

THE LITIGATION NEWSLETTER

Spring

1999

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CHAIR'S LETTER

John Mucha III

Watching the recent NCAA basketball tournament reminded me of just how important preparation is to success. While a few players are truly gifted and are able to dominate because of their natural-born talents, most of the rest have succeeded because they have been committed to preparation and have a strong will to win. They have worked with their coaches and have practiced hard to develop the tools and skills needed for the battle on the hardwood floor. But in addition to the tools, the successful players have also brought to the game considerable passion and emotion for what they do. It is this combination which elevates the level of the player's game and more often than not, results in success.

Of course, this is a lesson that transfers to all aspects of life, including the practice of litigation. Not only do we need to continually develop and sharpen the tools necessary to perform our role properly, we must remain inspired and impassioned in the application of those tools. In the practice of law, this sometimes can be an elusive goal. We have all seen a lawyer at some point or another who, while genuinely committed to their client's position, is so poorly skilled at taking a deposition or some other aspect of case preparation that he or she is unable to properly develop the case to its fullest potential. More often than not, the attorney's raw sense of commitment cannot overcome his or her lack of skills. In such cases, no matter how many times the attorney is able to "find the open spot on the court," his or her inability to "shoot the ball" usually results in defeat. On the other hand, I am sure that every litigator has had at least one case that, for whatever reason, is so dull, tedious or mundane that it raises the question, "I went through law school and sat through the bar exam for this?" The challenge all litigators face in such situations is to not to allow oneself to become so bored, cynical or jaded so as to overlook and miss the opportunities to "shoot" when they present themselves.

The Litigation Section is committed to helping its members become better litigators, regardless of the underlying substantive area of practice.

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LITIGATION SECTION • STATE BAR OF MICHIGAN

FOURTH ANNUAL SUMMER CONFERENCE**WINNING BEFORE TRIAL**

Treetops Sylvan Resort • Gaylord, Michigan

August 13 & 14, 1999

*We would like to thank our sponsors to date:***Arthur Andersen Litigation Services • Conway, MacKenzie & Dunleavy****Esquire Deposition Services • Paul Goebel Group****PricewaterhouseCoopers LLP • Record Copy Services****REGISTRATION**

Please register me for the Fourth Annual Summer Conference to be held at Treetops Sylvan Resort, Gaylord, Michigan, August 13 & 14, 1999.

Name _____

Firm _____

Address _____

City _____ State _____ Zip _____

Telephone _____

Spouse/Guest's Name _____

FEES

Litigation Section Members: \$125

Non-Section Members: \$150

*Registrant fees include:**Materials, Continental Breakfast, and Dinner.*

Spouse/Guests are welcome to attend the dinner Saturday night @ \$29.50 per person.

Registration Fee enclosed _____

Number of box lunches @ \$9.75 _____

I have enclosed _____

No. Children attending Dinner & Movie _____

@ \$17 per child _____

I have enclosed _____

No. guests attending Saturday Dinner _____

Amount enclosed for Saturday Dinner _____**TOTAL AMOUNT ENCLOSED** _____Method of Payment: Check MasterCard Visa

Make checks payable to: Litigation Section

Mail to: Litigation Section

P.O. Box 473 • Birmingham, MI 48012

CREDIT CARD INFORMATION

Name (As it appears on credit card) _____

Account Number (Include all digits) _____

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Signature _____

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*Treetops Sylvan Resort Reservation forms will be mailed upon receipt of your registration fee.***Room Rates:**

Standard Room:	\$99 Single	\$109 Double Occupancy
Queen Rooms:	\$109 Single	\$119 Double Occupancy
Queen Deluxe:	\$124 Single	\$139 Double Occupancy
Super Queen Deluxe:	\$134 Single	\$149 Double Occupancy
King Deluxe:	\$144 Single	\$159 Double Occupancy

*Rates are per room, per night,
plus 6% state tax and 2% local tax.*

Cancellations: \$75 of the registration fee made in connection with the Summer Conference of the Section shall be non-refundable. A registrant who does not attend shall be entitled to receive a refund of all but \$75 of their registration fee and shall be entitled to receive the conference materials. There shall be no exceptions to this policy.

For further information call:
Arlene Rubinstein
Summer Conference Administrator
248-644-7378 • 248-540-2771 (fax)

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In pursuit of this goal, the Litigation Section each year sponsors a number of very worthwhile seminars and other programs on topics of universal appeal such as procedure and persuasion, the most current of which are described in detail elsewhere in this newsletter. These programs follow the principle that good litigators are produced not merely by the teaching of skills, and that while solid skills are essential, the lawyer applying those skills must have a desire to put himself or herself "into" the case in order to be effective. Unless the lawyer is committed to his or her case, the skills and tools which the lawyer possesses run the risk of being applied without enthusiasm, ineffectively, or not at all.

The speakers presented by the Litigation Section reflect that all-important intertwining of preparation and passion. One cannot come away from

a presentation by someone like James McIlhaney, John Reed, Brian O'Neill, Charles Craver, Joan Feldman, Michael Tigar or Arthur Miller, for example, without being better equipped to be an effective lawyer and without feeling more motivated to apply those tools. Invariably, I hear from the attendees not only how much they learned, but also how much they feel inspired to apply their sharpened skills.

Like good basketball players, good litigators become even better through dedication to their craft and through good coaching. The Litigation Section's programs for litigators are like sessions with a good coach where one can improve the fundamental skills and at the same time nourish the zest for the "game". I therefore encourage all members of the Litigation Section to consider attending one of the many Litigation Section programs scheduled during the next few months, rejuvenate your passion, and to elevate your litigation practice to the next level.

**FOURTH ANNUAL SUMMER CONFERENCE
TREETOPS SYLVAN RESORT • GAYLORD, MICHIGAN
AUGUST 13 & 14, 1999**

CONFERENCE SCHEDULE AND ACTIVITIES

FRIDAY, AUGUST 13, 1999

4:00 - 6:00 p.m.	Check -in and Registration: Located in the Sylvan Inn Lobby
6:00 - 7:30 p.m.	Welcoming Reception: Located at Treetops Suite Patio
	Hor d'oeuvres and Cash bar
	(Beer, wine and soft drinks complimentary)
	Welcoming Remarks by John Mucha, Chairperson Litigation Section
	A clown will also perform magic tricks for families with children

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*Fourth Annual Summer Conference –
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SATURDAY, AUGUST 14, 1999

- 8:00 - 8:30 a.m.** **Registration & Continental Breakfast**
Located in Convention Center
- 8:30 - 1:00 p.m.** **Seminar – Located in Convention Center**
Introduction
New Developments and Strategies in Federal Court Jurisdiction
Professor Arthur R. Miller, Harvard Law School
Federal Court Practice Pointers: A View from the Bench
Honorable Virginia M. Morgan, U.S. District Court, Eastern District of Michigan
- 10:00 - 10:15 a.m.** **Break**
Developments in Federal Court Discovery Practice: A New Frontier
Professor Arthur R. Miller
Federal Court Practice Pointers: A View from the Bench
Honorable Virginia M. Morgan
Successful Motion Practice in State Court
Honorable Philip D. Schaefer, Chief Judge of Kalamazoo County Circuit Court
Panel Discussion
- Lunch on Own**
- 1:30 p.m.** **Golf Scramble – \$66 includes cart**
Box lunch available @ \$9.75 per person
Children/Spouse Activity – Horseback Riding @ \$22 per person
- 7:00 - 10:00 p.m.** **Children’s Dinner, Movie & Camp Fire –**
Located in the Warming House
Ages 5 -12, \$17.00 per child (Minimum of 9 Children)
- 7:30 - 10:00 p.m.** **Reception, Dinner & Speaker – Located in the Oak Room**
A.W. (Tony) England “Our Future in Space”
Cash Bar (Beer, Wine & Soft Drinks Complimentary)
We will serve a filet and whitefish combination plate.
Spouses/guests are welcome @ \$29.50 per person.
No charge for registrants.

Check out time is Noon

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*Fourth Annual Summer Conference –
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FACULTY

ARTHUR R. MILLER is the Bruce Bromley Professor of Law at Harvard Law School, where he has taught since 1971. Among lawyers, he is nationally known for his work on court procedure, a subject on which he has authored or co-authored more than twenty-five books; copyright and unfair competition, and remedies. The general public, however, knows him for his work in the field of the right of privacy, a subject on which he has written, testified, debated, and helped formulate legislation. His book, *The Assault on Privacy: Computers, Data Banks, and Dossiers* (1971) has been extremely influential.

In recent years, Professor Miller has taught courses on Civil Procedure, Copyright, and Complex Litigation. In the past three academic years he has co-taught a seminar on Law, Information and Technology as well. Professor Miller also carries on an active law practice, particularly in the federal appellate courts. Among the responsible positions he has held are those of Commissioner on the United States Commission on New Technological Uses of Copyrighted Works, Member of the Advisory Committee on Civil Rules for the United States Supreme Court, and Reporter for the American Law Institute's Project on Complex Litigation.

Since 1980, Professor Miller has been appearing on ABC's *Good Morning America* as the program's legal editor. He also comments regularly on legal topics for Boston's WCVB-TV, he is the host of the weekly *Miller's Law* program on the Courtroom Television Network and he appears frequently on other Court TV programs. He has also written occasional articles on law for various periodicals.

HONORABLE VIRGINIA M. MORGAN has been a United States Magistrate Judge since 1985. She began her legal career as the first female assistant prosecutor in Washtenaw County, Michigan, where she tried over 100 felony cases. She also maintained a private practice with her husband. As an Assistant United States Attorney, Judge Morgan served as a trial lawyer in both the criminal and civil divisions. As Chief of General Crimes, she supervised eight lawyers and prosecutions from over a dozen federal agencies. Justice Rehnquist appointed her to the Long Range Planning Committee of the Judicial Conference of the United States in 1992 and to the board of the Federal Judicial Center in 1997. She is past national president of the Federal Magistrate Judges Bar Association and past president of the Eastern District of Michigan Chapter of the Federal Bar Association.

HONORABLE PHILIP D. SCHAEFER was first elected to the Circuit Court in November, 1986. Since 1992, he has been the Chief Judge of Kalamazoo County Circuit Court. In 1994 he was appointed by the Michigan Supreme Court to Chair the Mediation Rule Committee. Judge Schaefer is an instructor for the Michigan Judicial Institute, has served as a judge for Advocacy classes at the Thomas Cooley Law School and was past president of the Kalamazoo County Bar Association, 1984-85.

A.W. (TONY) ENGLAND is currently Professor of Electrical Engineering and Computer Science and Professor of Atmospheric, Oceanic and Space Science at the University of Michigan, where he also spent 3 years as an Associate Dean of

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“WINNING BEFORE TRIAL”

The rules governing discovery and some of the old doctrines concerning jurisdiction are in a state of flux in the federal court system. Professor Arthur Miller's first presentation of the morning will cover **“Winning before Trial: New Developments and Strategies in Federal Court Jurisdiction.”** He will present an overview of the recent decisions and developments. Professor Miller will discuss changes affecting the scope of personal, ancillary and pendant jurisdiction and how they influence case outcomes. He will also cover procedural implications and strategies. The Honorable Virginia M. Morgan will respond to Professor Miller's talk with **“Federal Court Practice Pointers: A View from the Bench.”**

Professor Miller's second presentation will cover **“Winning before Trial: Developments in Federal Court Discovery Practice: A New Frontier.”** This presentation covers an overview of recent developments with emphasis on proposed changes to the Federal Rules of Civil Procedure affecting discovery and how these changes will affect your practice. The Honorable Virginia M. Morgan will again respond to Professor Miller's presentation.

The Honorable Philip D. Schaefer's presentation on **“Successful Motion Practice in State Court”** includes (1) “Effective Strategies for Dispositive Motions – When to File: Timing is Everything”; (2) “Applicable Michigan Court Rules: How Different Rules Should Influence Your Motion Strategy”; and (3) “Effective Strategies for Opposing Dispositive Motions: Use of Affidavits and Other Materials Outside the Pleadings.” Judge Schaefer will conclude his program with “Effective Use of Motions in Limine – When to File: Timing is Everything; What Matters are Appropriate for Motions in Limine: Use them

Sparingly and Know Your Judge and How They Tend to Rule on Evidentiary Issues.”

The program will conclude with an open panel discussion (involving all presenters). Members of the audience are invited to address the various panelists on these and related topics.

“OUR FUTURE IN SPACE”

Beginning with a visual retrospective of Professor England's experiences as an Apollo and Shuttle astronaut, he will develop his alternative future for NASA to the one currently defined. Features of his proposal include more vigorous investments in science and technology, and less emphasis upon the International Space Station.

Faculty –

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Graduate School. Professor England served as a Scientist Astronaut during two periods – Apollo astronaut from 1967-1972 and a Shuttle astronaut from 1979-1988. During the first period he completed Air Force flight school and served as a support crewman for Apollos 13 and 16. During the second period, he managed flight tests for the Shuttle's entry and landing system, flew as a Mission Specialist on Spacelab 2 – a solar astronomy and plasma physics mission – and served a Space Station Program Scientist. He has logged 3,000 hours as a pilot, 2,000 in high performance aircraft, and 8 days in Earth orbit.

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ETHICS NOTES FOR LITIGATORS

Marcia Proctor • General Counsel, Butzel Long

WITHDRAWAL FOR NONPAYMENT OF FEE

Inmates filed a class action suit in 1988 challenging prison regulations. One group of inmates was represented in various pleadings at different times by three different attorneys. One of the attorneys hoped to recover fees based upon an alleged violation of 42 USC 1983, and purported to have an unwritten "understanding" with the clients for a contingent fee. In 1990 the attorney became an associate at a 3-lawyer firm specializing in divorce. The law firm understood that the case would go to trial within one year and take 3 weeks to try.

The case was still open in 1999. The law firm had unsuccessfully moved to withdraw in 1996 when the 42 USC 1983 claim was dismissed, and in 1998 asserting unreasonable financial burden in that the associate had spent 95-100% of time in trials during the past 10 months. The law firm filed an appeal of the second denial, then terminated the employment of the associate and tried to require the associate to take the file. The appellate court remanded for an evidentiary hearing on the withdrawal motion, which took 6 days and resulted in a denial. Law firm appealed.

The appellate court first found that MRPC 1.16, addressing attorney withdrawal, is applicable to disciplinary proceedings but not expressly to a motion to a court for withdrawal. The court nevertheless found it "logical" to consider the ethical framework. After reviewing two cases from New Jersey, the court determined that the proper standard was to balance counsel's obligation to the client, the extent of the financial burden, and the availability of substitute counsel. Appropriate considerations are: (a) the likelihood of recovery of attorney fees in the matter; (b) whether the costs of continued litigation outweigh

any potential recovery; (c) whether the attorney seeking to withdraw is the beneficiary of the client fee agreement; (d) whether there is available substitute counsel. Motion granted. **In re Withdrawal of Attorney, Cain v Department of Corrections**, #211416 Mich App (3/12/99).

TRIAL PUBLICITY

A local rule restricting lawyer speech in criminal litigation was narrowly tailored to impose no greater limitation than necessary to serve the compelling government interest in protecting the right to a fair trial. It thus did not violate the First Amendment. The rule prohibited only statements likely to threaten the right to a fair trial and an impartial jury. Moreover, it explicitly listed six limited categories of prohibited speech which represented statements likely to cause prejudice, and made no distinctions based on point of view. Also, the rule's limitation did not apply longer than the litigation at issue, and applied to all lawyers or law firms participating on either side of the litigation. **In re Morrissey**, 1999 WL 64309 (CA4 1999).

JUDICIAL DISQUALIFICATION

A judge is not per se disqualified from presiding over a legal malpractice matter involving the law firm of a member of the judge's campaign committee, but sanctions for a frivolous motion should not have been imposed against the moving party. Disqualification is not automatic absent actual bias, but disclosure should be made. **Haman v Rinkel**, #196175 Mich App 1996. See also, **People v Hicks**, 528 NW2d 136 (Mich 1994); Michigan Ethics Opinion JI-79.

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PRIVILEGE AND WORK PRODUCT

Communications between lawyer and investment banker aimed at helping lawyer advise his client are not protected by client-attorney privilege, and are subject to disclosure. The banker was not translating or interpreting client information for the lawyer, but merely providing information the client did not have. **US v Ackert**, 1999 WL 104445 (CA2 1998). Compare **US v Kovel**, 296 F2d 918 (CA2 1961), communications between client and accountant or accountant and the client's lawyer about the client's communications to the accountant, are privileged.

Defendant was acquitted then filed suit after his FOIA request for his entire criminal file was denied by the prosecutor. The court distinguished between factual and deliberative work product, affording protection to the latter under the FOIA provision exempting disclosure of material "subject to privilege recognized by court rule". **Messenger v Ingham County Prosecutor**, 1998 Mich App LEXIS 318.

Plaintiffs filed stockholder's derivative action on behalf of the company. The company filed a motion to dismiss based upon a report of a 4-month allegedly independent investigation which concluded the suit was not in the company's best interests. The investigative reporter was assisted by outside counsel in preparing the report. Plaintiffs sought production of the report, which was refused under work-product and client-attorney privilege. The district court held the privileges were waived when the company relied on the report to support the motion to dismiss, then, upon reconsideration, held that although work product privilege applied, plaintiffs had shown substantial need and undue hardship meriting disclosure. The company still resisted disclosure, and sought mandamus in the Court of Appeals. The court rejected the client-attorney privilege claim, because the report was being presented to the court as a defense of the derivative

claims, not to the client to enable the client to make legal decisions. After determining that mandamus was an appropriate remedy, the Court of Appeals then applied the state derivative statute, finding that the intent could not have been to require disclosure of the report of the independent investigator, and would chill the investigative effort. The court agreed that "the equities involved in the case weigh in favor of" disclosure to the plaintiffs, but not to the public as part of the judicial record. The public would not get access until the district court reads the Report and weighs the interests of the public against the interests of the company in maintaining its privilege as to all or part of the Report. When the district court intends to rely on the Report in making a decision in the case, it should conduct a hearing regarding whether the report or parts of it should be disclosed or remain sealed. Adequate protection is provided if the Report is made available to plaintiffs under a protective order, and to the district court under seal. A submission in camera does not waive the privilege. A simple reliance on the report for legal purposes, however, or a placing before the court for a legal determination, does not place the document in the public domain. **In re Perrigo Co.** 128 F3d 430 (CA6 1997).

Government investigators met with target about improperly inducing business. At the meeting the target revealed it had counsel review its marketing plan, and revealed that the lawyer had "no problem" with various procedures and aspects at issue with the investigators. Government claimed client-attorney privilege was waived in toto by the disclosures to the investigators. Held: Questions are issues of law, and proper standard of review from district court to Sixth Circuit is de novo, not abuse of discretion. Privilege is waived with respect to the specific elements of the marketing plan disclosed to investigators, but not with regard to other aspects of legal services. A client's general assertion that counsel has reviewed a matter,

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without more specificity regarding what was said, will not waive privilege. **In re Grand Jury Proceedings October 12, 1995**, 78 F3d 251 (CA6 1996).

The First, Third and Sixth Circuit Court of Appeals have allowed immediate consideration of claims of privilege and attorney work product for subpoenaed or discovery materials. The prior rule required a lawyer to refuse to comply, be brought before the court, be found in contempt, and appeal the contempt citation. **In re Grand Jury Subpoenas**, 123 F3d 695 (CA1); **Kelly v Ford Motor Co**, 110 F3d 954 (CA3 1997); **In re Perrigo Co.**, 128 F3d 430 (CA6 1997). Mandamus is appropriate to review district court's order to disclose internal investigative report, in light of unavailability of other means to obtain relief, the potential for irreparable harm, and the novel issues presented.

MALPRACTICE

"Negligent referral" is not grounds for malpractice action. **Knight on v Goldenberg and Papista**, #199541 (Mich App 8/18/98) unpublished.

Failure of attorney to bring action on behalf of client could not give rise to legal malpractice claim where, prior to running of applicable period of limitations, new counsel was secured by client. **Boyle v Odette**, 168 Mich App 737 (1988).

A lawyer must advise a client of the statute of limitations applicable to a potential legal malpractice claim that the client had in underlying matter. **Herron v Repasky**, (unpublished Mich App 1998). Where the lawyer's engagement letter expressly excludes advice about any malpractice claim, no such duty arises. **Heller v Donaldson**, (unpublished Mich App 1998). See also, **Togstad, et al v Vesely, Otto,**

Miller & Keefe, 291 NW2d 686 (Minn 1980), lawyer without medical malpractice expertise negligently advised prospective client that there was no medical malpractice claim and failed to notify client of statute of limitations; award in excess of \$600,000.

PRO SE ATTORNEYS

After a law firm dissolution, two partners paid their share of a loan guarantee to the firm while a third partner refused to pay. The lender subsequently sued the withholding partner, who filed a third party claim against other firm members. The withholding partner and the third party defendants all represented themselves, without counsel, pro se. The plaintiff and the third party defendants filed summary judgment motions, including motions for attorney fee sanctions, against the withholding partner, and prevailed. In a case of first impression, the court held that a pro se litigator is not entitled to an award of "attorney fees", because as a pro se litigant the party has not incurred "attorney fees" as defined in the court rules, but remanded for a determination of whether sanctions should be imposed on other grounds. **FMB-First National Bank v Miller**, No 200958 Mich App (11/24/98).

JOINT DEFENSE AGREEMENTS

The magistrate found that, where a joint defense agreement indicates that confidences and secrets of individual parties will be shared among counsel, an irrebuttable presumption arises that all counsel and their clients received confidential information and a disqualification of one counsel will impute to other counsel. The district court remanded, holding that there was no implied client-lawyer relationship among the parties and the counsel for other parties within the defense agreement, and in the absence of evidence that confidential information was in fact shared there will be no

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imputation based solely on the language of the Agreement. **Essex Chemical Corp v Hartford Accident and Indemnity Co**, 993 F Supp 241 (D NJ 1998).

TRANSFERRING LAWYERS

Predecessor lawyer cannot require successor counsel to cover costs advanced to client by predecessor lawyer, because to do so would violate MRPC 1.8(e). Michigan Ethics Opinion RI203. Also MRPC 1.8(f) requires client to consent to someone else paying the client's legal bills.

Lawyer, who had worked 300 hours on plaintiff's case and had extensive direct contact with plaintiff, took a position with defendant's law firm. Although defendant's firm knew at least one month before the lawyer arrived for work that the lawyer had worked on the case, the firm did not institute a conflict wall to screen the lawyer from the case until nine days after the lawyer began working there, and did not notify the court of the attorney's hire until five days after implementation of the conflict wall. The court characterized the notice eventually sent to the court as "misleading at best" as to what steps had been taken to deal with the conflict as required under MRPC 1.10(b), and when these actions occurred. The court noted that the defendant's firm had known of the conflict for at least a month prior to the lawyer joining the firm. Defendant's firm was disqualified. **Cobb Publishing Inc v Hearst Corp**, 891 F Supp 388 (ED Mich 1995).

Firm A previously represented client in patent matter. Client retained Firm B as trial counsel for litigation against alleged patent infringer, who was represented by inside lawyer C. Lawyer C subsequently transferred Firm A, bringing the patent defense with him to the firm. Client discharged Firm B and hired Firm D, who filed a motion to disqualify Firm A. The court held that Firm B's failure to seek

disqualification of Lawyer C does not constitute client's "consent" to the adverse representation, that Firm D's motion to disqualify Firm A and Lawyer C is not "untimely" while the parties are negotiating the conflict issue, and that Lawyer's C's filing an appearance without reference to Firm A does not vitiate the conflict issue. The court requested an opinion from the State Bar of Michigan Standing Committee on Professional Ethics. **Kearns v Chasler Corporation**, 771 F Supp 190 (ED Mich 1991).

Imputed disqualification for conflict with a former client may be avoided by timely screening of transferring lawyer from the hiring firm's matters, or by timely screening of firm from the matter the transferring lawyer brings to the firm. Mich Op RI-97.

EXPERT WITNESSES

Litigation privilege protects an expert witness from liability to opposing party for testimony. **Kahn v Burman**, 673 F Supp 210 (ED Mich 1987), affd 878 F2d 1436 (CA6 1989).

CONFLICTS - ADVANCE WAIVERS

A client's acknowledgment at the outset of representation that the lawyer generally represents other clients in unrelated matters, and agreement that the lawyer is not disqualified from continuing to do so, does not act as a valid waiver of conflict of interest five years later when the lawyer represents a disclosed client in a new litigation matter against the waiving client. **Worldspan LP v Sabre Group Holdings, Inc**, 5 F Supp 2d 1356 (ND Ga 1998).

"Knowing" prospective consent to future conflicts is not impossible, but must be "exceedingly

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explicit” **Florida Ins Guaranty Assn Inc v Carey Canada**, 749 F Supp 255 (SD Fla 1990).

A client agreement may provide that if a conflict arises the lawyer may seek court permission to withdraw and that in such an event the client should seek substitute representation. See MRPC 1.16(c) requiring permission of the tribunal. The agreement may not provide that after withdrawal based upon a conflict of interest the lawyer may in every case continue to represent another client in relation to the same matter, without evaluation of whether the lawyer has further ethical duties which prevent that participation. Michigan Ethics Opinion RI-183.

CONTEMPT

Counsel must advise a client to obey a court order to pay the opposing attorney fees, even if the order is clearly incorrect and even while seeking a stay. While plaintiffs’ attorneys did not technically instruct their client to violate the order, their failure to advise their client of his obligation to comply with the order had the same effect. Contempt sanctions ordered. **Schoensee v Bennett**, 1998 WL 85294 (Mich App 1998).

CONTACTS WITH PARTIES

Lawyer has a duty to report to the Attorney Grievance Commission the conduct of opposing counsel who, allegedly at the request of both parties, assisted in the negotiation of a property settlement between parties without the presence, consent or knowledge of the opposing counsel, Michigan Ethics Opinion RI-145.

See also, **People v Green**, 405 Mich 273 (1979) and **US v Lopez**, 989 F2d 1032 (CA9 1993), prosecutor acceding to contact initiated by criminal defendant without consent of defense counsel violates the ethics rule, but is not prejudicial for defendant.

Aetna’s lawyers hired investigators to interview former employees of Upjohn to disclose more information about environmental damages that were the underlying subject matter of litigation. The magistrate had found that the investigators had failed to determine whether the

former employees were represented by counsel, failed to clearly identify themselves as working for lawyers in litigation against Upjohn, and failed to adequately state the purpose of the interviews. The court upheld the magistrate’s decision that the investigators misled the former employees, that if conducted by a lawyer the contacts would violate MRPC 4.3, and that through operation of MRPC 5.3, the lawyer could not accomplish the deception, intentionally or unintentionally, by hiring a nonlawyer. The evidence obtained through those contacts was excluded. The court considered Aetna’s argument that the lawyer did not order, ratify or timely know of the investigators’ conduct, but held that the magistrate’s finding that to exonerate the investigators’ conduct on that ground would render the ethical proscription in MRPC 4.3 meaningless, was not clearly erroneous or contrary to law particularly where Aetna offered no evidence demonstrating reasonable efforts to comply with MRPC 4.3. **Upjohn v Aetna**, 191 US Dist Lexis GG2; 1991 WL 490026 (WD MI, 1991).

Counsel represented a client fired from a company for alleged sexual harassment of three clerical employees, and wanted to contact one of the clerical employees who had since left the company and who had been told that the client was terminated before

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the employee provided any statement of sexual harassment. The clerical employees' statements of alleged sexual harassment, if true, are not imputed to the company, and are not an admission of the company. If the statements are untrue, they may be imputed to the company to the extent the company has acted in reliance on those statements without appropriate confirmation or investigation. If the employees' statements on the time at which the allegations were made to the company are truthful, it may at most be an admission against the interest of the company. If the statements on the time are untruthful, it would not be an admission or imputed to the organization. Michigan Ethics Opinion RI-44.

A lawyer represented a client crushed and killed by a malfunctioning 16-ton press in a workplace accident, and wished to contact current and former employees of defendant organization without consent of defense employer's counsel. Under Michigan law, a deliberate act of an employer and a specific intent that there be an injury creates an intentional tort exception. To support that the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge, a plaintiff must be able to allege a specific danger known to the employer that was certain to result in an injury and must allege that the employer required the plaintiff to work in the face of that danger. While a state of mind may be imputed to a corporation, such a state of mind cannot reasonably be inferred from imputed notice of disconnected facts. Michigan Ethics Opinion RI-120.

Counsel wished to contact opposing entity's former accounting manager/controller, who had been privy to confidential and sensitive information directly related to the current lawsuit. The employee worked for defendant, but became employed in a business in which plaintiff had an ownership interest four months before the lawsuit was filed. Held: MRPC 4.2 prohibits contacts with "parties". Whether an entity constituent is a party depends upon whether the constituent is an

agent for the entity. As a former employee, the controller cannot be an agent for defendant, and thus there is no reason to address whether statements will be admissions or actions will impute. **Valassis v Samelson**, 143 FRD 118 (ED Mich 1992).

But see, **Rentclub Inc v Transamerica Rental Finance Corp**, 811 F Supp 651 (MD Fla 1992), aff 43 F3 d 1439 (CA 11 1995). Counsel hired as a trial consultant an individual who had formerly served as chief financial officer of a division of the opposing party entity. Held: Even though consultant is a former employee of the party opponent, as employee he had access to privileged information which the consultant is required to keep secret even after leaving employment. Even though as former employee the consultant lacks the necessary agency relationship required to make statements admissible against the corporation, the connection of the employee to the entity's civil liability may be so close as to require in fairness that ex parte contacts be prohibited. "A former employee who is a party because of his position and knowledge will remain a party even after he leaves the corporation because that employee has a memory." Counsel disqualified.

The institution of litigation does not preclude the seeking of public records pursuant to FOIA in addition to seeking them through formal discovery. **CMU Supervisory-Technical Ass'n v Board of Trustees**, 223 Mich App 727 (1997).

Model Rule 4.2 generally protects represented government entities from unconsented contacts by opposing counsel with an important exception based on the constitutional right to petition and the derivative public policy of ensuring a citizen's right of access to government decision makers. Thus Rule 4.2 permits a lawyer representing a private party in a controversy with the government to communicate about the matter with government official who have authority to take

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or to recommend action in the matter, provided that the sole purpose of the lawyer's communication is to address a policy issue, including settling the controversy. In such a situation the lawyer must give government counsel reasonable advance notice of his intent to communicate with such officials to afford an opportunity for consultation between government counsel and the official on the advisability of their entertaining the communication. In situations where the right to petition has no apparent applicability, either because of the position and authority of the official sought to be contacted or because of the purpose of the proposed communication, Rule 4.2 prohibits communication without prior consent of government counsel. ABA Op 97-408 (1997).

SETTLEMENTS

In Michigan employment litigation, GM and a former employee stipulated to the entry of a permanent injunction barring the employee from serving as a witness in any litigation involving GM without GM's consent. GM and the employee also entered into a separate settlement agreement providing that GM would not pursue contempt or breach of contract remedies if the employee was subpoenaed to testify before another tribunal. Subsequently the employee was subpoenaed to give expert testimony against GM in another state, and GM sought to enforce the injunction. The Court held that the employee could testify, since (a) the Michigan stipulation cannot control proceedings against GM brought in other states, by other parties; (b) the Michigan stipulation cannot be viewed as dictating to other courts that evidence relevant to another controversy is inadmissible. **Baker v General Motors**, 1998 WL 7072 (US Sup Ct 1998).

SEND US YOUR DECISIONS!

The *Litigation Newsletter* is seeking recent decisions of interest to our readers.

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AM I DREAMING?

Charles N. (Nick) Simkins • Simkins & Simkins, PC

When I finished reading Senate Bill 119, which would give the trial courts of Michigan discretion to award actual costs and attorney fees to the prevailing party, I thought that I had been dreaming. When I thought that eight Republican Senators had decided that it was about time, in Michigan, that plaintiffs and their lawyers be awarded actual costs and attorney fees against defendants when plaintiffs prevail, I thought that the Biblical prophecies had been fulfilled in terms of the lions laying down with the lambs, Republican Senators looking out for the rights of persons injured because of the negligence of others. When I thought of these eight Republican Senators sitting up in Lansing, worrying about the injustice caused when defendants needlessly and without foundation deny negligence, or needlessly and without foundation deny that a person is injured, and decided to do something about it, I became quite emotional.

The problem with this proposed statute is that it, like many of the current court rules that deal with costs and expenses, including attorney fees, gives the court discretion, and heretofore, the courts have seemed to be very reluctant to exercise that discretion in terms of awarding real costs and real attorney fees. For example, MCR 2.313, entitled "Failure to Provide or Permit Discovery; Sanctions," at paragraph A(5) provides that the court may award reasonable expenses, including attorney fees, to the prevailing party if opposition to a motion for discovery is unjustified. However, in 22 years of practicing law, I have not even heard of a court really awarding actual attorney fees under this provision in our state. MCR 2.313(C), entitled "Expenses on Failure to Admit," provides that if a party proves the truth of a request for admission that was denied, the court has the discretion to award expenses, including actual attorney fees, incurred by the party in making that proof. Again, in my experience, I have never even

heard of the court enforcing that provision and awarding actual attorney fees. MCR 2.625, entitled "Taxation of Costs" is a court rule that has a specific provision for "frivolous claims and defenses," but again, you would be hard-pressed in Michigan to find a court that actually awards actual attorney fees and costs to a prevailing party under this court rule.

There is even a court rule, MCR 2.109, entitled "Security for Costs," which empowers a court to require a party to post a bond as a condition to continuing with a lawsuit, and again, this provision is not enforced.

It would seem that one of the driving motivations for the proposed legislation is to do away with frivolous lawsuits, but MCR 2.114, entitled "Signatures of Attorneys and Parties; Verification; Effect; Sanctions," provides at paragraphs E and F that if a person or attorney is found to have filed a frivolous lawsuit, or one not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, that the court can award expenses, including reasonable attorney fees. This is a provision that is also not enforced.

Perhaps the most powerful attorney fee provision with regard to paying costs and attorney fees to prevailing parties is in the mediation section of the court rules, specifically MCR 2.403(0) entitled "Rejecting Party's Liability for Costs." Following mediation, of a party who has rejected a mediation award does not exceed the mediation award by more than 110 percent, then that party is deemed to have wrongfully rejected the mediation award, and is subject to sanctions in terms of costs and attorney fees

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incurred by the other side. In all of the cases wherein we have been involved with a defendant who has wrongfully rejected a mediation award, the trial courts have been reluctant to award complete expenses and complete, actual attorney fees, and, in my opinion, actually encourage defendants and their insurance carriers to reject mediation awards.

I believe that this legislation introduced by Senators Steil, Gougeon, Jaye, Schwarz, Goschka, Sikkema, Bennett, and McManus will reduce the number of frivolous defenses offered by insurance companies and their lawyers in this state, but, in the meantime, until this bill becomes law, I would hope that each of these Senators sends a letter to the trial judges of our state asking them to enforce the court rules currently in effect regarding costs and attorney fees for prevailing parties.

SENATE BILL NO. 119

January 27, 1999, introduced by Senators Steil, Gougeon, Jaye, Schwarz, Goschka, Sikkema, Bennett and McManus and referred to the Committee on Judiciary.

A bill to amend 1961 PA 236, entitled "Revised Judicature Act of 1961," (MCL 600.101 to 600.9948) by adding section 2402.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

SEC. 2402. (1) NOTWITHSTANDING ANY OTHER PROVISION OF THIS ACT, THE COURT SHALL AWARD COSTS AS ALLOWED BY STATUTE OR COURT RULE AND ATTORNEY FEES TO THE PREVAILING PARTY IN A CIVIL ACTION.

- (2) IF THERE IS NO PREVAILING PARTY, THE JUDGE MAY AWARD COSTS AS ALLOWED BY STATUTE OR COURT RULE AND ATTORNEY FEES TO THE PARTY WHO PREVAILS ON 1 OR MORE ISSUES.
- (3) THE COURT MAY LIMIT THE COSTS OR FEES RECOVERED UNDER SUBSECTION (1) IF THE COURT DETERMINES THE PAYMENT OF COSTS OR FEES IS UNJUST.
- (4) EACH COUNSEL OF RECORD IN A CIVIL ACTION BROUGHT IN A COURT IN THIS STATE SHALL MAINTAIN ACCURATE, UP-TO-DATE RECORDS OF HOURS WORKED ON THE MATTER REGARDLESS OF THE FEE ARRANGEMENT WITH HIS OR HER CLIENT.
- (5) AS USED IN THIS SECTION, "PREVAILING PARTY" MEANS:
 - (A) IN AN ACTION INVOLVING SEVERAL REMEDIES OR ISSUES OR MULTIPLE COUNTS THAT STATE DIFFERENT CAUSES OF ACTION OR DEFENSES, THE PARTY PREVAILING ON EVERY REMEDY, ISSUE, OR COUNT.
 - (B) IN AN ACTION INVOLVING ONLY 1 ISSUE OR COUNT STATING ONLY 1 CAUSE OF ACTION OR DEFENSE, THE PARTY PREVAILING ON THE ENTIRE RECORD.

Enacting section 1. This amendatory act takes effect January 1, 2001.

CIVIL LITIGATION INSTITUTE

Friday - Saturday, June 25 - 26, 1999
University of Michigan Law School
Ann Arbor

Course Schedule

Session I: Effective Advocacy Clinic

- 9:00 a.m. - 9:10 a.m. **Welcome and Introduction**
- 9:10 a.m. - 10:15 a.m. **Tort Reform – Three Years Later:**
A distinguished panel of trial lawyers reviews the effects of tort reform on civil litigation practice, and discusses crucial cases presently before the Michigan Supreme Court.
- George A. Googasian, moderator
The Googasian Firm, P.C., Bloomfield Hills
- Lance R. Mather, defendant
Smith Haughey, Rice & Roegge, P.C., Grand Rapids
- David R. Getto, plaintiff
Sommers, Schwartz, Silver & Schwartz, P.C., Southfield
- 10:15 a.m. - 10:30 a.m. **Break**
- 10:30 a.m. - 11:45 a.m. **Direct and Comparative Cross Examination of Expert:**
A distinguished panel of trial lawyers demonstrates and analyzes the cross examination of an expert in a civil litigation case.
- Edward R. Stein, moderator
Stein, Moran, Raimi & Goethel, P.C., Ann Arbor
- Gary A. Maximiuk, direct examination
Wheeler Upham, P.C., Grand Rapids
- Thomas H. Blaske, cross-examination
Blaske & Blaske, P.L.C., Ann Arbor
- Sandra J. Anderson, comparative cross-examination
Vorys, Sater, Seymour & Pease, Columbus, OH
- 11:45 - 1:00 p.m. **Lunch**

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Civil Litigation Institute –*Continued from Page 17***Session II: Customized Learning Tracks****Choose One Track or Choose One Segment for Each Time Period****1:00 p.m. - 1:55 p.m.*****Track One: Advanced Issues in Evidence******Evidence in the Courtroom – How it Really Works:
A Panel of Judges Discusses Current Evidentiary Issues***Thomas H. Blaske, moderator
Blaske & Blaske, P.L.C., Ann ArborHon. Dennis C. Kolenda
17th Circuit Court, Grand RapidsHon. William J. Giovan
3rd Circuit Court, DetroitHon. Cynthia D. Stephens
3rd Circuit Court, Detroit**- OR -*****Track Two: Advanced Litigation Skills
Courtroom Presentation Technologies:
Effective Use of PowerPoint in Trial.***Edward R. Stein
Stein, Moran, Raimi & Goethel, P.C., Ann Arbor**1:55 p.m. - 2:50 p.m.*****Track One: Advanced Issues in Evidence******Daubert & Its Aftermath: New Developments
in Scientific Evidence – A View from the Bench***Hon. Susan B. Neilson
3rd Circuit Court, Detroit**- OR -*****Track Two: Advanced Litigation Skills
Anticipating Juror Reactions & Verdicts:
Inexpensive “focus groups” and similar techniques to
help you predict juror responses and plan your case strategy.***Steven H. Weston
Halpert, Weston, Wuori & sawusch, P.C., Kalamazoo**2:50 p.m. - 3:45 p.m.*****Track One: Advanced Issues in Evidence******Evidentiary Misfeasance & Malfeasance:
Dealing with spoliation & destruction of evidence.****Continued*

Kathleen A. Lang
Dickinson Wright, P.L.L.C., Detroit

Kathleen L. Bogas
Sachs, Waldman, O'Hare, Helveston, Bogas & McIntosh, Detroit

- OR -

*Track Two: Advanced Litigation Skills
Controlling the Runaway Witness:
Dealing with non-responsive witnesses, argumentative witnesses, and
professional witnesses, cornering the witness & punishing non-responsive
answers.*

Sheldon J. Stark
Stark & Gordon, Royal Oak

Megan P. Norris
Miller, Canfield, Paddock & Stone, P.L.C., Detroit

3:45 p.m. - 4:00 p.m. **Break**

Session III: Advanced Trial Skills

4:00 p.m. - 5:00 p.m. **Panel Discussion: How to Win the Multi-Million
Dollar Verdict – Learn Winning Tactics From
Attorneys Who Have Done It**

Richard L. Halpert, moderator
Halpert, Weston, Wuori & Sawusch, P.C., Kalamazoo

Arnold E. Reed
Arnold E. Reed & Associates, P.C., Detroit

Barry A. Seifman
Barry A. Seifman, P.C., Farmington Hills

Saturday, June 26, 1999

Session IV: Ethics

9:00 a.m. - 9:50 a.m. **Candor Toward The Tribunal: Ethics of Witness
Preparation and Testimony – The ethics of witness preparation for
deposition and trial, including how a lawyer should respond after
discovering that a client has lied in deposition, affidavit, or in trial.**

John W. Allen
Varnum, Riddering, Schmidt & Howlett, L.L.P., Kalamazoo, MI

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Civil Litigation Institute –
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Plenary Session: Effective Trial Techniques Illustrated

10:00 a.m. - 12:00 Noon **Persuasive Advocacy Techniques:
*Powerful Strategies for Opening Statements & Closing Arguments***

Peter T. Hoffman
University of Nebraska College of Law, Lincoln, NE

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