The defendant and his brother, Brent Boswell, were convicted of two counts of first degree murder, in violation of MCL ' 750.316, MSA ' 28.548, Assault with Intent to Murder, in violation of MCL ' 750.83, MSA ' 28.274, by a jury on December 18, 1973. The defendant was sentenced on January 11, 1974 to two concurrent life terms on the 1<sup>st</sup> degree murder counts and a term of 5 to 10 years for the assault with intent to murder.

The only eye-witness to the tragic events of September 10, 1973 was Lester Drum. He was shot and two other guards were killed at approximately 7:45 that evening. Mr. Drum identified Brent Boswell as the lone gunman. He testified that Travis Boswell was standing behind Brent Boswell and he did not see a firearm in his possession or see him do anything. Travis Boswell merely watched.

The only other witness who could place either defendant at the scene was Clifford Smith. Mr. Smith testified that he saw two men walk through the gate of the Lear Siegler plant that he had never seen before. A few minutes later he heard shots. He jumped behind some objects. One man ran out through the gate and "then he came back and got the other guy by the arm and they started running across the street." At trial he said he was positive that the man in front was Brent Boswell, but he was not positive the second man was Travis Boswell.

Attorney Harry Pliskow represented both defendants at trial. The sole defense presented for both defendants

was an alibi defense. The only mention of a "mere presence" defense for Travis Boswell was in passing in Mr. Pliskow's closing argument. He also requested the "mere presence" jury instruction, but then failed to object when the judge failed to give that instruction, as promised. In fact, of course, Mr. Pliskow offered no evidence or testimony or argument to support "mere presence" defense during the trial.

#### ANALYSIS

Travis Boswell argues that his Sixth Amendment rights were violated because Harry Pliskow's dual representation resulted in a conflict of interest. This conflict of interest necessarily occurred because the only defense available to the co-defendant, Brent Boswell, was an alibi defense. An alibi defense for Brent Boswell and a mere presence defendant for Travis Boswell are completely antagonistic defenses. It was impossible for one attorney to represent both defendants and present these mutually exclusive defenses.

Under both the United States and Michigan Constitutions every defendant has the right to effective assistance of counsel and the undivided loyalty of his attorney. Strickland v Washington, 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984); Holloway v United States, 435 US 475, 489090, 55 L Ed 2d 426, 98 S Ct 1173 (1978); Glasser v United States, 315 US 60, 62 S Ct 457, 86 L Ed2d 680 (1942); Hall v United States, 200 F3d 962 (6<sup>th</sup> Cir, 2000), People v Gallagher, 116 Mich App 283 (1982).

Appellate courts have long recognized that it is a bad practice to assign one attorney to represent multiple defendants. People v Dockery, 20 Mich App 201

(1969). MCR 6.005(F) and (G) requires the appointment of separate counsel when defendants are jointly charged, a full and fair disclosure of any present or potential conflict of interest to the defendants, and the trial judge's constant vigilance relative to a conflict of interest when retained counsel represents more than one defendant. Hill, supra. *There is no record which indicates any issue on conflict of interest was raised by the judge or defense counsel.*

To the contrary, Travis Boswell personally asked for a mistrial stating he was dissatisfied with his attorney and requested that he have time to retain a new attorney. This request was denied by the trial judge long after the trial judge had heard the testimony of Mr. Smith and Mr. Drum, both of whom had testified that Travis Boswell had been merely present at the scene.

To analyze a claim of ineffective assistance of counsel, the court applies a two-pronged standard. People v Stanaway, 446 Mich 643, 521 NW2d 557 (1994); Strickland, supra; People v Rhinehart, 149 Mich App 172 (1986). A defendant must show (1) his counsel's performance was deficient, and (2) this performance prejudiced the defense depriving the defendant of a fair trial. Strickland, supra; Hall, 200 F2d at 965.

When the claim is based on conflict of interest, the standard used is slightly different. Hall, supra; Rhinehart, supra; People v Simmons, 134 Mich App 779, 788, 352 NW2d 275 (1984). When an actual conflict of interest exists, prejudice is presumed. Hall, Id.

First, the defendant has demonstrated that he and his brother had actual conflicting interests. Brent Boswell's only avenue of defense was that he was not present at the scene, because witnesses testified that he had the gun and he fired the shots. Travis Boswell had various defenses available to him since no one saw him with a gun or actively do anything except watch and then leave. Defenses available to him included mere presence including lack of knowledge, intent and participation.

Second, not only did an actual conflict of interest exist, but Mr. Pliskow made an actual choice between the possible alternative courses of action available to Travis Boswell so as to benefit Brent Boswell. This actual conflict of interest adversely affected Mr. Pliskow's performance. Clearly, once he advocated Brent Boswell's defense that he was not there, he could not advocate that Travis Boswell was present when his brother shot the complainants but that Travis did not participate or have knowledge of what would happen. Where it is demonstrated that an attorney made a choice which was helpful to one client and harmful to the other, an actual conflict of interest is demonstrated. United States v Mers, 701 F2d 1321, 1328 (11<sup>th</sup> Cir, 1983).

A conflict of interest is evident in this case by Mr. Pliskow's failure to pursue a mere presence defense or other defense and by failing to object when the judge failed to give a mere presence jury instruction. Further, Mr. Pliskow was also not in a position to negotiate a plea agreement for Travis Boswell which may require

him to testify against his brother since he also represented Brent Boswell and any such action would be against Brent Boswell's best interest. Hall, 200 F2d at 966; Thomas v Foltz, 818 F2d 476, 481 (6<sup>th</sup> Cir, 1987). Forgoing plea negotiations is proof of an actual conflict of interest. See *id.* at 481-82.

The second-prong of the Strickland and Stanaway standard is that defense counsel's performance must have been adversely affected by the conflict of interest. Inherent in a defendant's Sixth Amendment right to counsel is the right to a reasonably competent attorney and the right to counsel's undivided loyalty. See Strickland 466 US at 692; Hall 200 F2d 966. Here defense counsel could not argue effectively for Travis Boswell. He could not argue that Travis Boswell was merely present, that he had no knowledge of Brent Boswell's intention, that he did not know Brent Boswell had a gun, that Travis Boswell did not have a gun and was not seen to do anything at all because he had to argue for Brent Boswell that neither of them were there.

The defendant's Sixth Amendment right to competent appellate counsel was compromised in the same manner and based on the same conflict of interest—duel representation. Evitts v Lucey, 469 US 387, 105 S Ct 830, 83 L Ed 2d 821 (1986); People v Wolfe, 156 Mich App 225 (1985). The appeals were based on the same issues and Travis Boswell's issues personal to his own case were never adequately reviewed or litigated. To raise the issues brought forward this appeal would have doomed Brent Boswell's appeal.

Travis Boswell's counsel pretrial, during trial and on appeal was ineffective and failed to represent his individual interests. Mr. Boswell is entitled to a new trial.

Given the fact that the defendant is granted a new trial, the court declines to rule on the remaining issues which may be addressed at the time of defendant's new trial.

IT IS HEREBY ORDERED that the jury verdict is set aside and the defendant, Travis Boswell is granted a new trial.

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Dated: June 22, 2000.

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**People v Robert Baker Smith**  
**Opinion and Order**

**STATE OF MICHIGAN**  
**IN THE 37<sup>TH</sup> DISTRICT COURT FOR THE COUNTY OF MACOMB**

**THE PEOPLE OF THE STATE OF MICHIGAN,**

v

**Case No. W241666**

**ROBERT BAKER SMITH,**

**Defendant.**

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**OPINION AND ORDER**

**Statement of Facts**

Defendant Robert Baker Smith is charged with possession of a switchblade.<sup>1</sup> The charge stems from the arrest of one Mary Hollenback which occurred on May 12, 1997.

On that date, Ms. Hollenback was operating a vehicle in the City of Warren. At an evidentiary hearing held on August 15, 1997,<sup>2</sup> Warren police Officer Martin Kerr testified that he observed a 1990 Ford Escort traveling northbound on Mound Road in the area of Ten Mile Road.<sup>3</sup> The vehicle made a turnaround and proceeded southbound after which Officer Kerr stopped the vehicle due to his observations that it was being driven erratically. The vehicle was driven by Ms. Hollenback who was later arrested for driving under the influence of alcohol.

At this point, the factual record indicates a dispute. Officer Kerr testified that the Defendant, who was a passenger in the vehicle, was quite intoxicated. He testified that he was wobbling and was very unsteady. His speech was slurred. He said that the Defendant was not oriented to his surroundings other than that he knew he was in a parking lot.<sup>4</sup> The parking lot was used by a bar called "Sports Factory." According to the Defendant's testimony, the bar at one time had been called "The Red Pump." He further testified that the Defendant informed him that he was drinking, which is why he was the passenger.<sup>5</sup> Finally, Officer Kerr testified that the Defendant nearly passed out in the vehicle after it had been stopped. In fact, he testified that the Defendant was more intoxicated than the driver.<sup>6</sup>

On September 5, 1997, Warren Police Officer Jeffrey Motyka testified that the Defendant appeared to

be intoxicated. He also testified that his speech was slurred.

On September 5, the Defendant testified that he had not been drinking. He stated that he was on probation through the City of Madison Heights and that the terms and conditions of that probation subjected him to random drug screens and prohibited him from consuming alcohol.<sup>7</sup>

Officer Kerr testified that he offered to give the Defendant a ride home and that he consented. He further testified that he then asked Officer Motyka to transport him, as his own vehicle would be used to transport Ms. Hollenback to the police station. He also testified that the Defendant never indicated that he wished to make his own arrangements for transportation.

However, the Defendant testified that he told Officer Kerr that he did not wish the police to take him home and that he would provide his own transportation. He further testified that, as he began walking toward the bar to make a telephone call for a cab, Officer Kerr stepped in front of him and said that the police were responsible for him and that they would transport him home.

Officer Motyka testified that he agreed to give the Defendant a ride home. He further testified that the Defendant never refused the offer for the ride, nor did he ever indicate that he wished to provide his own transportation. Again, this is disputed by the Defendant who testified that he wished to make his own arrangements to get home.<sup>8</sup>

Officer Motyka testified that, prior to allowing the Defendant to enter his vehicle, he asked him whether

he had any guns, knives, or sharp objects in his possession. His testimony indicates that the Defendant responded in the negative. He asked whether he could check, and the Defendant responded in the affirmative.<sup>9</sup>

Officer Motyka then proceeded to conduct a pat-down search and felt an item in the right front pocket of the Defendant's jacket, which felt larger and heavier than a cigarette lighter. He then asked the Defendant whether he could remove the item, and he responded by saying, "Go ahead."<sup>10</sup>

Upon removing the item, Officer Motyka testified that the item was a switchblade. He described it as a mechanical knife with a black handle, and a blade which was approximately four inches in length.<sup>11</sup> He said that the blade folded into the handle and popped open upon pushing a button located on the side.<sup>12</sup> Officer Motyka then placed the Defendant under arrest.

#### Conclusions of Law

Defendant argues that Officer Motyka's search was conducted in violation of the Fourth

Amendment to the United States Constitution. He cites the case of Maryland v Wilson to support his view. In Maryland, the United States Supreme Court ruled that, once a vehicle was stopped by the police, all of the passengers could be ordered to exit the vehicle. However, the Court did not rule that police have the right to search those passengers unless they believe that the passengers are engaged in criminal activity.

Essentially, Defendant argues that the police had no right to search him, as it was agreed among everyone that he was not engaged in criminal activity. Because he did not request or even desire a ride home from the police, their justification of the search does not pass Constitutional muster. Thus the evidence seized from the search, the knife, is inadmissible necessitating a dismissal.

The People essentially argue that this case is about credibility. They argue that the Defendant was so intoxicated that he could not drive himself home, nor could he be left at the scene. He consented to be driven home and consented to the search which resulted in Officer Motyka discovering the knife. The People's position is that this version of the events of May 12, 1997 should be believed because the police officers have no motive to lie, whereas Defendant does.

In deciding this case, this Court, at the outset, notes that Defendant's reliance on Maryland v Wilson is misplaced. Defendant Cites that case for the proposition that there is no automatic right for the police to search all of the occupants of a vehicle once it is lawfully stopped. However, the holding in that case was that the police could constitutionally require all occupants to exit the vehicle. The question whether the occupants could be searched was never raised nor was it decided.

This Court finds that the issues raised have already been resolved in the case of People v Otto, 91

Mich App 444(1979), a case cited by neither party. In Otto, a Michigan State Trooper stopped a hitchhiker on northbound Interstate 75 near Six Mile Road. Hitchhiking is a civil infraction.<sup>13</sup> The trooper did not issue a citation but, instead, transported the hitchhiker and his female companion in his patrol car to Eight Mile Road, which is where the hitchhiker indicated he wished to go.<sup>14</sup>

Prior to putting the hitchhiker into his patrol car, the trooper conducted a pat-down search and felt a hard bulge in the left side of the hitchhiker's jacket. The bulge was a .25 Galles automatic pistol with one round in the magazine. The hitchhiker was charged with carrying a concealed weapon.<sup>15</sup>

After the hitchhiker was bound over, he moved in Detroit Recorder's Court to suppress the evidence as being obtained by means of an unconstitutional search and, in the alternative, for an evidentiary hearing. Recorder's Court Judge Thomas L. Poindexter denied the motion to suppress.<sup>16</sup> The hitchhiker appealed, and the Court of Appeals affirmed Judge Poindexter's ruling.

In affirming the lower Court's decision, the Court of Appeals briefly reviewed the standard to be used in deciding the constitutionality of pat-down searches. The Court quoted the following passage from Pennsylvania v Mims, 434 US 106, 108-09; 98 SCT 330; 54 L Ed 2d 331 (1977):

The touchstone of our analysis under the Amendment is always "the reasonableness in all Circumstances of the particular governmental invasion of a citizen's personal security." (Emphasis In original.) Terry v Ohio, 392 US 1, 19 (88 SCT 180; 20 L Ed 2d 889) (1968). Reasonableness, of course, depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."

United States v Brignoni-Ponce, 422 US 873, 878 (95 SCT 2574; 45 L Ed 2d 607) (1975). Otto at 449-50.

Applying this standard, the Court found that the trooper's search was reasonable. The Court found that the trooper could have either issued the hitchhiker a citation or transported him off the freeway.<sup>17</sup> The Court was persuaded that transporting the hitchhiker was the better course of action. Not transporting the hitchhiker would have resulted in a continual violation and would have been dangerous.

The Court then went on to conclude that the pat-down search was reasonable under the circumstances. The Court ruled that the alternative to conducting a pat-down search would be to handcuff the hitchhiker. This, however, would result in an ever greater intrusion.

Turning to the case currently under consideration, this Court finds that the Defendant was intoxicated at the time of the stop. Officers Kerr and Motyka testified that he was drunk. Neither of these witnesses knows the Defendant and has no reason to lie about his condition. The Defendant, on the other hand, was on probation with one of the conditions being that he was

to refrain from consuming alcohol. Defendant did have a motive to lie. Taking this into account as well as observing the demeanor of the witnesses while testifying, the Court is convinced that Officers Kerr and Motyka are more credible than the Defendant as to the question of whether this Defendant was intoxicated at the time of the stop.

Applying the Court of Appeals analysis in Otto, this Court finds that Officer Motyka's search was reasonable under the circumstances. Had the Defendant not been transported, he would have been left alone while intoxicated after 1:00 a.m. The Defendant could have easily been a danger to himself. Thus, under Otto, it was reasonable for the Defendant to be transported in a scout car and reasonable for Officer Motyka to conduct the pat-down search.

It should be noted that, in arguing that the search was unreasonable, Defendant misses the most important philosophical underpinning behind excluding evidence obtained by constitutionally impermissible searches. That underpinning is to discourage lawless police conduct.

In this instance, Officers Kerr and Motyka were clearly not acting lawlessly. They were attempting to assist the Defendant. This is true even if one believes that the Defendant was not intoxicated.

Defendant's Motion to Dismiss is DENIED.

IT IS SO ORDERED.

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JOHN M. CHMURA  
District Court Judge  
Dated: October 21, 1998

- 1 The Complaint reads as follows: "Defendant did possess a knife having the appearance of a pocket knife, the blade of which could be opened by the flick of a button, pressure on a handle, or other mechanical contrivance; Contrary to MCL 750.226a; MSA 28.423(2)."
- 2 Evidentiary hearings were held on August 25, 1997 and September 5, 1997, the purposes of which were to establish facts to support Defendant's Motion To Dismiss.
- 3 According to Officer Kerr, this occurred at approximately 1:00 a.m.
- 4 However, on cross-examination, Officer Kerr testified that he could not recall whether he asked the Defendant where he was.
- 5 Officer Kerr could not recall whether the Defendant took a preliminary breath test. He was not asked to perform any field sobriety tests.
- 6 Officer Kerr testified to these facts on August 25, as well as September 5.
- 7 The Defendant's criminal record reveals that he pled guilty to driving while impaired on January 24, 1995 in the City of Royal Oak.
- 8 The Defendant testified that Officer Motyka, like Officer Kerr, testified that the police were responsible for him and thus would be providing the transportation home.

- 9 The Defendant testified that he responded neither in the negative nor the affirmative.
- 10 Officer Motyka testified that, when he asked the Defendant about the item he felt in his pocket, he responded by saying that the pocket was empty.
- 11 The Defendant described the blade as approximately eight inches long. Officer Kerr, who also inspected the knife, testified that the blade was approximately 8 ½ inches long.
- 12 Officer Kerr testified that the knife popped open by releasing a spring.
- 13 See MCL Section 257.679a; MSA Section 9.2379(1)
- 14 The trooper did give the hitchhiker a verbal warning. See MCL Section 750.227; MSA Section 28.424.
- 15 Judge Poindexter granted an evidentiary hearing but limited it to the hitchhiker's testimony only. The hitchhiker testified exactly as he had at his preliminary examination. Although the Court of Appeal's opinion does not specify how Judge Poindexter ruled after the hearing, given that the appellate court granted leave to appeal the denial of the motion to suppress, presumably Judge Poindexter denied any motion to dismiss.
- 16 The trooper had no authority to arrest the hitchhiker. See MCL Section 257.728; MSA Section 9.2428. Presumably the trooper could have issued a citation and transported the hitchhiker.

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## Starting Points in a Criminal Defense

by William L. Cataldo

In this third installment of handling a criminal case, I will cover the initial arraignment and pre-trial phases of a felony case at circuit court. Hopefully some of the following tips and practical experiences I've learned in my years of practicing criminal law will be applicable in your cases.

Each circuit court handles its felony arraignments and pre-trials differently. Even though I mainly practice in the tri-county area of Detroit, similarities exist in how cases are docketed. The time between district court bindover and circuit court arraignment is usually one to three weeks. With many courts having blind draws, you may not know what judge you have until the circuit court appearance date. This may have a chilling effect on some of your plea strategy but should not affect your preparation. This time should be used to visit your client to discuss all of the available options, calculate guidelines, identify issues and options and order the preliminary exam transcript.

For judges who review this column I implore them to notify the administrators of appointment lists on attorneys who fail to meet the minimum standards required for competent representation. I also urge a type of judicial activism that gives judges the courage to tell attorneys to file the necessary motions to properly resolve obvious issues that might be in the client's best interest. If the system is to work fairly, a judge who remains silent on an issue that should be litigated is as guilty as the attorney whose representation falls short of acceptable standards. This includes the attorneys who refuse to file the necessary motion because they are not being paid for it. The issue should not be one of mutual exclusivity but one that focuses on a person's right to a fair disposition of their case. Too often I have seen courts remain silent when obvious mistakes are being made because judges may view their role only as a final arbiter and feel there is some barrier to urging an attorney to properly represent their client. I would be the first to say I'm not sure if there is an ethical obligation under the Judicial Code of Conduct preventing this. But if there is, I dare say this rule should be tossed out. In looking lately at the public's increased displeasure with how the system operates, we should all be vigilant to insure that both victims' and defendants' rights are properly litigated to maintain the integrity of the system. The focus shouldn't be who discovers the issue but that it's properly litigated and objectively decided upon.

Proper representation of a felony begins and ends with pursuing a defense the client wants. Many times I am appointed as the third or fourth attorney. I've discovered prior counsel decided the matter should not be tried because it was a no win position. It's usually the way this information is presented to the client that

unravels the attorney/client relationship. The client simply wants to be heard. Some clients simply want their day in court. Many clients are sophisticated because they have been through the system before and have felt cheated by attorneys who didn't spend a sufficient amount of time discussing the case with them. Too often, because of our busy schedules, we appear at court to work out a deal and then attempt to discuss it with the client in the holding cell in front of other defendants or in the box when they are hauled in to court en masse. This places a certain pressure on the defendant to make an immediate decision that (without proper prior discussions) is regretted later.

Unfortunately, in courts with busy dockets, the prosecutors don't carefully review the file prior to the first hearing date. The first real discussion occurs at the arraignment. Quick bindovers to circuit courts with large dockets and unknown assignments to specific courts make it so defense counsel is unable to speak directly to a particular prosecutor to discuss the merits of the case. In smaller jurisdictions this happens less frequently because there may only be two or three prosecutors. Even in those situations, I have discovered in attempting to resolve matters long distance, return phone calls are infrequent and most of the discussion does not happen until just prior to the arraignment/pre-trial. When this occurs my policy over the last several years has simply been to arraign the individual and set the matter for pre-trial. When I've driven to the court, I take the time to introduce myself to the prosecutor and lay a foundation for my defense that indicates what motions I may file. I also try to find out as much as I can about plea bargains, policies, jail caps and the judge's sentencing policies. It usually saves a trip or two.

Working out the guidelines on your cases prior to the arraignment/pre-trial is mandatory. This should be done between bindover and the time of pre-trial to make more effective use of your pre-trial effort. Hopefully the prosecutor will also have calculated the guidelines and any discrepancies can be reviewed and worked out. I do not want to give the impression that pleading a case at the arraignment is inappropriate. Many times it is. Especially if your client has confessed, indicated guilt in some fashion or wishes to resolve the matter. This requires that a meeting with your client be conducted prior to the pre-trial to explain the guidelines and list the options available at the pre-trial. Once a client is informed of all options, then there isn't the pressure spoken of earlier to make a decision on the spot.

Many courts entertain the opportunity to conduct Cobbs evaluations. Tri-county area attorneys may be more familiar with this practice. The Michigan Supreme Court allows defense counsel to request an initial sentencing evaluation by the court during the pre-trial phase.

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This tells the client what specific sentence would be given if a plea of guilty was entered. This process lends a certain reliability to defense counsel's recommendations and provides the client with an assurance that they have not been deceived or misled by counsel. Those that practice in courts not allowing Cobbs pleas, I would encourage repeated requests until the judge relents. In this day and age it is very difficult to properly counsel a client on all options until all options are known. The Cobbs plea allows an attorney direct access to information necessary to formalize strategy. Under Cobbs if the court is unable to sentence according to the terms, the plea can be withdrawn and the matter set for trial. Many times if a court is unable to go with the deal because certain factors were unknown at the time the guidelines were calculated or it appears the judge has a change of heart, the plea can be withdrawn or a new sentence is worked out instead of the withdrawal of a plea.

There is a caveat to this process though. If your client intends to testify at court and enters a plea of guilty, should they take the stand during a subsequent trial, those statements can be used to impeach inconsistent testimony. It's better to attempt to enter a no contest plea in those circumstances. There can be a chill on your client's desire to testify otherwise. If it does not appear the client would be a good witness, then it becomes less of a concern.

In courts where Cobbs pleas are not entertained, the attorney needs to have a sufficient working knowledge of that judge's policies concerning specific crimes. We all know that paper crimes such as forgery and embezzlement are treated more lightly than assaultive crimes. Young lawyers should take the opportunity to discuss individual judge's policies with more experienced attorneys or take the time to call the probation department to seek information from an agent who has sufficient experience with that court and the way in which it handles certain cases. In this day and age I find it unjustifiable that courts will not speak in advance about charges and force you to plead blindly. It's not fair to defense counsel, not fair to the defendant and seems to merely serve the purpose of assembly line justice. Practicing criminal law is difficult enough having to theorize all of the potential outcomes and then have a person make a life altering decision without having any specifics.

I'm not saying that courts couldn't place certain conditions on the Cobbs plea. I am familiar with and in support of various judges in the tri-county area who indicate to defendants, when asking them to be truthful concerning their prior record, that if statements they've made to the court prior to the plea turn out to be false, they will lose their right to withdraw their plea. I also am in favor of conditions where the court indicates if the guidelines are not calculated right by defense counsel, that it will fall to their responsibility not the court's for resolving it against the defendant. Competent counsel should not be afraid of conditions courts apply to maintain an element of control over the process.

I'm certain some courts will continue to refuse to consider Cobbs pleas and may be angered by my opinion. A Cobbs plea only locks in the defendant. The sentence can be changed, withdrawn or modified without repercussion. To ignore the reality of it, in my opinion, can only be viewed as intransigence. I challenge any judge who does not allow Cobbs pleas to ask a criminal practitioner to give an honest answer as to their usefulness.

Turning to other issues, at the pre-trial hearing counsel should advise the court if motions will be filed and request the court to set a reasonable amount of time to file those motions. We all know various district courts have court reporters who have trouble completing transcripts in a timely fashion. Enough time should be set to receive the transcript and file a motion.

Once a decision has been made to enter a plea, the process is similar to that of pleading a misdemeanor which was discussed last month. Each question should be reviewed between counsel and client to eliminate any uncertainty and to save embarrassing moments during the plea.

Having your client state the facts that establish the crime for the plea is the tricky part. Many judges will allow me to ask my client leading questions. We have all had individuals who were involved either as an aider and abettor or some other associated fashion and they are unable to admit or agree that they actually performed the crime. It is important to notify the court at this point in the process, if the court is doing all the questioning, what your client's role was and to have him admit that he knew what was going on and in some way was participating. Anticipating these problems in advance saves the court time and saves your client (and you) the embarrassment. This is a critical stage of the process during which the client needs to continue to believe that they are only admitting to their responsibility. Too many times in the past I, too, have been guilty of just simply telling my client to say yes if they want the deal. This is not the way to handle it. Make certain that the plea is tailored to state specifically what your client's responsibilities were. In my experience the courts are reasonable in allowing counsel to question or have the prosecutor question in the form of yes or no answers. Many times our clients want to give a narrative about how they started the day and where they went and this frustrates courts. These mitigating factors are best saved for elocution at sentencing.

Once again, it is important to follow up whatever happens at each pre-trial with a letter to your client that explains exactly what the conversation was at the bench and exactly what information you presented to your client and what their responses were. This saves time if some attorney handles the matter further down the road or there is a question by your client through a grievance or a Ginther request by appellate counsel.

## Editor's Update

by Maury Klein

In last month's issue there was discussion that a case was pending in the Court of Appeals which was dispositive of the matter of emotional damages for loss of a pet. That case was *Koester v. VCA Animal Hospital et al*, No. 216563 and the decision was released on December 26, 2000. The concluding paragraphs follow:

In this matter, plaintiff pleaded damages of emotional distress and loss of society and companionship of his dog. Pets have long been considered personal property in Michigan jurisprudence. See *Ten Hopen v Walker*, 96 Mich 23 6, 23 9; 55 NW 657 (1893). Consequently, the issue before this Court is whether plaintiff can properly plead and recover for emotional injuries he allegedly suffered as a consequence of his property being damaged by defendants' negligence.

There is no Michigan precedent which permits the recovery of damages for emotional injuries allegedly suffered as a consequence of property damage. Plaintiff requests that we allow such recovery when a pet is the property that is damaged, arguing that pets have evolved in our modern society to a status which is not consistent with their characterization as a "chattel." In essence, plaintiff requests that we create for pet owners an independent cause of action for loss of consortium when a pet is negligently injured by a veterinarian. Although this Court is very sympathetic to plaintiff's position, we defer to the Legislature to create such a remedy.

There are several factors that must be considered before expanding and/or creating tort liability including, but not limited to, legislative and judicial policies. In this

case, there is no statutory, judicial, or other persuasive authority which compels or permits this Court to take the drastic action proposed by plaintiff. Case law on this issue from sister states is not consistent, persuasive, and/or sufficient precedent. We refuse to create a remedy where there is no legal structure in which to give it support. However, plaintiff and others are free to urge the Legislature to visit this issue in light of public policy considerations, including societal sentiment and treatment of pets, and the prospect of public perception that Michigan law does not provide a just and fair remedy to net owners who pay veterinarians to perform specialized services for their pets with the legitimate expectation that their pets will receive the appropriate treatment and instead suffer when their pet is further and/or fatally injured because of a veterinarian's negligence.

We decline to allow the recovery of emotional distress damages arising from negligence committed against plaintiff's pet; therefore, plaintiff's complaint failed to plead legally cognizable damages and was properly dismissed by the trial court. MCR 2.116(C)(8); see also *Smith, supra*.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Michael J. Talbot

Isl Patrick M. Meter

Note: The editor has learned that Plaintiff intends to seek leave to appeal.



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